



FAYETTE COUNTY PUBLIC SCHOOLS

**Executive Summary
Fayette County Public Schools Board Meeting
Agenda Item**

MEETING: Planning

DATE: 6/13/2016

TOPIC: Northwest Evaluation Association - Contract

PREPARED BY: Shelley Chatfield

Recommended Action on: 6/20/2016

Action Item for Vote (REGULAR MEETING)

Superintendent Prior Approval: No

Recommendation/Motion: A motion is in order to approve the Northwest Evaluation Association Contract

Background/Rationale: Board Policy 01.11 states that contracts with the district with an expenditure amount above \$20,000.00 must be approved by a vote of the Board. This month District staff would like to enter into a contract with Northwest Evaluation Association (NWEA).

Policy: Board Policy 01.11 states that contracts with the district with an expenditure amount above \$20,000.00 must be approved by a vote of the Board.

Fiscal Impact: \$368,137.50

Attachments(s): Click here to enter text.

AN EQUAL OPPORTUNITY SCHOOL DISTRICT

Board of Education: Melissa Bacon, Chair • Amanda Ferguson, Vice Chair • Douglas Barnett • Daryl Love

Superintendent Emmanuel Caulk

701 East Main Street, Lexington, Kentucky 40502 • Phone: 859.381.4100 • www.fcps.net

Mailing Address: 1126 Russell Cave Rd., Lexington, Kentucky 40505

NWEA MAP (Measure of Academic Progress)

MAP creates a personalized assessment for each student at their learning level by measuring student progress and growth.

- Will help establish a student's precise instructional level and identify which areas to focus on for academic growth.
 - It compares a student's academic progress with others in their class, grade, school and district.
 - Helps principals track a student's academic growth over time regardless if they are above, or below grade level.
 - Informs instruction using real-time data that is valid and reliable.
 - MAP provides information on where students are performing on individual state and Common Core standards, so test results can be used to project proficiency on state required assessments.
 - It helps to identify at-risk students and helps to build an RIT plan for those students.
 - Incorporates materials for individual student goal setting.
 - Because MAP enables teachers to see both what students know and what they're ready to learn, teachers can target supplemental instruction accordingly, rather than guessing where the gaps in student understanding may be.
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- Teachers depend on MAP reports to help them streamline teaching strategies and provide differentiated instruction, and to create flexible grouping across the classroom.
 - School and district leaders use MAP reports to evaluate programs and monitor school and student performance relative to growth, proficiency, and norms.
 - District decision makers rely on MAP reports to aid in resource management, help determine performance trends by grade and school, and compare local student achievement to the national scale.

Schedule A

Bill To Partner ID: 2374 Fayette County School District Accounts Payable 701 East Main Street, Room 105 Lexington, KY 40502 USA	Sold To Partner ID: 2374 Fayette County School District Accounts Payable 701 East Main Street, Room 105 Lexington, KY 40502 USA
Quote Number: Q039632 Quote Date: 05/18/2016	Start Date: 07/01/2016 End Date: 06/30/2017

PRODUCT NAME	QUANTITY	LIST PRICE	DISCOUNT %	TOTAL
Skills Navigator (Multi-Subject)	3000	\$4.00	75%	\$3,000.00
Web-Based Measures of Academic Progress (MAP) Math, Reading & Language	28221	\$13.50	22.22%	\$296,320.50
Web-Based MAP for Primary Grades	6554	\$13.50	22.22%	\$68,817.00
MFS On-Site Applying Reports Workshop	5	\$3,500.00	100%	\$0.00
On-Site NWEA Professional Development Data Coaching Services	2	\$4,000.00	100%	\$0.00
			GRAND TOTAL	\$368,137.50

Notes:

This Schedule A is subject to NWEA's terms and conditions located at: <https://legal.nwea.org/>. By signing this Schedule A you agree you have read and understood the terms and agree to them.



NWEA's Privacy and Security Policy for Student Information can be found at:

<https://legal.nwea.org/NWEA%20Privacy%20and%20Security%20for%20PII%20Sept%2024%202014.pdf>

NWEA's W9 can be found at: <https://legal.nwea.org/NWEA%20W-9.pdf>

Until this Schedule A is signed, the terms identified here are valid for 90 days from the date above.

Please confirm the billing address listed above on the left, or specify changes to your account manager.

Signature: 	Printed Name: 
Date:	Title:

MASTER SUBSCRIPTION AGREEMENT

THIS MASTER SUBSCRIPTION AGREEMENT (this "Subscription") is entered into effective as of the last date set forth on the signature page (the "Effective Date") by and between NORTHWEST EVALUATION ASSOCIATION, an Oregon nonprofit corporation ("NWEA"), and the school or school district or other subscribing entity on the signature page ("Subscriber"). The term "Subscriber" shall also refer to a school or group of schools forming an educational entity or any individual persons using or accessing the Services (as defined in Section 1 below) on behalf of the school or school district.

NWEA provides certain assessments, reporting, scoring, Software, professional development, and other services, (collectively, the "Services"). Specific Services agreed to by Subscriber will be set forth in one or more applicable order schedules or other order documents (collectively referred to herein as the ("Schedule(s)"). The parties further agree as follows:

1. **Subscription.** Subscriber affirms its subscription to the Services for the term specified in the Schedule(s) (the "Term"). Schedule(s) may be provided as a separate attachment to the same email that this Subscription is sent from¹. In connection with this Subscription, NWEA will grant to Subscriber a limited license to use certain software ("Software") that implement the delivery of the Services.

2. **Definition.** The Services include during the Term: (a) access to certain assessments set forth in the Schedule(s); (b) test items including, images, text, graphs, charts, pictures ("Content"); (c) professional development offerings set forth in the Schedules(s) (d) reports, Learning Continuum, and scoring ("Reporting"). Documentation is made available to Subscribers by NWEA ("Documentation"). The Software consists of (i) a lockdown browser sublicensed through NWEA from a third party that facilitates access to the Services; (ii) NWEA software that supports client server assessments and (iii) any other software set forth in the supplemental terms as applicable. Supplemental terms for these products and services may be found here <http://info.nwea.org/supplementalterms.html>.

3. **Grant of License.** 3. Grant of License. NWEA hereby grants to Subscriber a nonexclusive, nontransferable license to access, use, display, and install or download a copy, as needed, of the Software for Subscriber's internal use only to gain access to the Services during the Term. This Subscription extends only to the quantity of students indicated on Schedule(s). For MAP® assessments, this Subscription

is limited to a maximum of three test events and one summer test administration for each student per academic year, except for MAP for Primary Grades Skills Checklist which can be administered without such calendar year limitation. In addition, there is no limitation on the number of administrations of Skills Navigator® and/or Children's Progress Academic Assessment per calendar year.

4. **Protection from Unauthorized Use or Access.** Subscriber shall not: (a) copy, distribute, reproduce, resell, publish, license, create derivative works, transfer, rent, lease, or sublicense any or all of the Services and Software; (b) exploit for any commercial purposes any portion of the Services and Software, in particular the Content and Reporting or permit use of the Services and Software by anyone not employed or in contract with Subscriber; (c) remove any proprietary notices or labels on the Services and Software; (d) use the Services and Software in an attempt to, or in conjunction with, any device, program, or service designed to circumvent technological measures employed to control access to, distribution of, or rights in, the Content or other work protected by the copyright laws of any jurisdiction. Subscriber shall use secure measures to prevent unauthorized use (e.g., copying test items) by their end users. Further, Subscriber shall reproduce all copyright, trademark, and other proprietary notices and legends on each copy, or partial copy, of the Services and Software. Subscriber will deactivate and remove from any equipment under its control any prior versions of Services.

5. **Ownership.** The Services and Software are owned by NWEA and are copyrighted and offered through this Subscription to Subscriber, except certain Software is sublicensed from a NWEA supplier. All right, title, and interest in the Services and Documentation and all copies, and all updates, enhancements, modifications, and improvements, along with all associated intellectual property rights, remain with NWEA, regardless of the source giving rise to the intellectual property and despite any modifications or adaptations made for the benefit of Subscriber. The Service, Documentation, and all updates, enhancements, modifications, and improvements are protected by United States and international copyright laws and treaties, as well as other intellectual property laws. Subscriber is not granted any license to use any of NWEA's trade or service marks and NWEA retains all

¹ If Subscriber is renewing through NWEA's Online Account Renewal Process, Subscriber shall receive a confirmation page listing the Services renewed and Services added (if any) instead of a new Schedule. For the purposes of this Subscription, such confirmation page shall serve as Subscriber's Schedule.

right, title, and interest in its trade and service marks. Subscriber shall allow NWEA to use, without restriction or royalty obligation, any comments, suggestions, or contributions provided by Subscriber with respect to the Services. Subscriber hereby grants and assigns to NWEA any intellectual property rights that Subscriber may incidentally obtain or have with respect to any such comments, suggestions or contributions.

6. **Confidential Information.** Subscriber acknowledges that all Content, test scripts, underlying ideas, algorithms, item calibrations, concepts, procedures, processes, principles, know-how, and methods of operation that comprise the Services, including updates enhancements, modifications, and improvements are proprietary and confidential and contain trade secrets (collectively, “NWEA Confidential Information”), and Subscriber shall respect such confidentiality, and shall keep the Confidential Information strictly confidential. Subscriber shall not use, disclose, or distribute any Confidential Information, directly or indirectly, without the prior written consent of NWEA, except that NWEA authorizes Subscriber to disclose Confidential Information to Subscriber’s employees or agents who have signed written confidentiality and nondisclosure agreements before such disclosure. Both NWEA and Subscriber acknowledge that this obligation survives the termination of this Subscription.

7. **Student Information.**

7.1 **Student Information**
Generally. Subscriber shall have in place a policy to address student educational information (“Student Information”) and the necessary parental and guardian consents for NWEA to provide Services to Subscriber under this Subscription. NWEA and Subscriber acknowledge that NWEA may have access to Subscriber’s Student Information and Subscriber has obtained any necessary parental or guardian consent. NWEA shall respect such confidentiality and implement policies and practices to keep such information confidential. Except as permitted under this Subscription, NWEA shall not disclose any Student Information regarding Subscriber’s students or their families that NWEA learns or obtains during the course of its performance under this Subscription without the written consent of Subscriber. Absent reckless or intentional acts or omissions by NWEA, in no event is NWEA liable for any disclosure of Student Information. Subscriber is solely responsible for configuring roles based access to Student Information within the Services and for ensuring the security and availability of Subscriber’s own computers, computer networks, and internet connections, including security patches, choice of browser, and browser configuration settings to be used with the Services and Software.

email, and other transmissions. Subscriber acknowledges that its designated Systems Administrator controls the access and security points of the Services and Software and may designate additional administrators with similar privileges. Subscriber grants permission to NWEA to transfer Student Information for the sole purpose of maintaining, supporting and troubleshooting the Services to its contractors that have executed confidentiality agreements.

7.2 **Subscriber’s Ownership of Student Information.** Student Information (excluding Assessment Data as defined in Section 18) is and will remain the property of Subscriber and under Subscriber’s control. NWEA may itself, through its own employees or its contractors, maintain and use Assessment Data to conduct assessment and research activities for the collective benefit of multiple Subscribers.

8. **FERPA.** NWEA shall maintain Student Information for and on behalf of Subscriber – in accordance with the Family Educational Rights and Privacy Act (“FERPA”), 20 U.S.C. § 1232g(a)(4)(A)(ii), 1232g(b)(1) for the primary purpose of providing assessment and research services pursuant to this Subscription, which may include longitudinal studies, alignment studies, norming studies. Personally identifiable information (“PII”) derived from Student Information provided to NWEA may be disclosed only to NWEA employees or employees of contractors who have a legitimate educational interest in maintaining, organizing, or analyzing the data for uses authorized in this Subscription. Subscriber is responsible for any notices to parents required under FERPA and for providing parents and guardians with an opportunity to inspect and challenge the contents of the student records in question. If NWEA receives a request from a parent or guardian challenging the content of student records maintained by NWEA, NWEA shall contact Subscriber to validate the identity of the parent or guardian and student and request instructions regarding corrective action to be taken, if any. Once validated, NWEA shall correct erroneous Student Information and associated educational records as directed by Subscriber in writing.

9. **Authorizations.** As part of this Subscription, Subscriber authorizes NWEA to perform the following actions:

9.1 **GRD Authorization.** NWEA may include Student Information in its secure Growth Research Database (“GRD”) to provide Services to Subscriber. With inclusion of Student Information in the GRD, as part of the Services, Subscriber will have access to results of norming studies and alignment studies and the ability to order virtual comparison group and longitudinal reports, and

other research reports from the GRD that may require nominal additional fees. NWEA will handle all such data in a manner that protects student anonymity.

9.2 Duration of GRD

Authorization. The authorization for use of Student Information pursuant to this Subscription and for legitimate educational research is effective from the date when Subscriber first subscribed to the Services or commences use of the Services or Software, whichever is sooner. Both NWEA and Subscriber acknowledge that the permissions and obligations expressed in this Subscription survive the termination or expiration of this Subscription and any renewals. As described in Section 18, NWEA will maintain Student Information derived under this Subscription, allowing Subscriber to continue to access Reporting and research services and to validate the authenticity of data in such Reporting generated prior to termination. NWEA will not use Student Information for commercial or advertising purposes.

9.3 GRD Opt Out.

Should Subscriber decline to authorize PII in the GRD and upon receipt of Subscriber's request pursuant to this Section 9.3, NWEA will deidentify Student Information in the GRD and will not be able to offer Subscriber the ability to order virtual comparison group or longitudinal reports and other custom research reports due to the inability to accurately link student data. To elect this option, Subscriber must send an email to legalservices@nwea.org with the following information: (i) your name, title and contact information; (ii) the name of your school or entity; (iii) request removal of PII from the GRD; and (iv) an acknowledgment that you are duly authorized and have legal capacity to execute this request for your respective party.

9.4 Requests for Redisclosure of Student Information. NWEA shall use commercially reasonable efforts to provide notification to Subscriber of any written third party requests to NWEA for redisclosures of Student Information from Subscriber. From time to time, NWEA receives such requests from state educational agencies and their designated vendors to redisclose Student Information for evaluation, audit and educational purposes. After receipt of a state educational agency request, NWEA shall provide email notification to Subscriber, identifying the third party making such requests for redisclosure and identifying the nature of such redisclosure requests. Such notification to the Subscriber is also for the purposes of providing Subscriber an ability to create and maintain a record of the request or disclosure with the records of each student and providing the record to parents upon request, as required by 34 CFR 99.32. Subsequent to NWEA's email notification to Subscriber, NWEA

reserves the right to promptly respond to such requests for redisclosures. By signing this Subscription, Subscriber explicitly consents to such redisclosures by NWEA to state education agencies and their designated vendors for the purposes set forth under this Section 9.4. Subscriber acknowledges and agrees that any such redisclosures of Student Information to the requesting state education agencies and their designated vendors are in accordance with and subject to the limitations set forth in 34 CFR 99.31 for redisclosures of Student Information without the prior written prior consent of parent or eligible student. Subscriber further acknowledges and agrees that any such redisclosures of Student Information to the requesting state education agencies and their designated vendors are in accordance with 34 CFR 99.35(a)(1) permitting certain authorized representatives access to Student Information in connection with the audit or evaluation of state supported educational programs or for enforcement or compliance purposes. Subscriber agrees to indemnify NWEA in accordance with Section 25 of this Subscription for any consequences which may result from NWEA's redisclosure of Student Information to state educational agencies and their designated vendors for the purposes set forth in this Section 9.4. Subscriber shall authorize NWEA to enter into any required Agreements with the third party organizations on its behalf as may be necessary under FERPA or its accompanying regulations to facilitate the redisclosure of Student Information, including but not limited to redisclosures under 34 CFR 99.35 (a)(2) and 34 CFR 99.31(a)(6)(i)(C).

10. Subscriber Information. Subscriber hereby permits NWEA to use information regarding its schools or district (other than PII) to perform its obligations hereunder and to include such information for research, to be used and disclosed to internal and external researchers that have executed confidentiality agreements. However, NWEA shall seek permission from Subscriber before including such information that is identifiable to the school or district in any publication. This permission survives termination or expiration of this Subscription.

11. Privacy and Breach Notification. Subject to the limitations of warranty set forth in Section 21 of the Subscription, within NWEA's sole discretion and to the extent commercially reasonable, NWEA shall maintain the necessary and appropriate privacy and data security controls to secure Student Information. NWEA shall maintain commercially reasonable policies and procedures for the designation and training of responsible staff members to ensure the security and confidentiality of Student Information. NWEA shall maintain an incident response program that specifies the actions to be taken when NWEA detects unauthorized acquisition or use of its information systems. As part of such response

programs, NWEA shall notify the Subscriber by email or telephone without unreasonable delay, after confirmation of a breach of its security related to computer systems which contain Student Information. For the purposes of this Subscription, a breach means actual evidence of the unauthorized acquisition of or unauthorized use of Student Information ("Breach"). In the event of a Breach, Subscriber shall cooperate fully with NWEA to ensure NWEA can comply with any notification obligations NWEA may have to the affected parent(s), legal guardian(s) or eligible student(s) or any other parties for which notification by NWEA may be required under applicable law.

12. **Protection.** The Services may contain mechanical or electronic methods to prevent unauthorized use or distribution of the Services. Subscriber shall not disable or circumvent such control devices.

13. **Fees and Taxes.** Subscriber shall pay the Subscription fees set forth on the applicable Schedule during the Term and any renewal terms. Subscriber is solely responsible for any personal property taxes or local licensing fees resulting from Subscriber's agreement under this Subscription or in connection with NWEA's delivery of Services under this Subscription.

14. **Billing and Payment.** Subscriber shall use its best efforts to determine the number of students to be tested by Subscriber and the payments due. NWEA shall send an invoice based on the applicable Schedule to Subscriber, and Subscriber shall pay the amount due within 30 days of the invoice date by mailing a check or depositing the amount due via a wire transfer. Subscriber must contact NWEA at accountsreceivable@nwea.org for wire transfer instructions. If Subscriber overestimated the number of students tested, NWEA is not obligated to refund any Subscription fees. If, however, Subscriber tests more students than the number Subscriber originally estimated and paid for, NWEA may submit an amended invoice to capture the additional students, and Subscriber shall pay the variance within 30 days of the amended invoice date.

15. **Amendments and Renewals.** Future fees associated with adjustments, including but not limited to, the number of students tested, supplemental products, and Subscription renewals or price increases shall serve as amendments to the Subscription scope and price. Adjustments from Subscriber's issuance of a (a) purchase order, (b) written authorization or confirmation via NWEA's Online Account Renewal Process, (c) submission of a roster, (d) initiation of testing, or (e) payment of any Subscription renewal or Subscription expansion invoice constitute acceptance of the amended Subscription scope and price.

Notwithstanding anything to the contrary, terms of any purchase orders or written authorizations issued by Subscriber or any other communications which are additional to or inconsistent with this Subscription are not binding unless NWEA expressly assents to such terms in writing. Such Subscription renewals and expansions are governed by this Subscription (including all NWEA order forms). The conditions of payment described in Sections 13 and 14 apply to all subscription renewals and expansions. Subscriber shall make all payments under this Subscription to NWEA.

16. **Professional Development.** If Subscriber is new to the Services, Subscriber's teachers and staff administering the Services must participate in NWEA introductory product training before testing begins (e.g. MAP Admin Workshop if Subscriber subscribes to Web-based or Client Server MAP) and pricing is set forth in Schedule(s). Subscriber shall assign a member of its staff to coordinate the logistics of setting up the training before testing begins. If Subscriber experiences staff turnover that affects the administration of the Services, Subscriber shall notify NWEA within 30 days after the staffing change. NWEA may require Subscriber to send the new staff to introductory NWEA product training. NWEA recommends, but does not require, subsequent ongoing professional development workshops.

17. **Publicity.** Subscriber consents to NWEA's use and/or references to Subscriber's name, directly or indirectly, in NWEA's marketing and training materials.

18. **Termination and Remedies.** This Subscription automatically renews at the end of the Term, unless Subscriber provides 30 days written notice to NWEA before the end of the applicable Term. Either party may terminate this Subscription for convenience with thirty (30) days written notice. This Subscription may be terminated immediately without prior notice to Subscriber upon Subscriber's breach of this Subscription and license. Upon termination for any reason, NWEA is under no obligation to refund any fees paid by Subscriber for the Services and related services. After termination or expiration of the Subscription, NWEA shall continue to maintain Student Information, allowing Subscriber to continue to access the Reporting unless Subscriber notifies NWEA in writing to destroy PII in the Student Information. Subscriber acknowledges that NWEA will retain use of deidentified Student Information, assessment data and results, and other metadata including, but not limited to, testing response times, scores (goals, RIT, overall RIT etc.), responses, item parameters and item sequences that result from the Services and Software (collectively "Assessment Data") for research and improvement of products and services. NWEA may seek any legal or equitable remedy available against Subscriber for

breach of the terms of this Subscription, including without limitation, injunctive relief and specific performance. Sections 5-11, 17, 18, and 21-26 survive any termination or expiration of this Subscription or the termination of any license granted under this Subscription.

19. **Support.** NWEA will provide to Subscriber limited support, updates, enhancements, modifications, improvements, and maintenance services. If this Subscription is for Client Server MAP, Subscriber shall provide student and class information in a Class Roster File ("CRF") for each test window in the approved format as described in the CRF template. Subscriber shall submit the CRF during the time period that is posted on NWEA's website and before Subscriber's first day of testing. Subscriber acknowledges that the validity and accuracy of the Reporting depends upon the quality of the data rostered by Subscriber.

20. **Scheduled Maintenance.** NWEA has system maintenance periods throughout the year that will affect Subscriber's ability to upload or download student or test data, to access Reporting, or to interact with any of NWEA's websites. The ability to test during the scheduled maintenance periods shall not be affected for Client Server MAP Subscribers. NWEA will provide Subscriber with notice regarding regularly scheduled maintenance. Notwithstanding the foregoing, NWEA may perform emergency maintenance at any time without any advance notice to Subscriber.

21. **Limited Warranty.** NWEA warrants to Subscriber that the MAP assessment system, and/or Skills Navigator® and/or Children's Progress Academic Assessment (whichever assessment system is included in the applicable Schedule(s), defined as "Assessment System" for the purposes of this Section 21) when properly installed and used, will perform substantially as represented in the Documentation. The Assessment System may include open source software components. This limited warranty is void if the failure of the Assessment System results from (a) use of the Assessment System in connection with software or hardware not compatible with the Assessment System or not meeting the technical specifications provided by NWEA; (b) improper or inadequate maintenance; or (c) accident, abuse, misapplication, or use by Subscriber of the Assessment System other than as described in the Documentation provided by NWEA. This limited warranty is void if the Assessment System is altered or modified in any way by anyone other than NWEA. NWEA does not warrant that the operation of the Assessment System meets Subscriber's requirements or will be uninterrupted or error free. Subscriber is responsible for the results obtained and decisions made from its use of the Assessment System.

NWEA assumes no responsibility for the operating environment or for Subscriber's security programs in which the Assessment System functions. NWEA will, at its sole option, either replace or, with its commercially reasonable efforts, correct the Assessment System that fails to perform substantially in accordance with the Documentation for the Assessment System or as represented in writing by NWEA upon written notice of such failure. If NWEA is unable to correct the error after using commercially reasonable efforts, NWEA shall, at its sole option, either replace the Assessment System with a functionally equivalent software program or refund the fees paid for licensing the Assessment System on a prorated basis and cancel the license granted in this Subscription.

22. **Disclaimer.** EXCEPT FOR THE EXPRESS LIMITED WARRANTY PROVIDED IN SECTION 21, TO THE MAXIMUM EXTENT PERMITTED BY APPLICABLE LAW, THE SERVICES ARE PROVIDED "AS-IS" WITHOUT WARRANTY OF ANY KIND, EITHER EXPRESS OR IMPLIED, INCLUDING BUT NOT LIMITED TO ANY IMPLIED WARRANTY OF MERCHANTABILITY, FITNESS FOR A PARTICULAR PURPOSE OR USE, QUALITY, PRODUCTIVENESS OR CAPACITY, OR THAT THE OPERATION OF THE SOFTWARE INCLUDED WITHIN THE SERVICES SHALL BE ERROR-FREE. EXCEPT AS PROVIDED HEREIN, THE ENTIRE RISK AND LIABILITY ARISING OUT OF THE USE OF THE SERVICES REMAINS WITH SUBSCRIBER, INCLUDING BUT NOT LIMITED TO, WHEN SUBSCRIBER'S PRACTICES ARE INCONSISTENT WITH *THE STANDARDS FOR EDUCATIONAL AND PSYCHOLOGICAL TESTING* (1999) BY THE AMERICAN EDUCATIONAL RESEARCH ASSOCIATION, THERE IS NO WARRANTY FOR DATA SECURITY OR PERFORMANCE ISSUES (a) CAUSED BY FACTORS OUTSIDE OF NWEA'S REASONABLE CONTROL; OR (b) THAT RESULTED FROM ANY ACTION OR INACTION OF SUBSCRIBER OR SUBSCRIBER'S THIRD PARTIES; OR (c) RESULTING FROM SCHEDULED MAINTENANCE PERIODS.

23. **Disclaimer of Actions Caused by and/or Under the Control of Third Parties.** NWEA DOES NOT AND CANNOT CONTROL PERFORMANCE OF SERVICES BASED ON THE FLOW OF DATA TO OR FROM NWEA'S NETWORK AND OTHER PORTIONS OF THE INTERNET, WHICH DEPENDS IN LARGE PART ON THE PERFORMANCE OF INTERNET SERVICES PROVIDED OR CONTROLLED BY THIRD PARTIES. AT TIMES, ACTIONS OR INACTIONS OF SUCH THIRD PARTIES CAN IMPAIR OR DISRUPT SUBSCRIBER'S CONNECTIONS TO THE INTERNET (OR PORTIONS THEREOF), ALTHOUGH NWEA SHALL USE COMMERCIALY REASONABLE EFFORTS TO REMEDY AND AVOID SUCH EVENTS, NWEA CANNOT GUARANTEE THAT SUCH EVENTS SHALL NOT OCCUR. ACCORDINGLY, NWEA DISCLAIMS ANY AND ALL LIABILITY RESULTING FROM OR RELATED TO SUCH EVENTS.

24. **Limitation.** THE REMEDIES PROVIDED UNDER THE LIMITED WARRANTY ARE SUBSCRIBER'S SOLE AND EXCLUSIVE REMEDIES. EXCEPT TO THE EXTENT THE FOLLOWING LIABILITY LIMITATION IS PROHIBITED BY APPLICABLE LAW, IN NO EVENT SHALL NWEA BE LIABLE FOR ANY DAMAGES OR EXPENSES WHATSOEVER, INCLUDING WITHOUT LIMITATION, DAMAGES FOR LOST PROFITS, LOST OPPORTUNITY, LOST SAVINGS, LOSS OF GOODWILL, LOST BUSINESS,

LOSS OF ANTICIPATED BENEFITS, BUSINESS INTERRUPTION, LOSS OF BUSINESS INFORMATION, LOSS OF OR DAMAGE TO DATA, COMPUTER FAILURE OR MALFUNCTION, OR ANY AND ALL OTHER FF, SPECIAL, INCIDENTAL, CONSEQUENTIAL DAMAGES, OR PECUNIARY LOSS, WHETHER BASED IN CONTRACT, TORT, OR OTHERWISE, ARISING OUT OF THE USE OF OR INABILITY TO USE THE SERVICES, EVEN IF NWEA HAS BEEN ADVISED OF THE POSSIBILITY OF SUCH DAMAGES. IN ANY CASE, NWEA'S ENTIRE LIABILITY UNDER THIS SUBSCRIPTION IS LIMITED TO THE AMOUNT ACTUALLY PAID BY SUBSCRIBER FOR THE RIGHT TO USE THE SERVICES IN THE TWELVE MONTHS PRECEDING THE INCIDENT GIVING RISE TO LIABILITY. THIS LIMITATION OF LIABILITY ALSO APPLIES TO THE SERVICES DEVELOPERS AND SUPPLIERS. IT IS THE MAXIMUM FOR WHICH THEY AND NWEA ARE COLLECTIVELY RESPONSIBLE.

25. Indemnification.

25.1 By Subscriber. Subject to applicable law, Subscriber shall indemnify, defend, and hold harmless NWEA and NWEA's officers, directors, employees, agents, and representatives, from and against any claims, damages, expenses, judgments, fines, and amounts paid in settlement in connection with any proceeding arising from (1) any breach of Sections 6, 7, 9 or 11 (2) any use of the Services and Software or (3) any other breach of this Subscription by Subscriber or any of its employees and agents.

25.2 By NWEA. Subject to Section 24, NWEA shall (i) defend Subscriber against any claims made by an unaffiliated third party that the Assessment System infringes its US patent, copyright, or trademark; and (ii) pay the amount of any resulting adverse final judgment against Subscriber (after any appeals) or settlement to which NWEA consents. Subscriber must notify NWEA promptly in writing of the claim. Subscriber must also give NWEA sole control over its defense or settlement. Subscriber agrees to provide NWEA with reasonable assistance in defending the claim. NWEA's obligations under this Section will not apply to the extent the claim (or adverse final judgment) is based on: (i) Subscriber using the Assessment System after NWEA has informed Subscriber to discontinue use due to such a claim; (ii) the combination or use of Assessment System with non-NWEA information, data, or materials (other than as contemplated under this Agreement); (iii) modification of the Assessment System other than as contemplated by this Agreement; or (iv) use of NWEA's trademark(s) without express written permission. If NWEA receives information about a claim under this Section related to the Assessment System, NWEA may do any of the following, at our expense and without obligation to do so: (i) procure the right to continue its use; (ii) replace it with a functional equivalent; (iii) modify it to make it non-infringing (if NWEA does this, Subscriber will stop using the

allegedly infringing Assessment System immediately); or (iv) terminate this Agreement. Notwithstanding anything to the contrary, NWEA's commitment under this Section is Subscriber's exclusive remedy for third-party infringement and trade secret misappropriation claims. Nothing in this Section 25.2 obligates NWEA to indemnify Subscriber from and against any claims, suits, actions, losses, damages, liabilities, costs and expenses attributable to the acts or omissions of Subscriber, its officers, employees or agents.

26. Miscellaneous.

26.1 Force Majeure. Neither party is liable for any delay or failure to perform any obligation hereunder due to causes beyond its control, including without limitation, war, riot, insurrection, civil commotion, terrorist activity, fire, industrial disputes of whatever nature, acts of nature, computer crimes, epidemics, acts or omissions of third party vendors or suppliers, equipment failures, public enemies of government, failure of telecommunications, system malfunctions, fire, or other casualty.

26.2 Waiver and Severability. Waiver of any default or breach under this Subscription by NWEA does not constitute a waiver of any subsequent default or a modification of any other provisions of this Subscription. If any part of this Subscription is held invalid, illegal, in conflict with any law, or otherwise unenforceable by a court of competent jurisdiction, the parties intend that the remainder of this Subscription nevertheless remain in full force and effect.

26.3 No Third Party Beneficiaries. The parties do not intend to confer any right or remedy on any third party.

26.4 Survival. All provisions of this Subscription that would reasonably be expected to survive the termination of this Subscription do so.

26.5 Entire Agreement; Order of Precedence. This Subscription (including any applicable supplemental terms based on Subscriber's Services which are incorporated into this Subscription) contains the entire understanding of the parties regarding the subject matter of this Subscription and supersedes all prior and contemporaneous negotiations and agreements, whether written or oral, between the parties with respect to the subject matter of this Subscription. If there is a conflict among any of the terms of this Subscription, the parties intend that it be resolved by giving precedence to Subscription documents in the following order (i.e. the earlier listing governing the later): (i) any Supplemental terms relevant to Services Subscriber subscribes or subscribed to; (ii) this Subscription without any Schedules; (iii) the

most recent Schedule; followed by (iv) any other Schedules in reverse chronological order.

26.6 **Assignment.** Subscriber may not assign this Subscription to any third party without the prior written consent of the NWEA.

26.7 **Binding.** This Subscription shall bind and inure to the benefit of the parties and their respective successors, and approved assigns, if any.

26.8 **Merger and Successors in Interest of NWEA.** In the event of a merger between NWEA and any third party, any such newly formed entity created as a result of such merger shall continue to maintain the Student Information and any PII subject to this Subscription provided the newly formed entity is subject to the terms and conditions as set forth under the Subscription. In the event of a sale of NWEA to any third party, any successor in interest of NWEA shall continue to maintain the Student Information and any PII subject to this Subscription provided the successor in interest of NWEA is subject to the terms and conditions as set forth under the Subscription.

26.9 **Representation of Signatories.** Each person signing this Subscription represents and warrants that he or she is duly authorized and has legal capacity to execute and deliver this Subscription for their respective party.

26.10 **Notices.** Any notice required under this Subscription shall be in writing and effective when (a) delivered personally against receipt, (b) deposited in the mail and registered or certified with return receipt requested, postage prepaid, (c) shipped by a recognized courier service and addressed to either party as designated in this Subscription, (d) delivered by email to an email address designated by the recipient, or (e) when delivered via any of the foregoing at such other address as may be provided by the recipient in accordance with this Section 26.10.

Address for Notices to NWEA:

Northwest Evaluation Association
121 NW Everett Street
Portland, OR 97209
Email: legalservices@nwea.org

Address for Notices to Subscriber shall be sent to the address set forth in Subscriber's signature box below.

26.11 **Controlling Law and Venue.** The parties intend that this Subscription be construed and controlled by the laws of the State of Oregon, U.S.A., without giving effect to principles of conflict of laws. The United Nations Convention on Contracts for

the International Sale of Goods is specifically disclaimed and does not apply to this Subscription. Any litigation arising out of this Subscription must be conducted in courts located in Multnomah County, Oregon.

26.12 **Attorney Fees.** If any lawsuit is instituted to interpret, enforce or rescind this Subscription, the prevailing party on a claim shall be entitled to recover, in addition to any other relief awarded, its reasonable attorney fees and other fees, costs, and expenses of every kind, including but not limited to the costs and disbursements specified in ORCP 68A(2), incurred in connection with the lawsuit, the collection of any award, or the enforcement of any order as determined by a judge.

26.13 **Counterparts.** This Subscription may be executed in counterparts, each of which shall be deemed an original, and the counterparts shall together constitute one and the same Subscription, notwithstanding that all of the parties are not signatory to a single original or the same counterpart. The parties may also deliver and accept facsimile or electronically scanned signatures, which shall be binding upon the parties as if the signature were an original.

26.14 **Vendor Status and Independent Contractor.** The Services is provided by NWEA within its normal business operations and is operated in a competitive environment. The Services offered under this Subscription constitutes a vendor relationship, as defined by OMB Circular A-133 and therefore, any monies to pay for this Subscription, are not subject to the federal audit requirements of OMB Circular A-133. NWEA is an independent contractor, and neither NWEA nor its employees, shall be deemed Subscriber's employees. Nothing contained in this Subscription shall create or imply an agency relationship, joint venture or partnership between the parties.

NWEA:

Northwest Evaluation Association

By: _____
Geri Cohen, Sr. Vice President & CFO

Date: _____

SUBSCRIBER name and address:
(please print)

By: _____

Printed Name: _____

Title: _____

Date: _____

*OK
PH.*