



## SAN DIEGO COMMUNITY COLLEGE DISTRICT SOFTWARE LICENSE AND SUPPORT AGREEMENT

This Software License and Support Agreement ("**Agreement**") is entered into effective as of \_\_\_\_\_ ("Effective Date") by and between \_\_\_\_\_ a California corporation ("Software Provider"), and the San Diego Community College District ("College").

### **RECITALS**

WHEREAS, College desires to implement a web-based software system \_\_\_\_\_ (Describe the type of software being purchased/used.)

WHEREAS, Software Provider has developed and owns such a system \_\_\_\_\_

WHEREAS, College desires to license the Software and obtain the services as provided herein.

NOW, THEREFORE, in consideration of the mutual representations, warranties and agreements contained herein, the parties hereto agree as follows:

### **AGREEMENT**

1. Term of Agreement. Unless earlier terminated as provided herein, the initial term of this Agreement shall be from \_\_\_\_\_ through \_\_\_\_\_ ("Term").

2. License of Software to College; Third Party Services.

(a) License. Subject to the terms of this Agreement, Software Provider hereby grants to College a limited, non-exclusive, non-sublicensable and non-transferrable license for College employees and students (collectively, "**College Users**") to use the Software during the Term. The College Users may not use the Software for other than College operations. College is responsible for the actions of all College Users, for ensuring that only authorized College Users are provided access to the Software, and that access of College Users authorized by the College is limited to that portion of the Software and College Data (as defined below) as is reasonably necessary in order to fulfill the purposes of this Agreement.

3. Annual Software License Fee. College agrees to pay to Software Provider an annual license fee (the "**Annual License Fee**") for use of the Software as set forth below.

(a) Annual License Fee. The Annual License Fee shall be \$\_\_\_\_\_, which is based on a fee of \$\_\_\_\_\_ per license for \_\_\_\_\_ licenses.

(b) Payment. The Annual License Fee for each school year shall be paid by College within 30 days of receipt of an invoice from Software Provider.

(c) Failure to Make Payment. In the event College fails to pay the Annual License Fee or other fees due hereunder when due it will constitute a material breach of this Agreement and, upon notice from Software Provider, College agrees to immediately cease, and to cause College Users to cease, using the Software and Software Provider will have no further obligation to provide any maintenance or support to College or College Users.

(d) Taxes. The fees in this Section 3 and in Section 5 below do not include sales, use or similar taxes which may be applicable. College is solely responsible and liable for payment of all sales, use, excise, value added or similar taxes, duties or charges imposed by any federal, state or local government or jurisdiction with respect to any fees or other payments to be made by College to Software Provider under this Agreement, excluding taxes based on Software Provider's overall net income.

4. Ownership of Software; Third Party Materials. Software Provider and its licensors are and will remain the exclusive owners of all right, title and interest in and to the Software and all derivative works, and in the materials licensed by Software Provider from third parties ("**Third Party Materials**"), including but not limited to copyrights, patent rights, and trade secrets and all other intellectual property rights as may exist now and/or hereafter come into existence, subject only to the rights of third parties in open source components and the limited license granted under this Agreement. In addition, Software Provider shall own any and all other ideas, concepts, themes, technology, algorithms, programming codes, documentation or other intellectual property or copyrightable material conceived, developed, created, written or contributed by Software Provider pursuant to this Agreement ("**Specific Developments**"). College will have no rights in the Software, any derivative works, the Specific Developments or Third Party Materials, except the license and related rights expressly set forth in this Agreement. College agrees not to (i) alter, merge, modify, adapt or translate the Software or Third Party Materials, or decompile, reverse-engineer, disassemble, or otherwise reduce the Software or Third Party Materials to a human-perceivable form, (ii) sell, rent, lease or sublicense the Software or Third Party Materials or (iii) create derivative works based upon the Software or Third Party Materials.

5. Software Implementation, Data Conversion, Hosting and Training Services. Software Provider agrees to provide the services associated with the implementation of the Software, data conversion, hosting and training of College employees on the use of the Software as follows:

(a) Hosting. The Software and College's data will be hosted on Software Provider's servers (included in the Annual License Fee).

(b) Importing of Data. \_\_\_\_\_(Term and timeline to be discussed with provider and details included here.)

(c) Training. Software Provider will provide training to College employees and students on implementation and use of the Software in an amount agreed upon by the parties.

6. Ownership and Control of College Data. College will retain ownership of, and the ability to control, all College data imported into the Software ("**College Data**"). College Data

includes pupil records, as defined in California Education Code §49073.1(d)(5) (“**Pupil Records**”). Pupils may retain possession and control of their own pupil-generated content, as defined in California Education Code section 49073.1(d)(5), including transfer of pupil-generated content to a personal account, by contacting the College. Software Provider may, however, use and disclose to third parties College Data that has been anonymized or de-identified, but only to improve its educational products, to demonstrate the effectiveness of its products and in the development and improvement of educational sites, services and applications. Upon the termination of this Agreement, to the extent College Data resides on Software Provider servers, Software Provider agrees to assist in the transfer all College Data back to College in an industry standard open format such as SQL at no charge.

7. Responsibilities of College. College agrees to prepare and furnish to Software Provider upon request such information as is reasonably requested by Software Provider in order for Software Provider to perform its obligations under this Agreement.

8. Software Provider Software Maintenance and Support. Software Provider agrees to provide maintenance and support of the Software to the College. Such maintenance and support will include coverage in the form of bug fixes and other corrections to the Software; telephone and email support for questions regarding operations of the Software; change the Software as necessary to incorporate upgrades and new features; support to College in resolving problems/errors resulting from misuse or hardware/software failure; telephone or web conferences with College to address future growth or modifications to the Software. Maintenance and support of the Software is provided at no additional cost to College. Software Provider is not responsible for, nor will it have any liability resulting from, (a) modifications to or alterations of the Software or databases by College or College Users, unless such modification or alteration is approved in writing by Software Provider, or (b) any failure of College or College Users equipment or software.

9. Confidentiality.

(a) Confidential Information Defined. Each party (the “**Disclosing Party**”) may from time to time during the Term disclose to the other party (the “**Receiving Party**”) certain information regarding the Disclosing Party’s business, including technical, marketing, financial, employee, planning, and other confidential or proprietary information (“**Confidential Information**”). The Software, Third Party Materials and related know-how, technology, system designs, layouts, software, concepts, techniques, data and files will be considered Confidential Information of Software Provider. College Data will be considered Confidential Information of College.

(b) Protection of Confidential Information. The Receiving Party will protect the Disclosing Party’s Confidential Information from unauthorized use, access, or disclosure in the same manner as the Receiving Party protects its own confidential or proprietary information of a similar nature and with no less than reasonable care. College acknowledges that the Software is maintained as a trade secret by Software Provider, and agrees to use reasonable care in preserving such secrecy, including making such information available only to those College Users required to have access in order to fulfill the purposes of this Agreement.

(c) Exceptions. The Receiving Party’s obligations under this section with respect to any Confidential Information of the Disclosing Party will terminate if the Receiving Party can demonstrate that such information: (i) was already known to the Receiving Party at the time of disclosure by the Disclosing Party; (ii) is disclosed to the Receiving Party by a third party who

had the right to make such disclosure without any confidentiality restrictions; (iii) is, or through no fault of the Receiving Party has become, generally available to the public; or (iv) is independently developed by the Receiving Party without access to, or use of, the Disclosing Party's Confidential Information. In addition, the Receiving Party will be allowed to disclose Confidential Information of the Disclosing Party to the extent that such disclosure is (i) approved in writing by the Disclosing Party, (ii) necessary for the Receiving Party to enforce its rights under this Agreement in connection with a legal proceeding; or (iii) required by law or by the order of a court or similar judicial or administrative body, provided that the Receiving Party notifies the Disclosing Party of such required disclosure promptly and in writing and cooperates with the Disclosing Party, at the Disclosing Party's reasonable request and expense, in any lawful action to contest or limit the scope of such required disclosure.

(d) Return of Confidential Information. In addition to Software Provider's obligations under Section 6, promptly upon the written request of the Disclosing Party following termination of this Agreement, the Receiving Party will either, at Disclosing Party's option, return to the Disclosing Party or destroy all Confidential Information of the Disclosing Party in the Receiving Party's possession or control and certify in writing that it has fully complied with its obligations under this Section.

(e) Use of Confidential Information. The Receiving Party will not use Confidential Information of the Disclosing Party for any purpose prohibited by law or other than as required, including as reasonably contemplated, or specifically permitted by this Agreement. Software Provider further agrees it will not use any personally identifiable information in College Data to engage in or facilitate targeted advertising.

(e) Injunctive Relief. Because monetary damages may not be sufficient to remedy a violation of the provisions of this section, a Disclosing Party shall be entitled, upon becoming aware of any such violation and without waiving any other rights or remedies it may have, to seek whatever injunctive or other equitable relief it may deem appropriate.

(f) Non-Retention Certification. Software Provider certifies that, in accordance with this Agreement, Pupil Records shall not be retained or available to Software Provider or its employees or agents upon completion of the terms of this Agreement. This certification may be enforced by any lawful means, including, without limitation, through civil action.

## 10. Privacy and Collection of College Data.

(a) Compliance with Law. Each of Software Provider and College represents and warrants that it, and its officials, agents, employees and subcontractors have and will continue to receive training so as to be familiar with the provisions of the Family Educational Rights and Privacy Act ("FERPA") and equivalent state provisions, and each party agrees that it will comply with such provisions and take all reasonable measures necessary to protect student education records from unauthorized acquisition or release. In the event that any unauthorized acquisition or release of student education records occurs, each party agrees to advise the other promptly upon discovery of such unauthorized acquisition or release and, if required by law, College will notify the affected parent, legal guardian or student (if at least 18 years of age), as applicable, in writing of such unauthorized acquisition or unauthorized release. Software Provider acknowledges that Pupil Records must be protected and will take all legally required actions, including the designation and training of responsible individuals, to ensure the security and confidentiality of Pupil Records. Software Provider will identify those employees and subcontractors who will have access to Pupil Records and ensure such individuals receive appropriate instructions as to how to comply with the

security and confidentiality requirements of this Agreement with respect to Pupil Records. Software Provider warrants that all Pupil Records will be encrypted in transmission using a minimum of 256 bit AES encryption. In addition, Software Provider 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. This Agreement is intended to comply with California Education Code Section 49073.1.

(b) Sharing of College Data. Software Provider will not share College Data with or disclose it to any third party, except (i) as directed by College or College Users, (ii) to College Users as contemplated by this Agreement, (iii) to Software Provider's subcontractors who need access to fulfill Software Provider's obligations under this Agreement and who have agreed to maintain the confidentiality of such information or (iv) as required by applicable law. When Software Provider believes that any disclosure is required by applicable law, it shall promptly notify the College prior to the disclosure and give the College a reasonable opportunity to object to the disclosure.

(c) Storage and Process. Software Provider will store and process College Data in accordance with commercially reasonable practices, including appropriate administrative, physical, and technical safeguards, to secure such data from unauthorized access, disclosure, alteration, and use.

(d) Right to Correct. A parent, legal guardian, or student who has reached 18 years of age may review personally identifiable information in the student's education records and correct erroneous information by serving a written request for access or description of the erroneous information and written request for correction upon College and furnishing College, upon request, such information as is reasonably requested to respond to the request. College is responsible for correcting all such erroneous information and Software Provider agrees to fully cooperate with College to make such corrections.

(e) Social Security Numbers. College agrees that it will not collect or store as part of the College Data or otherwise any social security numbers.

(f) Data Breach Notification. Software Provider agrees that upon becoming aware of any unauthorized disclosure of Pupil Records stored on equipment used by Software Provider or any subcontractor or in facilities used by Software Provider or any subcontractor, Software Provider will take the following measures:

- i. promptly notify the College of the suspected or actual incident;
- ii. promptly investigate the incident and provide College with detailed information regarding the incident, including the identity of affected users; and
- iii. assist the College in notifying affected users, affected parents, legal guardians of commercially reasonable steps to mitigate the effects and to minimize any damage resulting from the incident.

11. Software Provider Warranty.

(a) Software Warranty. Software Provider warrants to College that the Software as delivered, will materially comply with the published specifications of Software Provider for such Software. Software Provider's obligations under this warranty are limited to providing College with a copy of corrected Software. Software Provider does not warrant that the operation of the Software will be uninterrupted or error-free. IN PARTICULAR, FOR PURPOSES OF THE FOREGOING WARRANTY, SOFTWARE PROVIDER AND COLLEGE ACKNOWLEDGE THAT THE SOFTWARE IS NOT AND CANNOT BE MADE TO BE 100% ACCURATE, AND THAT ANY ERRORS OR FAILURE TO PERFORM SHALL NOT BE DEEMED A BREACH OF SUCH WARRANTY UNLESS THEY ARE SIGNIFICANT AND NOT TO BE EXPECTED IN LIGHT OF THE LIMITATIONS OF SOFTWARE OF THIS TYPE.

(b) No Other Warranty. EXCEPT AS EXPRESSLY SET FORTH ABOVE, SOFTWARE PROVIDER DISCLAIMS ALL WARRANTIES, EXPRESS OR IMPLIED, WITH REGARD TO ALL TECHNOLOGY, THIRD PARTY MATERIALS, SOFTWARE OR DERIVATIVE WORKS PROVIDED OR OTHERWISE LICENSED TO COLLEGE IN CONNECTION WITH THIS AGREEMENT, INCLUDING BUT NOT LIMITED TO, THE IMPLIED WARRANTIES OF MERCHANTABILITY, FITNESS FOR A PARTICULAR USE AND NON-INFRINGEMENT.

12. Indemnification.

(a) By Software Provider. Software Provider agrees to defend, indemnify and hold harmless College and its directors, officers, employees, and agents from and against all damages, costs (including reasonable attorneys' fees), judgments and other expenses arising out of or on account of any third party claim: (i) alleging that the Software infringes or misappropriates the proprietary or intellectual property rights of any third party, except to the extent that such infringement results from College's misuse of or modifications to the Software; (ii) that results from the negligence or intentional misconduct of Software Provider or its employees or agents; or (iii) that results from any breach of any of the representations, warranties or covenants contained herein by Software Provider.

(b) By College. To the extent permitted under applicable law, College agrees to defend, indemnify and hold harmless Software Provider and its directors, officers, employees, and agents from and against all damages, costs (including reasonable attorneys' fees), judgments and other expenses arising out of or on account of any third party claim that results from (i) the negligence or intentional misconduct of College or its employees or agents or (ii) any breach of any of the representations, warranties or covenants contained herein by College.

(c) Indemnification Procedure. The parties' obligation to indemnify is subject to the conditions that the party with the obligation to indemnify ("**Indemnifying Party**") is given prompt notice of any such claims and is given primary control of and all reasonably requested assistance (at the other party's cost) for the defense of such claims (with counsel reasonably satisfactory to the party being indemnified ("**Indemnified Party**")), provided that the Indemnified Party shall under no circumstances be required to admit liability, and provided further that any delay in notification shall not relieve the Indemnifying Party of its obligations hereunder except to the extent that the delay materially impairs its ability to indemnify. Without limiting the foregoing, the Indemnified Party may participate in the defense at its own expense and with its own counsel; provided that if the Indemnified Party reasonably concludes that the Indemnifying Party has conflicting interests or different defenses available with respect to such claim, the reasonable fees and expenses of one counsel to the Indemnified Party shall be borne by the Indemnifying Party. The Indemnifying Party shall not enter into or acquiesce to any settlement containing any admission of or stipulation to any guilt, fault, liability or wrongdoing on the part of the Indemnified Party or which would otherwise

adversely affect the Indemnified Party without the Indemnified Party's prior written consent (which shall not be unreasonably withheld). The Indemnifying Party shall keep the Indemnified Party advised of the status of the claims and the defense thereof and shall consider in good faith the recommendations made by the Indemnified Party with respect thereto.

13. Insurance. Software Provider agrees to carry a comprehensive general and automobile liability insurance with limits of Two Million Dollars (\$2,000,000.00) per occurrence combined single limit for bodily injury and property damage in a form mutually acceptable to both parties to protect Software Provider and College against liability or claims of liability which may arise out of this Agreement. Software Provider agrees to maintain workers' compensation insurance as required under applicable law.

14. Termination.

(a) Termination by College. College may terminate this Agreement without cause prior to the expiration of the Term, effective upon the end of a College fiscal year, by giving Software Provider written notice of its intent to so terminate at least sixty (60) days prior to the end of such College fiscal year.

(b) Termination for Cause. Either party may terminate this Agreement prior to the expiration of the Term, effective immediately upon written notice to the other party, in the event of a material breach of this Agreement by the other party hereto, which breach remains uncured for more than thirty (30) days after written notice thereof. In addition, either party may terminate this Agreement upon ten (10) days written notice to the other party upon the occurrence of any one or more of the following: (i) the institution by or against the other party of insolvency, receivership, or bankruptcy proceedings or any other proceedings for the settlement of the other party's debts; (ii) the other party making an assignment for the benefit of creditors; or (iii) the other party's dissolution.

(c) Rights in Law and Equity Remain. The foregoing rights to terminate are in addition to, not in lieu of, all other rights and remedies which may be available to either party under this Agreement, at law and/or in equity.

(d) Survival. The obligations in the following Sections will survive any expiration or termination of this Agreement: Sections 2(b), 4, 6, 9, 10, 11, 12, 14 and 15 and any obligations to pay for license fees, services, training or taxes pursuant to Sections 3 or 5 that were earned or payable relating to the period prior to termination.

15. Miscellaneous.

(a) Entire Agreement; Counterparts. This Agreement and any Exhibits hereto contain the entire agreement between the parties with respect to the transactions contemplated hereby and supersedes all prior negotiations, commitments, agreements and understandings between them with respect thereto. This Agreement may be executed in two or more counterparts, all of which when taken together shall be considered one and the same agreement and will become effective when counterparts have been signed by each party and delivered to the other party, it being understood that both parties need not sign the same counterpart. In the event that any signature is delivered by facsimile transmission, or by e-mail delivery of a ".pdf" data file, such signature will create a valid and binding obligation of the party executing (or on whose behalf such

signature is executed) with the same force and effect as if such facsimile signature page were an original thereof.

(b) Notices. All notices, requests, demands and consents to be made hereunder to the parties hereto pursuant to this Agreement will be in writing and will be sufficiently given if personally delivered, sent by other means of electronic transmission (including electronic mail) or sent by mail, postage prepaid to the party at the following addresses or to such other address as either party may hereafter designate to the other in accordance herewith:

If to Software Provider:

Provider Name: \_\_\_\_\_  
Address: \_\_\_\_\_  
Attention: \_\_\_\_\_  
E-mail: \_\_\_\_\_

If to College:

San Diego Community College District  
Attn: Kelly Rosas, Manager, Business Services  
3375 Camino del Rio South, Suite 270  
San Diego, CA 92108  
[krosas@sdccd.edu](mailto:krosas@sdccd.edu)

(c) Assignment; Successors and Assigns. Neither party may assign this Agreement or its obligations hereunder without the prior written consent of the other party hereto, except that either party may assign this Agreement in connection with a sale of all or substantially all its outstanding equity or assets without the consent of the other party hereto. Subject to the foregoing, this Agreement will be binding upon, and inure to the benefit of, each of the parties hereto and, except as otherwise expressly provided herein, their respective legal representatives, successors and assigns.

(d) Amendments, Waivers and Severability. Except as otherwise provided herein, this Agreement may be amended, and compliance with any provision of this Agreement may be omitted or waived, only by written agreement duly signed by Software Provider and College. Any provision of this Agreement that is prohibited or unenforceable in any jurisdiction will not invalidate or render unenforceable the remaining provisions of this Agreement.

(e) Governing Law. This Agreement will be governed by, and construed and enforced in accordance with, the substantive laws of the State of California, without regard to its principles of conflicts of laws.

(f) Relationship of the Parties. Nothing contained in this Agreement will be construed as creating any agency, partnership, or other form of joint enterprise between the parties. The relationship between the parties will at all times be that of independent contractors. Neither party will have authority to contract for or bind the other in any manner whatsoever. This Agreement confers no rights upon either party except those expressly granted herein.

(g) Interpretation. This Agreement will be construed without regard to any presumption or rule requiring construction or interpretation against the party drafting an instrument or causing any instrument to be drafted. The headings in this Agreement are for reference only and will not affect the interpretation of this Agreement.

(h) No Third-Party Beneficiaries. This Agreement is for the sole benefit of the parties hereto and their respective successors and permitted assigns and nothing herein, express or implied, is intended to or will confer upon any other person or entity any legal or equitable right, benefit or remedy of any nature whatsoever under or by reason of this Agreement.

(i) Improper Payments. Software Provider represents and warrants that it has not directly or indirectly offered or given, and will not directly or indirectly offer or give, to any employee, agent or representative of College any cash or noncash gratuity or payment with a view toward securing any business from College or influencing such person with respect to the conditions, or performance of any contracts with or orders from College, including without limitation this Agreement.

(j) Limitation of Liability. Notwithstanding any violation of Civil Code section 1798.25 et seq., in no event will either party be liable to the other party or to any third party for any incidental, special, indirect, exemplary, punitive or consequential damages arising out of or relating to this Agreement, including any damages for business interruption, loss of use, or lost or damaged data, whether arising out of breach of contract, tort (including negligence) or otherwise, even if such party or any of its authorized representatives has been advised of the possibility of such damages. Each party's aggregate liability arising out of or relating to this Agreement for any damages, costs, judgments, expenses or loss resulting from any claims, demands, or actions arising out of or relating to this Agreement (including indemnification) will not exceed the fees paid or due payable by College to Software Provider during the preceding twelve months pursuant to this Agreement.

(k) Force Majeure. Neither party will be liable to the other for any delay or failure to perform due to causes beyond its reasonable control. Performance times will be considered extended for a period of time equivalent to time lost because of any such delay by providing prompt written notice of such expected delay to the other party.

(l) HIPAA and Omnibus Rule Compliance. If this agreement involves services, activities or products subject to the Health Insurance Portability and Accountability Act of 1996 (HIPPA), the Contractor covenants that it will appropriately safeguard Protected Health Information (defined in 45 CFR 160.103), and agrees that it is subject to, and shall comply with, the provisions of 45 CFR 164 Subpart E regarding use and disclosure of Protected Health Information, and other modifications to HIPAA rules under the Omnibus Rule of 2013 under the Health Information Technology for Economic and Clinical Health Act and the Genetic Information Nondiscrimination Act.

(m) PCI Compliance. If, in the course of its engagement by the College, Contractor has access to or will collect, access, use, store, process, dispose of or disclose credit, debit or other payment cardholder information, Contractor shall at all times remain in compliance with the Payment Card Industry Security Standard ("PCI DSS") and if applicable, Payment Application Data Security Standard (PA DSS) requirements, including remaining aware at all times of change to these standards and promptly implementing all procedures and practices as may be necessary to remain in compliance with these standards, including promptly notifying the College of its non-compliance, in each case, at Contractor's sole cost and expense. Both parties are

responsible for the cardholder data that is in such party's control or possession, as mandated by PCI Security Standards Council<sup>4</sup> (PCI SSC) in the performance of their individual and mutual responsibility under this Agreement.

(n) HECVAT. Software Contractor agrees to include a completed Higher Education Community Vendor Assessment Toolkit (HECVAT) with this agreement and update HECVAT annually, if needed.

(o) Due Authority of Signatories. Each individual signing this Agreement on behalf of a party represents and warrants that he or she has been duly authorized by appropriate action of such party to execute, and thereby bind such party to, this Agreement.

IN WITNESS WHEREOF, the parties have entered into this Agreement as of the Effective Date.

**SOFTWARE PROVIDER** \_\_\_\_\_

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

By: \_\_\_\_\_, President

**SAN DIEGO COMMUNITY COLLEGE DISTRICT**

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

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

Print: \_\_\_\_\_

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