UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF TENNESSEE

M.S. (a minor, by his parent and next friend, Sharonda Covington), SHARONDA COVINGTON, and DEREK STEPP, on behalf of themselves and all others similarly situated,	)	
Plaintiffs,	)	Case No.: 1:16-cv-00501
v.	)	
	)	Judge J. Ronnie Greer
HAMILTON COUNTY DEPARTMENT OF EDUCATION, DURHAM SCHOOL SERVICES, L.P., and BENJAMIN COULTER,	)	Magistrate Judge Susan K. Lee
Defendants.	)	

Memorandum in Support of Durham School Services, L.P.'s Rule 12(b)(6) Motion to Dismiss

Defendant DURHAM SCHOOL SERVICES, L.P. ("Durham") submits this memorandum in support of its Rule 12(b)(6) motion to dismiss the amended complaint against it (Doc. 3) in its entirety and with prejudice.

Introduction

This case arises out of the tragic November 21, 2016 school bus crash on Talley Road in Chattanooga in which six children died and several others were injured. The amended complaint alleges that plaintiff M.S. is one of the injured children. Plaintiffs Sharonda Covington and Derek Stepp are M.S.' parents. (Doc. 3 at ¶4)

Durham is a private company that provides school bus services to defendant Hamilton County Department of Education ("the District"), which includes Woodmore Elementary School in Chattanooga, attended by plaintiff M.S. (Doc. 3 at ¶¶6-7) Plaintiffs assert that the bus driver involved in the subject accident – Durham's employee, non-party Johnthony Walker – had a history of speeding and driving recklessly which was known to Durham and the District before

November 21, 2016. (Doc. 3 at ¶¶ 71-72) On November 21, 2016, Walker was driving a school bus with plaintiff M.S. and other students of Woodmore Elementary School aboard, taking the children home after school. (Doc. 3 at ¶ 70) Plaintiffs allege that Walker was speeding and swerving, and ultimately crashed the bus into a large tree on the side of Talley Road. (Doc. 3 at ¶¶73-81)

Plaintiffs assert five claims against Durham: two claims seeking relief under 42 U.S.C. §1983 and one claim seeking relief under 42 U.S.C. §1985, all premised upon Durham's alleged improper conduct in hiring, training, and supervising Walker (Counts I, II, and III); one Tennessee state law claim for negligence and gross negligence, asserting that Durham is liable for Walker's conduct pursuant to the doctrine of *respondeat superior* and that Durham was directly negligent in its hiring, training, and supervision of Walker (Count IV); and one Tennessee state law claim for assault and battery asserting that Durham is liable for Walker's intentionally tortious conduct pursuant to the doctrine of *respondeat superior* (Count V).

The accident should not have happened; this is beyond dispute. That said, however, plaintiffs have a proper and adequate remedy in a state court tort action. Indeed, eight other lawsuits against Durham arising from the accident are currently pending in state court, a fact of which this Court may take judicial notice. *See, e.g., Rodic v. Thistledown Racing Club, Inc.*, 615 F.2d 736, 738 (6th Cir. 1980) ("Federal courts may take judicial notice of proceedings in other courts of record.").[1] Like those cases, this case against Durham is about its alleged negligence in

[1] These cases, all filed in the Circuit Court of Hamilton County, Tennessee, are: *Boling v. Durham School Services, L.P. and Johnthony Walker* (No. 16 C 1367); *Hale v. Durham School Services, L.P., Johnthony Walker, and National Express, LLC* (No. 16 C 1397); *McGee v. Durham School Services, L.P., Johnthony Walker, and Thomas Built Buses, Inc.* (No. 16 C 1406); *Jones v. Durham School Services, L.P., National Express, LLC, Johnthony Walker, and Thomas Built Buses, Inc.* (No. 16 C 1449); *Byrd v. Durham School Services, L.P., National Express, LLC, and Johnthony Walker* (No. 16 C 1395); *Poole v. Durham School Services, L.P.*

hiring, training, and supervising Walker. For the reasons that follow, this case is not about a deprivation of plaintiffs' Constitutional rights or a conspiracy to do so, and therefore must be dismissed.

Argument

I. Standard of review.

To survive a motion to dismiss brought pursuant to Rule 12(b)(6), "a complaint must present a plausible claim based on sufficient factual allegations." *Fisher v. Dodson*, 451 Fed. Appx. 500, 501 (6th Cir. 2011); *see also, Solo v. United Parcel Service Co.*, 819 F.3d 788, 793 (6th Cir. 2016) (citations omitted). "Mere conclusory statements and legal conclusions are insufficient." *Fisher*, 451 Fed. Appx. at 501.

In deciding the motion, this Court must accept all factual allegations in the complaint as true and draw all reasonable inferences in the plaintiff's favor. *Solo*, 819 F.3d at 793. In so doing, this Court considers the complaint in its entirety, "as well as documents incorporated into the complaint by reference, and matters of which a court may take judicial notice." *Ohio Public Employees Retirement System v. Federal Home Loan Mortgage Corp.*, 830 F.3d 376, 383 (6th Cir. 2016). Documents "incorporated into the complaint by reference" include those that the defendant attaches to the motion to dismiss if those documents are "referred to in the complaint and central to the claim." *Id.*

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and Johnthony Walker (No. 16 C 1376); *Stevenson v. Durham School Services, L.P., National Express, LLC, and Johnthony Walker* (No. 16 C 00501); and *Williams v. Durham School Services, L.P., Johnthony Walker, and National Express, LLC* (No. 16 C 1396).

II. Counts I and II fail to state a claim against Durham under 42 U.S.C. §1983 because Durham is not a state actor.

A. Plaintiffs' section 1983 claims and the controlling legal principles.

In Counts I and II, plaintiffs assert that Durham, through its alleged conduct *vis a vis* Walker (Doc. 3 at ¶¶35-69), deprived M.S. of his Constitutional rights to be protected from state-created danger and to bodily integrity.

It is well-established that the United States Constitution protects citizens from infringement of their rights by the government, not by private parties. *Flagg Bros., Inc. v. Brooks*, 436 U.S. 149, 156 (1978) ("most rights secured by the Constitution are protected only against infringement by governments"). Therefore, one asserting a claim under section 1983 must plead and prove that the alleged deprivation of rights was caused by a person acting under color of state law – that is, a state actor. *See, e.g., Wittsock v. Mark A. Van Sile, Inc.*, 330 F.3d 899, 902 (6th Cir. 2003); *Alkire v. Irving*, 330 F.3d 802, 813 (6th Cir. 2003); *Brock v. McWherter*, 94 F.3d 242, 244 (6th Cir. 1998). Here, plaintiffs allege that Durham was a state actor: "The acts complained of herein were committed by Durham and the District under color of state law and were state actions. Durham, at all times relevant to this Complaint, was a state actor." (Doc. 3 at ¶29)

Durham is a private company and its employees, including Walker, are private actors as well. (Doc. 3 at ¶7) Plaintiffs' amended complaint is replete with allegations about the contract between Durham and the District pursuant to which Durham provided school bus services to the students of Woodmore Elementary School (Doc. 3 at ¶¶ 14-69), but a private entity is not a state actor simply because it is a government contractor and was acting in furtherance of that contract at the time of the conduct at issue. *See, e.g., Rendell-Baker v. Kohn*, 457 U.S. 830, 841 (1982) ("Acts of…private contractors do not become acts of the government by reason of their

significant or even total engagement in performing public contracts."); *Bishawi v. Northeast Ohio Correctional Ctr.*, 628 Fed. Appx. 339, 342 (6th Cir. 2014) (same). Instead, a private entity may be deemed a state actor under section 1983 only if its alleged rights-depriving conduct can be classified as state action pursuant to one of three theories: (1) the public function test, (2) the state compulsion test, and (3) the symbiotic relationship/entwinement test. *See, e.g., Rendell-Baker*, 457 U.S. at 838; *Marie v. American Red Cross*, 771 F.3d 344, 363 (6th Cir. 2014). Here, plaintiffs assert that all three tests apply to Durham, alleging as follows:

- *Public function test* – "Durham carried out functions historically and traditionally reserved exclusively to governmental entities." (Doc. 3 at ¶28)

- *State compulsion test* – "Pursuant to the terms of the contract, Durham was subject to the coercive power of the District and received such significant overt and covert encouragement from the District that the decisions of Durham were those of the District." (Doc. 3 at ¶30)

- *Symbiotic relationship/entwinement test* – "In order to effectuate the contract's requirements, the balance of its terms make clear that Durham and the District were pervasively entwined in the state action complained of herein." (Doc. 3 at ¶27)

B. A private school bus company that transports school students pursuant to a government contract is not a state actor for purposes of section 1983 under any of the three tests.

The question presented is one of first impression in the Sixth Circuit: is a private school bus company that transports public school students pursuant to a government contract a state actor for purposes of section 1983? To date, two Circuits – the First and the Third – have both addressed the question and both have answered "no." In *Santiago v. Puerto Rico*, 655 F.3d 61 (1st Cir. 2011), the plaintiff, a special education public school student, was sexually molested by his school bus driver, an employee of the defendant private bus company. In *Black v. Indiana Area School District*, 985 F.2d 707 (3d Cir. 1993), involved a similar fact pattern: the plaintiffs were public school students who were sexually molested by their bus driver, an employee of the

defendant private bus company. Both courts held that the plaintiffs could not maintain section 1983 claims because the private bus company was not a state actor under any of the three "state actor" tests and this Court should hold likewise.[2]

1. The public function test.

A private party may become a state actor if it assumes a traditional public function when performing the challenged conduct; that is, if the challenged activity is one that is "traditionally exclusively" provided by the state. *Tahfs v. Proctor*, 316 F.3d 584, 593 (6th Cir. 2003). "Exclusivity is an important qualifier, and its presence severely limits the range of eligible activities. The narrowness of this range is no accident. The public function test has a specific targeted purpose: it is meant to counteract a state's efforts to evade responsibility by delegating core functions to private parties." *Santiago,* 655 F.3d at 69 (citing *Rendell-Baker*, 457 U.S. at 842). Accordingly, "the activities that have been held to fall within the state's exclusive preserve for purposes of the public function test are few and far between," and they do not include bus transportation provided to public school children.[3] *Id.* at 69.

In *Santiago,* the First Circuit held that the provision of school bus services to public school children is not a public function because school transportation is not exclusively provided

[2] Where the issue presented is one of first impression in the Sixth Circuit, the court should look to other Circuits for guidance. *See, e.g., U.S. v. Washington*, 584 F.3d 693, 698 (6th Cir. 2009).

[3] Activities conducted by private entities held to be exclusively provided by the state for purposes of the public function test include: administering elections, *Terry v. Adams*, 345 U.S. 461 (1953); operating a "company town," *Marsh v. Alabama*, 326 U.S. 501 (1946); and administering private property used for a public service, *Evans v. Newtown,* 382 U.S. 296 (1966). Significantly, a private utility company, even under circumstances of enjoying a state-conferred monopoly, does not perform a public function in furnishing electrical service to its customers. *Jackson v. Metro. Edison Co.*, 419 U.S. 345 (1974). Furnishing emergency medical services, including ambulance transportation and even under an exclusive contract, is also not a public function. *Eggleston v. Prince Edward Volunteer Rescue Squad, Inc.*, 569 F. Supp. 1344 (E.D. Va. 1983), *aff'd without opinion*, 742 F.2d 1448 (4th Cir. 1984).

by the state. The First Circuit reached this conclusion in reliance upon on the Supreme Court's holding in *Rendell-Baker* that a private institution paid by the state to educate "maladjusted high school students" was not a state actor under the public function test because education is not a service provided solely by the state: "That a private entity performs a function which serves the public does not make its acts state action." *Rendell-Baker*, 457 U.S. at 842; *Santiago*, 655 F.3d at 69. The First Circuit reasoned that "education in general is not an exclusive public function because it has long been undertaken by private institutions." *Id.* at 69. Accordingly, the First Circuit found that student transportation falls outside the exclusive purview of the state: "[i]f the education of children does not itself fall within the narrow range of exclusive state functions, it is hard to imagine how a service ancillary to education, such as the transportation, would qualify." *Id.* at 69; *see also, id.* at 70 ("[Plaintiff's] mother had several options for transporting her son to school….This freedom to choose alternatives removes school busing from the realm of services that are traditionally exclusively reserved to the state."). In *Black*, the Third Circuit reached the same conclusion for the same reasons and also in reliance upon *Rendell-Baker*. *Black.*, 985 F.2d at 708-711 (3d Cir. 1993); *see also, Stillwell v. Mayflower Contract Services*, 1995 U.S. Dist. LEXIS 8455, *8-10 (N.D. Ill. 1995) (same, relying upon *Rendell-Baker*); *Hamlin v. City of Peekskill Bd. of Educ.*, 377 F. Supp. 2d 379, 384-385 (S.D.N.Y. 2005) (same, relying upon *Black* and *Stillwell*).

Here, plaintiffs allege that "Durham carried out functions historically and traditionally reserved exclusively to governmental entities." (Doc. 3 at ¶28; see also ¶100) However, they make no factual allegations going to how this is so. Although plaintiffs allege that Durham and the District "exercised exclusive, joint control over school bus transportation to and from Woodmore Elementary School" (Doc. 3 at ¶11), this does not mean that Durham and the District

exercised exclusive control over all forms of student transportation to and from Woodmore Elementary, and that is what the public function test requires. The issue here is very specific – whether providing school bus services to public school children is a function traditionally and exclusively reserved to the state. As a matter of law, it is not. Durham therefore cannot be deemed a state actor under the public function test.

2. The state compulsion test.

To establish state action under the state compulsion test, "a plaintiff must demonstrate a particularly close tie between the state and the private party's conduct, such that the conduct may fairly be regarded as state action." *Santiago*, 655 F.3d at 71; *see also, Wolotsky v. Huhn*, 960 F.2d 1331, 1335 (6th Cir. 1992) ("The state compulsion test requires that a state exercise such coercive power or provide such significant encouragement, either overt or covert, that in law the choice of the private actor is deemed to be that of the state."). This means that the private party's alleged rights-depriving conduct must be "compelled (or, at least, heavily influenced) by a state regulation." *Santiago*, 655 F.3d at 71.

The First Circuit in *Santiago* rejected this theory of state actor liability on the ground that the alleged rights-depriving conduct was the bus driver's "alleged molestation coupled with the bus company's failure properly to screen and train its employees," and "[n]o state regulation compelled (or even encouraged)" these actions of either the driver or the bus company. *Santiago*, 655 F.3d at 71. The First Circuit explained further that

> [t]he state compulsion test requires more than the taking of action against a backdrop of applicable state regulations. Because there is no showing that the Commonwealth exercised coercive power over or significantly encouraged either the abuse to which [plaintiff] was allegedly subjected or the bus company's failure properly to screen and train its employees, the state compulsion test is not

satisfied. *Id.* at 71.

See also, Hill v. New York City Board of Educ., 808 F. Supp. 141, 153 (E.D.N.Y. 1992) (private school bus company not a state actor under state compulsion test; no state regulation or ordinance compelled it to terminate the plaintiff school bus driver's employment after school district requested that plaintiff not be assigned to drive any of its bus routes).

Here, Durham's alleged rights-depriving conduct is its alleged failure to properly hire and train driver Johnthony Walker and to properly act on complaints about Walker's alleged reckless driving before the accident. (Doc. 3 at ¶¶35-69) Although plaintiffs also allege that "[p]ursuant to the terms of the contract, Durham was subjected to the coercive power of the District and received such significant overt and covert encouragement from the District that the decisions of Durham were those of the district]" (Doc. 3 at ¶ 30), this is not the issue for purposes of the state compulsion test. The issue is whether a state regulation "compelled (or even encouraged)" the specific alleged rights-depriving conduct – Walker's alleged reckless driving and Durham's alleged improper hiring, training, and supervision of Walker. *Santiago*, 655 F.3d at 71. Plaintiffs have made no allegations that this conduct was compelled or encouraged by the state, nor can they. The terms of the contract between Durham and the District, attached to this motion as Exhibit A, make this plain. Pursuant to the contract:

- Durham "shall be solely responsible for hiring" all bus drivers; all Durham employees, including bus drivers, "shall be CONTRACTOR employees and, in no event, shall be the employees of the DISTRICT." (Exh. A at p. 3, no. 14; capitalization in original)

- Durham "shall be solely responsible for providing such personnel with appropriate supervision, training, and direction in the performance of personnel job duties." (Exh. A at p. 3, no. 14; capitalization in original)

- It is Durham's sole responsibility to address "any questions or concerns" of the District "regarding the performance or any personnel" it employs, as well as to screen

> all job applicants through drug-testing, criminal background checks, "and any other tests, or checks required by state or federal law for individuals." (Exh. A at p. 3, no. 14; capitalization in original)

Under these circumstances, the alleged conduct at issue of Walker and Durham could not have been compelled by the state as a matter of law. *See, e.g., Stillwell, supra*, 1995 U.S. Dist. LEXIS 8455, *12 (private bus company not a state actor under state compulsion test where its contract with the school district "does not provide that the School District will exercise any authority over the personnel decisions made" by it).

3. The symbiotic relationship/entwinement test.

To establish state action under the symbiotic relationship/entwinement test, a plaintiff must show that the private entity's actions "are attributable to the state through a symbiotic relationship between the two. The requisite nexus is premised on a showing of "mutual interdependence," and "[t]he most salient factor in this determination is the extent to which the private entity is (or is not) independent in the conduct of its day-to-day affairs." *Santiago*, 655 F.3d at 71. There is no symbiotic relationship where "the cooperation between" the private entity and the state "was only that appropriate to the execution of the subject matter of the contract and the contractor's fiscal relationship with the State is not different from that of many contractors performing services for the government." *Black*, 985 F.2d at 711; *see also, Rendell-Baker*, 457 U.S. at 843 ("Here, the school's fiscal relationship with the State is not different from that of many contractors performing services for the government. No symbiotic relationship…exists here."); *Marie*, 771 F.3d at 364 ("crucial inquiry under the entwinement test is whether the nominally private character of the private entity is overborne by the pervasive entwinement of public institutions and public officials in its composition and workings such that there is no substantial reason to claim unfairness in applying constitutional standards to it").

Here, plaintiffs allege that "[i]n order to effectuate the contract's requirements, the balance of its terms make clear that Durham and the District were pervasively entwined in the state action complained of herein" (Walker's alleged reckless driving and Durham's alleged improper hiring, training, and supervision of him). (Doc. 3 at ¶27) However, a review of the contract terms demonstrates that this is not so and that Durham maintained its status as a private entity separate from the District at all times. For example:

- Durham and its employees are solely responsible for securing and maintaining all valid permits, licenses, and certifications required to operate school buses. (Exh. A at p. 1, no. 4)

- Durham is solely responsible for obtaining general liability and worker's compensation insurance coverage. Durham is to be the named insured under these policies and the District is to be an additional insured. (Exh. A at p. 1, no. 5)

- Durham is to procure and furnish to the District a performance bond. (Exh. A at p. 2, no. 6)

- Durham is to hold the District harmless and indemnify it from claims arising from the act or omission of Durham's employees in connection with the performance of the contract. (Exh. A at p. 2, no. 7)

- Durham is to provide its employees with "formal safety instruction on a regular basis" and provide "evidence" to the District that it is doing so. (Exh. A at p. 2, no. 8)

- While carrying out the contract, Durham "is an independent contractor, and not an officer, agent, or employee of the District." Durham's officers, agents, and employees are the officers, agents, and employees of Durham and not the District. (Exh. A at p. 2, no. 9)

- Durham is "solely responsible" for hiring the personnel required to carry out the contract, including bus drivers. (Exh. A at p. 3, no. 14)

- Durham is required to provide all buses and other equipment necessary to carry out the contract. (Exh. A at pp. 5-6, no. 18)

- Durham may use the District's existing transportation facilities pursuant to a separate lease agreement. (Exh. A at p. 6, no. 19 and Exh. 1)

- Durham will purchase all fuel used to carry out the contract and may not store the fuel on the District's premises. (Exh. A at p. 6, no. 20)

- Durham is to report "serious or persistent misconduct on the part of students" to the District and the District will "then impose reasonable disciplinary measures." (Exh. A at p. 7, no. 23)

- Durham is to pay penalties to the District for contract violations, such as late buses. (Exh. A at p. 7, no. 24)

Plaintiffs also make some incorrect allegations regarding the contract. At paragraph 20, plaintiffs allege that Durham and the District are essentially one because the contract "required Durham to purchase and equip its school buses with digital cameras and radios that were any person to alter or destroy *the radios or digital recordings*, the private property of Durham, that person would be subject to prosecution." (Doc. 3 at ¶20; emphasis added) Plaintiffs allege further that "[u]pon information and belief, there is no Tennessee criminal statute which prohibits alteration or tampering with *the radio or digital video recording* of a private person," which means that "Durham's private property was afforded the protection of governmental property." (Doc. 3 at ¶20; emphasis added) This is not so. Paragraph 18 of the contract states in pertinent part that "[A]ny persons who destroy, alter, or vandalize *the radio or digital recording systems*" – not simply "recordings" – "are subject to prosecution or suspension or both." (Exh. A at p. 6, no. 18; emphasis added) Such destruction is plainly prohibited by Tennessee criminal statute: T.C.A. §39-14-408, Vandalism.

And at paragraph 24, plaintiffs allege that "[a]s an equal partner in this joint venture, Durham worked closely with the District on a day-to-day basis. Durham had the power to veto or approve any existing or proposed rule or regulation which involved the provision of school bus services in Chattanooga, a power equal to that held by the District. Establishing, repealing and altering regulations and rules governing the provision of governmental services is a power

traditionally reserved exclusively to the state." (Doc. 3 at ¶24) This is incorrect. The contract does not give Durham "veto" or "approval" power anywhere, and instead states that Durham will "assist" the District bus routing; the District alone has approval power over bus routing; route changes may be made by agreement between the District and Durham; and "the DISTRICT will cooperate with the CONTRACTOR by approving the routes or suggested needed changes in a reasonable and timely way." (Exh. A at p. 3, no. 13)

C. There is no *Monell* claim here.

Although an employer cannot be held liable under section 1983 for any federal constitutional torts committed by its employees pursuant to the doctrine of *respondeat superior*, it can be held liable under section 1983 where the employee's alleged rights-depriving conduct arises from the "execution of a government's policy or custom." *Monell v. Dept. of Social Services of City of New York*, 436 U.S. 658, 694 (1978); *see also, Gregory v. City of Louisville*, 444 F.3d 725, 752 (6th Cir. 2006). Here, the amended complaint recites some elements of a *Monell* claim. For example, plaintiffs allege that "[d]efendants, by agreement, conspiracy, and concerted action, tacitly approved [the] unconstitutional conduct by failing to act, amounting to an official policy of inaction." (Doc. 3 at ¶ 117) As with all section 1983 claims, however, the predicate to liability of a private company under *Monell* is that it be a "state actor." *See, e.g., Tsao v. Desert Palace, Inc.*, 698 F.3d 1128, 1139 (9th Cir. 2012) (holding that *Monell* applies to "private entities acting under color of state law," citing *William St. v. Corrections Corp. of Am.*, 102 F.3d 810, 817 (6th Cir. 1996) (applying *Monell* to a claim against a private entity, alleged to be acting under color of state law) (remaining citations omitted)). Because Durham is not a state actor for all of the reasons discussed above, plaintiffs cannot maintain a *Monell* claim against it.

III. Count III fails to state a claim against Durham under section 1985 because plaintiffs are not persons protected by section 1985.

In Count III, plaintiffs assert that Durham and the District conspired to deprive them of their constitutional rights to protection against a state-created danger and bodily integrity pursuant to 42 U.S.C. §1985. Section 1985 provides a cause of action against private persons for conspiracy to interfere with the civil rights of others. Although plaintiffs do not specify which provision of section 1985 they rely upon here, the only potentially applicable provision is section 1985(3)[4], a part of the Anti-Ku Klux Klan Act of 1871:

> **(3) Depriving persons of rights or privileges**
>
> If two or more persons in any State or Territory conspire or go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; or for the purpose of preventing or hindering the constituted authorities of any State or Territory from giving or securing to all persons within such State or Territory the equal protection of the laws; or if two or more persons conspire to prevent by force, intimidation, or threat, any citizen who is lawfully entitled to vote, from giving his support or advocacy in a legal manner, toward or in favor of the election of any lawfully qualified person as an elector for President or Vice President, or as a Member of Congress of the United States; or to injure any citizen in person or property on account of such support or advocacy; in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages occasioned by such injury or deprivation, against any one or more of the conspirators.

There are four elements to a section 1985(3) claim: (1) defendants "conspire[d] or [went] in disguise on the highway or on the premises of another," (2) defendants did so "for the purpose of

[4] Section 1985(1) is titled "Preventing Officer from Performing Duties." Section 1985(2) is titled "Obstructing Justice; Intimidating Party, Witness or Juror."

depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws," (3) defendants "did, or caused to be done, any act in furtherance of the object of the conspiracy," and (4) the plaintiff was "injured in his person or property" or "deprived of having and exercising any right or privilege of a citizen of the United States." *Griffin v. Breckenridge*, 403 U.S. 88, 102-103 (1971); *see also, Haverstick Enterprises, Inc. v. Financial Federal Credit, Inc.*, 32 F.3d 989, 993-994 (6th Cir. 1994).

The second element is pertinent here. The Sixth Circuit has established that "[t]he persons protected under the 'equal privileges and immunities' language of the statute are those individuals who join together as a class for the purpose of asserting certain fundamental rights." *Browder v. Tipton*, 630 F.2d 1149, 1150 (6th Cir. 1980); *see also, Webb v. United States*, 789 F.3d 647, 671-672 (6th Cir. 2015); *Haverstick Enterprises, Inc. v. Financial Federal Credit, Inc.*, 32 F.3d 989, 993-994 (6th Cir. 1994). In other words, "[t]he class of persons protected by section 1985(3) are the discrete and insular minorities that receive heightened protection under the Equal Protection Clause because of their inherently personal characteristics. The class-based invidiously discriminatory animus required by section 1985(3) must be based on race, ethnic origin, sex, religion, or political loyalty." *Graham v. Sequatchie County Gov't.*, 2011 WL 1305961, *13 (E.D. Tenn. April 4, 2011).

Here, although plaintiffs do not state it clearly, they appear to allege that the section 1985(3) class is comprised of those children who rode Woodmore Elementary School Bus 366. (Doc. 3 at ¶107: "The Plaintiffs faced special danger on Bus 366 because the sadistic acts were specifically targeted at and visited upon the occupants of the school bus, not the general public at large.") This is not a class protected by section 1985(3). In order to state a section 1985(3)

claim, "the tortfeasor's animus [must be] sparked, and the class formed, by the unique and peculiar fashion in which a class of victims exercises a fundamental right." *Browder,* 630 F.2d at 1153-1154. The children who rode Bus 366 were not exercising a fundamental right in doing so – they were simply going to school and returning home from school – nor were they "a class of persons who receive heightened protection under the Fourteenth Amendment's Equal Protection Clause." *Graham,* 2011 WL 1305961, *13. The amended complaint contains no allegations to the contrary.

The amended complaint also contains no allegations that Durham was motivated in its alleged actions at issue by an animus toward children. *See, e.g., Webb,* 789 F.3d at 672 (section 1985(3) claim must allege "class-based discrimination" and "class-based animus"); *Haverstick Enterprises*, 32 F.3d at 994 (handicapped plaintiff's section 1985(3) claim dismissed where record failed to show "that the defendants' actions were motivated to any degree by an animus against the handicapped"). Instead, plaintiffs assert that Durham's sole motivation was "to maximize profit." (Doc. 3 at p. 2) By failing to show that Durham was motivated by an animus toward children, and "[b]y failing to show the unique fashion in which they exercised a fundamental right, plaintiffs fail to allege that they are members of a protected class." *Browder*, 630 F.2d at 1154. Their section 1985(3) claim must therefore be dismissed. *See also, Evans v. City of Etowah,* 2008 WL 918515, *8 (E.D. Tenn. April 3, 2008) (section 1985(3) claim not actionable where based upon non-specific claim that defendants "conspired and agreed" to violate plaintiff's civil rights and "plaintiff fails to even indicate of what protected class she is a member").[5]

[5] In *Browder*, the Sixth Circuit noted that it had recognized "legitimate" section 1985(3) classes as follows: supporters of a sheriff's political opponent; anti-Nixon demonstrators; and members of the Jewish faith. *Browder*, 630 F.2d at 1152. The court noted further that other Circuits had

IV. This Court should decline jurisdiction over Counts IV and V.

The only claims challenged on this motion are the section 1983 and 1985 claims. It is admitted that plaintiffs have also pled state tort causes of action that would survive a pre-answer motion to dismiss. (Doc. 3 at Counts IV and V) However, if this Court dismisses the section 1983 and 1985(3) claims against Durham, it will have "dismissed all claims over which it has original jurisdiction." 28 U.S.C. § 1367(c)(3). (Doc. 3 at ¶¶1-3) Plaintiffs' remaining claims in Counts IV and V are based on state law, and there is no diversity of citizenship alleged. (Doc. 3 at ¶¶1-3, 130-147) Counts IV and V should accordingly be dismissed. *See, United Mine Workers of Am. v. Gibbs*, 383 U.S. 715, 726 (1966) ("if the federal claims are dismissed ... the state claims should be dismissed as well.").

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recognized the following section 1985(3) classes: an environmentalist group; persons deceived into voting for a sham candidate; worshippers at a particular church; and women. *Id.* at 1152, n. 7; *see also, Volunteer Medical Clinic, Inc. v. Operation Rescue,* 948 F.2d 218 (6th Cir. 1991) (women seeking abortions but prevented from receiving them by abortion protestors constitute a protected class under section 1985(3)).

Conclusion

WHEREFORE, Defendant DURHAM SCHOOL SERVICES, L.P. respectfully requests that this Honorable Court dismiss plaintiffs' complaint against it in the entirety and with prejudice. Defendant also requests any such other and further relief to which this Court finds it entitled.

Respectfully submitted,

DURHAM SCHOOL SERVICES, L.P.

By: */s/ James M. Burd*
One of its attorneys

James M. Burd
WILSON ELSER MOSKOWITZ EDELMAN & DICKER LLP
100 Mallard Creek Road – Suite 250
Louisville, Kentucky 40207
Tel: (502) 238-8500
Email: james.burd@wilsonelser.com

Melissa A. Murphy-Petros (*pro hac vice application pending*)
WILSON ELSER MOSKOWITZ EDELMAN & DICKER LLP
55 W. Monroe Street – Suite 3800
Chicago, Illinois 60603
Tel: (312) 704-0550
Email: melissa.murphy-petros@wilsonelser.com

Michael R. Campbell
Lauren M. Turner
CAMPBELL & CAMPBELL
735 Broad Street – Suite 1200
Chattanooga, Tennessee 37402
Tel: (423) 266-1108
Email: mikecampbell@campbellattorneys.com
Email: lmt@campbellattorneys.com

Certificate of Service

I hereby certify that on February 9th, 2017, a copy of the foregoing was filed electronically. Notice of this filing will be sent by operation of the Court's electronic filing system to all parties indicated on the electronic receipt. Parties may access this filing through the Court's electronic filing system.

s/Lauren M. Turner
Lauren M. Turner