



Kenton County School District | It's about ALL kids.

## Issue Paper

**DATE:**

July 27, 2022

**AGENDA ITEM (ACTION ITEM):**

Consider/Approve the continued software license agreement between Progress Learning (Education Galaxy/Liftoff) and Beechgrove to purchase a supplemental, standards-aligned reading and math resource.

**APPLICABLE BOARD POLICY:**

01.11 General Powers and Duties of the Board

**HISTORY/BACKGROUND:**

Education Galaxy provides online assessment and practice for students in Grades K-8 to help build mastery towards the Kentucky Core Academic Standards. Our unique online program is easy to use and enjoyable for both teachers and students. Students work on their Study Plans practicing important concepts while teachers pull formative assessment reports to identify the strengths and weaknesses of their classroom and individual students. Liftoff is designed for struggling learners and at-risk students. Liftoff will build confidence for your students and provide the support and instruction they need to improve. First, students take an adaptive diagnostic to determine their level on a variety of skills. Once their level is determined, students work at that level and quickly elevate to more difficult concepts.

**FISCAL/BUDGETARY IMPACT:**

\$4,810.15 (Beechgrove Title I Budget)

**RECOMMENDATION:**

Approve the software license agreement between Progress Learning (Education Galaxy/Liftoff) and Beechgrove to purchase a supplemental, standards-aligned reading and math resource for grades K-5.

**CONTACT PERSON:**

Andrea Krumpelman

Handwritten signature of Andrea Krumpelman in blue ink.

Principal/Administrator

Handwritten signature of Judy Smith in blue ink.

District Administrator

Handwritten signature of the Superintendent in blue ink.

Superintendent

Use this form to submit your request to the Superintendent for items to be added to the Board Meeting Agenda.

Principal –complete, print, sign and send to your Director. Director –if approved, sign and put in the Superintendent's mailbox.



USATestprep and Education Galaxy are now Progress Learning

400 Galleria Parkway, Suite 1000  
Atlanta, GA 30339  
US

Phone: 1-877-377-9537  
Fax: 877-816-0808  
Email:  
orders@progresslearning.com

## Quote

**Quote #:** Q-14499-3  
**Date:** 7/12/2022 12:29 AM  
**Expires On:** 9/22/2022  
**Quote Total:** \$4,810.15

### Ship To

Jeremy Dodd  
Beechgrove Elementary School  
1029 Bristow Rd  
Independence, KY 41051  
United States  
jeremy.dodd@kenton.kyschools.us

### Bill To

Kenton County 1055 Eaton Dr  
, KY 41017

SALESPERSON	EMAIL	PAYMENT METHOD
Spring Renz	spring.renz@progresslearning.com	Net 30

*For credit card payments, a 3% processing fee will be applied at time of payment.  
The credit card total after fees will be \$4,954.45.*

## Subscription Information

Beechgrove Elementary School

License	Start Date	End Date	List	Discount	Total
Elementary School Progress Learning	9/23/2022	9/22/2023	\$8,500.00	\$3,689.85	\$4,810.15
Liftoff (Common Core) - Elementary	9/23/2022	9/22/2023	Included	\$0.00	\$0.00
Beechgrove Elementary School Subtotal:					\$8,500.00
Beechgrove Elementary School Discount:					\$3,689.85
Beechgrove Elementary School Total:					\$4,810.15

Subtotal:	\$8,500.00
Discount	\$3,689.85
Total:	\$4,810.15

A 43% one-time discount has been applied.





**THE KENTON COUNTY BOARD OF EDUCATION**  
1055 EATON DRIVE, FORT WRIGHT, KENTUCKY 41017  
TELEPHONE: (859) 344-8888 / FAX: (859) 344-1531  
WEBSITE: [www.kenton.kyschools.us](http://www.kenton.kyschools.us)  
*Dr. Henry Webb, Superintendent of Schools*

## **VENDOR ASSURANCES REGARDING PROTECTION OF PERSONAL AND CONFIDENTIAL INFORMATION**

### **Data Security and Breach Protocols**

Vendors that receive Personal Information from Kenton County Board of Education (herein referred to as "KCBOE") as defined by and in accordance with Kentucky's Personal Information Security and Breach Investigation Procedures and Practices Act, KRS 61.931, et seq., (the "Act"), shall secure and protect the Personal Information by, without limitation, complying with all requirements applicable to non-affiliated third parties set forth in the Act.

"Personal Information" is defined in accordance with KRS 61.931(6) as "an individual's first name or first initial and last name; personal mark; or unique biometric or genetic print or image, in combination with one (1) or more of the following data elements:

- a) An account number, credit card number, or debit card number that, in combination with any required security code, access code or password, would permit access to an account;
- b) A Social Security number;
- c) A taxpayer identification number that incorporates a Social Security number;
- d) A driver's license number, state identification card number or other individual identification number issued by any agency as defined under the Act;
- e) A passport number or other identification number issued by the United States government; or
- f) Individually Identifiable Information as defined in 45 C.F.R. sec. 160.013 (of the Health Insurance Portability and Accountability Act), except for education records covered by the Family Education Rights and Privacy Act, as amended 20 U.S.C. sec 1232g."

As provided in KRS 61.931(5), a "non-affiliated third party" includes any person or entity that has a contract or agreement with the KCBOE and receives (accesses, collects or maintains) personal information from the KCBOE pursuant to the contract or agreement.

The vendor hereby agrees to cooperate with the KCBOE in complying with the response, mitigation, correction, investigation, and notification requirements of the Act.

The vendor shall notify as soon as possible, but not to exceed seventy-two (72) hours, KCBOE, the Commissioner of the Kentucky State Police, the Kentucky Auditor of Public Accounts, the Commonwealth (Kentucky) Office of Technology, and the Commissioner of the Kentucky Department of Education of a determination of or knowledge of a breach, unless the exception set forth in KRS 61.932(2)(b)(2) applies and the vendor abides by the requirements set forth in that exception. Notification shall be in writing on a form developed by the Commonwealth (Kentucky) Office of Technology.

The vendor hereby agrees to report to the KCBOE, immediately and within twenty-four (24) hours, any known reasonably believed instances of missing data, data that has been inappropriately shared, or data taken off site.

The vendor hereby agrees that the KCBOE may withhold payment(s) owed to the vendor for any violation of the Act's notification requirements.

The vendor hereby agrees to undertake a prompt and reasonable investigation of any security breach as defined under the Act in accordance with KRS 61.933.

Upon conclusion of an investigation of a security breach as defined under the Act as required by KRS 61.933, the vendor hereby agrees to an apportionment of the costs of the notification, investigation, and mitigation of the security breach.

In accordance with KRS 61.932(2)(a), the vendor shall implement, maintain, and update security and breach investigation procedures that are appropriate to the nature of the information disclosed, that are at least as stringent as the security and breach investigation procedures and practices established by the Commonwealth (Kentucky) Office of Technology and that are reasonably designed to protect the Personal Information from unauthorized access, use, modification, disclosure, manipulation, or destruction.

#### **Student Data Security**

Pursuant to KRS 365.734, if the vendor is a cloud computing service provider (which is defined pursuant to KRS 365.734(1)(h) as any person or entity other than an educational institution that operates cloud computing services) or, through service to the KCBOE, becomes the equivalent of a cloud computing service provider, the vendor further hereby agrees that:

- \* The vendor shall not process student data as defined pursuant to KRS 365.734 for any purpose other than providing, improving, developing, or maintaining the integrity of its cloud computing services, unless the vendor receives express permission from the student's parent. The vendor shall work with the KCBOE to determine the best method of collecting parental permission.
- \* With a written agreement for educational research, the vendor may assist the KCBOE to conduct educational research as permitted by the Family Educational Rights and Privacy Act of 1974, as amended, 20 U.S.C. sec. 1232g.
- \* Pursuant to KRS 365.734, the vendor shall not in any case process student data to advertise or facilitate advertising or to create or correct an individual or household profile for any advertisement purposes.
- \* Pursuant to KRS 365.734, the vendor shall not sell, disclose, or otherwise process student data for any commercial purpose.
- \* Pursuant to KRS 365.734, the vendor shall certify in writing to the agency that it will comply with KRS 365.734(2).

#### **Family Educational Rights and Privacy Act, National School Lunch Act and Child Nutrition Act**

If during the course of this agreement, the KCBOE discloses to the vendor any data protected by the Family Educational Rights and Privacy Act of 1974 (FERPA), as amended (20 U.S.C. sec. 1232g, *et seq.*), and its regulations, and data protected by the Richard B. Russell National School Lunch Act (NSLA) (42 U.S.C. sec. 1751 *et seq.*), and the Child Nutrition Act of 1966 (CNA) (42 U.S.C. sec. 1771 *et seq.*), the vendor agrees that it is bound by and will comply with the confidentiality, security and redisclosure requirements and restrictions stated in FERPA, NSLA and CNA.

The vendor hereby agrees to report to the KCBOE, immediately and within twenty-four (24) hours, any known reasonably believed instances of missing data, data that has been inappropriately shared, or data taken off site.

The vendor agrees that FERPA-protected information is confidential information. FERPA-protected information includes, but is not limited to the student's name, the name of the student's parent or other family members, the address of the student or student's family, a personal identifier, such as the student's social security number, student number, or biometric record, other indirect identifiers, such as the student's date of birth, place of birth, and mother's maiden name, and other information that, alone or in combination, is linked or linkable to a specific



student that would allow a reasonable person in the school community, who does not have personal knowledge of the relevant circumstances, to identify the student with reasonable certainty.

The vendor understands and acknowledges that any unauthorized disclosure of confidential information is illegal as provided in FERPA and in the implementing federal regulations found in 34 CFR, Part 99. The penalty for unlawful disclosure is a fine of not more than \$250,000 (under 18 U.S.C. sec. 3571) or imprisonment for not more than five years (under 18 U.S.C. sec. 3559) or both.

The vendor understands and acknowledges that children's free and reduced price meal and free milk eligibility information or information from the family's application for eligibility, obtained under provisions of the NSLA or the CNA is confidential information and that any unauthorized disclosure of confidential free and reduced price lunch information or information from an application for this benefit is illegal. The penalty for unlawful disclosure is a fine of not more than \$1,000.00 (under 7 C.F.R. 245.6) or imprisonment for up to one year (under 7 C.F.R. 245.6), or both.

In the event there is a conflict between this agreement and any other agreement between KCBOF and Vendor, the terms of this agreement shall apply.

Progress Learning

Vendor Name

400 Lanier Pkwy, Ste 1000 Atlanta, GA 30339

Vendor Address

677-377-9537

Vendor Telephone

vendorforms@progresslearning.com

Vendor Email Address

DocuSigned by:

Spencer Hatch

3ED8CFED5E554AD

Signature by Vendor's Authorized Representative

Spencer Hatch

Print Name

7/26/2022

Date

## SERVICES AGREEMENT

### TERMS AND CONDITIONS

1. **OVERVIEW.** Progress Learning operates an online resource to help teachers prepare students for certain graduation and assessment tests and exams. The following terms and conditions ("Terms and Conditions") provide for terms that are common to this Agreement, including all Schedules. In the event of a conflict between these Terms and Conditions and any Schedule, these Terms and Conditions will control, unless expressly stated to the contrary in the Schedule.

#### 2. SERVICES.

2.1 **General.** All services provided by Progress Learning under this Agreement ("Services"), including the Software Services, will be provided to Customer according to these Terms and Conditions, the Signature Page, and all schedules, exhibits, or other attachments made a part of this Agreement. During the Term, Progress Learning shall provide Customer a user name, a teacher password and a student password to enable teachers employed by Customer ("Teachers") and students enrolled in Customer's classes ("Students") to access the Software Services.

2.2 **Software Services.** Progress Learning will provide Customer and its authorized Teachers and Students ("Authorized Users"), with access to the software products and related services and content provided by Progress Learning via a web browser and identified on the Signature Page ("Software Services"). During the Term and subject to Customer's compliance with this Agreement, Progress Learning grants Customer the non-exclusive, nontransferable, non-assignable, and limited right to allow Authorized Users to remotely access the Software Services in accordance with the terms of this Agreement solely for the benefit of Customer and the Authorized Users in the ordinary course of Customer's operations.

2.3 **Service Delivery.** Progress Learning may provide the Services from any facility and may from time to time transfer any or all of the Services being provided hereunder to any new facility(ies) or relocate the personnel, equipment and other resources used in providing those Services.

2.4 **Restrictions.** Customer shall not lease, license, sell, sublicense or otherwise transfer its access to or use of the Software Services. The Software Services may only be accessed or used by Customer and Authorized Users for their own benefit. In addition, Customer shall not modify, create derivative works of, or attempt to decipher, decompile, disassemble or reverse engineer the Software Services. Nothing in this Agreement confers upon either party any right to use the other party's Marks (defined below), except in Progress Learning's performance of the Services. All use of such Marks by either party will inure to the benefit of the owner of such Marks, use of which will be subject to specifications controlled by the owner.

3. **RIGHTS RESERVED.** All right, title, and interest in and to the Services (including all content contained therein) and all service marks, trademarks, trade names, logos, and any

modifications to the foregoing ("Marks") of Progress Learning, together with all suggestions, contributions, enhancements, improvements, additions, modifications, or derivative works thereto and copies thereof, will remain in possession of Progress Learning. Customer acknowledges that the Software Services in source code, object code and any other form remains Confidential Information of Progress Learning and that the Software Services in any form is not licensed to Customer by this Agreement or any Schedule and will not be provided by Progress Learning. No right or implied license or right of any kind is granted to Customer regarding the Services, including any right to use, reproduce, market, sell, translate, distribute, transfer, adapt, disassemble, decompile, reverse engineer, or possess the Software Services, the documentation thereof, the content contained therein, or other technical material, or any portions thereof.

#### 4. FEES AND PAYMENT TERMS.

4.1 **Services Fees.** For the Services provided under this Agreement, Customer will pay Progress Learning the fees in the amounts set forth on the Signature Page. Unless otherwise set forth on the Signature Page, applicable fees will be invoiced to Customer annually in advance. Fees are non-cancelable and non-refundable. Except as otherwise may be set forth on the Signature Page, all amounts owed shall be due 30 days from receipt by Customer of an invoice for same. After the Initial Term, and at the beginning of each Renewal Term thereafter, Progress Learning may adjust the fees applicable during the upcoming Renewal Term upon written notice provided at least 60 days prior to the end of the Initial Term or applicable Renewal Term, as the case may be. All fees paid and expenses reimbursed under this Agreement will be in United States currency.

4.2 **Late fees.** Progress Learning will not charge Customer Late Fees. Progress Learning, at its option, may suspend the Services, in whole or in part, if Progress Learning does not receive all undisputed amounts due and owing under this Agreement within 30 days after delivery of notice to Customer of the failure to pay such overdue balances.

4.3 **Taxes.** The fees and expenses due to Progress Learning as set forth in this Agreement are net amounts to be received by Progress Learning, exclusive of all sales, use, withholding, excise, value added, ad valorem taxes, or duties incurred by Customer or imposed on Progress Learning in the performance of this Agreement or otherwise due as a result of this Agreement. This section will not apply to taxes based solely on Progress Learning's income.

4.4 **Offset.** Fees and expenses due from Customer under this Agreement may not be withheld or offset by Customer against other amounts for any reason.

#### 5. CUSTOMER OBLIGATIONS.

5.1 **Technical Requirements.** Customer must have required equipment, software, and Internet access to be able to use



## SERVICES AGREEMENT

### TERMS AND CONDITIONS

the Software Services. Acquiring, installing, maintaining and operating equipment and Internet access is solely Customer's responsibility. Progress Learning neither represents nor warrants that the Software Services will be accessible through all web browser releases.

**5.2 Use of Software Services.** Customer shall not, and shall not permit others, in using the Software Services to: (i) publish, ship, distribute or disseminate material or information that encourages conduct that could constitute a criminal offense or give rise to civil liability; (ii) engage in any conduct that could constitute a criminal offense or give rise to civil liability for Progress Learning; (iii) misrepresent or in any other way falsely identify Customer's identity or affiliation, including through impersonation or altering any technical information in communications using the Software Services; (iv) transmit or upload any material through the Software Services containing viruses, trojan horses, worms, time bombs, cancelbots, or any other programs with the intent or effect of damaging, destroying, disrupting or otherwise impairing Progress Learning's, or any other person's or entity's, network, computer system, or other equipment; (v) interfere with or disrupt the Software Services, networks, or servers connected to the Progress Learning systems or violate the regulations, policies or procedures of such networks or servers, including unlawful or unauthorized altering of any of the information submitted through the Software Services; (vi) attempt to gain unauthorized access to the Software Services, other Progress Learning customers' computer systems, or networks using the Software Services through any means; or (vii) interfere with another party's use of the Software Services. Progress Learning has no obligation to monitor Customer's use of the Software Services. However, Progress Learning reserves the right (but has no obligation) at all times to monitor, review, retain and disclose any information as necessary to satisfy or cooperate with any applicable law, regulation, legal process or governmental request. Customer shall be responsible for all acts and omissions of its Authorized Users as if such acts or omissions were its own.

**5.3 Compliance with Law.** Customer agrees not to use or allow the use of the Software Services for illegal purposes or for the transmission of material that is unlawful, harassing, defamatory (true and damaging to others), invasive of another's privacy, abusive, threatening, or obscene, or that infringes the rights of others. Customer is solely responsible for any and all improper use of the Software Services that occurs as a direct or indirect result of any act or omission of Customer and any Authorized User. Customer will notify Progress Learning immediately of any unauthorized use of the Software Services or any other breach of security that is known or suspected by Customer.

## 6. NON-DISCLOSURE AND CONFIDENTIALITY.

**6.1 Disclosure.** Each party may disclose to the other party certain Confidential Information of such party or of such party's associated companies, distributors, licensors, suppliers, or

customers. "Confidential Information" means any information that is of value to its owner and is treated as confidential, including trade secrets, technology, information pertaining to business operations and strategies, and information pertaining to customers, pricing, and marketing; "Disclosing Party" refers to the party disclosing Confidential Information hereunder, whether such disclosure is directly from Disclosing Party or through Disclosing Party's employees or agents; and "Receiving Party" refers to the party receiving any Confidential Information hereunder, whether such disclosure is received directly or through Receiving Party's employees or agents.

**6.2 Requirement of Confidentiality.** The Receiving Party agrees: (a) not to disclose or otherwise make available Confidential Information of the Disclosing Party to any third party without the prior written consent of the Disclosing Party, provided that the Receiving Party may disclose the Confidential Information of the Disclosing Party to its, and its affiliates', officers, employees, consultants and legal advisors who have a "need to know", who have been apprised of this restriction and who are themselves bound by nondisclosure obligations at least as restrictive as those set forth in this Section 6; (b) to use the Confidential Information of the Disclosing Party only for the purposes of performing its obligations or as otherwise authorized under the Agreement; and (c) to promptly notify the Disclosing Party in the event it becomes aware of any loss or disclosure of any of the Confidential Information of Disclosing Party. Customer acknowledges that the Software Services and documentation are the Confidential Information of Progress Learning. The obligations in this Section 6 shall survive termination and continue for so long as the applicable information constitutes Confidential Information. Confidential Information shall not include information that: (a) is already known to the Receiving Party without restriction on use or disclosure prior to receipt of such information from the Disclosing Party; (b) is or becomes generally known by the public other than by breach of this Agreement by, or other wrongful act of, the Receiving Party; (c) is developed by the Receiving Party independently of, and without reference to, any Confidential Information of the Disclosing Party; or (d) is received by the Receiving Party from a third party who is not under any obligation to the Disclosing Party to maintain the confidentiality of such information.

**6.3 Compelled Disclosure.** If the Receiving Party becomes legally compelled to disclose any Confidential Information, the Receiving Party shall provide: (a) prompt written notice of such requirement so that the Disclosing Party may seek, at its sole cost and expense, a protective order or other remedy; and (b) reasonable assistance, at the Disclosing Party's sole cost and expense, in opposing such disclosure or seeking a protective order or other limitations on disclosure. If, after providing such notice and assistance as required herein, the Receiving Party remains required by Law to disclose any Confidential Information, the Receiving Party shall disclose no more than that portion of the



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Confidential Information which, on the advice of the Receiving Party's legal counsel, the Receiving Party is legally required to disclose and, upon the Disclosing Party's request, shall use commercially reasonable efforts to obtain assurances from the applicable court or agency that such Confidential Information will be afforded confidential treatment.

**6.4 Data Use.** Customer agrees that data derived by Progress Learning from Progress Learning's performance of the Services or input by Customer may be used for the purposes of analysis, including statistical analysis, trend analysis, creation of data models, and creation of statistical rules. The results of such analysis ("De-identified Data") may be used by Progress Learning for any lawful purpose. Notwithstanding anything contained in this Agreement, De-identified Data shall not contain (i) any Confidential Information of Customer, (ii) any information that identifies or can be reasonably used to identify an individual person, (iii) any information that identifies or can be reasonably used to identify Customer or its affiliates and their suppliers, or (iv) any information that identifies or can be reasonably used to identify any activities or behaviors of Customer.

**6.5 Personal Information.** This Section 6.5 applies only to personal information collected by Progress Learning through the Services. Personal information is retained only for educational purposes. Progress Learning will only use the personal information provided for the purpose for which such information was provided, including for the recording and tracking of student results on assessment items within the Software Services and can be accessed only by the individual student and their teachers or administrators at their school or district. Customer information may also be used to contact Customer when necessary or appropriate. Demographic and profile data is also used to tailor the Customer and Authorized User experience, including by showing content Progress Learning determines may interest the Customer or Authorized Users. In accordance with the Family Education Rights and Privacy Act (FERPA), the Children's Online Privacy Protection Act (COPPA) and other applicable law, none of the collected personal information is sold to or shared with any third party.

## 7. LIMITED WARRANTY; DISCLAIMER.

**7.1 Limited Warranty.** Progress Learning represents and warrants that it will provide the Services in a manner consistent with general industry standards reasonably applicable to the provision thereof and that the Software Services will perform substantially in accordance with the documentation under normal use and circumstances. In the event of Progress Learning's breach of the foregoing warranty, Progress Learning's sole and exclusive obligation and liability, and Customer's sole and exclusive remedy, shall be for Progress Learning to use commercially reasonable efforts to cure such breach. If Progress Learning cannot cure such breach within 30 days after Customer's written notice of such breach, Customer may, at its option, terminate the Agreement upon 30 days advance written notice to Progress Learning.

**7.2 Disclaimer.** OTHER THAN AS EXPRESSLY SET FORTH IN SECTION 7.1, EACH PARTY DISCLAIMS ALL WARRANTIES, CONDITIONS, AND REPRESENTATIONS TO THE OTHER PARTY REGARDING THIS AGREEMENT, WHETHER ORAL OR WRITTEN, EXPRESS, IMPLIED, OR STATUTORY, WITHOUT LIMITING THE FOREGOING, ANY IMPLIED WARRANTY OR CONDITION OF MERCHANTABILITY, THE IMPLIED WARRANTY AGAINST INFRINGEMENT, THE IMPLIED WARRANTY OR CONDITION OF FITNESS FOR A PARTICULAR PURPOSE, AND THOSE ARISING FROM A COURSE OF DEALING OR USAGE OF TRADE ARE EXPRESSLY EXCLUDED AND DISCLAIMED BY PROGRESS LEARNING. NO WARRANTY IS MADE THAT USE OF THE SERVICES WILL BE ERROR FREE OR UNINTERRUPTED, THAT ANY ERRORS OR DEFECTS IN THE SERVICES WILL BE CORRECTED, OR THAT THE SERVICES FUNCTIONALITY WILL MEET CUSTOMER'S REQUIREMENTS.

## 8. LIMITATION OF LIABILITY.

**8.1 Exclusion of Damages.** EXCEPT AS OTHERWISE PROVIDED IN SECTION 8.3, IN NO EVENT WILL EITHER PARTY BE LIABLE TO THE OTHER OR TO ANY THIRD PARTY FOR ANY CONSEQUENTIAL, INCIDENTAL, INDIRECT, EXEMPLARY, SPECIAL OR PUNITIVE DAMAGES, INCLUDING LOSS OF USE, REVENUE, PROFIT, OR DATA, WHETHER ARISING OUT OF BREACH OF CONTRACT, TORT (INCLUDING NEGLIGENCE) OR OTHERWISE, REGARDLESS OF WHETHER SUCH DAMAGE WAS FORESEEABLE AND WHETHER OR NOT SUCH PARTY HAS BEEN ADVISED OF THE POSSIBILITY OF SUCH DAMAGES.

**8.2 Liability Cap.** EXCEPT AS OTHERWISE PROVIDED IN SECTION 8.3, IN NO EVENT WILL EITHER PARTY'S LIABILITY ARISING OUT OF OR RELATED TO THIS AGREEMENT, WHETHER ARISING OUT OF OR RELATED TO BREACH OF CONTRACT, TORT (INCLUDING NEGLIGENCE) OR OTHERWISE, EXCEED THE AGGREGATE AMOUNTS PAID OR PAYABLE TO PROGRESS LEARNING PURSUANT TO THIS AGREEMENT DURING THE TWELVE (12) MONTH PERIOD PRECEDING THE EVENT GIVING RISE TO THE CLAIM.

**8.3 Exceptions.** The exclusions and limitations in Section 8.1 and Section 8.2 shall not apply to: (a) damages or other liabilities arising out of or relating to a party's failure to comply with its obligations under Section 6 (Non-Disclosure and Confidentiality); or (b) a party's obligations under Section 9 (Indemnification).

## 9. INDEMNIFICATION.

**9.1 Progress Learning Indemnification.** Progress Learning shall defend Customer and its officers, directors,



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employees, agents, successors and permitted assigns against any third party claim, suit, action or proceeding (each, an "Action") based on a claim that Customer's receipt or use of the Services in accordance with this Agreement infringes any intellectual property right or misappropriates any trade secret of a third party, and shall pay all settlements entered into and damages awarded against Customer to the extent based on such an Action; provided, however, that Progress Learning shall have no obligations under this Section 9.1 with respect to claims to the extent arising out of: (a) any instruction, information, designs, specifications or other materials provided by Customer to Progress Learning; (b) use of the Services in combination with any materials, software, or equipment not supplied to Customer or specified by Progress Learning in writing; or (c) any modifications or changes made to the Services by or on behalf of any person or entity other than Progress Learning. If the Services, or any part thereof, become, or in the opinion of Progress Learning may become, the subject of a claim of infringement or misappropriation, Progress Learning may, at its option: (i) procure for Customer the right to use such Services free of any liability; (ii) replace or modify the Services to make them non-infringing; or (iii) terminate this Agreement and refund to Customer any portion of the fees prepaid by Customer for the infringing Services.

**9.2 Customer Indemnification.** Customer shall defend Progress Learning and its officers, directors, employees, agents, affiliates, successors and permitted assigns against all Actions based on a claim that any information or materials provided by Customer, or Progress Learning's receipt or use thereof, infringes any intellectual property right or misappropriates any trade secret of a third party, and shall pay all settlements entered into and damages awarded against Progress Learning to the extent based on such an Action.

**9.3 Indemnification Procedures.** The indemnifying party shall solely control the defense and settlement of the applicable Action. The party seeking indemnification hereunder shall promptly notify the indemnifying party in writing of any Action and cooperate with the indemnifying party at the indemnifying party's sole cost and expense. The indemnifying party shall immediately take control of the defense and investigation of such Action and shall employ counsel of its choice to handle and defend the same, at the indemnifying party's sole cost and expense. The indemnifying party shall not settle any Action in a manner that requires the indemnified party to pay monies or admit liability without the indemnified party's prior written consent, which shall not be unreasonably withheld or delayed. The indemnified party's failure to perform any obligations under this Section 9.1 shall not relieve the indemnifying party of its obligations under this Section 9.1 except to the extent that the indemnifying party can demonstrate that it has been materially prejudiced as a result of such failure. The indemnified party may participate in and observe the proceedings at its own cost and expense.

## 10. TERM AND TERMINATION.

**10.1 Initial Term.** This Agreement shall commence on the Effective Date and shall continue in full force and effect for the initial term set forth on the Signature Page ("Initial Term"), unless earlier terminated as provided for below. Thereafter, the Initial Term shall automatically renew for successive periods of one year each (each a "Renewal Term" and together with the Initial Term, the "Term"), unless either party provides written notice to the other party at least 30 days prior to the end of the then-current Initial Term or Renewal Term of its intent to not renew the Agreement.

**10.2 Termination.** Without prejudice to any other remedies and in addition to any other termination rights herein, the parties shall have the right to terminate this Agreement as provided below:

a. By either party if the other party commits a material breach of this Agreement and such breach remains uncured 30 days after written notice of such breach is delivered to such other party including the failure to pay any fees due to Progress Learning; or

b. By either party if the other party makes an assignment for the benefit of creditors, or commences or has commenced against it any proceeding in bankruptcy, insolvency, or reorganization pursuant to bankruptcy laws, laws of debtor's moratorium or similar laws.

**10.3 Effect.** Upon termination of this Agreement for any reason, all rights and licenses granted by Progress Learning hereunder to Customer will immediately cease. Within 30 days after termination or expiration of this Agreement, each party shall return or destroy the Confidential Information of the other party.

**10.4 Survival.** The rights and obligations of the parties set forth in this Section 10.4 and Sections 2.4, 3, 4, 6, 7.2, 8, 9, 10.3, 10.4, and 11, and any right or obligation of the parties in this Agreement which, by its nature, should survive termination or expiration of this Agreement, will survive any such termination or expiration of this Agreement.

## 11. GENERAL.

**11.1 Governing Law.** This Agreement shall be governed by and construed in accordance with the internal laws of Kenton County, State of Kentucky without giving effect to any choice or conflict of law provision or rule. The United Nations Convention on Contracts for the International Sale of Goods shall not apply in any respect to this Agreement or the parties.

**11.2 Conflicting Terms.** Notwithstanding the content of any Customer purchase order or any other document or record, whether in writing or electronic, relating to the subject matter of this Agreement, the terms of this Agreement shall govern and any conflicting, inconsistent, or additional terms contained in such documents shall be null and void.



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**11.3 Notice.** All communications required or otherwise provided under this Agreement shall be in writing and shall be deemed given when delivered (i) by hand, (ii) by registered or certified mail, postage prepaid, return receipt requested; or (iii) by a nationally recognized overnight courier service; to the address set forth on the Signature Page, as may be amended by the parties by written notice to the other party in accordance with this Section 11.3.

**11.4 Assignment.** Neither party may assign, transfer or delegate any or all of its rights or obligations under this Agreement, without the prior written consent of the other party, which consent shall not be unreasonably withheld or delayed; provided that upon prior written notice to the other party, either party may assign the Agreement to a successor of all or substantially all of the assets of such party through merger, reorganization, consolidation or acquisition. No assignment shall relieve the assigning party of any of its obligations hereunder. Any attempted assignment, transfer or other conveyance in violation of the foregoing shall be null and void. This Agreement shall be binding upon and shall inure to the benefit of the parties hereto and their respective successors and permitted assigns.

**11.5 Interpretation.** For purposes of this Agreement, (a) the words "include," "includes" and "including" shall be deemed to be followed by the words "without limitation"; (b) the word "or" is not exclusive; and (c) the words "herein," "hereof," "hereby," "hereto" and "hereunder" refer to this Agreement as a whole. Should any provision of this Agreement require judicial interpretation, the parties agree that the court interpreting or construing the same shall not apply a presumption that the terms of this Agreement shall be more strictly construed against one party than against another.

**11.6 Severability.** In case any one or more of the provisions of this Agreement should be invalid, illegal or unenforceable in any respect, the validity, legality and enforceability of the remaining provisions contained herein shall not in any way be affected or impaired thereby.

**11.7 Attorneys' Fees.** In the event that any action, suit, or other legal or administrative proceeding is instituted or commenced by either party hereto against the other party arising out of or related to this Agreement, the prevailing party shall be entitled to recover its reasonable attorneys' fees and court costs from the non-prevailing party.

**11.8 Entire Agreement.** This Agreement constitutes the entire agreement between the parties concerning the subject matter hereof and supersedes all written or oral prior agreements or understandings with respect thereto.

**11.9 Amendment; Waiver.** This Agreement may only be amended, modified or supplemented by an agreement in writing signed by each party hereto. No waiver by any party of any of the provisions hereof shall be effective unless explicitly set forth in

writing and signed by the party so waiving. Except as otherwise set forth in this Agreement, no failure to exercise, or delay in exercising, any rights, remedy, power or privilege arising from this Agreement shall operate or be construed as a waiver thereof, nor shall any single or partial exercise of any right, remedy, power or privilege hereunder preclude any other or further exercise thereof or the exercise of any other right, remedy, power or privilege.

**11.10 Force Majeure.** Neither party shall be liable for delay or failure in performing any of its obligations hereunder due to causes beyond its reasonable control, including an act of nature, war, natural disaster, governmental regulations, terrorism, communication or utility failures or casualties or the failures or acts of third parties.

**11.11 Equitable Relief.** Each party acknowledges that a breach by a party of Section 2.4 (Restrictions) or Section 6 (Non-Disclosure and Confidentiality) may cause the non-breaching party irreparable damages, for which an award of damages would not be adequate compensation and agrees that, in the event of such breach or threatened breach, the non-breaching party will be entitled to seek equitable relief, including a restraining order, injunctive relief, specific performance and any other relief that may be available from any court, in addition to any other remedy to which the non-breaching party may be entitled at law or in equity. Such remedies shall not be deemed to be exclusive but shall be in addition to all other remedies available at law or in equity, subject to any express exclusions or limitations in this Agreement to the contrary.

**11.12 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 shall 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.

**11.13 Relationship of Parties.** Nothing in this Agreement shall constitute or be deemed to constitute a partnership between the parties hereto or constitute or be deemed to constitute one party or agent of the other, for any purpose whatsoever, and neither party shall have the authority or power to bind the other, or to contract in the name of or create a liability against the other, in any way or for any purpose.

**11.14 Counterparts.** This Agreement may be executed in counterparts, each of which shall be deemed an original, but all of which together shall be deemed to be one and the same agreement. A signed copy of this Agreement delivered by facsimile, e-mail or other means of electronic transmission shall be deemed to have the same legal effect as delivery of an original signed copy of this Agreement.



**SERVICES AGREEMENT**

*Schedule 1*

**SCHEDULE 1**

**DESCRIPTION OF SERVICES**

See provided quote