

## **D2 DATA DRIVEN SOFTWARE CORPORATION**

### **I. MASTER LICENSE AGREEMENT**

This Master Subscription Agreement (this "Agreement") is entered into and made effective upon the date of bilateral execution of this Agreement, (April 15, 2011) by and between D2 Data Driven Software Corporation ("D2SC"), a Texas corporation with its principal office located at 900 Jackson St., Suite 380, Dallas, Texas 75202 and MSD Washington Township"), a school district with its principal office located at 8550 Woodfield Crossing Blvd., Indianapolis, Indiana 46240. In consideration of mutual promises and covenants contained in this Agreement, the parties agree to the following:

#### **1. SCOPE OF RELATIONSHIP**

- 1.1 **SUBSCRIPTIONS & SERVICES.** Subject to this Agreement and the Terms & Conditions of the D2SC Software Corporation Master Subscription Agreement executed on even date herewith and incorporated herein by reference for all purposes (the "Terms & Conditions"), D2SC will provide the subscriptions and services as defined in individual Solution Schedules which will be mutually agreed upon, attached hereto and incorporated herein. All capitalized terms used herein, but not otherwise defined herein, shall have the meanings ascribed thereto in the Terms & Conditions. D2SC and District shall endeavor to agree on a Solution Schedule within 30 days of the Effective Date of this Agreement. The Solution Schedules may only be modified by mutual written agreement.
- 1.2 **SOLUTION SCHEDULES.** Each Solution Schedule, which must be authorized in writing by both parties, will become a part of this Agreement, and, unless otherwise clearly specified in a writing signed by the parties, the terms and conditions of each Solution Schedule shall be independent of and shall have no impact upon the provisions of any other Solution Schedule. Each Solution Schedule will describe any products, licensing, maintenance and/or services to be provided. Each Solution Schedule will specify the fees, payment terms, service level agreements and associated implementation calendar.
- 1.3 **ADDITIONAL SERVICES.** District may order additional D2SC Solutions or add on to existing D2SC Solutions by providing a written request to D2SC. D2SC will then send District a proposed Solution Schedule, based on D2SC's formal requirements analysis and/or proposal for the additional services, specifying the terms of the Solution, including the payment(s) due for each ordered item. District may accept the terms of the Solution by signing that Solution Schedule and returning it to D2SC. All executed Solution Schedules will become part of this Agreement and will be covered by all of this Agreement's terms and conditions. In the event a Solution Schedule and this Agreement differ, the Solution Schedule shall prevail for that particular Solution Schedule only.
- 1.4 **EFFECTIVE DATE.** This Agreement shall be effective April 15, 2011 (the "Effective Date") and shall remain in effect for during the Term (as defined in Section 5.1) unless earlier terminated in accordance with the provisions set forth in this Agreement.
- 1.5 **NO THIRD PARTY BENEFICIARIES.** D2SC and District have entered into this Agreement for their own benefit and not for the benefit of any third parties, including students, parents or guardians, District's teachers, District's administrators or End Users. Nothing contained within this Agreement shall be construed or interpreted to permit enforcement by such third parties against either District or D2SC.
- 1.6 **CHANGE ORDER PROCESS.** All changes, additions or deletion of product or work performed under each Solution Schedule will require a Project Change Order that documents the required changes and the increase or decrease of fees in the Solution Schedule. A change order (sample attached as Attachment B) must be submitted by District for any system or project change requests. The change order will be reviewed by D2SC

for feasibility, pricing, deliverables and scheduling. Change orders will only be completed after signed authorization from District.

## 2. SUBSCRIPTION

2.1 SUBSCRIPTION RIGHTS GRANTED. In accordance with this Agreement and the Terms & Conditions, D2SC grants to District a limited, nontransferable, non-exclusive subscription to permit access to End Users to utilize the Applications included in the executed Solution Schedules attached hereto, for the purpose of facilitating the education of students under District's control as well as supporting District's operations as described in the Solution Schedule. Notwithstanding anything to the contrary herein, District may not use any aspect of the D2SC Solution, including but not limited to the Applications, in a resale capacity, to process and/or analyze the data of a Third Party.

2.2 SOFTWARE. District acknowledges and understands that D2SC may provide District with access to: (a) the Applications; and (b) Third Party Applications. District acknowledges that:

- (a) title to all such Applications and Third Party Applications remains with and is subject to the proprietary rights of D2SC or its Third Party vendor; and
- (b) such Applications and Third Party Application contain trade secrets and other valuable proprietary information of D2SC or its Third Party vendor.

District agrees not to license, sell, transfer, lease or disclose the Application or Third Party Application to any Third Party, except District may disclose such Application or Third Party Application if required to do so by law.

## 2.3 D2SC OBLIGATIONS.

- (a) Applications. D2SC shall, with District's assistance, within a commercially reasonable time frame, and shall create, operate and maintain the software to be utilized for District's access to the D2SC Applications, in accordance with this Agreement. The Applications shall provide an environment for end users to participate in an Internet-based education communication portal providing content delivery, assessment and analysis of data. The services provided via the Applications are subject to commercial availability, and are as set forth in the Solution Schedules.
- (b) District Interface. At the District's request D2SC shall create, design, develop, and configure the software for and with the assistance of District.
- (c) Application Data. Through its operation of the Applications, D2SC shall have the right to collect, maintain, and use a database of the Application Data, subject to the provisions of Section 3.3.
- (d) Not Responsible for Fulfillment. D2SC does not contemplate that End Users will utilize the Applications for any purpose other than education, however, D2SC shall have no obligation or responsibility regarding the actual provision of any services or assignments by and/or between End Users. D2SC shall not be a party to any agreement formed between any End Users and District or other End Users.
- (e) Use of Third-Party Contractors Permitted. D2SC and District agree and anticipate that D2SC may fulfill its obligations under this Agreement (either partially or completely) through the efforts of, or by contract with, Third Parties. Such Third Parties will be bound by D2SC's standard confidentiality agreements.

- (f) Technical Support. D2SC shall provide second-level technical support from the hours of 8:30 a.m. to 5:30 p.m. Monday to Friday, Central Time, excluding holidays recognized by D2SC, to the District. However the district will be responsible for handling first-level support questions from the End Users. D2SC's provided technical support services and fees to District are set forth on Solution Schedule A. D2SC shall assist District personnel, in the development and training of District employees to be designated "On-Site Trainers," District employees with an extensive knowledge of the D2SC Solution, service, workflows and documentation who are to provide first-level support to End Users.

#### 2.4 DISTRICT OBLIGATIONS & RESTRICTIONS.

- (a) Fees. In accordance with Section 6 of this Agreement, District shall pay to D2SC Subscription Fees, License Fees, Setup Fees and Service Fees as set forth in Solution Schedule(s).
- (b) Alterations. Unless otherwise provided in the relevant Solution Schedule, District agrees it shall not alter or modify the Applications or Third Party Applications or D2SC Software or any part thereof; copy or duplicate, or permit a Third Party to copy or duplicate the Applications, the D2SC Software or Third Party Applications or any part thereof or; reverse engineer, decompile or disassemble the Applications, D2SC Software or Third Party Applications.
- (c) District Employees. District shall assign a D2SC Project Manager responsible for coordinating and overseeing the project. This person will act as the main/single point of contact during the implementation and project. District shall provide reasonable access to appropriate District personnel to permit D2SC to instruct and assist District personnel in the development of On-Site Trainers and personnel to aid D2SC in the loading of relevant data.
- (d) District URL. D2SC shall have the right to link to District's homepage on D2SC's corporate webpage.
- (e) Application Security & Integrity. District agrees to implement and enforce policies and procedures to prevent End Users from:
  - (i) tampering in any way with the software or functionality of the Applications;
  - (ii) putting any material the Applications which contains any viruses, time bombs, Trojan horses, possum bellies, worms, or other computer programming routines that may damage, interfere with, intercept or expropriate any system, data or information contained in or encompassing the Applications;
  - (iii) taking any action, or omitting to take any reasonable action, which would constitute an invasion of privacy of any user in any applicable jurisdiction; or
  - (iv) using or distributing tools designed for compromising privacy or security.

Without limiting the foregoing, District shall take commercially reasonable steps to prevent End Users of the Applications from disclosing to other End Users or subscribers non-public information or materials received by District due to its use of the Applications. District agrees to take all necessary steps to prevent District's employees, agents, contractors, participating students and their parents/guardians from the behavior contemplated under this Section 2.4(e).

- (f) Configurations. District shall assist D2SC in determining which configurations should apply and shall be responsible for supplying all supporting content and decisions to D2SC in a timely manner. D2SC shall have the right of final approval of the functionality and content.
- (g) End User Facilitation. District shall use all reasonable efforts to facilitate End User interaction with the Applications in compliance with the Acceptable Use Policy. Such efforts shall include, but are not limited to, promoting procedures and policies that involve the Application's use by End Users and

allocation of appropriate resources to instruct End Users on the Applications' functionalities and uses.

- (h) Acceptable Use Policy. D2SC is not responsible for monitoring the acceptable use of the product. It is recommended that the District have in place as part of its Information Security Policy(s) an Acceptable Use Policy ("AUP") that would cover the use of the D2SC System(s).
- (i) Contact Information. District shall provide D2SC the name and contact information of a primary and backup technical contact, the district Project Manager, and a senior district administrator who shall be notified in the event of technical support issues and/or failure of the Applications.

### **3. OWNERSHIP AND LICENSES.**

3.1 OWNERSHIP OF APPLICATIONS AND D2SC SOLUTIONS. The parties acknowledge and agree that the Applications and D2SC Solutions, together with all functional modifications and Customizations are D2SC's proprietary property protected under intellectual property laws. District further acknowledges and agrees that all right, title, and interest in and to the Customizations, Applications and D2SC Solutions, as well as all modifications and enhancements thereof, including associated intellectual property rights, are and shall remain with D2SC or its licensors. Subject to the terms and conditions of this Agreement, D2SC hereby grants to District for the term of this Agreement, the non-exclusive, non-transferable right and license to use the Applications and D2SC Solutions for District's purposes and to permit Application access to End Users.

3.2 OWNERSHIP OF CONTENT. Content created by District or District's employees, agents, or contractors for delivery via the Applications shall be considered the copyrighted property of District or District's employees, agents, or contractors (subject to contractual relationship between District and its employee, agent, or contractor). Ownership rights in Content as between District and other End Users shall be addressed in the Acceptable Use Policy. Nothing in this provision will require District to violate federal privacy laws. All other content made available for use by District is the copyrighted property of D2SC or Third Party content providers and will be available for a fee, collected by D2SC, as outlined in a Solution Schedule.

3.3 OWNERSHIP & LICENSE OF APPLICATION DATA. Upon payment of all amounts owed to D2SC hereunder, all data developed, created or collected in conjunction with the operation of the Applications or D2SC Solutions shall be the property of District.

3.4 OWNERSHIP OF DISTRICT INTERFACE. The parties acknowledge and agree that all right, title, and interest in and to any Customizations relating to the "look and feel" or other features of the District Interface and Customizations done specifically for District, as well as all modifications and enhancements thereof, including associated intellectual property rights, are and shall remain with D2SC or its licensors. This Agreement does not convey any ownership interest in or to the District Interface, Configurations, and Customizations. Specifically, the parties acknowledge and agree that D2SC may create other interfaces for Third Parties having the same functionality as the District Interface and Customizations and such interfaces will not infringe on, nor be inconsistent with, District's Interface rights as expressed herein. Subject to this Agreement, District hereby grants to D2SC, during the period that D2SC provides web hosting services, a non-exclusive, non-transferable right and license to use, reproduce, publicly perform, publicly display and transmit the District Interface and Customizations in conjunction with D2SC's operation of the Applications. In addition, subject to this Agreement, and notwithstanding any policy to the contrary, District hereby grants to D2SC for the term of this Agreement a non-exclusive, non-transferable right and license to publicly reference, perform and display the District Interface, Configurations and Customizations for demonstration purposes to promote D2SC's services.

3.5 TRADEMARK OWNERSHIP & LICENSES.

- 3.5.1 "D2SC" and related geometric icons, as well as the D2SC block are trademarks of D2SC. D2SC grants to District a non-exclusive, non-transferable license solely for use in connection with the District Interface contemplated herein, during the Term, to use, reproduce, display and transmit D2SC's trademarks solely on the District Interface and in the form provided by D2SC. D2SC's marks shall always appear on an End User's screen so as to be visible when an End User first accesses the Applications.
- 3.5.2 Notwithstanding any policy to the contrary, District grants to D2SC a non-exclusive, non-transferable, right during the Term, to use, reproduce, display and transmit District's name, trademarks and/or service marks in conjunction with D2SC's operation, as well as in conjunction with the promotion and public referencing of the Applications and this Agreement. All use of District's marks and names shall be in accordance with District's standards and specifications, which standards and specifications shall be provided to D2SC upon request to District by D2SC.

### 3.6 CONFIDENTIALITY

- 3.6.1 **NONDISCLOSURE AND NONUSE OBLIGATIONS.** District agrees that District will not use, disseminate, or in any way disclose any Confidential Information to any person, firm or business, except to the extent necessary for internal evaluations in connection with negotiations, discussions, and consultations with personnel or authorized representatives of D2SC and for any other purpose D2SC may hereafter authorize in writing. District shall disclose Confidential Information only to those consultants who need to know such information and certify that such consultants have previously agreed, either as a condition of employment or in order to obtain the Confidential Information, to be bound by terms and conditions substantially similar to those terms and conditions applicable to District under this Agreement. District will immediately give notice to D2SC of any unauthorized use or disclosure of the Confidential Information. District agrees to assist D2SC in remedying any such unauthorized use or disclosure of the Confidential Information. Notwithstanding the foregoing, each party's confidentiality obligations hereunder shall not apply to information which: (a) is already known to the receiving party; (b) becomes publicly available without fault of the receiving party; (c) is rightfully obtained by the receiving party from a third party without restriction as to disclosure, or is approved for release by written authorization of the disclosing party; (d) is shown by written record to be developed independently by either party without use of the other party's Confidential Information; or (e) is shown by written record to have been known by either party without restriction as to disclosure at the time of either party's receipt of such information.
- 3.6.2 **OWNERSHIP OF CONFIDENTIAL INFORMATION AND OTHER MATERIALS.** District acknowledges that, except as otherwise provided by law, all Confidential Information disclosed to District pursuant to this Agreement is owned by D2SC, and District will take measures to prevent the Confidential Information from becoming available to persons other than those persons selected by District to have access to the Confidential Information for limited purposes, and subject to the terms of this Agreement. This Agreement shall not be deemed to vest in District any rights to the Confidential Information. D2SC acknowledges that all public contracts, including contract addenda are a matter of public record and that any and all requests for D2SC information shall be left to the ruling of the office of the Indiana Public Access Counselor.
- 3.6.3 **RETURN OF CONFIDENTIAL INFORMATION.** D2SC may make a written request for return of any Confidential Information and within five (5) days after such request, and District shall destroy or deliver to D2SC, at D2SC's option: (a) all materials furnished to District by D2SC; (b) all tangible media of expression in District's possession or control which incorporate or in which are fixed any Confidential Information; and (c) written certification of District's compliance with District's obligations under this Section 3.6.3.

## 4. **PRIVACY.**

District's utilization of one or more D2SC Applications or D2SC Solutions under subscription from D2SC may include D2SC acting as an agent for District with respect to the warehousing, storage and analysis of data to District's specifications. District acknowledges and understands that the D2SC Solution(s) provided to District under this Agreement may be construed to include the transfer of personally identifiable student information and confidential employee information. District shall be responsible for compliance with the Family Educational Rights and Privacy Act (FERPA) and any other applicable all applicable privacy laws governing educational institutions or agencies. D2SC will take all necessary steps to comply with educational privacy laws and regulations and will maintain systems at an industry standard of security to prevent the unauthorized access to personally identifiable student information and confidential employee information. Further,

- (a) District agrees that D2SC shall be considered an organization conducting studies for and on behalf of District, at District's request, to improve instruction;
- (b) District shall obtain any necessary releases from students, parents and guardians, including but not limited to, written consents required under the FERPA regulations, 34 C.F.R. §99.30;
- (c) District shall notify D2SC when student information is no longer needed for the purposes it was obtained. Within a reasonable period of time after receiving notice from District, D2SC shall destroy such information;
- (d) District agrees to institute such procedures and enforcement policies applicable to End Users so as to encourage and maintain the integrity of End User access and passwords so as to prevent unauthorized access or disclosure of student information;
- (e) D2SC agrees to institute and enforce such procedures and policies necessary and to adopt industry standard security procedures to endeavor to prevent Third Party access to student information and Application Data by individuals not affiliated with D2SC.
- (f) District agrees to indemnify and hold harmless D2SC against any and all losses, including expenses that may be incurred by D2SC, either as a party, witness, or potential party or witness, in connection with or resulting from any litigation or claim brought against the District arising out of, or occasioned by, directly or indirectly, the performance, actions or non-actions of District, or District contracted third-party.

## **5. TERM & TERMINATION**

5.1 AGREEMENT TERM. The term of this Agreement (the "Term") shall commence on the Effective Date and shall expire 5 years thereafter unless (a) earlier terminated pursuant to the terms of this Agreement; or (b) extended by mutual written agreement.

5.2 SOLUTION SCHEDULE. Each individual Solution Schedule shall include a period of performance. In the event that any Solution Schedule period of performance extends beyond the Term, the Term shall automatically be extended and remain in effect until such time as the Solution Schedule period of performance is completed.

5.3 TERMINATION. D2SC may terminate this Agreement by written notice if District fails to pay any amount due under this Agreement or any subsequent Solution Schedule or Statement of Work within thirty (30) days after written notice of such nonpayment. In addition, either party may terminate this Agreement by written notice if the other party commits a material non-monetary breach of this Agreement, which breach, if capable of being cured, is not cured within thirty (60) days of a written notice of termination. Termination of an individual Solution Schedule shall have no effect on any other Solution Schedule or the Agreement so long as the terminating party is not in default of the Solution Schedule being terminated and complies with the terms and conditions of the Agreement and other Solution Schedules.

5.3.1 EFFECT OF TERMINATION. Termination of this Agreement for any reason shall not affect any past or future sums due D2SC under this Agreement or any additional remedies provided by law or equity to either party. All rights that have been granted to District shall immediately be terminated, except those rights which survive under section 8.9, and all unpaid charges accrued under this Agreement shall become immediately due and payable upon the happening of any event of termination. In the event of a termination of this Agreement or any Solution Schedule for default, each party shall return to the other within sixty (60) days of a request,

any property, data sheets, schematics, samples, user lists, Confidential Information, in whatever form or media which are used by a disclosing party or which are furnished to a recipient. Further, D2SC shall remove all copies of the Content provided by District and the District Interface from the servers within its control and use all commercially reasonable efforts to remove any references to District from any site which caches, indexes or links to the Applications.

## **6. FEES & PAYMENTS**

6.1 FEES. As compensation for the subscription to the Applications, D2SC Software and/or Third Party Applications granted to District and the provisions of services as applicable, District agrees to pay the amount(s) specified in the attached Solution Schedule(s), representing fees for subscriptions, Service Fees and Setup Fees, as applicable.

6.2 PAYMENT TERMS. Unless otherwise specified in the Solution Schedule, payments will be due and payable to D2SC within thirty (30) days of the date of D2SC's invoice. Such invoices will be generated at the beginning of each contract year for that year's projected Licensing and/or Maintenance Fees. Consulting and Implementation Services, Setup Fees and Customization Fees are to be invoiced during the month in which they are incurred.

6.3 NON-APPROPRIATION (Multi-Year Agreements only). Notwithstanding anything to the contrary in this Agreement, the District is obligated to make payments as approved each year by the District's Board of Trustees. While District's Board of Trustees is not obligating itself to actually appropriate current revenue for the payment of its obligations under this Agreement, District's Board of Trustees agrees to make a best effort attempt to obtain and appropriate funds for the payment of the obligation. Nevertheless, District's Board of Trustees retains the right to terminate this Agreement at the expiration of each budget period of District. District warrants that it has fully budgeted and appropriated sufficient funds in the current fiscal year to make the current payments due under this Agreement and that the funds have not been expended for other purposes.

Should District fail to budget, appropriate or otherwise make available funds to make payments under this Agreement, this Agreement shall be deemed terminated at the end of the then current Term. District agrees to deliver notice to D2SC of such termination at least 90 days prior to the end of the then current Term but failure to give notice shall not extend the Term beyond such Term. If this Agreement is terminated under this provision, District agrees to return all tangible portions of the D2SC Solutions including hardware and software as provided in Section 5.3.1.

6.4 INSURANCE. If applicable, District shall add any D2SC hardware identified by D2SC and located on District's premises to District's property insurance.

## **7. LIMITATIONS AND RISK OF LOSS**

7.1 GENERAL LIMITATION ON LIABILITY. The parties' rights, liabilities and responsibilities with respect to the D2SC Solutions and the Applications shall be exclusively those expressly set forth in this Agreement. D2SC SHALL NOT BE RESPONSIBLE OR HELD LIABLE TO THE DISTRICT FOR CONSEQUENTIAL, INCIDENTAL OR SPECIAL DAMAGES, WHICH SHALL INCLUDE, WITHOUT LIMITATION: LOSS OF PROFITS, INTEREST, PRODUCT OR SERVICE; BUSINESS INTERRUPTION; COSTS OF REPLACEMENT SERVICES; INCREASED COSTS OF OPERATION, MAINTENANCE OR STAFFING, ADVERSE JUDGMENT OR RULING. Notwithstanding anything that may appear to the contrary herein, in no event shall D2SC be liable in the aggregate for the lesser of (i) District's actual damages or (ii) the total amount D2SC actually received from the District under this Agreement.

## **8. GENERAL PROVISIONS**

- 8.1 ASSIGNMENT. Neither this Agreement nor any rights or obligations granted hereunder may be sold, leased, assigned or otherwise transferred, in whole or in part by either party by operation of law or otherwise, and any such attempted assignment shall be void and of no effect without the advance written consent of the other party, such consent not to be unreasonably withheld or delayed; PROVIDED, HOWEVER, that such consent shall not be required if D2SC assigns this Agreement (i) to a wholly owned subsidiary or (ii) in connection with a merger or sale of a controlling interest in its assets or equity. This Agreement will be binding upon and inure to the benefit of the parties, their legal representatives, successors and assigns.
- 8.2 GOVERNING LAW. This Agreement shall be governed by and construed in accordance with the laws of the State of Texas, without regard to conflicts of law. The parties to this Agreement consent to the exclusive jurisdiction and venue of the state and federal courts sitting in or for Dallas County, Texas.
- 8.3 DISPUTE RESOLUTION. In the event that any dispute or disagreement between the parties with respect to the interpretation of any provision of this Agreement, the performance of either party under this Agreement, or any other matter that is in dispute between the parties related to this Agreement, upon the written request of either party, the parties will meet for the purpose of resolving such dispute. The parties agree to discuss the problem and negotiate in good faith without the necessity of any formal proceedings related thereto. No formal proceedings for the resolution of such dispute may be commenced until either party concludes in good faith that the applicable resolution through continued negotiation of the matter in issue does not appear likely. At such time, the parties agree to attend non-binding mediation with costs split evenly among the parties and with each party bearing their own attorney's fees.
- 8.4 NO WAIVER. The failure of either party to enforce any rights granted hereunder or to take action against the other party in the event of any breach hereunder shall not be deemed a waiver by that party as to subsequent enforcement of rights or subsequent actions in the event of future breaches.
- 8.5 SEVERABILITY. In the event that any term or provision of this Agreement conflicts with the law under which this Agreement is to be construed, or if any such provision is held invalid by a court with jurisdiction over the parties to this Agreement, such provision shall be restated to reflect, as nearly as possible, the original intentions of the parties in accordance with applicable law, and the remainder of this Agreement shall remain in full force and effect.
- 8.6 RELATIONSHIP BETWEEN PARTIES. Except for the provisions in Section 4 of this Agreement, the relationship between D2SC and District is that of independent contractor, and nothing contained in this Agreement shall be construed (a) to give either party the power to direct or control the day-to-day activities of the other or (b) to constitute the parties as partners, franchisee-franchiser, joint ventures, co-owners or otherwise as participants in a joint or common undertaking, or otherwise give rise to fiduciary obligations, other than those contained herein, between the parties. This Agreement is not exclusive and D2SC is free to enter into similar agreements with any Third Party.
- 8.7 FORCE MAJEURE. Neither party shall be liable for any delay or failure in performance due to Force Majeure, which shall mean acts of nature, earthquake, labor disputes, changes in law, regulation or government policy (unless such change in law, regulation or government policy is initiated by District), riots, war, fire, epidemics, acts or omissions of vendors or suppliers, transportation difficulties, disruption of utility services or other occurrences which are beyond either party's reasonable control. In the event that D2SC is prevented or delayed in the delivery or installation of the D2SC Solutions for reasons beyond its control, such delivery or installation shall take place as soon thereafter as is reasonably possible.
- 8.8 NOTICE. Any notice or invoice required or permitted under this Agreement shall be in writing and delivered by hand, mailed by overnight express charges prepaid certified mail with return receipt requested, sent by facsimile with delivery confirmation or sent via electronic mail to the address set forth above. Notices or invoices shall be deemed received when delivered.



- 8.9 SURVIVAL. Sections 1, 3, 4, 5.3.1, 6, 7 and Sections 1 and 4 of the Terms & Conditions shall survive expiration or termination of this Agreement for any reason.
- 8.10 ENTIRE AGREEMENT. This Agreement (including the Terms & Conditions, all Exhibits, Schedules, Addenda, Solution Schedules and Statements of Work, if any) contains the full understanding between the parties and supercedes all prior representations or agreements, whether oral or written, with respect to such matters. This Agreement may only be changed by a written document signed by both parties. To the extent of any inconsistencies between the Agreement and the Solution Schedule, the Solution Schedule shall control, except if this Agreement is modified by Addenda, then the Addenda shall control. Notwithstanding anything in this Section 8.10, this Agreement is subject to and shall be read together with the Terms & Conditions.
- 8.11 AUTHORITY. The individuals executing this Agreement on behalf of D2SC and District have the power and authority to execute, deliver and perform this Agreement and to consummate the transactions contemplated hereby. The execution, delivery and performance by District of this Agreement and the consummation by District of the transactions contemplated hereby have been duly authorized by all necessary action on the part of District. This Agreement has been duly and validly executed and delivered by District and constitutes the valid and binding obligation of District, enforceable against District in accordance with its terms. The execution, delivery and performance by District of this Agreement and the consummation by District of the transactions contemplated hereby will not, with or without the giving of notice or the lapse of time, or both (a) require the consent of any Third Party, conflict with or cause breach or default under any agreement, (b) violate any provision of any law, rule or regulation to which District is subject, or (c) violate any order, judgment or decree applicable to District; except, in each case, for violations which in the aggregate would not materially hinder or impair the consummation of the transactions contemplated hereby.
- 8.12 SUBCONTRACT. D2SC will have the ability to utilize client facing subcontractors for this project and will notify the district when subcontractors will be used. The client will have the ability to request a substitute subcontractor.

*REMAINDER OF PAGE INTENTIONALLY LEFT BLANK*

## Term & Conditions

These Term & Conditions shall apply to the Master Subscription Agreement entered into between D2SC Software Corporation and the MSD Washington Township. This document should be read with and is incorporated by reference for all purposes into the Master Subscription Agreement (including all Exhibits, Schedules, Addenda, Solution Schedules and Statements of Work, if any).

### 1. DEFINITIONS

- (a) "ACCEPTABLE USE POLICY" shall mean District's policy on the use of the Applications.
- (b) "AGREEMENT" shall mean this Subscription Agreement, any and all Exhibits, Addenda, Schedules or Statements of Work attached hereto, hereby incorporated by reference, as may be amended from time to time or agreed upon and executed subsequent hereto.
- (c) "APPLICATIONS" shall mean any combination of D2SC Software Corporation's integrated education software tools (modules), including but not limited to those modules currently known as administration system, curriculum system, teacher system, student system, parent system and reporting system.
- (d) "APPLICATION DATA" shall mean the data developed and collected in conjunction with the operation of the Applications and D2SC Solutions and maintained by D2SC.
- (e) "CONFIDENTIAL INFORMATION" as used in this Agreement includes but is not limited to any and all technical and non-technical information including patent, copyright, trade secret, and proprietary information, techniques, sketches, drawings, models, inventions, reports, processes, apparatus, equipment, algorithms, marketing programs, marketing concepts, marketing and business plans, marketing procedures, software programs, software source documents, and formulae related to the current, future and proposed products and services of D2SC. Confidential Information includes, without limitation, D2SC's information conveyed orally or in writing or in some other form during the Discussions, and all other Confidential Information provided to District at any time, whether furnished by D2SC or another person to whom D2SC has furnished Confidential Information. Confidential Information shall also include any observations by District while reviewing or working with any Confidential Information.
- (f) "CONSULTING AND IMPLEMENTATION SERVICES" shall mean the services provided by D2SC employees or contractors as part of D2SC and may be set forth in a Solution Schedule or separate agreement as applicable.
- (g) "CONTENT" means any and all text, multimedia or images (graphics, audio and video), data and the like provided by D2SC or District, which shall be subject to the terms and conditions set forth in the Solution Schedule and Acceptable Use Policy.
- (h) "CUSTOMIZATION(S)" shall mean modifications, enhancements or other changes made by D2SC other than to the District Interface that are developed specifically for District under the terms of this Agreement and other features and components added to the District Interface or any Statement of Work agreed to by D2SC and District.
- (i) "DISTRICT INTERFACE" shall mean a customized and configured user interface and interaction model for the hosted Application simulating the look and feel of the D2SC Web Site(s) and related branding. This term as used herein shall include customized user interface and interaction model specific to a campus or individual school within a District.
- (j) "END USERS" shall mean all students, teachers, parents or guardians, administrators and other individuals identified by District utilizing the Applications, D2SC Software or Third Party Applications pursuant to an D2SC Solution as defined in each Solution Schedule.
- (k) "FEES" shall mean the Service Fees, Setup Fees and Customization Fees payable by District to D2SC under this Agreement.
- (l) "D2SC SOLUTION" shall mean the collective bundling of any and all Applications, Consulting and Implementation Services, Customization, access to the Global Network, hardware and Third Party Application(s) selected and implemented by D2SC, as outlined in each executed Solution Schedule.
- (m) "LICENSE or SUBSCRIPTION FEES" shall mean fees charged by D2SC for access to its Solution or Applications.

- (n) "SOLUTION SCHEDULE" shall mean a written order for any D2SC Solution accepted by D2SC and executed by both parties, which shall be subject to the terms and conditions of this Agreement and which, at a minimum, shall contain a description of the work to be undertaken and the obligations and responsibilities of each party related to that Solution Schedule.
- (o) "THIRD PARTY APPLICATION(S)" shall mean any Third Party-owned computer software D2SC provides under license to District for its use as part of the Applications or D2SC Solution.
- (p) "THIRD PARTY" shall mean any natural person or legal entity other than D2SC and District.
- (q) "SERVICE FEES" shall mean the fee(s) paid by District to D2SC, as set forth in Schedule 1, in consideration for D2SC's hosting, operation and maintenance and technical support of the Application.
- (r) "SETUP FEES" shall mean the fee(s) paid by District to D2SC, as set forth in Schedule 1, in consideration for D2SC's implementation, consultative advice on the development and management of the Applications.
- (s) "STATEMENT OF WORK" shall mean a written order for any supplemental, complementary or additional functionality from D2SC. Unless otherwise specified in writing, such Statement of Work shall be subject to the terms and conditions of this Master Agreement and shall conform with the format set forth in Schedule E, attached hereto.
- (t) "SOFTWARE" means computer programs together with input and output for formats, program listings, narrative description, operating instructions, and supporting documentation and shall include the tangible media upon which such programs and documentation are recorded. Except as otherwise provided in this Agreement, Software includes any enhancements, translations, modifications, updates, new releases, and other changes to Software.

## **2. SERVICE & MAINTENANCE**

- 2.1 SERVICE LEVEL AGREEMENTS. Each Solution Schedule will provide a Service Level Agreement. Specific remedies for D2SC's failure to meet the applicable Service Level Agreement will be stated in each executed Solution Schedule.
- 2.2 SCHEDULED MAINTENANCE WINDOW. D2SC has established set maintenance windows on Saturday and Sunday mornings between the hours of 8:00 a.m. and 11:00 a.m. (CST). During this time, D2SC reserves the right to take down District's or D2SC's server(s) in order to conduct routine maintenance checks to both software and hardware. If a District's server(s) will be down for more than sixty (60) minutes within this pre-established window, D2SC will advise District of such prior to any scheduled maintenance downtime. D2SC will not be responsible for any damages or costs incurred by District, if any, for scheduled down time. D2SC reserves the right to change its maintenance window upon 15 days prior notice to District.
- 2.3 UNSCHEDULED MAINTENANCE. From time to time it may be necessary for D2SC to perform maintenance on the Applications or the servers that falls outside the scheduled maintenance windows. Upon providing District 48 hours notice, D2SC may take down District's or D2SC's server for up to 2 hours.

## **3. WARRANTIES**

- 3.1 LIMITED WARRANTY. D2SC warrants solely for District's benefit that the Applications shall operate substantially in accordance with the documentation for the Applications. If during the Term, a defect in the Application appears causing the Application to not operate substantially in accordance with the documentation for the Application, D2SC shall use all commercially reasonable efforts to repair the Application, subject to the Agreement, upon written notice of the defect from District. D2SC does not warrant that the Applications will be free from errors or susceptibility to viruses. D2SC specifically disclaims any guarantee, warranty or other obligation regarding the actual provision of agreements, transactions or otherwise with, among or between End Users.
- 3.2 AUTHORITY WARRANTY. D2SC warrants that it has the authority to license the Third Party Application(s) for the purposes set forth in the Agreement and the Solutions Schedule(s). District acknowledges and agrees that its sole and exclusive remedies for breach of this warranty are set forth in Sections 3 and 4 of the Terms & Conditions to this Agreement.

**3.3 EXCEPT FOR THE WARRANTIES SET FORTH ABOVE, THE APPLICATION IS PROVIDED "AS IS," AND D2SC DISCLAIMS ANY AND ALL OTHER WARRANTIES OF MERCHANTABILITY, FITNESS FOR A PARTICULAR PURPOSE, NONINFRINGEMENT, SATISFACTORY QUALITY, OR ARISING FROM A COURSE OF DEALING, TITLE, NONINFRINGEMENT, USAGE OR TRADE PRACTICE.**

**3.4 WARRANTY LIMITATION. UNLESS OTHERWISE EXPRESSLY PROVIDED HEREIN OR IN A SOLUTION SCHEDULE, NEITHER D2SC NOR ANY OF ITS SERVICE PROVIDERS, LICENSORS, EMPLOYEES OR AGENTS WARRANT:**

- (a) D2SC will not be liable for unauthorized access to or alteration, theft or destruction of District's or END User's data, DATA files, programs, procedures or information through accident, fraudulent means or devices, DISTRICT OR END USERS' NEGLIGENCE , or any other method, unless such access, alteration, theft or destruction is caused as a result of D2SC's gross negligence or intentional misconduct.
- (b) D2SC WILL NOT BE LIABLE FOR ANY DAMAGES RESULTING FROM INACCURATE OR INCORRECT INFORMATION PROVIDED TO END USERS BY DISTRICT OR OTHER END USERS, OR FOR ANY DAMAGES RESULTING FROM THE FAILURE OF END USERS OR DISTRICT TO SATISFACTORILY COMPLY WITH ANY AGREEMENTS REACHED VIA THE APPLICATIONS.

#### **4.0 INDEMNITY OBLIGATIONS**

4.1 D2SC INDEMNITY OBLIGATIONS. D2SC will:

- (a) defend District against any claim that the products or services delivered by D2SC infringe a patent, copyright, trade secret, or other proprietary right in the United States; and
- (b) pay costs, damages and attorney's fees finally awarded against District as a result of such claims.
- (c) Infringement Remedies. In addition to defending District as stated above, if a claim occurs, or in D2SC's opinion, is likely to occur, D2SC will, at its sole option and expense, (subject to its agreement with Third Party Application vendors) either:
  - (i) procure District the right to continue using the D2SC Solution in question, or
  - (ii) replace or modify the infringing aspect of the D2SC Solutions so that it becomes non-infringing; provided that functionality is not materially and adversely affected by such replacement or modification. If neither of these alternatives is reasonably available, District shall cease using and return the aspect of the D2SC Solutions at issue and D2SC will refund the amount paid by District to D2SC for that part as depreciated. The depreciation shall be an equal amount per year over a three (3) year life commencing with the date of installation.
- (d) Exclusions. D2SC shall not be liable for infringement claims based on:
  - (i) the combination, operation or use of the Application, D2SC Solutions or Third Party Application with hardware, data or software not supplied by D2SC if the claim would have been avoided by use of other hardware, data or software; or
  - (ii) modifications to the D2SC Solutions if the modifications were not made by D2SC.

4.2 CONDITIONS. The indemnification obligations set forth above in Section 4.1 are contingent upon compliance with the following conditions by District:

- (a) Providing prompt written notice of a claim within twenty (20) days of its service upon District;
- (b) Providing all information and evidence within its control which is necessary for D2SC to conduct a defense; and

(c) Providing D2SC with sole control of the defense and all related settlement negotiations. However, District may participate in the defense or settlement of the claim at its own expense.

4.3 LIMITATIONS OF REMEDY. This Section 4 states the entire obligations of the parties with respect to indemnity or infringement of copyrights, patents, trade secrets or other intellectual property or proprietary rights.

5.0 WEB HOSTING. D2SC, subject to Section 2.3, will provide hosting services for the Applications. D2SC shall not be responsible under any existing or future criminal law, or under existing or future civil law, for any content provided or otherwise controlled by District in violation of any laws or regulations. D2SC's outsourced hosting standards will, subject to Section 2.3 and any and all provisions as outlined in each Solution's applicable Service Level Agreement (SLA), make all commercially reasonable efforts to ensure that the Application is available at all times without undue downtime. Whenever reasonable, downtime will be planned and scheduled to minimize any potential impact on District or End Users, and D2SC will notify District in advance of any downtime if possible. The Applications will perform at a response rate consistent with the then-current generally acceptable standards for Web sites.

**D2SC Software Corporation**

**MSD Washington Township**

By: \_\_\_\_\_

By: \_\_\_\_\_

Name: \_\_\_\_\_

Name: \_\_\_\_\_

Title: \_\_\_\_\_

Title: \_\_\_\_\_

Date: \_\_\_\_\_

Date: \_\_\_\_\_