

1.3 For this brief inconvenience, Plaintiffs sued the Defendants, including McKinney ISD, for over \$1 million. As discussed below, *even if* this were a meritorious lawsuit (it is not), McKinney ISD is not liable to Plaintiffs because the School District did not “use” or “operate” the bus in question—the bus was owned, operated, driven, maintained, and controlled by Defendant Durham. The District is therefore immune from suit, and this Court does not have jurisdiction.

1.4 All claims against McKinney ISD should therefore be dismissed. Further, because Plaintiffs were fully apprised of the law asserted in this Plea and given a full opportunity to drop this frivolous lawsuit without penalty – but they refused – Plaintiffs should be compelled to pay the District’s attorneys’ fees under Tex. Educ. Code § 11.161.

II. Jurisdictional Evidence

2.1 McKinney ISD relies on the following evidence in support of this Plea:

Exhibit A: Durham School Services, L.P.’s Response to McKinney ISD’s First Requests for Admission

Exhibit B: Affidavit of Geoff Sanderson

Exhibit B-1: Contract for Transportation Services

Exhibit C: Affidavit of Lucas Henry

Exhibit C-1: Billing Statements

Exhibit C-2: Letter from Counsel for McKinney ISD to Counsel for Plaintiffs

2.2 All exhibits listed above are incorporated into this Pleading as if set forth verbatim below.

III. Statement of Undisputed Facts

3.1 Plaintiffs are the parents of McKinney ISD students who, at the times relevant to this case, attended McClure Elementary School. See Plaintiffs' Second Amended Petition, ¶ 4.3. On February 28, 2023, the Plaintiffs' students boarded the school bus (the "Bus") to ride home on Route 159. See Plaintiff's Petition, ¶ 4.4. As Plaintiffs allege, McKinney ISD has a contract with Defendant Durham whereby Durham provides drivers, buses, and bus maintenance to transport District students. See Plaintiff's Amended Petition, ¶ 4.1 (alleging a contract between McKinney ISD and Durham); Exhibit B-1, the Contract for Transportation Services between Durham and McKinney ISD (the "Contract"); Exhibit B, ¶ 3. Under the Contract, Durham "is an independent contractor" of the District, and "neither [Durham], its employees or its Agents shall be considered to be an Officer, Agent, or Employee of [the] District." Exhibit B-1, ¶ 11.

3.2 The Bus in question was owned, operated, controlled, and maintained by Defendant Durham. See Exhibit A, Response to Request for Admission Numbers 3-4 (admitting that Defendant Garcia was not an agent or employee of McKinney ISD); 5 and 8 (admitting that the Bus was owned by Durham and not owned by McKinney ISD); 6 and 11 (admitting that the Bus was owned and operated by

Durham and not operated by McKinney ISD); and 7 (admitting that the Bus was maintained by Durham); see also Plaintiff’s Amended Petition, ¶ 6.2 (alleging that the Bus was “Durham-owned”). The Bus driver that day was Defendant Isabel Garcia, a Durham employee acting “within the course and scope of employment with Defendant Durham while operating the bus on route 159.” Plaintiff’s Petition, ¶ 4.4. Per ¶ 11 of the Contract, and as admitted by Durham, and as stated in ¶ 4.4 of Plaintiffs’ Petition, Garcia was an employee of Defendant Durham—**she was not a McKinney ISD employee**. See Plaintiff’s Amended Petition, ¶ 4.4 (“Ms. Doe [the driver] is believed to have been within the course and scope of employment with Defendant Durham while operating the bus.”).

3.3 According to Plaintiffs, the Bus deviated from its ordinary route for unknown reasons, causing the riders to remain on the bus longer than usual. See Plaintiffs’ Petition, ¶¶ 4.4 - 4.5. Plaintiffs allege this “traumatized” their children, who feared they were being “kidnapped.” Id. Plaintiffs also allege the children suffered heat related injuries because it was 82 degrees outside, and the Bus’s air conditioning was allegedly not working. Id., ¶ 4.9.

3.4 “Plaintiffs allege that McKinney ISD failed to act as a reasonably prudent school district in selecting and overseeing Defendant Durham’s transportation of McKinney ISD students, including but not limited to its oversight and responsiveness to the facts [alleged by Plaintiffs] as they were developing.” Id.,

¶ 4.7. Accordingly, Plaintiffs bring claims against McKinney ISD for (1) false imprisonment; (2) negligence; (3) negligent entrustment; and (4) negligent hiring, training, or supervision. Plaintiffs seek damages of over \$1 million.

3.5 As discussed below, McKinney ISD is entitled to dismissal of all of Plaintiffs' claims because the District did "use" or "operate" the Bus, and McKinney ISD's immunity from suit has therefore not been waived under the Texas Tort Claims Act.

IV. Argument and Authorities

A. Plea to the Jurisdiction Standard

4.1 "Immunity from suit defeats a trial court's subject-matter jurisdiction and is properly asserted in a plea to the jurisdiction." *Davison v. Plano Indep. Sch. Dist.*, 2014 Tex. App. LEXIS 2007, *8 (Tex. App.—Dallas, 2007) (*citing* Tex. Dep't of Parks & Wildlife v. Miranda, 133 S.W.3d 217, 225-26 (Tex. 2004)). "Whether a trial court has subject-matter jurisdiction and whether a plaintiff has alleged facts that affirmatively demonstrate a trial court's subject-matter jurisdiction are questions of law." *Id.* at 226 (*citing Kaufman Cnty. v. Leggett*, 396 S.W.3d 24, 28 (Tex. App.—Dallas 2012, pet. denied)).

4.2 "A jurisdictional plea can be based on the pleadings or on evidence." *Id.* (*citing Miranda*, 133 S.W.3d at 226). When reviewing a plea to the jurisdiction, the court must consider the evidence submitted by the parties to resolve jurisdictional

issues, and, as with a motion for summary judgment, must determine whether the evidence creates a fact issue as to jurisdiction. *Id.* at *9-*10. “If the relevant evidence fails to raise a fact question or is undisputed on the jurisdictional issues, the trial court rules on the plea as a matter of law.” *Id.*

B. School Districts are Immune from Suit and Liability Unless Waived

4.3 “Under the doctrine of sovereign immunity, the state is not liable for the torts of its agents or officers unless there is a constitutional or statutory waiver of immunity. By enacting the Texas Tort Claims Act, the legislature has allowed suits against a governmental unit of the state under certain circumstances.” *Paris Indep. Sch. Dist. v. Cieminski*, 1996 Tex. App. LEXIS 1669, *6 (Tex. App.—Dallas 1996, no pet.) (citing *Mount Pleasant Indep. Sch. Dist. v. Estate of Lindburg*, 766 S.W.2d 208, 211 (Tex. 1989)). Texas school districts are governmental units immune from suit and liability unless that immunity has been waived by the Texas Tort Claims Act. Harms arising from the “use” and “operation” of a motor vehicle are the only claims for which school district immunity has been waived under the TTCA. *See* Tex. Civ. Prac. Rem. Code §§ 101.021; 101.051; *see Dallas County Schs v. Vallet*, No. 05-16-00385-CV, 2016 Tex. App. LEXIS 13099 (Tex. App. Dallas Dec. 8, 2016) (school district was immune from suit for negligence because act of bus driver leaving student unattended beside a busy highway related to the supervision and

control of the student, not the operation of a motor vehicle, and therefore immunity was not waived under the TTCA).

4.4 To be subject to the TTCA's waiver of immunity, the school district must actually "use" or "operate" the motor vehicle. In other words, "when injuries are not the proximate result of the use or operation of the school bus" by the public school district, "but the bus provides the setting for the injury, the actions do not fall within the section 101.051 exception to immunity." See *Hopkins v. Spring Indep. Sch. Dist.*, 736 S.W.2d 617 (Tex. 1987) (school district was immune from parent's suit for negligence – failure to provide adequate medical care – because student's seizure merely happened on a school bus, and the school district's use/operation of the bus did not cause the injury).

4.5 Of utmost importance to this case, it must actually be the school district that uses or operates the school bus – **immunity is not waived if a third-party contractor uses or operates the bus for district students.** *Mt. Pleasant Indep. Sch. Dist. v. Elliott*, 2014 Tex. App. LEXIS 4159, *19-*22 (granting defendant school district's plea to the jurisdiction where third party company – Durham Transportation, Inc. – drove a district-owned bus on the district's behalf). Moreover, "maintenance or repair does not fall within the definition of 'operation' or 'use,'" and therefore the TTCA does not waive immunity for claims against school districts for inadequate maintenance of a school bus. *Id.*

4.6 Moreover, as to Plaintiffs’ false imprisonment claims, the TTCA’s waiver of immunity specifically excludes claims “arising out of assault, battery, false imprisonment, or any other intentional tort.” Tex. Civ. Prac. & Rem. Code § 101.057; *see also City of Mesquite v. Wagner*, 2023 Tex. App. LEXIS 3251, *11 (Tex. App.—Dallas 2023, no pet hist.) (citing *Delaney v. Univ. of Houston*, 835 S.W.2d 56, 58 (Tex. 1992)).

C. This Court lacks Jurisdiction over all of Plaintiffs’ Claims because McKinney ISD did not Use or Operate the Bus

4.7 In this case, McKinney ISD did not drive, operate, or control the Bus, and therefore did not “use” or “operate” a motor vehicle within the meaning of the TTCA. This fact is not disputed – there is absolutely no evidence to raise a fact issue as to whether McKinney ISD “used” or “operated” the Bus. Instead, all evidence shows that, if anyone used the Bus, it was Defendant Durham and its driver, Isabel Garcia. See Plaintiff’s Petition, ¶ 4.4.

4.8 Because McKinney ISD is a public school district, and because it did not use or operate the Bus, immunity from suit has not been waived under the TTCA for any of Plaintiffs’ claims:

a. Plaintiffs’ negligence cause of action alleges that McKinney ISD “breached its duty of care by failing to act as a reasonably prudent school district, including but not limited to: failing to adequately supervise the company with which it contracted to provide bus services for its students, failing to report an emergency

situation involving McKinney I.S.D. students to law enforcement, and failing to adequately monitor and provide safe transportation to children on its bus system.” Plaintiffs’ Amended Petition, ¶ 6.3. But none of these actions constitute the “use” or “operation” of a school bus by the District under Texas law because no McKinney ISD employee ever actually drove the bus. *See Mt. Pleasant Indep. Sch. Dist.*, 2014 Tex. App. LEXIS 4159 at *15 (finding that there was no “waiver of immunity ... because there [was] no evidence that [school] District employees exercised direct control over the bus in question at the time of the accident” when bus was driven by third party contractor). Accordingly, McKinney ISD’s immunity is not waived as to Plaintiffs’ negligence claim.

b. Plaintiffs also attempt to plead causes of action against McKinney ISD for (1) negligent entrustment and (2) negligent hiring, supervision, retention, and training. See Plaintiffs’ Amended Petition, ¶¶ 7.2(b), 9.2. Plaintiffs allege that “Defendant McKinney I.S.D. entrusted the transportation of its students to Defendant Durham, believed by Plaintiffs to be a reckless or incompetent transportation company.” *Id.* Plaintiffs further allege that McKinney ISD was negligent in hiring, training, and otherwise supervising Durham’s employee, Defendant Garcia. *Id.* ¶ 9.2. However, immunity is not waived for claims of negligent entrustment, hiring, supervision, or any other theory pursued by Plaintiffs. *Los Fresnos Consol. Indep. Sch. Dist. v. Rivas*, 2005 Tex. App. LEXIS 6627, *19

(Tex. App.—Corpus Christi 2005, pet. denied) (“Negligent hiring, retention or entrustment does not constitute ‘use of a publicly owned automobile.’ Nowhere have we found, nor have the [plaintiffs] directed our attention to, any statutory waiver of immunity for negligent hiring, negligent retention, or negligent entrustment on the part of a governmental unit.”). Therefore, immunity is not waived for Plaintiffs’ negligent entrustment, hiring, retention, and supervision claims against McKinney ISD, and these claims should be dismissed for lack of jurisdiction.

c. Finally, Plaintiffs allege that “McKinney ISD willfully detained the students on bus 159,” and is therefore liable to Plaintiffs under the theory of false imprisonment. See Plaintiffs’ Amended Petition, ¶ 5.1. However, as explained above, the TTCA specifically states that it does not waive immunity for false imprisonment or any other intentional tort. Tex. Civ. Prac. & Rem. Code § 101.057 (2). Accordingly, McKinney ISD is immune from suit for false imprisonment, and this Court should dismiss that claim for lack of jurisdiction.

4.9 Because immunity has not been waived for any of Plaintiffs’ claims against McKinney ISD, the Court should GRANT the District’s plea to the jurisdiction and DISMISS all of Plaintiff’s claims. As discussed below, because this is an extreme case, the Court should also AWARD McKinney ISD its attorneys’ fees and costs.

V.
Motion for Attorneys' Fees and Costs

5.1 Tex. Educ. Code § 11.161 provides a mechanism for a court to award a public school district its fees and costs when the plaintiff brings a frivolous lawsuit from which the district is immune. § 11.161 states:

In a civil suit brought under state law, against an independent school district or an officer of an independent school district acting under color of office, the court may award costs and reasonable attorney's fees if:

- (1) the court finds that the suit is frivolous, unreasonable, and without foundation; and
- (2) the suit is dismissed or judgment is for the defendant.

Tex. Educ. Code § 11.161 (LEXIS 2023). “Courts considering attorney’s fees awarded under education code section 11.161 have analogized those awards to an award of fees as sanctions under both chapter 10 of the civil practice and remedies code and rule 13 of the rules of civil procedure.” *Farr v. Arlington Indep. Sch. Dist.*, 2018 Tex. App. LEXIS 5534, *11 (Tex. App.—Fort Worth 2018, no pet.) (mem. op.) (citing *Roach v. Ingram*, No. 14-16-00790-CV, 557 S.W.3d 203, 2018 Tex. App. LEXIS 3982, 2018 WL 2672546, at *17-18 (Tex. App.—Houston [14th Dist.] June 5, 2018, no pet. h.); *Ollie v. Plano ISD*, 383 S.W.3d 783, 793 (Tex. App.—Dallas 2012, pet. denied)). The Court may hold the plaintiffs **and their attorneys** jointly and severally liable for an award under § 11.161. *Id.* (upholding award of fees against

plaintiffs and their attorney under § 11.161 in suit alleging injuries from poor air quality in a school).

5.2 This action meets all the requirements to sustain an award under § 11.161. First, the suit is frivolous, unreasonable, and without foundation as against McKinney ISD. See Tex. Educ. Code § 11.161(1). As thoroughly discussed above, McKinney ISD did not own, operate, drive, or use the Bus, and is therefore immune from suit. The case law is crystal clear on that point. Second, the suit should be dismissed for lack of jurisdiction, satisfying the second element necessary for McKinney ISD to be entitled to recover its fees and costs. See Id. § 11.161(2). Finally, while the District would ordinarily not pursue an award of fees in a case involving students and parents, Plaintiffs' prosecution of this lawsuit is particularly egregious because **Plaintiffs were given a chance to nonsuit this action without consequence, but willfully chose to continue.** As shown in Exhibit C-2, counsel for McKinney ISD wrote a letter to Plaintiffs' counsel explaining exactly why the District cannot be liable in this case, and outlining applicable law. See Exhibit C-2. McKinney ISD's counsel provided Plaintiffs' counsel the opportunity to nonsuit all claims against the District without consequence. Id. However, Plaintiffs' counsel refused, and persisted with this lawsuit. Accordingly, Plaintiffs and their counsel should be ordered to pay the costs and attorneys' fees incurred by McKinney ISD – a public school district funded by taxpayers for the benefit of school children.

5.3 McKinney ISD has incurred and will incur \$10,804.50 in fees and costs thus far in this lawsuit. This is a reasonable and necessary amount for McKinney ISD to answer the suit, conduct necessary research into the parties' claims and defenses, conduct research into the applicable law, conduct very limited discovery on the jurisdictional facts, draft and file this Plea, and other necessary legal work. Accordingly, McKinney ISD is entitled to an award of \$10,804.50 under Tex. Educ. Code § 11.161.

VI.
Conclusion and Prayer

6.1 For the reasons above, the Court should GRANT McKinney ISD's Plea to the Jurisdiction, DISMISS all of Plaintiff's claims against McKinney ISD with prejudice to file the same, and ORDER Plaintiffs, including Plaintiffs' counsel, to pay sanctions to McKinney ISD in the amount of \$10,804.50.

Respectfully submitted,

**ABERNATHY, ROEDER, BOYD &
HULLETT, P.C.**

/s/Lucas C. Henry

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ATTORNEYS FOR MCKINNEY ISD

CERTIFICATE OF SERVICE

I certify that on July 12, 2023, a true and correct copy of the foregoing pleading was e-served served on all counsel of record in accordance with the Texas Rules of Civil Procedure.

/s/Lucas C. Henry

Lucas C. Henry

EXHIBIT A

Respectfully submitted,

By: /s/ S. Wesley Butler

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**ATTORNEYS FOR DEFENDANT
DURHAM SCHOOL SERVICES, L.P.**

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing has been served upon all counsel of record via e-service on this 20th day of June 2023.

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/s/ S. Wesley Butler

RESPONSES TO REQUEST FOR ADMISSIONS

REQUEST FOR ADMISSION NO. 1: Admit that Isabel was an employee of Durham at the time of the Incident.

RESPONSE: Defendant Durham admits that Isabel Garcia, who was driving a bus on Route 159, was an employee of Durham on February 28, 2023. Otherwise, denied as worded.

REQUEST FOR ADMISSION NO. 2: Admit that Isabel was an agent of Durham at the time of the Incident.

RESPONSE: Defendant Durham admits that Isabel Garcia, who was driving a bus on Route 159, was an employee of Durham on February 28, 2023. Otherwise, denied as worded.

REQUEST FOR ADMISSION NO. 3: Admit that Isabel was not an employee of McKinney ISD at the time of the Incident.

RESPONSE: Admitted.

REQUEST FOR ADMISSION NO. 4: Admit that Isabel was not an agent of McKinney ISD at the time of the Incident.

RESPONSE: Admitted.

REQUEST FOR ADMISSION NO. 5: Admit that Bus 18249 was owned by Durham at the time of the Incident.

RESPONSE: Defendant Durham admits that Bus 18249 was owned by Durham. Otherwise, denied as worded.

REQUEST FOR ADMISSION NO. 6: Admit that Bus 18249 was under the care, custody, and control of Durham at the time of the Incident.

RESPONSE: Defendant Durham admits that Bus 18249 was owned and operated by Durham and that Isabel Garcia, a Durham employee, was driving the bus on February 28, 2023. Otherwise, denied as worded.

REQUEST FOR ADMISSION NO. 7: Admit that Durham was responsible for maintaining Bus 18249 at the time of the Incident.

RESPONSE: Defendant Durham admits that it maintained Bus 18249.

REQUEST FOR ADMISSION NO. 8: Admit that Bus 18249 was not owned by McKinney ISD at the time of the Incident.

RESPONSE: Admitted.

REQUEST FOR ADMISSION NO. 9: Admit that Bus 18249 was not under the care, custody, and control of McKinney ISD at the time of the Incident.

RESPONSE: Admitted.

REQUEST FOR ADMISSION NO. 10: Admit that McKinney ISD was not responsible for maintaining Bus 18249 at the time of the Incident.

RESPONSE: Admitted.

REQUEST FOR ADMISSION NO. 11: Admit that McKinney ISD did not operate Bus 18249 on the date of the Incident.

RESPONSE: Admitted.

EXHIBIT B

CAUSE NO. 429-01133-2023

KAYLA WALKER, et al.,	§	IN THE DISTRICT COURT
Plaintiffs,	§	
	§	
v.	§	429TH JUDICIAL DISTRICT
	§	
DURHAM SCHOOL SERVICES,	§	
L.P., MCKINNEY INDEPENDENT	§	
SCHOOL DISTRICT, AND	§	
ISABEL GARCIA,	§	
Defendants.	§	COLLIN COUNTY, TEXAS

AFFIDAVIT OF GEOFF SANDERSON

State of Texas §
 §
Collin County §

BEFORE ME, the undersigned authority, on this day personally appeared Geoff Sanderson, who, after being duly sworn by me, on his oath deposed and said:

1. “My name is Geoff Sanderson. I am over the age of 18 years and am competent to make this affidavit. The statements contained in this Affidavit are true and correct. The statements are based on my personal knowledge, unless I expressly indicate to the contrary.

2. I am employed as the Chief Accountability Officer for the McKinney Independent School District (“McKinney ISD” or the “District”). McKinney ISD contracts with Durham School Services, LP (“Durham”), to provide bus transportation services for District students. Attached hereto as Exhibit B-1 is a true

and correct copy of the agreement between Durham and McKinney ISD that was in effect at the times relevant to this lawsuit (the “Contract”).

3. The Contract states that Durham is an independent contractor of the District, and “neither [Durham], its employees or its Agents shall be considered to be an Officer, Agent, or Employee of [the] District.” See Exhibit B-1, ¶ 11. At all times relevant to this lawsuit, the bus at-issue in this lawsuit was owned, used, operated, driven, and controlled by Durham and/or Durham’s employees – not by McKinney ISD or its employees. McKinney ISD was not responsible for driving, operating, using, maintaining, or otherwise controlling the bus at-issue in this suit.

4. I verify under penalty of perjury that the statements made above are true and correct.”

Further affiant sayeth naught.

[signature page to follow]

By:

Geoff Sanderson

Geoff Sanderson
Chief Accountability Officer, McKinney ISD

STATE OF TEXAS

§
§
§

COUNTY OF COLLIN

SWORN TO AND SUBSCRIBED BEFORE ME on this 12 day of July, 2023
by Geoff Sanderson.

Ardena M. Johnson

Notary Public in and for the State of Texas

My Commission Expires: 5-22-2026

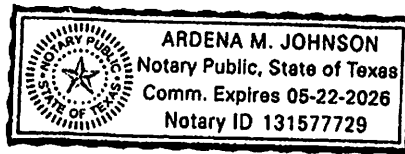


EXHIBIT B-1

CSC #3021
McKinney Independent School District
Transportation Agreement

AGREEMENT FOR THE TRANSPORTATION OF PUPILS

This **AGREEMENT FOR THE TRANSPORTATION OF PUPILS**, hereinafter referred to as the "AGREEMENT", is made and entered into this ____ day of May, 2017, by and between **MCKINNEY INDEPENDENT SCHOOL DISTRICT** with a principal office located at #1 Duval Street, McKinney, TX 75069, hereinafter referred to as "DISTRICT", and **DURHAM SCHOOL SERVICES, L.P.**, a Delaware limited partnership, with its principal office located at 4300 Weaver Parkway, Warrenton, Illinois 60555, hereinafter referred to as "CONTRACTOR."

1. Scope of Services. CONTRACTOR shall provide safe, timely and convenient pupil transportation services to DISTRICT which includes, but not limited to, transporting students between school and a point reasonably close to the pupils' homes, or alternative locations as specified by DISTRICT, or to and/or from fieldtrips, excursions, approved trips, extracurricular activities, athletic activities or any other purpose designated by DISTRICT, including the use of said equipment during DISTRICT declared emergency; providing equipment, storage and maintenance thereof; providing employees to perform such services; and administrative, supervisory and operational services required thereby ("Work") based on the assumptions and at the rates set forth on Schedule A.

2. Change in Scope of Services. The following provisions shall apply in the event of the applicable reduction in service:
 - a. This Agreement contemplates transportation shall be provided for each and every day that school is convened and in accordance with bus routes, timetables, and schedules submitted by CONTRACTOR to DISTRICT and approved by DISTRICT, for a minimum of 175 operating days per school year. If the actual number of operating days falls below 175 during any school year, then the parties agree to renegotiate in good faith the rates provided in the attached Schedule A if such renegotiations is requested by Contractor. If the parties cannot reach an agreement, Contractor may, at its option, continue to operate the Agreement at the original rates or terminate the Agreement upon thirty (30) days' written notice. If the actual number of operating days falls below the contemplated minimum days and the District does not provide notice in advance of the end of the applicable school year making a renegotiation of rates impracticable, Contractor will invoice District and District agrees to pay a sum equal to fifty percent (50%) of the daily charges for each day work is cancelled.

 - b. If District cancels any work due to inclement weather, such as, but not limited to, snow, ice, flood, extreme cold/extreme heat or for other safety reasons or other emergency situations, Contractor will invoice District and District agrees to pay a sum equal to fifty percent (50%) of the daily charges for each day work is cancelled.

 - c. If the average daily number of routes is reduced by five percent (5%) or more, then both parties agree to renegotiate in good faith the rates provided in Schedule A if such renegotiation is requested by Contractor. If the parties cannot reach an agreement, Contractor may, at its option, continue to operate the Agreement at the original rates or terminate the Agreement upon thirty (30) days' written notice.

3. Payment for Services. On or about the fifth business day of each month CONTRACTOR shall submit invoices in the form and number required by DISTRICT for all services performed under

CSC #3021
McKinney Independent School District
Transportation Agreement

this AGREEMENT. Payment for such services will be made in check, money order, or ACH or wire transfers within a reasonable time thereafter, in accordance with law. Texas Government Code Chapter 2251 provides that payment is due for goods or services thirty (30) days from the date goods/services are completed, or an invoice is received by DISTRICT, whichever is later. A payment is considered overdue beginning on the 31st day. Payment by credit card is accepted but requires an increase in the invoiced amount of two and one-half percent (2.5%) to cover processing fees. In the event sums due and payable are not received timely, a late charge of 1.5% per month of the outstanding balance, or the maximum rate allowed by law, whichever is less, will be assessed upon the account. In the event such sums are not received within sixty (60) days, service may be discontinued until such time as CONTRACTOR has received all sums due.

4. Adjustment of Rates.

a. The rates set forth in Schedule A shall be increased three percent (3%) on each anniversary date during the term of this Agreement. However, in the event of an annual increase in the Consumer Price Index, all items, all Urban Consumers, for the Dallas area, published by the U.S. Department of Labor ("CPI") for each year ending in April in excess of three percent (3%), the daily and hourly school bus rates shall be increased in proportion to the increase in the CPI, but in no event shall any such annual increase in the daily and hourly school bus rates exceed five percent (5%).

b. Notwithstanding any contrary statements in this Agreement or in any documents incorporated herein by reference, in the event any federal, state, local or other government body's statutes, laws, rules, or regulations impact Contractor's methods and/or costs in connection with the provision of services hereunder (e.g., changes in healthcare or other benefits requirements, changes in equipment requirements, changes in services requirements, changes in unemployment insurance benefit requirements, etc.), or in the event there are other material changes in the requirements of the District (such as major enrollment changes or additions or special needs or physically handicapped children, which require added transportation equipment), and the impact of such changes materially impacts the methods and/or costs of the Contractor in connection with providing the Bus Service hereunder during the term of the Agreement, Contractor, upon written notice to District, may request a renegotiation of the Agreement which shall be conducted in good faith. Such renegotiations may include, without limitation, changes in rates, term, payment schedules, levels or service, and the types or number of vehicles to be used. Any modification to the Agreement resulting from such renegotiations shall become effective on a mutually agreed upon date. If the parties cannot come to an agreement, either party may terminate the Agreement upon thirty (30) days' notice.

5. Term. The term of this AGREEMENT shall be for a period of five (5) years beginning July 1, 2017 through June 30, 2022. This AGREEMENT shall be renewable for five (5) additional terms of one (1) year, at the option and mutual written agreement of both parties, taking into consideration CONTRACTOR'S performance under this AGREEMENT and cost negotiations, and subject to applicable statutes and regulations. Any notice of intent not to extend the AGREEMENT, by either party, must be given in writing by March 1 of each applicable contract year.

6. Entire Agreement. This AGREEMENT contains all the terms and conditions agreed upon by the Parties and no other agreement, oral or otherwise, including DISTRICT'S Request for Proposal, regarding the subject matter of this Contract, or any part thereof, shall have any validity or bind

CSC #3021
McKinney Independent School District
Transportation Agreement

the Parties. The complete AGREEMENT consists of this AGREEMENT and the Proposal of CONTRACTOR, which is incorporated herein by reference. In the event of any conflict between the terms of this AGREEMENT and the Proposal, the terms of this AGREEMENT shall govern.

7. Permits and Licenses. CONTRACTOR, its employees, and its agents shall secure and maintain valid permits, licenses, and certifications as required by law for the execution of this AGREEMENT.
8. Insurance. CONTRACTOR shall maintain insurance as set forth below during this AGREEMENT period and shall furnish a certificate of insurance for Commercial General and Auto Liability coverage and for Workers' Compensation coverage. CONTRACTOR shall furnish new Certificates of Insurance for liability coverage and for Workers' Compensation coverage within fifteen (15) days following the placement of new or renewed coverage. Certificates shall provide that a thirty (30) day prior notice of cancellation will be given to DISTRICT.

General and Auto Liability insurance shall be maintained to protect CONTRACTOR from any claims from damages for personal injury or death, and from damage to property, which may arise from operations of CONTRACTOR under this AGREEMENT. General and Auto Liability insurance shall each have a combined single limit of Ten Million Dollars (\$10,000,000). Worker's Compensation insurance shall be maintained as required by law and to protect CONTRACTOR from claims, which may arise from its operation under this AGREEMENT. The DISTRICT shall be added as additional insured with regard to the General and Auto Liability policies.

9. Hold Harmless Agreement. TO THE FULLEST EXTENT ALLOWED BY LAW, CONTRACTOR SHALL HOLD HARMLESS AND INDEMNIFY DISTRICT, ITS GOVERNING BOARD, OFFICERS, AGENTS, AND EMPLOYEES FROM EVERY CLAIM OR DEMAND WHICH MAY BE MADE BY REASON OF ANY INJURY TO PERSON OR DAMAGE TO PROPERTY SUSTAINED BY ANY PERSON, FIRM OR CORPORATION, TO THE EXTENT THAT SUCH INJURY OR DAMAGE WAS CAUSED BY ANY NEGLIGENT ACT OR OMISSION OR WILLFUL MISCONDUCT OF CONTRACTOR OR OF ANY PERSON, FIRM, OR CORPORATION, DIRECTLY OR INDIRECTLY EMPLOYED BY CONTRACTOR UPON OR IN CONNECTION WITH ITS PERFORMANCE UNDER THIS AGREEMENT.

To the extent permissible by law, DISTRICT shall hold harmless and indemnify CONTRACTOR, its Officers, Agents, and Employees from every claim or demand which may be made by reason of any injury to person or damage to property sustained by any person, firm or corporation, to the extent that such injury or damage was caused by any negligent act or omission or willful misconduct of DISTRICT or of any person, firm, or corporation, directly or indirectly employed by DISTRICT upon or in connection with its performance under this AGREEMENT.

10. Safety Program. CONTRACTOR shall provide formal safety instruction on a regular basis for all operating personnel assigned to this AGREEMENT. CONTRACTOR shall provide copies of all documentation of such training to DISTRICT on a regular, not less than monthly, basis.
11. Independent Contractor. While engaged in carrying out and complying with the terms and conditions of this AGREEMENT, CONTRACTOR is an independent contractor, and neither CONTRACTOR, its employees or its Agents shall be considered to be an Officer, Agent, or Employee of DISTRICT.

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12. Assignments. CONTRACTOR shall not assign or transfer any of its rights, burdens, duties, or obligations under this AGREEMENT without the prior written consent of DISTRICT.
13. Subcontracting. CONTRACTOR will not subcontract any of its rights, burdens, duties, or obligations under this AGREEMENT without the written consent of DISTRICT, except on a short term, interim basis in the event of an emergency. Consent shall not be unreasonably withheld.
14. Routing and Scheduling. Prior to the start of any service under this AGREEMENT, DISTRICT and CONTRACTOR shall cooperatively establish routes and schedules conforming to the needs of DISTRICT. If, at any time during the term of this AGREEMENT, it is determined by mutual consent that service may be improved by revisions to routing, scheduling, or bus assignment, DISTRICT and CONTRACTOR shall plan and institute such changes jointly. CONTRACTOR shall have sufficient notice to review such changes and evaluate the safety consideration. All routes, scheduled, and bus stops shall be established by CONTRACTOR on such basis as may be determined by it to be most efficient, but shall be approved by DISTRICT and shall not be revised without mutual consent and authorization.
15. Contractor's Personnel. CONTRACTOR shall employ and assign for services under this AGREEMENT a sufficient number of qualified regular and substitute drivers based on projected basic and supplementary transportation, taking into account the current driver absence rates. CONTRACTOR shall be solely responsible for hiring and discharging its employees. DISTRICT shall have the right to request removal of any of CONTRACTOR's employees from providing services under this AGREEMENT provided that such request is made in writing with the reasons set forth and provided that such request does not violate any laws against discrimination nor in violation of any federal, state or local law.

CONTRACTOR agrees that each driver's skill set shall include, but not be limited to:

- a. Be certified as required by law and possess a valid license or permit issued by this State.
- b. Be certified by a duly licensed medical practitioner as medically qualified and free of medical or physical conditions that, absent reasonable accommodation, would limit safe operation of a school bus. This shall include drug testing prior to employment and random drug testing of thirty-three (33%) percent of drivers per year.
- c. Successfully complete a course of training, applicable DISTRICT policies and regulations, and behind-the-wheel school bus driving instruction.
- d. Possess a satisfactory driving record and criminal history record, after review of such records prior to employment and periodically thereafter to the extent permitted or available by law. CONTRACTOR will conduct any criminal history related record checks.
- e. CONTRACTOR shall hold each driver responsible for:
 - i. Supervising the loading and unloading of his or her bus at every pick-up and delivery point.
 - ii. Keeping informed of, and complying with, all rules and regulations affecting the operation of school buses and standards of conduct.
 - iii. Complying with all federal, state, and local traffic laws while operating buses under this Agreement.
 - iv. Carrying appropriate identification at all times while on duty.

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CONTRACTOR shall instruct all drivers and other employees regarding the rules and regulations applicable to safe driving on school or DISTRICT grounds.

16. Record Keeping and Accident Reports. CONTRACTOR will be required to provide access to any and all operational records related to the provision of services under this AGREEMENT and kept in the ordinary course of business to DISTRICT within 30 days of DISTRICT's written request for such records. DISTRICT shall maintain the confidentiality of CONTRACTOR's records to the extent permitted by law. All operational records, including, but not limited to audio, digital and video recordings are, and shall be, the exclusive property of CONTRACTOR.

All equipment involved in an accident shall be reported as defined by law. Accidents involving CONTRACTOR'S equipment or personnel while operating for DISTRICT shall also be reported to DISTRICT. If requested by DISTRICT, pupil injuries not involving acceleration, deceleration, or movement of the bus may also be reported to DISTRICT on forms provided by DISTRICT.

17. Equipment Requirements. All buses supplied under this AGREEMENT shall be approved school buses, as defined by applicable statutory or administrative codes within the state in which DISTRICT operates. DISTRICT may inspect school buses at any time with or without notice to CONTRACTOR. The CONTRACTOR will maintain a comprehensive services record on each vehicle – with such record being available to the DISTRICT at all times.

- a. Regular preventive maintenance shall be practiced on all buses, as approved by the bus manufacturer and as required by DISTRICT and state law. Buses shall be cleaned inside and out, as necessary, and repairs to visible body damage, inside or out, shall be made immediately after such damage occurs.
- b. Spare buses, either DISTRICT or CONTRACTOR supplied, of appropriate sizes, and meeting all the above requirements, shall be located by CONTRACTOR at points close enough to DISTRICT so they may be substituted for regularly assigned buses, if needed, without delay.
- c. At the start of the contract, no bus should be older than seven (7) years old, and no bus should exceed ten (10) years of age at any point. The CONTRACTOR shall provide at least ten percent (10%) additional equipment during normal route times for extracurricular field trips and special event trips. One hundred percent (100%) of the buses will have air conditioning by the end of year one, or July 1, 2018.
- d. One hundred percent (100%) of fleet shall have three (3) cameras per bus.
- e. CONTRACTOR shall provide ten (10) total activity buses.
- f. CONTRACTOR will not allow any advertising billboards to be placed on any school bus that is contracted to DISTRICT without prior written approval from DISTRICT.

18. Use and Maintenance of Facility. CONTRACTOR agrees to pay \$10,500.00 per month to lease DISTRICT Transportation Center, hereinafter referred to as "Facility".

- a. CONTRACTOR will be responsible for the day-to-day maintenance and repairs of the Facility due to routine wear and tear including interior painting, cleaning, and non-environmental waste disposal. CONTRACTOR will install long distance telephone

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service and computer data lines as needed (CONTRACTOR responsible for line charges), and cover the cost of personal property taxes and insurance for CONTRACTOR'S equipment. DISTRICT will provide existing furniture and office equipment. DISTRICT will continue to maintain existing local telephone lines for use by CONTRACTOR.

- b. CONTRACTOR will be responsible for maintenance of any shop and office equipment that DISTRICT provides CONTRACTOR usage of and shall be responsible for all damage caused by the negligence of CONTRACTOR or its employees, excluding normal wear and tear. CONTRACTOR will be responsible for cleaning shop area and waste disposal area.
- c. If CONTRACTOR is successful in securing additional business from nearby Districts or other Customers, then CONTRACTOR may enter into an agreement with DISTRICT to pay fair market value for the proportionate amount of usage of the Facility required to serve such Districts or Customers. CONTRACTOR must obtain permission from DISTRICT prior to using Facility. Reasonable agreement will not be withheld.
- d. DISTRICT retains the right to request CONTRACTOR to maintain DISTRICT-owned and operated maintenance vehicles at a price that is to be mutually agreed upon.

19. Environmental Indemnification.

- a. To the extent permitted by the laws and Constitution of the State of Texas, DISTRICT hereby represents and warrants to its knowledge and in good faith that:
 - i. The Property and Facility have been used, operated and maintained at all times in compliance with all applicable federal, state and local environmental quality laws, regulations, rules, policies and rulings; and
 - ii. Any and all liquid storage tank(s) (underground and/or above ground) are in good maintenance and repair and are not now leaking; and
 - iii. All applicable federal, state and local registration requirements respecting existing liquid storage tank(s) (underground and/or above ground) and discharge into the soil, ground water, surface water, storm drain system, sewer drain system, etc., have been strictly complied with at all times; and
 - iv. There has been no discharge of oil, gasoline, diesel fuel, solvents, other hydrocarbons or any other hazardous materials into or contamination by such materials or otherwise of the soil, ground water, surface water, storm drain system, sewer drain system, etc., or any other pollution from any use, operation and/or maintenance of the Property and Facility at any time prior to the date hereof.
 - v. DISTRICT shall comply with all applicable federal, state and local environmental quality laws, regulations, rules, policies, and rulings related to use, maintenance and operation of the Property and Facility at all times prior to, during and after this AGREEMENT.

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- b. CONTRACTOR shall comply with all applicable federal, state and local environmental quality laws, regulations, rules, policies, and rulings related to its use, maintenance and operation of the Property and Facility at all times during this AGREEMENT after DISTRICT complies with the testing, inspection, and initial repair or replacement provisions herein on the following terms and at the expense of DISTRICT:
 - i. As soon as practicable after the date hereof but prior to CONTRACTOR taking possession of the Facility, DISTRICT shall provide CONTRACTOR with a written report regarding existing liquid storage tank(s), including tank size, type, and construction, piping type and construction, and the year of installation and current or future modifications that must be made in order to comply with any federal, state, local or insurance requirements.
 - ii. DISTRICT shall conduct precision tank testing of all liquid storage tanks, performed by a certified tank testing firm acceptable to CONTRACTOR, which firm shall provide to DISTRICT and CONTRACTOR a written report indicating the condition of the tank(s).
 - iii. DISTRICT shall make any needed repairs, modifications, tank replacement and environmental clean-up required as a result of the tank test report and in order to comply with all applicable federal, state and local requirements.
 - iv. In the event a tank develops a leak during the term of this AGREEMENT after DISTRICT complies with the testing, inspection, and initial repair or replacement provisions herein, DISTRICT shall make any needed repairs, modification, tank replacement and environmental clean-up required as a result of any future tank test reports(s) and in order to comply with all current and future federal, state and local requirements.
 - v. In the event a tank is required to be taken out of service due to a leak or in order to comply with environmental quality requirements during the term of this AGREEMENT, and CONTRACTOR is then required to fuel vehicles at a location off the Property, DISTRICT shall reimburse CONTRACTOR for the price differential between on-site fueling and other costs associated with such fueling including extra personnel and mileage expenses, for the duration of such period.
- c. DISTRICT shall have full responsibility for the proper removal and disposal of any and all existing hazardous material stored on-site prior to the commencement of CONTRACTOR'S occupation of the Property or Facility.
- d. CONTRACTOR shall have no liability for any matters relating to hazardous or toxic conditions of the Property and Facility, environmental cleanup and disposal, or of violations of environmental quality laws (except for liability arising out of or related to the willful or negligent acts of CONTRACTOR).
- e. To the extent permitted by the laws and Constitution of the State of Texas, DISTRICT hereby agrees to indemnify and hold CONTRACTOR harmless from and against any loss, cost, or expense, damages, claims or liability arising out of or related to the use, maintenance and operation of the Property and Facility related to environmental quality

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matters affecting the Property and Facility including without limitation, contamination of soil, surface water or ground water, personal injury or property damage and compliance with all applicable federal, state and local requirements affecting environmental quality (except for liability arising out of or related to the willful or negligent acts of CONTRACTOR).

- f. **CONTRACTOR HEREBY AGREES TO INDEMNIFY AND HOLD DISTRICT HARMLESS FROM AND AGAINST ANY LOSS, COST, OR EXPENSE, DAMAGES, CLAIMS, OR LIABILITY ARISING OUT OF OR RELATED TO THE WILLFUL OR NEGLIGENT ACTS OF CONTRACTOR RELATED TO ENVIRONMENTAL QUALITY MATTERS AFFECTING THE PROPERTY OR FACILITY BUT ONLY TO THE EXTENT THAT SUCH DAMAGE OR CLAIM AROSE OUT OF THE WILLFUL OR NEGLIGENT ACTS OF CONTRACTOR.**
 - g. The indemnification obligations of paragraphs "e" and "f" shall survive the termination or expiration of this AGREEMENT.
20. Fuel. DISTRICT shall handle the purchase and storage of fuel.
21. Termination of Agreement. If either Party refuses or fails to perform services as required as specified in this AGREEMENT, or any separable part thereof, the other Party may, without prejudice to any other right or remedy, serve written notification upon it of intention to terminate and, unless within forty-five (45) days after service of such written notice of the condition or violation the party in breach shall cease and make satisfactory arrangements for the correction thereof, this AGREEMENT shall, upon the expiration of the forty-five (45) days, cease and terminate. The DISTRICT may, at its option, and without prejudice to any other remedy to which it may be entitled at law or in equity, or elsewhere under this Agreement by giving thirty (30) days written notice of termination to CONTRACTOR if the latter should: (1) be adjudicated a voluntary or involuntary bankruptcy; (2) institute or suffer to be instituted any proceeding for a reorganization or rearrangement of its affairs; (3) make an assignment for the benefit of creditors; (4) become insolvent or have a receiver of its assets or property appointed; or (5) allow any money judgement against it to remain unsatisfied for a period of ninety (90) days or longer.
22. Termination for Lack of Funding: District shall have the right to terminate the Agreement at the end of any contract year if it has been denied adequate funding for the provision of school bus services. In the event District is denied adequate funding for the provision of school bus services, District shall immediately notify Contractor in writing. In the event funding is restored, Contractor shall have the right of first refusal to resume providing services to District in accordance with the Agreement.
23. Notices. Notices to either party to this AGREEMENT shall be in writing and shall be considered duly served and delivered if such notice is delivered by hand; mailed via the United States mail, certified, return receipt requested; or sent via overnight service. All such notices shall be addressed:

DISTRICT: McKinney Independent School District
#1 Duvall Street
McKinney, Texas 75069
Attention: _____

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CONTRACTOR: Durham School Services, L.P.
Attn: Contract Administrator
4300 Weaver Parkway
Warrenville, Illinois 60555
Telephone: (630) 821-5400

24. Discipline. CONTRACTOR will, in writing, report serious or persistent misconduct on the part of students to the designated DISTRICT employee following completion of the route. DISTRICT shall then impose reasonable disciplinary measures upon the students in accordance with its discipline management program. CONTRACTOR will not remove any pupil, or refuse transportation to any pupil, without the written authorization of DISTRICT.

Vandalism damages to CONTRACTOR'S equipment or facilities shall be the responsibility of CONTRACTOR. However, DISTRICT shall give CONTRACTOR reasonable assistance in obtaining restitution for damaged equipment or facilities. All repairs will be made promptly by the CONTRACTOR to maintain the buses in good condition as required by this Agreement.

25. Force Majeure. CONTRACTOR shall be excused from performance hereunder, and DISTRICT shall not be allowed to levy any damages or penalties, liquidated or otherwise during the time and to the extent that CONTRACTOR is prevented from performing in the customary manner by an act of God, fire, flood, war, riot, civil disturbance, state of emergency, terrorism, epidemic, quarantine, strike, lockout, labor dispute, oil or fuel shortage, freight embargo, rationing or unavailability of materials or products, loss of transportation facilities, commandeering of equipment, materials, products, plants, or facilities by the Government, or any other occurrence which is beyond the control of CONTRACTOR.
26. Choice of Law. This AGREEMENT shall be governed by the laws of the State of Texas without regard to its conflict of laws principles.
27. Severability. In the event any provision of this AGREEMENT is determined to be illegal or void, the remainder of this AGREEMENT shall remain in full force and effect.
28. Amendments. Changes to this AGREEMENT may only be made by written amendment mutually agreed to by the parties.
29. Attorney's Fees. N/A.
30. Execution by Facsimile or in Counterparts. The Parties may sign this AGREEMENT in counterparts such that their signatures may be on separate pages. A copy, facsimile or an original of this AGREEMENT, with all signatures appended together, shall be deemed a fully executed AGREEMENT. Signatures transmitted by facsimile or other electronic means shall be deemed original signatures.
31. Liquidated Damages. DISTRICT must notify the General Manager (of the Contractor location that performs the services) in writing (an email to the General Manager is an acceptable form of notice) within three (3) DISTRICT business days of an occurrence giving rise to a liquidated damage claim and must assess such liquidated damage claim within 30 days of its occurrence. No liquidated damages shall be assessed during the first 30 days of any Agreement school year. Failure to timely notify or assess shall relieve Contractor of its obligation to pay liquidated damages for such occurrence. Notice must provide specifics regarding the occurrence, including

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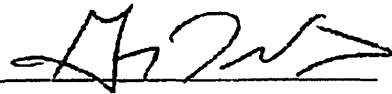
a reference to the contract provision at issue as well as all information necessary for Contractor to review the claim. This Agreement does not provide for a District unilateral right to set-off and District cannot deduct the liquidated damages from payment due Contractor until Contractor has confirmed in writing (email is an acceptable form of writing) to the District that the claim and amounts are appropriate.

32. Contractor Compliance. CONTRACTOR shall comply with all applicable federal and state laws, rules, and regulations and all DISTRICT policies, procedures, and regulations as they exist or as they may be amended. If any provision of this Agreement is contrary to any federal or state law, rule, or regulations and/or DISTRICT policy, procedure, or regulation as it exists or may be amended, then the federal and/or state law, rule or regulation and/or DISTRICT policy, procedure, or regulation shall control.

IN WITNESS WHEREOF, the parties hereto have executed this AGREEMENT as of the date written above.

DURHAM SCHOOL SERVICES, L.P.

By: Durham Holding II, L.L.C.,
Its general partner

By: 

Name: Gary Waits

Title: Chief Financial Officer

Date: May 15, 2017

**MCKINNEY INDEPENDENT SCHOOL
DISTRICT**

By: 

Name: Galy Cunningham

Title: Chief Communications &
Support Services Officer

Date: 4/4/17

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 McKinney Independent School District
 Transportation Agreement

SCHEDULE A

Regular and Special Education
 Home-to-school Transportation
 Normal and Extended District School Year

Based on 4 Hours		
Bus Capacity	Daily Rate	Hourly Rate
20 or smaller	\$278.66	\$29.51
21-47 passenger	\$278.66	\$29.51
48-72 passenger	\$278.66	\$29.51
73 and larger	\$278.66	\$29.51

Additional Transportation Services
 Extracurricular Trips, Mid-Day Runs, Shuttles
 And Other District Requested Bus Service

	Hourly Rate	Mileage Rate	Minimum Call-Out Charge
All Bus Capacities	\$24.66	\$0.41	\$49.32
Mid-Day Runs	\$29.51	\$0	\$59.02

Bus Monitors and Bus Aides: The District may require the use of bus monitors and/or bus aides in the performance of this contract. If monitors or aides are required, the District shall compensate the Contractor \$15.87 per hour. Billable time is to be based on total driving time, including layover time. Monitors or aides working in excess of 40 hours in one week shall be billed at one-and-one-half times the hourly rate stated.

Transit Buses: At the District's request, Contractor will also provide 10 transit style buses for activity and athletic field trips. These buses will be equipped with air conditioning, underneath storage and customized seating. The daily rate charge for each bus will be \$98.13 per day for 180 days, plus \$25.59 per hour and \$0.62 per mile.

Performance Bond: The District may require the Contractor to furnish a performance bond in accordance with the requirements of this proposal. If a performance bond is required, the District shall compensate the Contractor \$9,714 per year.

Maintenance on District Non-Student Transportation: The District may require the Contractor to provide maintenance on District Non-Student Transportation Fleet. If work is required, the District will compensate the Contractor \$51.12 per labor hour. The District will compensate the Contractor additional charges of 10% for parts above actual cost.

Rates provided for all transportation trips shall begin and end at the transportation center, and shall include total driver's time, including time for bus pre-trip checkout, post-trip, and layover time. For driver's time in excess of 40 hours per week, the charge will be one-and-one-half time the hourly rate stated above.

****The \$98.13 per day rate will only be charged for the existing 6 transit buses. The daily charge will not be assessed for the four newly retrofit buses.**

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Transportation Agreement

District Employee Driven Trips: If District Employees (Coaches) request to drive buses, and District approves, District Employees must be licensed and employed by the Contractor. District shall reimburse Contractor all costs associated with employment and licensing (i.e. license exams, physicals, drug screens, evaluations, TEA certifications, etc.) of District employees. District employees are subject to Contractor employee requirements. District Employees shall be paid by the District for driving. Contractor shall bill the District at the mileage rate only for miles driven by the District Employee during the trip.

ADDENDUM NUMBER FIVE

MCKINNEY INDEPENDENT SCHOOL DISTRICT, hereinafter referred to as “**DISTRICT**”, and **DURHAM SCHOOL SERVICES, L.P.**, hereinafter referred to as “**CONTRACTOR**”, mutually agree to amend the existing Agreement for the Transportation of Pupils dated, May 15, 2017 hereinafter referred to as “**Agreement**”, as stated below:

1. The term of the Agreement shall be extended for an additional one (1) year ending June 30, 2023.
2. The parties mutually agree that the transportation rates for the 2022-2023 school year are in accordance with the revised Schedule A attached hereto.
3. Rates for the 2022-2023 school year are lower than that of the 2021-2022 school year as District has purchased and will provide a portion of the fleet used for servicing this Agreement.
4. The vehicles used for the transportation of pupils will be of a mixed fleet between the District and Contractor.
5. This Addendum is effective July 1, 2022 and is agreed to by the parties.
6. All other terms and conditions of the original Agreement remain the same.

IN WITNESS WHEREOF, the parties hereto have executed this Addendum as of the date written below.

DURHAM SCHOOL SERVICES, L.P.

MCKINNEY INDEPENDENT SCHOOL DISTRICT

By: Durham Holding II, L.L.C.,
Its general partner

By:  _____

Name: Gary Waits

Title: President & CEO

Date: 10/13/2022

By:  _____

Name: Jason Bird

Title: Deputy Superintendent

Date: 6/28/2022

SCHEDULE A

**McKinney Independent School District
Pricing Page**

Regular and Special Education Home to school Transportation Normal and Extended District School Year

District Owned Bus - Based on 4 Hours		
Bus Capacity	Daily Rate	Hourly Rate
20 or Smaller	\$272.16	\$34.55
21 - 47 passenger	\$272.16	\$34.55
48 - 72 passenger	\$272.16	\$34.55
73 and larger	\$272.16	\$34.55

Contractor Owned Bus - Based on 4 Hours		
Bus Capacity	Daily Rate	Hourly Rate
20 or Smaller	\$326.16	\$34.55
21 - 47 passenger	\$326.16	\$34.55
48 - 72 passenger	\$326.16	\$34.55
73 and larger	\$331.35	\$34.55

**Additional Transportation Services Extracurricular Trips, Mid-Day Runs, Shuttles and Other District
Requested Bus Service**

	Hourly Rate	Mileage Rate	Minimum Call-Out Charge
All Bus Capacities	\$28.86	\$0.47	\$57.72
Mid-Day Runs	\$34.55		
Shuttle Runs	\$28.86		

Bus Monitors and Bus Aides	
Hourly Rate*	\$18.58

*Billable time is to be based on total driving time, including layover time

All rates are subject to 3.0% annual increases

EXHIBIT C

CAUSE NO. 429-01133-2023

**KAYLA WALKER, et al.,
Plaintiffs,**

v.

**DURHAM SCHOOL SERVICES,
L.P., MCKINNEY INDEPENDENT
SCHOOL DISTRICT, AND
ISABEL GARCIA,
Defendants.**

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IN THE DISTRICT COURT

429TH JUDICIAL DISTRICT

COLLIN COUNTY, TEXAS

AFFIDAVIT OF LUCAS HENRY

STATE OF TEXAS

§
§
§

COUNTY OF COLLIN

BEFORE ME, the undersigned notary, on this day, personally appeared Lucas Henry, a person whose identity is known to me. After I administered an oath to him, upon his oath, he said:

“My name is Lucas Henry. I am capable of making this affidavit. The facts stated in this affidavit are within my personal knowledge and are true and correct. The documents attached hereto are true and correct copies of the originals.

1. I am an attorney licensed to practice law in the State of Texas by the Supreme Court of Texas and an attorney in the law firm of Abernathy, Roeder, Boyd & Hullett, P.C., in McKinney, Texas. I have been licensed to practice law in Texas since 2016. I have been retained by Defendant McKinney ISD to represent it in the

represent it in the above-referenced matter.

2. The law firm of Abernathy, Roeder, Boyd & Hullett, P.C. is frequently engaged in the handling of litigation matters and I, as one of its attorneys, handle litigation matters on a regular basis.

3. I am familiar with the fees usually and customarily charged by attorneys in Collin County, Texas for services performed in both trial and appellate courts for the type of litigation involved in this suit. I considered the following factors in determining the reasonableness of the fee and anticipated fees for appeals in this case:

- a. the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;
- b. the likelihood, if apparent to the client, that the acceptance of the particular employment would preclude other employment by me;
- c. the fee customarily charged in the locality for similar legal services;
- d. the amount involved and the results obtained;
- e. the time limitations imposed by the client or by the circumstances;
- f. the nature and length of the professional relationship with the client;
- g. the experience, reputation, and ability of the lawyer or lawyers performing the services;
- h. whether the fee would be fixed or contingent on results obtained or uncertainty of collection before the legal services have been rendered; and

- i. to the extent not already enumerated, the requirements of State Bar Rule 1.04, Texas Disciplinary Rules of Professional Conduct, Article 10, Section 9, Title 2, Subtitle G - Appendix, Government Code, V.T.C.A.
4. My hourly rate for services rendered in this matter is \$265.00 per hour.

These are reasonable rates for an attorney with my experience in Collin County, Texas.

5. Additionally, Charles Crawford, who is a director and shareholder at ARBH with over 34 years of experience, contributed legal services to this matter. Charles Crawford's rate for services rendered in this matter was \$265.00 per hour. This is a reasonable rate for an attorney with Charles Crawford's experience in Collin County, Texas.

7. Additionally, I was assisted by Kimberly Escamilla, a legal assistant. Kimberly Escamilla's rate for services rendered in this matter was \$110.00 per hour. This is a reasonable rate for a legal assistant with Kimberly Escamilla's experience in Collin County, Texas.

8. Additionally, I was assisted by Laura Ball, a file clerk. Laura Ball's rate for services rendered in this matter was \$110.00 per hour. This is a reasonable rate for a file clerk with Laura Ball's experience in Collin County, Texas.

9. It is the experience of the firm and of the undersigned that the usual reasonable fee charged for the handling of this type of case by similar firms in Grayson County, Texas and Collin County, Texas would be based on the following

work, among other things: reviewing the client's file; review of documents relating to the file; correspondence and communications with client; legal research regarding claims and defenses; drafting pleadings; preparation of dispositive documents; preparing Motions; and the preparation of this and other affidavits. I am of the opinion that these services, and all other services rendered on behalf of Defendant, were reasonable and necessary.

10. With respect to this matter through June 30, 2023, ARBH has performed the legal services and taken the actions with respect to the issues presented by this case as described in the redacted billing records attached hereto as **Attachment 1**. The redacted billing records attached hereto as **Attachment 1** are incorporated herein by reference. Legal assistants who performed substantive work on this file worked under the supervision of attorneys in connection with this matter. Descriptions of the substantive work performed by legal assistants as well as the time spent performing the work and the amount charged for the work are included in the billing records attached as **Attachment 1**. The legal assistants who performed work in this matter are qualified through education, training, and work experience to perform substantive legal work.

11. As of June 30, 2023, McKinney ISD has incurred approximately \$9,304.50 in reasonable and necessary attorney fees for services performed by or

expenses incurred for services originating from this office in connection with this matter. Statement dates and totals are as follows:

3/31/2023	\$2,504.00
4/30/2023	\$2,351.50
5/31/2023	\$2,040.00
6/30/2023	\$2,409.00
Total	\$9,304.50

These fees were reasonable, necessary, just, and equitable fees. Additionally it is anticipated that reasonable and necessary fees of \$1,500.00 have been or will be incurred from June 30, 2023 through the execution of a final judgment, for a total of \$10,804.50. It is my opinion that \$10,804.50 is a reasonable, necessary, just, and equitable fee for the services ARBH performed in connection with matter.

12. I am a custodian of records for ARBH. Attached hereto, as **Exhibit C-1** are 9 pages of records from ARBH. These records are kept by ARBH in the course of regularly conducted activity, made at or near the time of the occurrence of the matters set forth by, or from the information transmitted by, a person with knowledge of those matters, and were made by the regularly conducted activity as a regular practice. It was the regular course of business of ARBH for an employee or representative of ARBH, with knowledge of the act, event, condition, opinion or diagnosis, recorded to make the record or to transmit the information thereof to be included in such record. The records attached hereto are the originals or exact

duplicates of the original. The records have been redacted to remove information protected by the attorney-client privilege.

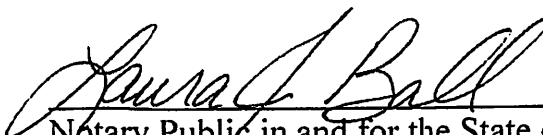
13. Additionally, attached hereto as **Exhibit C-2** is a letter drafted by me and sent to counsel for Plaintiffs in this matter. The letter sets forth the law applicable to this case, and explains why McKinney ISD is immune from this suit. The letter provided Plaintiffs with 7 days to contact me and affirm that they would nonsuit all claims against McKinney ISD brought in this suit in light of the clear law set forth in the letter. Plaintiffs refused to nonsuit these claims.”

Further affiant sayeth not.



Lucas Henry
Director, ARBH

SUBSCRIBED AND SWORN TO BEFORE ME by the said Lucas Henry, on this the July 11, 2023, to certify which, witness my hand and seal of office.



Notary Public in and for the State of Texas

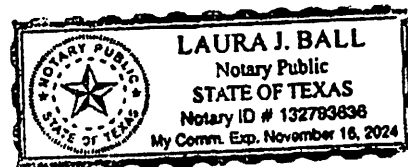


EXHIBIT C-1

ABERNATHY, ROEDER, BOYD & HULLETT, P.C.

Attorneys at Law

1700 Redbud Boulevard, Suite 300

McKinney, Texas 75069

Metro 214.544.4000

McKinney I.S.D.
TASB Insurance Matter

Page 1

March 31, 2023

ACCOUNT NO.: 870011-1653M
STATEMENT NO: 1

ATTN: Tina Lee

Walker v. McKinney ISD - LCH

***This statement includes fees and expenses thru 03/31/2023.
Payments received after the date of this statement
may not be included on this statement.***

FEES FOR SERVICES RENDERED:

				HOURS	
03/07/2023	L110	A104	Review/analyze - Review petition and conference with Lucas Henry regarding petition's allegations.	0.50	132.50
03/15/2023	L110	A108	Communicate (other external) - Conference with Lucas Henry regarding service of petition, answer.	0.20	53.00
03/16/2023	L110	A104	Review/analyze - Review contract with Durham.	0.50	132.50
	L110	A108	Communicate (other external) - Strategy conference with Lucas Henry.	0.20	53.00
	L110	A108	Communicate (other external) - Emails with Rick McDaniel and Geoff Sanderson regarding documents.	0.20	53.00
03/27/2023	L110	A104	Review/analyze - Review bus video.	1.20	318.00
03/29/2023	L110	A108	Communicate (other external) - Emails with Cody Cunningham regarding [REDACTED]	0.10	26.50
	L110	A108	Communicate (other external) - Conference with Lucas Henry regarding [REDACTED]	0.20	53.00
			CHARLES CRAWFORD	3.10	821.50
03/16/2023	L110	A103	Draft/revise - Draft initial answer outline.	0.40	44.00
03/27/2023	L110	A103	Draft/revise - Revise answer.	0.20	22.00
			KIMBERLY ESCAMILLA	0.60	66.00
03/06/2023	L240	A108	Communicate (other external) - Telephone calls with Cody		

Walker v. McKinney ISD - LCH

				HOURS	
			Cunningham regarding [REDACTED]	0.20	53.00
	L240	A104	Review/analyze - Emails regarding Bus incident.	0.50	132.50
03/07/2023	L240	A102	Research - Search Collin County court records for lawsuit.	0.10	26.50
	L240	A104	Review/analyze - Review Plaintiff's Original Petition.	0.50	132.50
	L240	A108	Communicate (other external) - Email Plaintiff's Original Petition to Cody Cunningham.	0.10	26.50
03/08/2023	L240	A108	Communicate (other external) - Email Mark Houser regarding contact by Plaintiffs' attorney regarding service.	0.10	26.50
03/15/2023	L240	A108	Communicate (other external) - Accept Service of Process.	0.10	26.50
	L240	A106	Communicate (with client) - Emails with Rick McDaniel and staff regarding service of lawsuit, answer date, and request for documents.	0.20	53.00
03/16/2023	L240	A104	Review/analyze -Review contract with Durham fo [REDACTED].	0.40	106.00
	L240	A106	Communicate (with client) - Reply to email from Geoff Sanderson regarding [REDACTED]	0.10	26.50
	L240	A106	Communicate (with client) - Emails with Geoff Sanderson and Jason Bird regarding items needed to proceed with answering suit.	0.20	53.00
03/20/2023	L240	A104	Review/analyze - Receive and review email from Geoff Sanderson regarding video of bus incident.	0.10	26.50
	L240	A104	Review/analyze - work on getting video of Bus Incident to view.		<i>n/c</i>
03/21/2023	L240	A106	Communicate (with client) - Reply to email from Geoff Sanderson regarding [REDACTED]	0.10	26.50
	L240	A104	Review/analyze - Review [REDACTED]	1.00	265.00
03/27/2023	L240	A104	Review/analyze - Review video of bus incident and take notes for use in Answer.	1.30	344.50
	L240	A103	Draft/revise - Begin draft of Answer.	0.20	53.00
03/28/2023	L240	A104	Review/analyze - Review request for comment from newspaper and email Charles Crawford regarding same.	0.10	26.50
	L240	A108	Communicate (other external) - Email Cody Cunningham regarding [REDACTED]	0.10	26.50

Walker v. McKinney ISD - LCH

				<i>HOURS</i>	
03/29/2023	L240	A108	Communicate (other external) - Telephone call with Cody Cunningham regarding [REDACTED].	0.20	53.00
	L240	A103	Draft/revise - Draft [REDACTED] and send it to Cody Cunningham. LUCAS C. HENRY	0.50	132.50
				<u>6.10</u>	<u>1,616.50</u>
TOTAL FEES:				<u>9.80</u>	<u>2,504.00</u>
CURRENT STATEMENT TOTALS:					2,504.00
<u>ACCOUNT BALANCE DUE:</u>					<u><u>\$2,504.00</u></u>

Task Code Summary

		<i>Fees</i>	<i>Expenses</i>
L110	Fact Investigation/Developement	887.50	0.00
L100	Case Assessment, Development and Administration	887.50	0.00
L240	Dispositive Motions	1616.50	0.00
L200	Pre-Trial Pleadings and Motions	1,616.50	0.00

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ABERNATHY, ROEDER, BOYD & HULLETT, P.C.

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McKinney I.S.D.
TASB Insurance Matter

Page 1
April 30, 2023
ACCOUNT NO.: 870011-1653M
STATEMENT NO.: 2

ATTN: Tina Lee

Walker v. McKinney ISD - LCH

***This statement includes fees and expenses thru 04/30/2023.
Payments received after the date of this statement
may not be included on this statement.***

FEES FOR SERVICES RENDERED:

				HOURS	
04/04/2023	L110	A103	Draft/revise - Review and edit draft answer.	0.10	26.50
04/10/2023	L110	A104	Review/analyze - Review Durham Bus's answer.	0.10	26.50
04/13/2023	L110	A108	Communicate (other external) - Email from Plaintiff's attorney regarding identity of bus driver.	0.10	26.50
04/17/2023	L110	A108	Communicate (other external) - Emails with Melinda DeFelice and Dr. Pratt regarding [REDACTED]	0.10	26.50
04/18/2023	L110	A104	Review/analyze - Review amended petition and compare to original petition.	0.40	106.00
	L110	A108	Communicate (other external) - Voice message and telephone conference with Tina Lee regarding facts, strategy.	0.40	106.00
	L110	A108	Communicate (other external) - Strategy conference with Lucas Henry.	0.20	53.00
04/21/2023	L110	A103	Draft/revise - Begin TASB initial report and budget.	1.00	265.00
04/24/2023	L110	A103	Draft/revise - Work on TASB initial report and budget.	0.70	185.50
04/25/2023	L110	A108	Communicate (other external) - Emails with other attorneys regarding bus driver's identity.	0.10	26.50
	L110	A103	Draft/revise - Work on TASB report and budget.	1.00	265.00
04/26/2023	L110	A103	Draft/revise - Work on TASB report and budget.	0.30	79.50

Walker v. McKinney ISD - LCH

				HOURS	
04/27/2023	L110	A103	Draft/revise - Finalize TASB report and budget. CHARLES CRAWFORD	0.30 <u>4.80</u>	79.50 <u>1,272.00</u>
04/06/2023	L110	A110	Manage data/files - Finalize and prepare answer for filing.	0.10	11.00
04/12/2023	L110	A103	Draft/revise - Draft initial outline for initial disclosures.	0.50	55.00
04/27/2023	L110	A110	Manage data/files - Submit case budget plan and initial litigation report with TASB. KIMBERLY ESCAMILLA	0.30 <u>0.90</u>	33.00 <u>99.00</u>
04/01/2023	L240	A103	Draft/revise - Draft Answer.	0.30	79.50
04/05/2023	L240	A103	Draft/revise - Amend Answer and email to Kimberly Escamilla with instructions to file.	0.20	53.00
04/07/2023	L240	A104	Review/analyze - Review ██████████ ██████████	0.60	159.00
	L240	A106	Communicate (with client) - Email Geoff Sanderson regarding ██████████ ██████████.	0.10	26.50
04/10/2023	L240	A104	Review/analyze - Review Durham's Answer.	0.20	53.00
04/11/2023	L240	A105	Communicate (in firm) - Email Kimberly Escamilla regarding starting disclosure process for McClure bus incident lawsuit.	0.10	26.50
04/13/2023	L240	A107	Communicate (other outside counsel) - Email with opposing counsel regarding identity of bus driver.	0.10	26.50
04/16/2023	L240	A106	Communicate (with client) - Email Melinda DeFelice regarding ██████████.	0.10	26.50
04/17/2023	L240	A106	Communicate (with client) - Emails with Shawn Pratt regarding ██████████.	0.10	26.50
	L240	A108	Communicate (other external) - Email Dallas Morning News regarding inquiry about answer filed in bus lawsuit.	0.10	26.50
	L240	A108	Communicate (other external) - Telephone call with Tina Lee regarding facts of the case.	0.20	53.00
	L240	A108	Communicate (other external) - Email Answers to Tina Lee.	0.10	26.50
	L240	A108	Communicate (other external) - Review Dallas Morning News article regarding the incident.	0.10	26.50
04/18/2023	L240	A104	Review/analyze - Review Amended Petition and send same to Tina Lee.	0.20	53.00

Walker v. McKinney ISD - LCH

				HOURS	
04/26/2023	L240	A106	Communicate (with client) - Respond to email from Rick McDaniel regarding status of lawsuit.	0.10	26.50
04/28/2023	L240	A103	Draft/revise - Begin drafting Initial Disclosures.	0.70	185.50
	L240	A106	Communicate (with client) - Detailed email to Jason Bird and Geoff Sanderson regarding collecting information for use in Initial Disclosures.	0.10	26.50
	L240	A102	Research - Research on [REDACTED]. LUCAS C. HENRY	0.30	79.50
				<u>3.70</u>	<u>980.50</u>
TOTAL FEES:				<u>9.40</u>	<u>2,351.50</u>
CURRENT STATEMENT TOTALS:					2,351.50
PREVIOUS STATEMENT TOTALS:					\$2,504.00
<u>ACCOUNT BALANCE DUE:</u>					<u><u>\$4,855.50</u></u>

Task Code Summary

		<u>Fees</u>	<u>Expenses</u>
L110	Fact Investigation/Developement	1371.00	0.00
L100	Case Assessment, Development and Administration	1,371.00	0.00
L240	Dispositive Motions	980.50	0.00
L200	Pre-Trial Pleadings and Motions	980.50	0.00

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ABERNATHY, ROEDER, BOYD & HULLETT, P.C.

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McKinney I.S.D.
TASB Insurance Matter

Page 1
May 31, 2023
ACCOUNT NO.: 870011-1653M
STATEMENT NO.: 4

ATTN: Tina Lee

Walker v. McKinney ISD - LCH

***This statement includes fees and expenses thru 05/31/2023.
Payments received after the date of this statement
may not be included on this statement.***

FEES FOR SERVICES RENDERED:

					HOURS	
05/04/2023	L110	A104	Review/analyze - Review Plaintiffs' disclosures and Durham's disclosures and documents.	0.50	132.50	
05/10/2023	L110	A104	Review/analyze - Review initial disclosures.	0.10	26.50	
05/15/2023	L110	A104	Review/analyze - Notice from court regarding DWOP.	0.10	26.50	
	L110	A108	Communicate (other external) - Email from Tina Lee regarding status.	0.10	26.50	
05/17/2023	L110	A108	Communicate (other external) - Court and Plaintiffs' attorney emails regarding scheduling order.	0.10	26.50	
05/22/2023	L110	A104	Review/analyze - Review request for admissions.	0.10	26.50	
	L110	A108	Communicate (other external) - Emails with attorneys regarding scheduling order.	0.20	53.00	
05/23/2023	L110	A108	Communicate (other external) - Emails with counsel regarding scheduling order, mediator.	0.10	26.50	
05/24/2023	L110	A108	Communicate (other external) - Emails regarding potential mediators.	0.10	26.50	
05/26/2023	L110	A108	Communicate (other external) - Emails regarding potential mediators.	0.10	26.50	
			CHARLES CRAWFORD	1.50	397.50	
05/09/2023	L240	A110	Manage data/files - create Sharefile link with Bates Labeled documents.	0.70	77.00	

Walker v. McKinney ISD - LCH

				<i>HOURS</i>	
05/10/2023	L240	A110	Manage data/files - E-serve Initial Disclosures. LAURA BALL	0.20 0.90	22.00 99.00
05/22/2023	L110	A110	Manage data/files - Finalize and e-serve requests for admission. KIMBERLY ESCAMILLA	0.30 0.30	33.00 33.00
05/04/2023	L240	A104	Review/analyze - Review [REDACTED]	0.30	79.50
05/08/2023	L240	A104	Review/analyze - Review District's documents.	0.30	79.50
	L240	A103	Draft/revise - Draft Initial Disclosures.	0.30	79.50
	L240	A105	Communicate (in firm) - Email Laura Ball with instructions for processing documents.	0.10	26.50
05/10/2023	L240	A104	Review/analyze - Finalize and ensure e-service of Initial Disclosures.	0.20	53.00
05/15/2023	L240	A104	Review/analyze - Receive and review DWOP notice.	0.10	26.50
	L240	A107	Communicate (other outside counsel) - Telephone call with Durham's attorney.	0.30	79.50
	L240	A107	Communicate (other outside counsel) - Receive and respond to email from Tina Lee regarding DWOP notice.	0.20	53.00
05/17/2023	L240	A107	Communicate (other outside counsel) - Emails with Court and opposing counsel regarding dates for trial.	0.10	26.50
05/18/2023	L240	A104	Review/analyze - Review and approve Scheduling Order.	0.10	26.50
	L240	A103	Draft/revise - Begin working on Requests for Admission.	0.30	79.50
05/22/2023	L240	A103	Draft/revise - Draft Requests for Admission.	0.40	106.00
	L240	A103	Draft/revise - Ensure service of Requests for Admission.	0.10	26.50
05/23/2023	L240	A107	Communicate (other outside counsel) - Emails with opposing counsel regarding mediator named in DCO.	0.10	26.50
05/24/2023	L240	A107	Communicate (other outside counsel) - Emails with opposing counsel regarding mediators and DCO (.1)	0.10	26.50
05/25/2023	L240	A103	Draft/revise - Draft Plea to the Jurisdiction LUCAS C. HENRY	2.70 5.70	715.50 1,510.50
05/19/2023	L240	A103	Draft/revise - Write draft of Request for Admission to Durham. ELAINE FUNG	0.00	n/c 0.00

Walker v. McKinney ISD - LCH

	<i>HOURS</i>	
TOTAL FEES:	8.40	2,040.00
CURRENT STATEMENT TOTALS:		2,040.00
PREVIOUS STATEMENT TOTALS:		\$4,855.50
<u>ACCOUNT BALANCE DUE:</u>		<u>\$6,895.50</u>

Task Code Summary

	<i>Fees</i>	<i>Expenses</i>
L110 Fact Investigation/Developement	430.50	0.00
L100 Case Assessment, Development and Administration	430.50	0.00
L240 Dispositive Motions	1609.50	0.00
L200 Pre-Trial Pleadings and Motions	1,609.50	0.00

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EXHIBIT C-2

A | R | B | H
ABERNATHY ROEDER
BOYD HULLETT
EST. 1876

Lucas Henry
lhenry@abernathy-law.com

1700 Redbud Boulevard, Suite 300 | McKinney, Texas 75069
Main: 214.544.4000 | Fax: 214.544.4044

June 26, 2023

Kimberly Penepacker
Matthew Aulsbrook
Gillianne Van Der Merwe
Aulsbrook Law Firm, PLLC
424 E. Lamar Blvd., Ste 200
Arlington, Texas 76011

Via Email: Kim@thetexaslawdog.com
Via Email: Matt@thetexaslawdog.com
Via Email: Gillianne@thetexaslawdog.com

Re: Cause No. 429-01133-2023; *Kayla Walker et. al. v. Durham School Services, L.P., McKinney Independent School District, and Isabel Doe*; In the 429th Judicial Court; Collin County, Texas

Dear Ms. Penepacker;

As you know, this firm represents McKinney ISD in Cause No. 429-01133-2023. The purpose of this letter is to request that the Plaintiffs voluntarily dismiss all claims brought against McKinney ISD in this lawsuit. Simply put, McKinney ISD did not use, operate, drive, or control the school bus in question, and therefore cannot be liable to the Plaintiffs. The District's position on this issue is thoroughly discussed below, with citations to applicable law. **If the Plaintiffs refuse to dismiss all claims against McKinney ISD, the District intends to seek reimbursement for all of the attorneys' fees it has incurred in defending this suit.**

The Facts

As Plaintiffs allege, McKinney ISD has a contract with Defendant Durham School Services whereby Durham provides drivers, buses, and bus maintenance to transport District students. See Plaintiff's Amended Petition, ¶ 4.1 (alleging a contract between McKinney ISD and Durham). Under the Contract, Durham "is an independent contractor" of the District, and "neither [Durham], its employees, or its Agents shall be considered to be an Officer, Agent, or Employee of [the] District." A copy of the Contract is included with this letter.

As recently admitted by Durham, and as alleged in Plaintiffs' Petition, the bus in question was owned, operated, and controlled by Defendant Durham. The Bus driver on the day of the incident was Defendant Isabel Garcia, a Durham employee allegedly acting "within the course and scope of employment with Defendant Durham while operating the bus on route 159." See Plaintiffs' Petition, ¶ 4.4. Per ¶ 11 of the Contract, and as admitted by Durham, and as stated in ¶ 4.4 of Plaintiffs' Petition, Garcia was an employee of Defendant Durham—she was not a McKinney

ISD employee. See Plaintiff's Amended Petition, ¶ 4.4 ("Ms. Doe [the driver] is believed to have been within the course and scope of employment with Defendant Durham while operating the bus").

According to Plaintiffs, the Bus deviated from its ordinary route for unknown reasons, causing the riders to remain on the bus longer than usual. See Plaintiffs' Petition, ¶¶ 4.4 - 4.5. Plaintiffs allege this "traumatized" their children, who feared they were being "kidnapped." Id. Plaintiffs also allege the children suffered heat-related injuries because it was 82 degrees outside, and the Bus's air conditioning was allegedly not working. Id., ¶ 4.9.

"Plaintiffs allege that McKinney ISD failed to act as a reasonably prudent school district in selecting and overseeing Defendant Durham's transportation of McKinney ISD students, including but not limited to its oversight and responsiveness to the facts [alleged by Plaintiffs] as they were developing." Id., ¶ 4.7. Accordingly, Plaintiffs bring claims against McKinney ISD for (1) false imprisonment; (2) negligence; (3) negligent entrustment; and (4) negligent hiring, training, or supervision.

However, McKinney ISD cannot be liable for any of the Plaintiffs' claims. As thoroughly discussed below, McKinney ISD did not "use" or "operate" the bus, and it is therefore immune from all of the Plaintiffs' claims (in addition to simply not being liable because MISD did not commit any wrongdoing).

The Law

"Under the doctrine of sovereign immunity, the state is not liable for the torts of its agents or officers unless there is a constitutional or statutory waiver of immunity. By enacting the Texas Tort Claims Act, the legislature has allowed suits against a governmental unit of the state under certain circumstances." *Paris Indep. Sch. Dist. v. Cieminski*, 1996 Tex. App. LEXIS 1669, *6 (Tex. App.—Dallas 1996, no pet.) (citing *Mount Pleasant Indep. Sch. Dist. v. Estate of Lindburg*, 766 S.W.2d 208, 211 (Tex. 1989)). Texas school districts are governmental units immune from suit and liability unless that immunity has been waived by the Texas Tort Claims Act. Harms arising from the use and operation of a motor vehicle are the only claims for which school district immunity has been waived under the TTCA. *See* Tex. Civ. Prac. Rem. Code §§ 101.021; 101.051; *see Dallas County Schs v. Vallet*, No. 05-16-00385-CV, 2016 Tex. App. LEXIS 13099 (Tex. App. Dallas Dec. 8, 2016) (school district was immune from suit for negligence because act of bus driver leaving student unattended beside a busy highway related to the supervision and control of the student, not the operation of a motor vehicle, and therefore immunity was not waived under the TTCA).

To be subject to the TTCA's waiver of immunity, the school district must actually "use" or "operate" the motor vehicle. In other words, "when injuries are not the proximate result of the use or operation of the school bus," by the public school district, "but the bus provides the setting for the injury, the actions do not fall within the section 101.051 exception to immunity." *See Hopkins v. Spring Indep. Sch. Dist.*, 736 S.W.2d 617 (Tex. 1987) (school district was immune from parent's suit for negligence – failure to provide adequate medical care – because student's seizure merely happened on a school bus, and the school district's use/operation of the bus did not cause the injury).

Of utmost importance to this case, it must actually be the school district that uses or operates the school bus – **immunity is not waived if a third-party contractor uses or operates the bus for district students.** *Mt. Pleasant Indep. Sch. Dist. v. Elliott*, 2014 Tex. App. LEXIS 4159, *19-*22 (granting defendant school district’s plea to the jurisdiction where third party company – Durham Transportation, Inc. – drove a district-owned bus on the district’s behalf). Moreover, “maintenance or repair does not fall within the definition of ‘operation’ or ‘use,’” and therefore the TTCA does not waive immunity for claims against school districts for inadequate maintenance of a school bus, even if the school district is responsible for the maintenance. *Id.*

Moreover, as to Plaintiffs’ false imprisonment claims, the TTCA’s waiver of immunity specifically excludes claims “arising out of assault, battery, false imprisonment, or any other intentional tort.” Tex. Civ. Prac. & Rem. Code § 101.057; *see also City of Mesquite v. Wagner*, 2023 Tex. App. LEXIS 3251, *11 (Tex. App.—Dallas 2023, no pet hist.) (citing *Delaney v. Univ. of Houston*, 835 S.W.2d 56, 58 (Tex. 1992)).

Request for Nonsuit

None of Plaintiffs’ claims are viable against McKinney ISD. The District is immune from Plaintiffs’ negligence claims (and variations thereof, including negligent entrustment and negligent hiring) and Plaintiffs’ false imprisonment claims because the District did not use or operate the school bus in question. If anyone used or operated this bus, it was Defendant Durham and its driver, Defendant Garcia. This fact is not disputed. Therefore, McKinney ISD respectfully requests the Plaintiffs voluntarily dismiss all claims against the District to avoid needless and wasteful litigation.

Entitlement to Attorneys’ Fees

Tex. Educ. Code § 11.161 provides a mechanism for a court to award a public school district its fees and costs when the plaintiff brings a frivolous lawsuit from which the district is immune. § 11.161 states:

In a civil suit brought under state law, against an independent school district or an officer of an independent school district acting under color of office, the court may award costs and reasonable attorney’s fees if:

- (1) the court finds that the suit is frivolous, unreasonable, and without foundation; and
- (2) the suit is dismissed or judgment is for the defendant.

Tex. Educ. Code § 11.161 (LEXIS 2023). “Courts considering attorney’s fees awarded under education code section 11.161 have analogized those awards to an award of fees as sanctions under both chapter 10 of the civil practice and remedies code and rule 13 of the rules of civil procedure.” *Farr v. Arlington Indep. Sch. Dist.*, 2018 Tex. App. LEXIS 5534, *11 (Tex. App.—Fort Worth 2018, no pet.) (mem. op.) (citing *Roach v. Ingram*, No. 14-16-00790-CV, 557 S.W.3d 203, 2018 Tex. App. LEXIS 3982, 2018 WL 2672546, at *17-18 (Tex. App.—Houston [14th Dist.] June 5, 2018, no pet. h.); *Ollie v. Plano ISD*, 383 S.W.3d 783, 793 (Tex. App.—Dallas 2012, pet. denied)). The Court may hold the plaintiffs and their attorneys jointly and severally

liable for an award under § 11.161. *Id.* (upholding award of fees against plaintiffs and their attorney under § 11.161 in suit alleging injuries from poor air quality in a school).

This action meets all the requirements to sustain an award under § 11.161. First, the suit is frivolous, unreasonable, and without foundation as against McKinney ISD. See Tex. Educ. Code § 11.161(1). As thoroughly discussed above, McKinney ISD did not own, operate, drive, or use the bus, and is therefore immune from suit. Second, if Plaintiffs refuse to voluntarily dismiss their claims, the suit will be dismissed in favor of the District. See *Id.* § 11.161(2).

Finally, while the District would ordinarily not pursue an award of fees in a case involving students and parents, Plaintiffs' further prosecution of this lawsuit would be particularly egregious because **Plaintiffs are being given a chance to nonsuit this action without consequence.** Should Plaintiffs continue with this lawsuit, they and their counsel (see *Farr*—counsel can be jointly liable for fees) should be ordered to pay the costs and attorneys' fees incurred by McKinney ISD – a public school district funded by taxpayers for the benefit of school children.

Please email me within the next 7 days to confirm that the Plaintiffs will indeed nonsuit all of their claims against the District. If you do not, I will file a motion with the Court seeking dismissal of all of the Plaintiffs' claims against McKinney ISD, and an award of all of the District's fees and costs. Thank you for your prompt attention to this matter.

Very truly yours,

/s/ Lucas C. Henry

Lucas Henry

Automated Certificate of eService

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Kimberly Escamilla on behalf of Lucas Henry
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Envelope ID: 77441320
Filing Code Description: Plea to Jurisdiction
Filing Description: McKinney ISD's Plea to the Jurisdiction and Motion for Attorneys' Fees
Status as of 7/13/2023 10:04 AM CST

Associated Case Party: Kayla Walker

Name	BarNumber	Email	TimestampSubmitted	Status
Kim JonesPenepacker		kim@thetexaslawdog.com	7/12/2023 11:40:57 AM	SENT

Associated Case Party: Durham School Services, L.P.

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Debra Garland		dgarland@kilpatricktownsend.com	7/12/2023 11:40:57 AM	SENT
John R.Robinson		John.Robinson@kilpatricktownsend.com	7/12/2023 11:40:57 AM	SENT

Associated Case Party: McKinney I.S.D

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Associated Case Party: S P

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Matt Aulsbrook		matt@thetexaslawdog.com	7/12/2023 11:40:57 AM	SENT
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Celsie Roberson		celsie@thetexaslawdog.com	7/12/2023 11:40:57 AM	SENT

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Kimberly Escamilla on behalf of Lucas Henry

Bar No. 24101901

kescamilla@abernathy-law.com

Envelope ID: 77441320

Filing Code Description: Plea to Jurisdiction

Filing Description: McKinney ISD's Plea to the Jurisdiction and Motion for Attorneys' Fees

Status as of 7/13/2023 10:04 AM CST

Associated Case Party: S P

Gillianne Van der Merwe		gillianne@thetexaslawdog.com	7/12/2023 11:40:57 AM	SENT
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Case Contacts

Name	BarNumber	Email	TimestampSubmitted	Status
Kimberly Escamilla		kescamilla@abernathy-law.com	7/12/2023 11:40:57 AM	SENT