

## **AMENDMENT NO. 1 TO AGREEMENT (YEAR 2 OF 5)**

This "Amendment No. 1 to Agreement (Year 2 of 5)" ("Amendment No. 1") is made effective as of September 1, 2020 ("Effective Date") by and between the Alvord Unified School District ("District"), a California public school district, and First Student, Inc. ("Contractor"), a Delaware corporation designated as entity number C1670282 by the California Secretary of State. The District and Contractor may be referred to herein individually as a "Party" and collectively as the "Parties."

### ***RECITALS***

A. The District and Contractor are parties to that certain agreement entitled "Agreement (Year 2 of 5)" dated July 1, 2020 ("Current Agreement"). In accordance with the Current Agreement, the Contractor is to furnish, among other things, transportation services for certain District students on specified home-to-school ("HTS") and nonpublic school ("NPS") routes ("Transportation Services"). The Current Agreement, as modified by this Amendment No. 1, shall be referred to herein as the "Amended Agreement."

B. On or about March 4, 2020, Governor Newsom, on behalf of the State of California ("State"), declared the existence of a public health emergency arising from the spread of the virus that causes COVID-19, and the World Health Organization declared that COVID-19 is a worldwide pandemic. As a result of this public health emergency, public health officers issued orders intended to slow the spread of the virus that causes COVID-19. Consistent with such orders, the District closed its schools to in-person instruction ("School Closures"), and it presently is uncertain as to whether or when the District's schools will reopen in the 2020-2021 school year. Since the School Closures first occurred, the District's students have not been attending in-person classes in the District's schools or in any NPS settings, and the Contractor has not provided any Transportation Services. However, the Parties anticipate that the District will be authorized to reopen its schools for in-person instruction at some point (and, depending on governmental requirements and other various factors, from time to time thereafter) during the 2020-2021 school year ("School Open Periods").

C. On or about March 27, 2020, House Resolution 748 (a.k.a., the "CARES Act") became law (Public Law No: 116-136). The CARES Act, among other things, established the "Education Stabilization Fund" to assist educational agencies to prepare for and respond to the COVID-19 public health emergency. A portion the funds allotted to the Education Stabilization Fund were allocated to the Elementary and Secondary School Emergency Relief Fund ("ESSER Funds"). In accordance with Sections 18002 and 18003 of the CARES Act, ESSER Funds have been allocated to the State, and the California Department of Education ("CDE"), has made those ESSER Funds available to local educational agencies in the State. Section 18006 of the CARES Act provides that "A local educational agency ... that receives funds under 'Education Stabilization Fund,' shall to the greatest extent practicable, continue to pay its employees and contractors during the period of any disruptions or closures related to coronavirus."

D. The Parties acknowledge that, as of the Effective Date, there are no mandatory provisions or guidance with respect to the scope and interpretation of Section 18006 of the CARES Act. However, the Parties acknowledge and agree that one of the presumed goals underlying Section 18006 of the CARES Act is that the payments to contractors made in accordance with Section 18006 (each a "CARES Act Payment") will allow service providers to continue to pay their employees, so that the employees will have financial resources available during the period schools are closed, thereby enabling the service providers to be able to resume providing necessary services when the current COVID-19 public health emergency ends. The Parties also acknowledge and agree that, regardless of whether any governmental entity subsequently issues mandatory provisions or guidance regarding those matters, the

Parties have entered into this Amendment No. 1 to, among other things, implement, on a good faith basis, the provisions of Section 18006 of the CARES Act as those relate to periods when School Closures occur during the Regular 20-21 School Year (“School Closure Periods”).

E. The Contractor acknowledges that a primary intent and goal of the District, in entering into this Amendment No. 1, is to achieve continuity with respect to Transportation Services to be provided during the School Open Periods; specifically, that: (i) subject to limitations set forth in this Amendment No. 1, the Contractor shall be ready, willing, and able to provide any and all Transportation Services, as requested by the District, to be provided during the School Open Periods; and (ii) the same drivers who were providing Transportation Services for or on behalf of the District prior to when the School Closures commenced shall also provide those services for or on behalf of the District during the School Open Periods if possible. In addition, the Parties acknowledge and agree that the District’s obligations to make payments to the Contractor pursuant to this Amendment No. 1 shall: (i) apply only to School Closure Periods; (ii) be and remain in effect only during the District’s regular 2020-2021 school year (i.e., not including any extended school year, summer school, or similar programs) that ends on or around May 28, 2021 (“Regular 20-21 School Year”); and (iii) be and remain in effect only if and to the extent the District has ESSER Funds available, as described herein, to make such payments to the Contractor.

**Now**, in consideration of the foregoing and of the respective rights and obligations of the Parties as set forth in the Amended Agreement, consideration that each Party acknowledges is adequate, the Parties hereby agree as follows:

#### **AGREEMENT**

**Section 1. CARES Act Payments.** Subject to all other provisions of this Amendment No. 1, the District shall make CARES Act Payments to the Contractor on the following basis:

- (i) With respect solely to School Closure Periods occurring during the Regular 20-21 School Year, the District will make monthly CARES Act Payments to Contractor, in arrears and subject to receipt of properly documented monthly invoices, at the rate of fifty percent of what the Contractor otherwise would have been paid per school day, in accordance with the Current Agreement;
- (ii) For purposes of this Amendment No. 1: (1) the term “school day” as used in this Section shall include only those days that the Contractor reasonably would have provided Transportation Services, in accordance with the Current Agreement, if the School Closures had not occurred as a result of the COVID-19 public health emergency; and (2) the total number of school days to be funded in accordance with this Amendment No. 1 shall be limited to a maximum of 87 school days; provided, however, that if the number of School Closures exceeds 87 school days the parties shall negotiate in good faith to determine adequate compensation to cover Contractor’s fixed costs.
- (iii) Contractor shall submit monthly invoices to the District, each of which shall specify the CARES Act Payment amount due for the month covered by the invoice;
- (iv) The Contractor shall not invoice the District for any CARES Act Payments: (1) to the extent reductions of the invoiced amounts are necessary on account of Alternative Financial Assistance (defined in Section 3 herein) received by the Contractor, and (2) as otherwise may be required pursuant to this Amendment No. 1; and
- (vii) The District will review, process, and issue payment on each invoice within thirty days following receipt of the invoice; provided that the time for issuance of payment may be extended if and to

the extent the Contractor does not provide reasonably supporting documentation for the invoiced amount or the District reasonably has questions regarding such information.

**Section 2. District Use of CARES Act Funding.** For avoidance of doubt: (i) in no event shall the District be obligated to use any funds other than ESSER Funds presently allocated to and already received by the District to make CARES Act Payments to the Contractor in accordance with this Amendment No. 1; and (ii) with respect to School Closure Periods, the CARES Act Payments payable pursuant to Section 1 herein are in lieu of any and all payments pursuant to the Current Agreement as may be attributable in any manner to the School Closure Periods. In addition, the District's obligation to make CARES Act Payments to the Contractor in accordance with this Amendment No. 1 shall be subject to the availability of such ESSER Funds, as determined by the District in its sole discretion, which may include considerations of the practicability of using such funding for COVID-19-related matters of greater priority. At such time as the District expends or otherwise allocates all of such ESSER Funds, the District's obligations to make CARES Act Payments pursuant to this Amendment No. 1 shall cease and terminate.

**Section 3. Certain Contractor Obligations.**

**Subsection 3.1 Provision of Services Guaranteed.** The Contractor hereby represents, warrants, and guarantees that: (i) it shall provide any and all Transportation Services as the District, at any time during the Regular 20-21 School Year, may request, all in accordance with the Current Agreement; and (ii) that the Contractor shall provide such Transportation Services in full compliance with any and all applicable (1) laws and other governmental requirements relating to the COVID-19 public health emergency, and (2) guidance relating to the COVID-19 public health emergency issued by the CDE, the Centers for Disease Control and Prevention ("CDC"), and/or State or other public health officials, as may be in effect from time to time during the Regular 20-21 School Year (including, without limitation, requirements for physical distancing and facial coverings). However, the obligation of the Contractor set forth in clause (i) of the foregoing sentence shall be deemed and construed to apply only with respect to the maximum number of District students that the Parties anticipated, when they entered into the Current Agreement and as set forth in the Current Agreement, would be transported by the Contractor during the Regular 20-21 School Year, not to any District students in excess of that maximum number.

**Subsection 3.2 Contractor Employee Wages and Benefits.** At all times during the Regular 20-21 School Year (including, without limitation, when any School Closures are in effect) the Contractor shall continue to pay the salary, wages, medical, dental, and vision plan premiums ("Wage and Benefit Payments") for all of the Contractor's administrative staff and mechanics who provide services for or on behalf of the District at any time since the School Closures commenced (each a "Direct Employee"), regardless of whether any of those Direct Employees at any time file (or have filed) for unemployment benefits. Contractor shall not be required to make Wage Payments for drivers during School Closure periods but Benefit Payments for drivers will be paid by the Contractor.

**Section 4. Alternative Financial Assistance.**

**Subsection 4.1 Applications for Alternative Financial Assistance.** At all times during the Regular 20-21 School Year, and during the one-year period following the Regular 20-21 School Year, the Contractor shall provide written notice to the District of any and all Contractor applications for and/or other attempts by or on behalf of the Contractor to obtain grant funds or other financial assistance relating to School Closures that occurred during the Regular 20-21 School Year (regardless of whether relating to School Closures, in a temporal sense, on a current or retroactive basis), through the Paycheck Protection Program of the CARES Act, business interruption insurance, and/or other Federal or California COVID-19-related financial assistance legislation or executive action, excepting applications and attempts to obtain payroll tax credits pursuant to Section 2301 of the CARES Act or other applicable law ("Alternative Financial Assistance"). For avoidance of doubt: (i) any grant or other federal or

California COVID-19 financial assistance automatically provided to the Contractor, without need for application or other attempts to obtain such financial assistance, shall be deemed and construed to be Alternative Financial Assistance for purposes of this Section 3; and (ii) the Contractor shall be entitled to retain any and all payroll tax credits that it obtains pursuant to Section 2301 of the CARES Act or other applicable law, and such credits shall not be deemed or construed to be Alternative Financial Assistance for purposes of this Section 4.

**Subsection 4.2 Disposition of Alternative Financial Assistance.** In each event that the Contractor is successful in securing or otherwise receives any Alternative Financial Assistance: (i) the Contractor shall provide written notice to the District regarding the amount and source (i.e., specific program and/or legal authority) of the Alternative Financial Assistance; and (ii) to the extent not precluded by applicable laws or programs that authorized the Alternative Financial Assistance, the total amount of the CARES Act Payments paid by the District to Contractor pursuant to this Amendment No. 1 shall be adjusted to account for Alternative Financial Assistance received by the Contractor, provided that any such Alternative Financial Assistance may, on a proportional basis, be apportioned and paid to the District and other public school districts having written agreements with the Contractor that include provisions having substantially the same substantive effect as this Section 4. Within 60 days of the Contractor receiving Alternative Financial Assistance, the Parties shall determine the amount payable to the District pursuant to this Section 3 and the Contractor shall pay such amount to the District, provided that the total amount payable to the District pursuant to this Section 3 shall not to exceed an amount equal to whichever is less of: (i) the total of all Alternative Financial Assistance received or obtained by the Contractor; or (ii) the total of the CARES Act Payments paid by the District to the Contractor pursuant to this Amendment No. 1.

**Section 5. Contractor Records.** The Contractor must prepare and maintain, in accordance with generally accepted accounting principles, all financial and other records related to or associated with the Amended Agreement (including, without limitation, this Amendment No. 1) as may be necessary, appropriate, and/or required by law ("Contractor Records"). Without limiting the foregoing, the Contractor Records shall include records regarding the Wage and Benefit Payments made to or on behalf of Direct Employees. In accordance with Government Code Section 8546.7, the California State Auditor has the right, for a period of three years following final payment, to review, audit and/or copy records of the contracting parties with respect to each contract providing for expenditure of public funds in excess of \$10,000. In addition to the State Auditor, the District and any other governmental entities with competent jurisdiction shall each have an independent right pursuant to the Amended Agreement, and for a period of three years following final payment to the Contractor, to review, audit and/or copy the Contractor Records. Upon each request during such period, the Contractor shall make the Contractor Records reasonably available for such purposes.

**Section 6. Contractor Waiver and Release.** The provisions of this Amendment No. 1 set forth the sole extent of the Contractor's rights to receive payment from the District attributable to the School Closure Periods and/or the impacts of the COVID-19 public health emergency. As additional material consideration for the District's agreement to make CARES Act Payments pursuant to this Amendment No. 1, the Contractor hereby waives, and releases the District with respect to, any and all rights, claims, and actions the Contractor now or at any other time may have pursuant to the Current Agreement that relate to Transportation Services that the Contractor otherwise could or would have provided during the School Closure Periods and/or the Contractor's right to receive payment from the District attributable to such Transportation Services. In connection with the foregoing waiver and release, the Contractor hereby waives any and all rights that it may have pursuant to Section 1542 of the California Civil Code, which provides that:

A general release does not extend to claims that the creditor or releasing party does not know or suspect to exist in his or her favor at the time of executing the release and that, if known by him or her, would have materially affected his or her settlement with the debtor or released party.

**Section 7. Contractor Indemnification of District.**

**Subsection 7.1 General Requirement.** The Contractor shall indemnify and hold harmless the District with respect to any and all damages, losses, judgments, costs and expenses (including, without limitation, attorneys' fees and expenses), and other liabilities of whatever nature (each a "Liability" and, if multiple, the "Liabilities") to the extent arising from this Amendment No. 1 (including, without limitation, any failure or alleged failure by the Contractor to comply with COVID-19-related requirements as described in Subsection 3.1 herein) and/or any CARES Act Payments made to the Contractor pursuant to this Amendment No. 1. For all purposes of this Section 7, the Contractor's obligation to indemnify the District shall be deemed and construed to apply to the District, its Board of Education and each member thereof, the District's other officers, and its employees, agents, and other representatives (collectively, not including the District, the "District Representatives").

**Subsection 7.2 Defense of District.** The Contractor shall defend the District with respect to any and each claim, demand, action, or other proceeding that by allegation or implication is within the scope of the indemnification obligation set forth in Subsection 7.1 herein. Any and each defense of the District and/or any District Representatives conducted pursuant to this Amendment No. 1 must be conducted by qualified and appropriately experienced legal counsel that is reasonably acceptable to the District, but selected and retained by Contractor, at no cost to the District or any of the District Representatives.

**Subsection 7.3 Limitation on Obligation.** The Contractor shall not be obligated to indemnify and defend the District pursuant to Subsections 7.1 and 7.2 of this Amendment No. 1 to the extent any Liability is attributable to the sole negligence, active negligence, or willful misconduct of the District or any of the District Representatives, in which event the Parties shall be responsible and liable on a comparative basis.

**Subsection 7.4 Insurance Not a Limitation.** The obligations of Contractor pursuant to this Section 7 shall not be deemed or construed to be: (i) conditioned upon or in any other manner limited by the existence of any insurance coverage maintained by the Contractor or any other entity or person; or (ii) conditioned upon the receipt by the Contractor or any other entity or person of, or limited to the amount of, any insurance proceeds.

**Section 8. Contractor Refund of CARES Act Payments.** To the extent, for any reason (whether through audit or otherwise), the State, the County of Riverside, the Riverside County Superintendent of Schools, or any court or other governmental agency disallows some or all of the CARES Act Payments the District makes to the Contractor (including, without limitation, because the Contractor may have improperly expended such funds, or because the CARES Act Payments were determined to be a gift of public funds), the Contractor shall refund to the District the applicable portion of the CARES Act Payments. Each such refund shall be paid to the District within sixty days following receipt by the Contractor of notice from the District and documentation reasonably evidencing the reasons for, and the amounts of, the refunds. If the Contractor does not timely refund such amounts to the District, including, without limitation, because the Contractor disputes its obligation to refund the amounts to the District, the Contractor shall also pay interest, at the maximum rate allowed by State law, accruing from the date payment was due. Without limiting anything else in this Amendment No. 1, the provisions of this Section shall be deemed and construed: (i) to constitute a material portion of the

consideration to the District in exchange for making the CARES Act Payments to the Contractor pursuant to this Amendment No. 1; and (ii) to survive the expiration/termination of this Amendment No. 1.

**Section 9. Interpretation of Agreement.**

**Subsection 9.1 Fair and Reasonable Interpretations.** Each Party hereby acknowledges and agrees that, prior to execution and delivery of this Amendment No. 1, it has received, or had unqualified opportunities to receive, independent legal advice from its legal counsel with respect to the advisability of entering into this Amendment No. 1 and the meaning of the provisions herein. Therefore, the provisions of this Amendment No. 1 shall be construed based on their fair and reasonable meaning, and not for or against any Party based on whether such Party or its legal counsel was primarily responsible for drafting this Amendment No. 1 or any particular provision herein.

**Subsection 9.2 Recitals.** Each of Recitals A through E, inclusive, herein, is hereby incorporated as an effective and operative provision of this Amendment No. 1.

**Subsection 9.3 Entire Agreement.** This Amendment No. 1 constitutes the entire understanding and agreement between the Parties pertaining to the CARES Act Payments, and any and all prior and contemporaneous agreements, representations, and understandings of the Parties relating to such subject matter, whether oral or written, are hereby superseded and replaced.

**Subsection 9.4 Modifications of Agreement.** This Amendment No. 1 may be modified only by means of duly-approved written instrument executed and delivered by both Parties.

**Subsection 9.5 Conflicting Provisions.** In the event any provision(s) of this Amendment No. 1 conflict(s) with any provision(s) of the Current Agreement, the provision(s) of this Amendment No. 1 shall govern for all purposes.

**Subsection 9.6 Waiver.** A waiver by a Party of any provision of this Amendment No. 1 shall be binding only if the waiver is set forth in writing and has been duly approved and signed by the waiving Party. Unless so specified in the written waiver, a waiver by a Party of any provision of this Amendment No. 1 shall not constitute a waiver of any other provision(s) herein, similar or not, and shall not be construed as a continuing waiver. Except as waived in accordance with this Subsection, neither the failure by a Party at any time to require performance of any requirement of this Amendment No. 1, nor any forbearance or indulgence of the Party in regard to such requirement, shall in any manner affect the Party's right at a later time to enforce the same or any other provision of this Amendment No. 1.

**Subsection 9.7 Governing Law and Venue.** This Amendment No. 1 shall be governed by and interpreted in accordance with California law, notwithstanding any conflict-of-law, choice-of-law or other provision in any federal, state, or local law. Any action, arbitration, or other proceeding arising from this Amendment No. 1 shall be initiated and conducted only in the County of Riverside, California.

**Subsection 9.8 No Severability.** If a court of competent jurisdiction determines, for any reason, that any material provision or requirement of this Amendment No. 1 is invalid or unenforceable, such determination shall be deemed and construed to mean that this Amendment No. 1 was void, invalid, and unenforceable from the inception. Within 60 days of any such determination, the Contractor shall refund to the District any and all CARES Act Payments and other amounts that it paid to the Contractor pursuant to this Amendment No. 1.

**Subsection 9.9 Successors and Assigns.** Absent the express written consent of the District (which the District, in its sole discretion, may give, deny or condition), the Contractor shall not

assign this Amendment No. 1, and any attempt to do so shall be null and void. Subject to the foregoing, this Amendment No. 1 shall inure to the benefit of, and be binding on, the Parties' authorized successors and assigns.

**Subsection 9.10 No Third-Party Rights of Action.** This Amendment No. 1 shall in no event be deemed or construed to create any right or provide any basis for any third party to file, make, commence, or otherwise assert any claim, demand, action, or other proceeding against or involving the District.

**Subsection 9.11 Survival.** The Contractor's guarantees and other obligations pursuant to this Sections 3 through 8 herein, inclusive, shall survive the expiration or earlier termination of this Amendment No. 1 and/or the Current Agreement.

**Subsection 9.12 Agreement is Public Record.** Notwithstanding anything in any proposal or any discussions or writings relating hereto: (i) nothing in this Amendment No. 1 shall be deemed or construed to constitute confidential information; and (ii) this Amendment No. 1 is a public record which the District may disclose in accordance with California law or otherwise.

**Section 10. Counterparts.** This Amendment No. 1 may be executed in one or more counterparts, each of which shall be deemed to be an original and all of which, taken together, shall constitute one and the same instrument. Signature pages may be detached from counterpart originals and combined to physically form one or more copies of this Amendment No. 1 having original signatures of both Parties.

**Section 11. Due Authority.** Each person who has signed this Amendment No. 1 on behalf of a Party shall be deemed and construed to thereby represent and warrant that he or she has been duly authorized by such Party to sign, and thereby bind such Party to, this Amendment No. 1.

**IN WITNESS WHEREOF,** the duly authorized representatives of the Parties have executed this Amendment No. 1 as evidenced by their signatures below.

**Alvord Unified School District**

**First Student, Inc.**

By: \_\_\_\_\_  
Kevin Emenaker, Executive Director,  
Administrative Services

By: \_\_\_\_\_  
Print Name: \_\_\_\_\_  
Print Title: \_\_\_\_\_

**Approved as to form:**

By: Atkinson, Andelson, Loya, Ruud & Romo,  
Attorneys for the Alvord Unified School District

Fed. Tax ID No: \_\_\_\_\_

By: \_\_\_\_\_  
Brian W. Smith, Legal Counsel