AGREEMENT
By and between [school or collective organization] ("Customer") and
[Vendor] ("Vendor")

I.   Background: [Customer] and [vendor] desire to enter into an agreement for Vendor to provide [outsourced service] services in support of [Customer's] educational mission and activities. This Agreement sets out the terms and conditions governing Vendor's provision of these services.

II.   Incorporation of Documents; Order of Governance

The following documents are incorporated by reference into this Agreement and made a binding part of the Agreement: Customer's Request for Proposal dated [x], Vendor's Response to the RFP dated [x], [any other docs]. In the event of a conflict among the terms of the documents comprising this Agreement, the following order of governance will apply: (a) this Agreement including Exhibits referenced below; (b) the Vendor's Response to the RFP; and (c) the RFP [alternative: reverse order of (b) and (c)]

III.   Terms and Conditions:

1. Term and Termination: The initial term of this Agreement shall be [insert], and the Agreement shall automatically renew for successive [x-year] periods unless one of the parties indicates in writing, within [x days/months] of the expiration of the then-current term, its wish to not renew the Agreement further. [Alternative: The Agreement may be renewed for successive [x-year] periods upon mutual written agreement of the parties] This Agreement may be terminated by either party (a) upon written notice to the other party, for material breach that remains uncured for more than thirty (30) days following written notice by the non-breaching party; or (b) for convenience upon [x days or months] written notice to the other party.

2. Definitions:
    a. "Brand Features" means the trade names, trademarks, service marks, logos, domain names, and other distinctive brand features of each party, respectively, as secured by such party from time to time.
    b. "Customer" means [insert description of school or entity; be sure to include any affiliates to which the services will be provided]
    c. "Data" means information whether in oral or written (including electronic) form, created, obtained, transmitted, used, maintained, processed, and disposed of by Customer, End Users, and Vendor in the course of using and configuring/providing, respectively, the Services under this Agreement, and includes Customer Data, End User Data, and Personal Data.
    d. "Data Compromise" means a security-relevant event in which the security policy of a system used to create, transmit, maintain, use, process, or store data is disobeyed or otherwise breached, and in which Data is exposed to unauthorized disclosure, access, alteration, or use.
    e. "End User" means the individuals authorized by Customer to access and use the Services provided by Vendor under this Agreement.

f. "Operational" means [define]

g. "Personal Data" includes but is not limited to: personal identifiers such as name, address, phone number, date of birth, Social Security Number, and student or personnel identification number; Protected Health Information (PHI) as that term is defined in the Health Insurance Portability and Accountability Act, 45 CFR Part 160.103; personally identifiable information contained in student education records as that term is defined in the Family Educational Rights and Privacy Act, 20 USC 1232g; nonpublic personal information as that term is defined in the Gramm-Leach-Bliley Financial Modernization Act of 1999, 15 USC 6809; credit and debit card numbers and/or access codes and other cardholder data and sensitive authentication data as those terms are defined in the Payment Card Industry Data Security Standards; other financial account numbers and/or access codes; driver's license number; and other state- or federal-identification numbers such as passport, visa or state identity card numbers [add here any specific state-law additions to the notion of "personal" data].

h. "Customer Data" includes credentials issued to Customer by Vendor and all records relating to Customer's use of Vendor services and administration of End User accounts, including any Personal Data of Customer personnel that does not otherwise constitute Personal Data of an End User.

i. "End User Data" includes End User account credentials and information, and all records sent, received, or created by or for End Users, including email content, headers, and attachments, and any Personal Data of any End User or third party contained therein or in any logs or other records of Vendor reflecting End User's use of Vendor services.

j. "Services" means [insert based on particular services contracted]

3. Service Entry Plan:
   Vendor will develop, provide to Customer, and implement a detailed entry plan that provides for:
   a. the successful and uninterrupted transfer to Vendor of each service provided by Customer to End Users;
   b. the timely and successful integration of Vendor software, applications and Services with Customer's existing identity management and access management systems;
   c. the timely and successful integration with specified Customer applications;
   d. the availability of and support for the Services via specified Customer and End User devices including mobile devices; and
   e. Customer's ability to, directly or through instructions to Vendor, create, modify, suspend, eliminate, assign aliases for, and internally delegate the administration of, individual and group accounts created as part of Vendor's provision of Services.

   The entry plan will meet or exceed the specifications set forth in Exhibit ___ and identify the Customer applications and Customer and End User devices referenced in subsections (c) and (d) above.

4. Rights and License in and to Customer and End User Data
   The parties agree that as between them, all rights including all intellectual property rights in and to Customer and End User data shall remain the exclusive property of Customer, and Vendor has a limited, nonexclusive license to use these data as provided in this Agreement solely for the purpose of performing its obligations hereunder. This Agreement does not

give a party any rights, implied or otherwise, to the other's data, content, or intellectual property, except as expressly stated in the Agreement.

5. Data Privacy:

   a. Vendor will use Customer Data and End User Data only for the purpose of fulfilling its duties under this Agreement and for Customer's and its End User's sole benefit, and will not share such data with or disclose it to any third party without the prior written consent of Customer or as otherwise required by law. By way of illustration and not of limitation, Vendor will not use such data for Vendor's own benefit and, in particular, will not engage in "data mining" of Customer or End User Data or communications, whether through automated or human means, except as specifically and expressly required by law or authorized in writing by Customer.

   b. [depending on nature of services and data at issue] All Customer and End User Data will be stored on servers, located solely within the Continental United States.

   c. Vendor will provide access to Customer and End User Data only those Vendor employees and subcontractors who need to access the data to fulfill Vendor's obligations under this Agreement. Vendor will ensure that employees who perform work under this Agreement have read, understood, and received appropriate instruction as to how to comply with, the data protection provisions of this Agreement, and have undergone all background screening and possess all qualifications required by Customer [alternative: "undergone all background screening and possess all qualifications appropriate to the nature of the employees' duties and the sensitivity of the data they will be handling,"] prior to being granted access to the Data.

6. Data Security and Integrity [under review by IT security personnel]

   a. All facilities used to store and process Customer and End User data will employ commercial best practices, including appropriate administrative, physical, and technical safeguards, to secure such data from unauthorized access, disclosure, alteration, and use. Such measures will be no less protective than those used to secure Vendor's own data of a similar type, and in no event less than reasonable in view of the type and nature of the data involved. Without limiting the foregoing, Vendor warrants that all Customer Data and End User Data will be encrypted in transmission (including via web interface) and storage at no less than 128-bit level encryption [or cite NIST, ISO, or FIPS standards], and that Vendor will comply with all other technical specifications of Customer provided in Exhibit ___, which is incorporated herein by reference. [Tech specs are where any other NIST etc. standards or other specific standards a school wants, e.g. HIPAA security standards, would go]

   b. Vendor will use industry-standard and up-to-date security tools and technologies such as anti-virus protections and intrusion detection methods in providing Services under this Agreement.

   c. [for outsourced email services] Vendor will configure the Services to filter spam while permitting communications from third-party Internet Protocol addresses identified by Customer as legitimate, as specified in Exhibit ___.

   d. Vendor will at its expense conduct or have conducted at least annually:

- A SAS 70 audit of Vendor's security policies, procedures and controls resulting in the issuance of a Service Auditor's Report Type II;
- a vulnerability scan, performed by a scanner approved by Customer, of Vendor's systems and facilities that are used in any way to deliver services under this Agreement; and
- a formal penetration test, performed by a process and qualified personnel approved by Customer, of Vendor's systems and facilities that are used in any way to deliver services under this Agreement.

e. Vendor will provide Customer upon request the results of the above audits, scans and tests, and will promptly modify its security measures as needed based on those results in order to meet its obligations under this Agreement. Customer may require, at its expense, Vendor to perform additional audits and tests, the results of which will be provided promptly to Customer.

7. Data Integrity

Vendor will take commercially reasonable measures, including regular data integrity audits, to protect Customer and End User Data against deterioration or degradation of data quality and authenticity.

8. Response to Legal Orders, Demands or Requests for Data

a. Except as otherwise expressly prohibited by law, Vendor will:
  (i) immediately notify Customer of any subpoenas, warrants, or other legal orders, demands or requests received by Vendor seeking Customer and/or End User Data;
  (ii) consult with Customer regarding its response;
  (iii) cooperate with Customer's reasonable requests in connection with efforts by Customer to intervene and quash or modify the legal order, demand or request; and
  (iv) upon Customer's request, provide Customer with a copy of its response.

b. If Customer receives a subpoena, warrant, or other legal order, demand or request seeking Customer or End User Data maintained by Vendor, Customer will promptly provide a copy to Vendor. Vendor will promptly supply Customer with copies of data required for Customer to respond, and will cooperate with Customer's reasonable requests in connection with its response.

9. Data Compromise Response

a. Immediately upon becoming aware of a Data Compromise, or of circumstances that could have resulted in unauthorized access to or disclosure or use of Customer or End User Data, Vendor will notify Customer, fully investigate the incident, and cooperate fully with Customer's investigation of and response to the incident. Except as otherwise required by law, Vendor will not provide notice of the incident directly to the persons whose data were involved,

regulatory agencies, or other entities, without prior written permission from Customer.

b. Notwithstanding any other provision of this agreement, and in addition to any other remedies available to Customer under law or equity, Vendor will reimburse Customer in full for all costs incurred by Customer in investigation and remediation of such Data Compromise, including but not limited to providing notification to third parties whose data were compromised and to regulatory agencies or other entities as required by law or contract; the offering of [X] months' credit monitoring to each person whose data were compromised; and the payment of legal fees, audit costs, fines, and other fees imposed by regulatory agencies or contracting partners as a result of the Data Compromise. [alternative – add at end, "unless the Data Compromise was not due to negligence or misconduct on the part of the Vendor, in which case Vendor and Customer shall share the above costs equally"]

10. Data Retention and Disposal

a. Vendor will use commercially reasonable efforts to retain data in an End User's account, including attachments, until the End User deletes them or for an alternative time period mutually agreed by the parties.
b. Using appropriate and reliable storage media, Vendor will regularly back up Customer and End User Data and retain such backup copies for a minimum of [timeframe]. At the end of that time period and at Customer's election, Vendor will either securely destroy or transmit to Customer repository the backup copies. Upon Customer's request, Vendor will supply Customer a certificate indicating the records destroyed, the date destroyed, and the method of destruction used.
c. Vendor will retain logs associated with End User activity for a minimum of [x period of time], unless the parties mutually agree to a different period.
d. Vendor will immediately place a "hold" on the destruction under its usual records retention policies of records that include Customer and End User Data, in response to an oral or written request from Customer indicating that those records may be relevant to litigation that Customer reasonably anticipates. Oral requests by Customer for a hold on record destruction will be reduced to writing and supplied to Vendor for its records as soon as reasonably practicable under the circumstances. Customer will promptly coordinate with Vendor regarding the preservation and disposition of these records. Vendor shall continue to preserve the records until further notice by Customer.

11. Data Transfer Upon Termination or Expiration

a. Upon termination or expiration of this Agreement, Vendor will ensure that all Customer and End User Data are transferred to Customer or a third party designated by Customer securely, within a reasonable period of time, and without significant interruption in service, all as further specified in the Technical Specifications attached as Exhibit ___. Vendor will ensure that such migration uses facilities and methods are compatible with the relevant systems of the transferee, and to the extent technologically feasible, that Customer will have reasonable access to Customer and End User Data during the transition.

b. Vendor will notify Customer of impending cessation of its business or that of a tiered provider and any contingency plans in the event of notice of such a failure. This includes immediate transfer of any previously escrowed assets and data and providing Customer access to Vendor's facilities to remove and destroy Customer-owned assets and data. Vendor shall implement its exit plan and take all necessary actions to ensure a smooth transition of service with minimal disruption to Customer. Vendor will provide a fully documented service description and perform and document a gap analysis by examining any differences between its services and those to be provided by its successor. Vendor will also provide a full inventory and configuration of servers, routers, other hardware, and software involved in service delivery along with supporting documentation, indicating which if any of these are owned by or dedicated to Customer. Vendor will work closely with its successor to ensure a successful transition to the new equipment, with minimal downtime and effect on Customer, all such work to be coordinated and performed in advance of the formal, final transition date.

12. Service Levels; Interruptions in Service; Suspension and Termination of Service; Changes to Service:

a. Vendor warrants that the Services will be performed in a professional and workmanlike manner consistent with industry standards reasonably applicable to such Services. Vendor further warrants that the Services will be Operational at least 99.99% of the time in any given month during the term of this Agreement, meaning that the outage or downtime percentage will be not more than .01%. [Alternative: or other standard as stipulated in RFP response and agreed to by the parties] In the event of a Service outage, Vendor will (a) promptly and at Vendor's expense use commercial best efforts to restore the Services as soon as possible, and (b) unless the outage was caused by a Force Majeure event, refund or credit Customer, at Customer's election, the pro-rated amount of fees corresponding to the time Services were unavailable. Neither party will be liable to the other for any failure or delay in performance under this Agreement to the extent said failures or delays are proximately caused by forces beyond that party's reasonable control, provided that the party resumes performance as soon as it is reasonably able to do so.

b. From time to time it may be necessary or desirable for either the Customer or Vendor to propose changes in the Services provided. Such changes shall be made pursuant to the Change Control Procedure attached as Exhibit ___. [it is contemplated that this exhibit would indicate the different levels of change, and the corresponding level of authorization needed, including the ability for Vendor to make nonmaterial changes without Customer authorization] Automatic upgrades to any software used by Vendor to provide the Services that simply improve the speed, efficiency, reliability, or availability of existing Services and do not alter or add functionality, are not considered "changes to the Services" and such upgrades will be implemented by Vendor on a schedule no less favorable than provided by Vendor to any other customer receiving comparable levels of Services.

c. Vendor will provide Customer with ___ days' prior notice of scheduled downtime in the provision of Services for maintenance or upgrades. To the extent possible, Vendor will schedule downtime during times of ordinarily low use by Customer. In the event of unscheduled and unforeseen downtime for any reason, except as otherwise prohibited by law Vendor will promptly notify Customer and cooperate with Customers' reasonable

requests for information regarding the downtime (including causes, effect on Services, and estimated duration).

d. Customer may suspend or terminate (or direct Vendor to suspend or terminate) an End User's access to Services in accordance with Customer's policies. Customer will assume sole responsibility for any claims made by End User regarding Customer's suspension/termination or directive to suspend/terminate such service. Vendor may suspend access to Services by Customer or an End User immediately in response to an act or omission that reasonably appears to jeopardize the security or integrity of Vendor's Services or the network(s) or facilities used to provide the Services. Suspension will be to the minimum extent, and of the minimum duration, required to prevent or end the security issue. Vendor may suspend Customer's access to Services if, after at least thirty (30) days' written notice to Customer and subsequent good-faith, commercially reasonable efforts to resolve the matter with Customer to the parties' mutual satisfaction, Customer remains in material breach of this Agreement. The suspension will be lifted immediately once the breach is cured. Vendor may suspend access to Services by an End User in response to (i) a material breach by End User of any terms of use s/he has agreed to in connection with receiving the Services. Vendor will notify Customer of any suspension of End User access to Services before suspension or, if notice before is not feasible, as soon as reasonably possible thereafter.

13. <u>End-user support</u>. Vendor will provide Customer and End Users with initial training and ongoing technical support for the Services at no less than the levels and in the manner(s) specified in Exhibit ___.

14. <u>Institutional Branding</u>: Vendor services will provide reasonable and appropriate opportunities for Customer branding of Vendor services, as further specified in a mutually agreed upon Institutional Branding Plan to be attached as Exhibit ___. Each party shall have the right to use the other party's Brand Features only in connection with performing the functions provided in this Agreement and as specified in the attached Plan. Any use of a party's Brand Features will inure to the benefit of the party holding intellectual property rights in and to those features.

15. <u>Emergency communications</u>. Vendor warrants that its Services will enable and support [alternative, depending on the services at issue: "are compatible with and will not interfere with"] Customer's provision of emergency communications in compliance with applicable law and Customer policies. This includes enabling and supporting at least [x] Customer simulations annually of emergency communications.

16. <u>Compliance with Applicable Laws and Customer Policies</u>. Vendor will comply with all applicable laws in performing services under this Agreement. Any Vendor personnel visiting Customer's facilities will comply with all applicable Customer policies regarding access to, use of, and conduct within such facilities. Customer will provide copies of such policies to Vendor upon request.

17. <u>Warranties, Insurance and Liability</u>:

a. Vendor warrants that all services provided to Customer shall conform to and be performed in accordance with Vendor's proposal and that Vendor's services shall not

infringe any third-party intellectual property rights.[Add if vendor insists: Except as expressly provided in this Agreement, both parties disclaim all warranties, express or implied, to the fullest extent permitted by law.]

b. Throughout the term of this Agreement Vendor will maintain the minimum types and levels of insurance applicable to Vendor's performance under this Agreement: [insert]

c. Except as otherwise expressly provided in this Agreement or required by law, and except for damage arising from (i) breaches of confidentiality concerning a party's trade secrets or other proprietary data identified as confidential by that party, (ii) intellectual property infringement, and (iii) indemnity obligations, neither party will be liable for any special, consequential, incidental or indirect damage arising from or in connection with that party's performance under this Agreement. If a third party claim is made that the Services, in whole or in part, infringe a third party's intellectual property rights, then in addition to any other remedies Customer may have under this Agreement or the law, Vendor will, at no cost to Customer, either (i) secure all necessary rights for Customer to continue using the Services, (ii) modify the Services to eliminate the alleged infringement without adversely affecting the scope and level of Services provided to Customer; or (iii) replace the Services with noninfringing Services that otherwise meet all the requirements of this Agreement.

d. [Preferred] Vendor will defend, indemnify, and hold harmless Customer and its trustees, directors, officers, employees, subcontractors and agents (collectively "the Indemnitee") from and with respect to any and all claims, causes of action, damages, costs and liabilities of any kind whatsoever, including but not limited to reasonable attorney fees, regarding or arising fromVendor's performance under this Agreement and not caused by Indemnitee's sole negligence or willful misconduct.

[Alternative] Each party ("the Indemnifying Party") will defend, indemnify, and hold harmless the other party and its trustees, directors, officers, employees, subcontractors and agents (collectively "the Indemnitee") from and with respect to any and all claims, causes of action, damages, costs and liabilities of any kind whatsoever, including but not limited to reasonable attorney fees, regarding or arising from the Indemnifying Party's performance under this Agreement and not caused by Indemnitee's sole negligence or willful misconduct. [include any liability/indemnification limitations required for particular institution]

[Alternative] Each party ("the Indemnifying Party") will defend, indemnify, and hold harmless the other party and its trustees, directors, officers, employees, subcontractors and agents (collectively "the Indemnitee") from and with respect to any and all claims, causes of action, damages, costs and liabilities of any kind whatsoever, including but not limited to reasonable attorney fees, regarding or arising from the Indemnifying Party's performance under this Agreement and not caused by Indemnitee's sole negligence or willful misconduct; however, the Indemnifying Party's obligations hereunder shall not exceed a maximum of [insert amount] for any single claim, or [insert amount] for all claims made during the term of this Agreement. [include any liability/indemnification limitations required for particular institution]

[Alternative] Each party ("the Indemnifying Party") will defend, indemnify, and hold harmless the other party and its trustees, directors, officers, employees, subcontractors and agents from and with respect to any and all claims, causes of action, damages, costs and liabilities of any kind whatsoever, including but not limited to reasonable attorney fees,

regarding or arising from the Indemnifying Party's negligence or willful misconduct under this Agreement.

    e. [Alternative for publics – insert any state-specific language on indemnity required under state law][option if Vendor required some overall liability cap] The total liability of either party and its trustees, directors, officers, employees, subcontractors and agents to the other party, for all losses, damages, costs, and expenses, including attorneys fees, shall not exceed [$X] [the aggregate amount of consideration exchanged under this Agreement] [2X, 3X, etc. the aggregate amount of consideration exchanged under this Agreement], regardless of the legal theory under which such liability is imposed. This limitation of liability does not apply to breaches of security or confidentiality obligations, intellectual property infringement, warranty fulfillment, or indemnification obligations.

18. Equitable Relief: Vendor acknowledges and agrees that a breach of the provisions of Paragraphs [insert] of this Agreement would cause the Customer to suffer irreparable damage that could not be adequately remedied by an action at law. Accordingly, the Vendor agrees that Customer shall have the right to specific performance of the provisions of Paragraphs [insert] without posting of a bond or other security, to enjoin a breach or attempted breach of the provisions thereof, such right being in addition to all other rights and remedies that are available to Customer at law, in equity, or otherwise.

19. Headings: Headings used herein are for convenience only and shall not have any separate legal effect.

20. Governing Law and Jurisdiction: This Agreement and the rights and obligations of the parties hereunder shall be governed by the law of the State of Customer, without reference to choice of law principles. Any disputes arising under this Agreement may be brought only in courts of competent jurisdiction in [Customer's state] [alternative: the state of the defendant], following good-faith efforts by the parties to negotiate a resolution; and Vendor [alternative: each party] hereby submits to the sole and exclusive jurisdiction of such courts. [Alternative: silence on both]

21. No Drafting Presumption: The parties agree that the terms of this Agreement were mutually negotiated and shall not be construed either in favor or against either of them by virtue of the extent of their involvement in preparing this Agreement.

22. Assignment and Subcontracting: This Agreement and the rights and obligations hereunder may not be assigned by either party without the prior written consent of the other party, which will not be unreasonably delayed or withheld. Any attempted assignment without such consent shall be void. Any subcontractors at any tier used to help fulfill Vendor's obligations under this Agreement must be obligated to comply with the same terms and conditions regarding data handling and protection, and compliance with applicable laws, provided herein. [alternative: be approved in advance by Customer]

23. Notices: Any notices required to be given under this Agreement shall be given to [insert details]. Notice will be deemed effective on the date delivered orally or by hand, facsimile,

or electronic mail; and three (3) days after placement in the United States mail or certified mail.

24. Counterparts: This Agreement may be executed in any number of counterparts, including facsimile, PDF, and other electronic copies, each of which shall be deemed an original, but all of which taken together shall constitute one single agreement between the parties.

25. Relationship between parties: The Parties intend to create an independent contractor relationship and nothing contained in this Agreement shall be construed to make either Customer or Vendor partners, joint venturers, principals, agents or employees of the other. No officer, director, employee, affiliate, agent or subcontractor retained by Vendor to perform work on Customer's behalf under this Agreement shall be deemed to be an employee or agent of Customer. Neither Party shall have any right, power or authority, express or implied, to bind the other.

26. Severability and Waivers: If any provision of this Agreement is held by a court of competent jurisdiction to be contrary to Law, then the remaining provisions of this Agreement, if capable of substantial performance, shall remain in full force and effect. No delay or omission by either Party to exercise any right or power it has under this Agreement shall impair or be construed as a waiver of such right or power. A waiver by any Party of any breach or covenant shall not be construed to be a waiver of any succeeding breach or any other covenant. All waivers must be signed by the Party waiving its rights.

27. Survival of Terms: Those provisions of the Agreement that should by their nature survive termination, will do so. [Alternative: The following terms will survive the expiration or termination of this Agreement: [insert numbers]]

28. Entire Agreement and Amendments: This Agreement, including the Exhibits and other documents incorporated herein per Section II, represents the entire agreement between the Parties with respect to its subject matter and supersedes all prior discussions and agreements between the Parties with respect to such subject matter. No amendment to, or change, waiver or discharge of, any provision of this Agreement shall be valid unless in writing and signed by the party against whom it is claimed.

By signing below, each signatory represents and warrants that s/he has all necessary authority to bind his/her organization to the above terms and conditions.

AGREED:

For [Customer]:   For Vendor:

_____   _____
Signature   Signature

_____   _____
Print Name and Title   Print Name and Title

_____
Date   Date