



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

## Issue Paper

**DATE:**

October 23, 2023

**AGENDA ITEM (ACTION ITEM):**

Consider/Approve a sales contract with Formative and Ryland Elementary to purchase a site license through June 30, 2025.

**APPLICABLE BOARD POLICY:**

01.1 - Legal Status of the Board

**HISTORY/BACKGROUND:**

Formative is a web based tool that allows teachers to create tasks or assignments that are easily accessible for students through a device. Formative gives students the opportunity to interact with the tasks in real time, allowing the teacher to quickly and efficiently formatively assess student attainment of skills and adjust instruction as needed.

**FISCAL/BUDGETARY IMPACT:**

\$3,513.00 -ESSER

**RECOMMENDATION:**

Approve a sales contract with Formative and Ryland Elementary to purchase a site license through June 30, 2025.

**CONTACT PERSON:**

Dan Schacherer

A handwritten signature in blue ink, appearing to be 'D. Schacherer', written over a horizontal line.

Principal/Administrator

A handwritten signature in blue ink, appearing to be 'Tina Wachtman', written over a horizontal line.

District Administrator

A handwritten signature in blue ink, appearing to be 'J. [unclear]', written over a horizontal line.

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.



Newsela Inc.  
185 Madison Ave  
New York, NY 10016

## Order Form

**Billing Information:**

Billing Frequency: Upfront in full

Payment Terms: Net 30

Billing Schedule: Upon Contract Signature

**Order Form No.** Q-120849  
**Newsela Sales Rep:** Matthew Wheeland  
**Contact Email:** matthew.wheeland@newsela.com  
**Offer Date:** October 31, 2023  
**Expiration Date:** November 30, 2023

**To:**  
Dan Schacherer  
Ryland Heights Elementary School  
3845 Stewart Dr  
Ryland Hght, KY 41015-9307

Qty	Account	Products/Services	License Dates	Line Total
1	RYLAND HEIGHTS ELEMENTARY SCHOOL	Formative Gold	11/07/23 - 06/30/25	\$3,296.55
1	RYLAND HEIGHTS ELEMENTARY SCHOOL	Formative Locked Browser	11/07/23 - 06/30/25	\$216.45
Contract Total				\$3,513.00

\*See table above or Appendix for Product/Services details and License Dates.

This Order Form and the Terms of Service [available here](#), which are hereby incorporated by this reference, is entered into by and between Newsela, Inc., and its parents, subsidiaries and affiliates, having an office at 185 Madison Ave, 5th floor, New York, NY 10016 (together "Newsela") and the customer named above, having an office at the address set forth above ("Customer"). All capitalized terms used in this Order Form and not defined herein shall have the meanings ascribed to them in the Terms of Service linked above. This Order Form is subject to the Terms of Service linked above, Newsela's Privacy Policy and, where applicable, any additional Terms and Conditions, or other binding RFP or binding bid signed by and between the Parties (together the "Customer Agreement").

The Customer Agreement constitutes the entire agreement between the parties with regards to this subject matter, and supersedes all written or oral understandings, proposals, bids, offers, purchase or delivery orders, negotiations, agreements or communications of every kind. Additionally, the Customer Agreement specifically supersedes the terms and conditions of any Purchase Order delivered to Newsela after this Customer Agreement is executed and any such terms and conditions shall not be applicable or considered a part of the terms and conditions that govern this engagement. The Customer's internal requirements for Purchase Orders does not relieve Customer of its obligation to pay Newsela for all years included herein. This Customer Agreement and the terms contained therein are intended only for the Customer and should be kept confidential.

**Term:** The subscription for the above-identified Newsela Products will commence and end as defined above, or in the License Dates Section of the Appendix in this Customer Agreement. By signing this Order Form, the Customer agrees to

the pricing per product and quantity breakdowns underlying this Order Form, which will be provided by Newsela upon request at any time and will also be provided on the invoice unless requested otherwise. Failure of the Customer to make use of the Products during their respective License Dates specified herein will not extend Newsela's obligation to deliver those Products/Services beyond those dates.

Following the Subscription End Date, unless prohibited by law, this Customer Agreement will renew for the Products/Services licensed hereunder for successive periods equal in length to the greater of the Term or 12 months (a 'Renewal Term'). If this Customer Agreement is so renewed, Customer agrees the prices payable for such Renewal Term shall be the prevailing rates then offered by Newsela for the licensed products stated above.

**Fees:** The Customer agrees to pay the Contract Grand Total set forth above per the Billing Terms noted above upon execution of this Customer Agreement. If a Purchase Order is required, Customer shall submit the Purchase Order to Newsela in accordance with the Billing Information set forth hereinabove by emailing it to [billing@newsela.com](mailto:billing@newsela.com) and including "Customer Agreement No. Q-120849" in the subject line, otherwise a purchase order shall not be required for payment. Service will be suspended at Newsela's discretion if payment is not received by Newsela in accordance with the Billing Terms noted above. Failure of the Customer to use the Products/Services will not relieve Customer of its obligation to pay hereunder.

*Prices shown above do not include any state and local taxes that may apply. Any such taxes are the responsibility of the Customer and will appear on the final invoice (if applicable). If the contracting entity is exempt from sales tax, please send the required tax exemption documents immediately to [salestax@newsela.com](mailto:salestax@newsela.com).*

#### **Purchase Order Information**

If you need a Purchase Order, please fill out the following information.

PO Required: Yes

PO Number:

PO Amount:

#### **Billing Information**

Provide the billing service representative to whom the invoice should be addressed.

**Bill-To Name:** Dan Schacherer

**Bill-To Email:** [dan.schacherer@kenton.kyschools.us](mailto:dan.schacherer@kenton.kyschools.us)

By initialing here, I agree that the billing details stated above are current and accurate. \_\_\_\_\_

The individual executing this Customer Agreement has the authority to execute this agreement and bind the Customer, and Newsela has the right to rely on that authorization. The individual executing this Customer Agreement also certifies that there is funding in place for years included herein.

Authorized Signature:

Date of Signature:





Kenton County School District | It's about ALL kids

**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 seventy-two (72) 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)(b) 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 Education 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 seventy-two (72) 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 KCBOE and Vendor, the terms of this agreement shall apply.

Newsela.Inc  
Name Vendor

185 Madison Ave. 5th Floor New York, New York 10016  
Address Vendor

646 450 0005  
Telephone Vendor

privacy@newsela.com  
Email Address Vendor

DocuSigned by:

Chris Mezzatesta

Signature

by Vendor's Authorized Representative

Chris Mezzatesta  
Name Print

10/23/2023  
Date

# Master Services Agreement

**Last Updated:** Nov 04, 2022



THIS MASTER SERVICES AGREEMENT (collectively, with any Order Form(s), this "**Agreement**") is entered into and effective as of the Effective Date by and between Smartest Edu, Inc. d/b/a Formative ("**Formative**") and the Customer identified on the applicable Order Form. Formative and Customer may be referred to individually as a "**Party**" and collectively as the "**Parties**". For good and valuable consideration, the sufficiency and adequacy of which is hereby acknowledged, the Parties hereby agree as follows:

## 1. DEFINITIONS.

1.1 "**Affiliate**" means any entity which directly or indirectly controls, is controlled by, or is under common control with the subject entity. "Control" for purposes of this definition, means direct or indirect ownership or control of more than fifty percent (50%) of the voting interests of the subject entity.

1.2 "**Authorized Users**" means the Customer's employees, personnel, independent contractors, students, and other individuals to whom the Customer provides or makes available the Products. To the extent this Agreement is entered into by a District on behalf of one or more Schools, "Authorized Users" shall also include the applicable School's employees, personnel, independent contractors, students, and other individuals to whom such School provides or makes available the Products.

1.3 "**Confidential Information**" means all confidential and proprietary information, materials, know how, data, trade secrets, business plans, processes, financial information, marketing plans, customer, supplier, or investor lists, research, and technical or commercial information, in tangible or intangible form, relating to a Party (the "Disclosing Party") and that is provided to the other Party (the "Receiving Party"). Formative's Confidential Information shall include, but is not limited to, the Formative Intellectual Property.



support of the Products, including without limitation any and all revisions, modifications, and updates to such Documentation made by Formative from time to time.

1.6 **"Formative Platform"** means Formative's proprietary web-based learning and analytics platform.

1.7 **"Products"** means the Formative Platform and related products and services purchased by Customer pursuant to an Order Form, including any support, implementation, and training services offered by Formative and purchased by Customer in connection with the Formative Platform.

1.8 **"Law"** means any statute, law, ordinance, regulation, rule, code, order, constitution, treaty, common law, judgment, decree or other requirement of any federal, state, local or foreign government or political subdivision thereof, or any arbitrator, court or tribunal of competent jurisdiction.

1.9 **"Order Form"** means the document by which Customer purchases Products from Formative. Each Order Form shall reference this Agreement and forms part of this Agreement if executed by the authorized representatives of each Party.

1.10 **"School"** means a single educational institution.

1.11 **"Third Party Application"** means a software application with functionality that interoperates with the Products, that is provided by Customer or a third party (other than the Products).

1.12 **"User Data"** means the data and Information submitted or provided to the Products by Customer or its Authorized Users.

## 2. PRODUCTS.

2.1 Formative shall provide the Products that are set forth on an Order Form. To the extent Customer requests additional products or services, Formative shall have no obligation to provide additional products or services not set forth on a current Order Form, unless and until the Parties execute an additional Order Form that includes such products or services. In the event of any conflict between the terms of this Master Services Agreement and an Order Form, the Order Form shall control.

2.2 To the extent this Agreement is entered into by a District on behalf of one or multiple Schools, use of the Formative Platform as part of the Products by each School also shall be subject to the terms and conditions of the then-current Terms of Service presented or made available to an end user when accessing the Formative Platform (the **"Formative User Agreements"**). The Formative User Agreements may be updated from time to time as set forth in the Formative User Agreements. Customer shall ensure that each Authorized User agrees to the terms and conditions of the Formative User Agreements prior to use of the Products.

2.3 Formative may regularly update the Products and reserves the right to add and/or substitute functionally equivalent features for any reason, including without limitation in the event of product unavailability, or changes to software requirements. Formative shall have the right to discontinue any Product or feature or function thereof, with reasonable prior written notice to Customer and in accordance with the end-of-life policy or procedures provided or made available by Formative in connection with such written notice.

them without entitling Customer to any refund or credit, if for example and without limitation, the provider of the Third Party Application ceases to make the Third Party Application available for interoperation with the Products in a manner acceptable to Formative. Customer is responsible for complying with the applicable terms of service for any Third Party Applications with which Customer uses the Products.

### 3. LICENSE AND USE RESTRICTIONS.

3.1 Subject to the terms and conditions of this Agreement, during the Term, Formative grants Customer a limited, personal, non-exclusive, non-transferable, non-sublicenseable, and non-assignable license to: (a) access and use the Products solely for Customer's internal business purposes to assess and improve student engagement and track student growth over time; and (b) permit Authorized Users to access and use the Products solely for Customer's internal business purposes to assess and improve student engagement and track student growth over time.

3.2 Customer shall (a) be responsible for Authorized Users' use of the Products and compliance with this Agreement and the Formative User Agreements, (b) be responsible and liable for all User Data submitted through a Customer or Authorized User account, including without limitation, the accuracy, content, quality and legality of User Data provided or made available to Formative in connection with this Agreement and the means by which Customer acquired User Data, (c) use commercially reasonable efforts to prevent unauthorized access to or use of the Products, and notify Formative promptly of any such unauthorized access or use, (d) use the Products only in accordance with the Documentation and applicable Laws, rules and government regulations, and (e) be solely responsible for the Customer systems through which the Products are accessed. The Products do not replace the need for Customer to maintain regular back-up procedures and business continuity policies with respect to User Data.

3.3 Customer represents and warrants that (a) Customer has obtained all necessary rights, consents, permissions, and approvals in connection with all data provided or made available to Formative in connection with the Products and/or this Agreement, including without limitation obtaining all consents and providing all notices required under applicable data privacy and information security Laws, (b) such data does not infringe or otherwise violate the rights of any third party, and (c) any personally identifiable information of persons under the age of eighteen (18) collected or processed by Customer has been and shall be collected and processed only in strict compliance with applicable Laws, including all applicable data privacy and information security Laws. Customer further represents and warrants that it shall, at all times during the Term of this Agreement, have and adhere to a privacy statement, posted on its website, that reflects its current privacy practices and complies with all Laws, including applicable data privacy and information security Laws. Such privacy statement shall expressly provide notice to end users of (i) the type of information that may be collected by Customer; and (ii) how and for what purpose Customer uses the information collected and shares such information with third parties, including, without limitation, expressly permitting the use of data in connection with the Products and the sharing of such data with Formative and other third parties as contemplated by this Agreement. All transfers of data across international borders shall be in compliance with applicable privacy and data protection Law. To the extent applicable under this Agreement, the Parties shall enter into a data protection agreement ("DPA") to govern the processing of data in connection with this Agreement.

3.5 Customer shall not: (a) make the Products or the Documentation available to, or use any Products or the Documentation for the benefit of, anyone other than Customer or its Authorized Users (and, with respect to Authorized Users, only in conjunction with their performance of services under Customer's control and involving the review of information pertaining to their performance of such services); (b) sell, resell, sublicense, distribute, rent or lease any Products or any portion thereof, including the Documentation or include any Products in a service bureau, time sharing or outsourcing offering; (c) interfere with or disrupt the integrity or performance of the Products or third-party data contained therein; (d) attempt to gain unauthorized access to the Products or its related systems or networks; (e) copy the Products or any part, feature, function or user interface thereof; (f) access the Products in order to build a competitive product or service; (g) reverse engineer the Products, in whole or in part, nor use any methods to gain access to the source code or infrastructure of the Products, in whole or in part; or (h) access or use the Products in order to benchmark the Products, or any portion thereof, or Formative's performance of the Products. Customer shall use commercially reasonable measures to ensure Customer's use of the Products do not store or transmit code, files, scripts, agents or programs intended to do harm, including, for example, viruses, worms, time bombs and Trojan horses. Customer shall not provide any competitor of Formative (including any employee or contractor of such competitor) with access to or use of the Products, including by read-only access, direct access through an Authorized User identification and password information, or otherwise.

## 4. DATA.

4.1 Customer grants Formative a non-exclusive, royalty-free license to access and use User Data during the Term for the purposes of (a) providing the Products; (b) monitoring and improving the performance of the Products and other internal business purposes; and (c) creating de-identified versions of User Data. Customer represents and warrants that it owns or has the legal right and authority, and will continue to own or maintain the legal right and authority, to grant to Formative during the Term the license set forth in this paragraph.

4.2 Formative shall have the right to collect technical and usage data from Customer's and its Authorized Users' use of the Formative Platform and Products ("**Technical Data**"). Formative shall own all Technical Data, and all de-identified or aggregated versions of User Data created by Formative. Formative may use such Technical Data and de-identified or aggregated User Data to improve, provide and update the Formative Platform and Products; provided, that such data cannot reasonably be used to identify Customer or an Authorized User.

4.3 Following termination or expiration of this Agreement, Customer shall have forty-five (45) days during which to retrieve its User Data; provided, that Customer has paid all amounts owed to Formative under this Agreement. After such forty-five (45) day period, Formative may delete the User Data (provided, that Formative may retain an archival copy of User Data which may be deleted in accordance with Formative's standard backup and data retention policies).

## 5. FEES AND TAXES.



Formative's net income) relating to the provision of the Products.

5.2 If any amount owed to Formative under this Agreement is overdue, Formative may, without limiting its other rights and remedies, (a) charge interest on the past due balances at the rate of one and a half percent (1.5%) per month and/or (b) suspend the Products to Customer until such amounts are paid in full.

## 6. DISCLAIMER OF WARRANTIES.

**6.1 Products Provided "As Is".** TO THE FULLEST EXTENT PERMITTED BY APPLICABLE LAW, EXCEPT AS EXPRESSLY SET FORTH IN THIS AGREEMENT, THE PRODUCTS ARE PROVIDED BY FORMATIVE "AS IS," AND "WITH ALL FAULTS". FORMATIVE EXPRESSLY DISCLAIMS ALL OTHER WARRANTIES, EXPRESS OR IMPLIED, WITH RESPECT TO THIS AGREEMENT, THE PRODUCTS AND/OR THE RESULTS THAT MAY (OR MAY NOT) BE ACHIEVED BY AN AUTHORIZED USER OR CUSTOMER'S USE OF THE PRODUCTS, INCLUDING WITHOUT LIMITATION ALL IMPLIED WARRANTIES OF MERCHANTABILITY, FITNESS FOR A PARTICULAR PURPOSE, AND ANY WARRANTIES ARISING FROM A COURSE OF DEALING OR USAGE OR TRADE. FORMATIVE DOES NOT WARRANT THAT THE OPERATION OF THE PRODUCTS WILL BE UNINTERRUPTED OR ERROR-FREE AND WHILE FORMATIVE HAS USED REASONABLE MEASURES TO MAINTAIN THE CONFIDENTIALITY OF USERS' INFORMATION, CUSTOMER ACKNOWLEDGES AND AGREES THAT FORMATIVE CANNOT GUARANTEE THE SECURITY OR ACCESSIBILITY OF SUCH INFORMATION. CUSTOMER ACKNOWLEDGES THAT FORMATIVE USES A THIRD PARTY TO HOST THE PRODUCTS AND TO STORE USERS' INFORMATION AND FORMATIVE MAKES NO REPRESENTATION OR WARRANTY AND SHALL HAVE NO LIABILITY FOR SUCH THIRD PARTY SERVICES. FORMATIVE MAKES NO WARRANTIES REGARDING THE ACCURACY OR COMPLETENESS OF ANY INFORMATION PROVIDED IN CONNECTION WITH OR RESULTS OBTAINED THROUGH USE OF THE PRODUCTS, AND FORMATIVE SHALL HAVE NO LIABILITY FOR ANY CLAIM ARISING FROM ANY USE OF SUCH INFORMATION OR RESULTS.

## 7. OWNERSHIP AND CONFIDENTIALITY.

**7.1 Ownership.** Customer agrees that Formative and its third-party licensors own all rights, title and interests in and to the Products, the Documentation, and all updates, derivatives and modifications to or of the Products and the Documentation (collectively, the "**Formative Intellectual Property**"). Other than the limited license and use rights expressly set forth in this Agreement, to the Formative Intellectual Property, Formative does not grant Customer any rights to the Formative Intellectual Property and reserves all rights therein.

**7.2 Improvements.** If Customer proposes or provides any ideas, suggestions, recommendations, enhancements, improvements, or other feedback ("**Improvements**") to Formative, then Customer hereby assigns all rights, title, and interests, including all copyright, patent and trade dress rights, in and to such Improvements to Formative.

**7.3 Confidentiality of Agreement Terms.** The Parties agree that the terms of this Agreement and the pricing contained in this Agreement (including, without limitation, in each Order Form) are confidential information and that each Party may disclose only under an obligation of confidentiality to its auditors,

**7.4.1 Disclosure and Use Restrictions.** The Receiving Party shall use commercially reasonable efforts to avoid the loss, unauthorized disclosure and/or unauthorized use of any Confidential Information of the Disclosing Party. The Receiving Party agrees to protect the confidentiality of the Confidential Information of the Disclosing Party in the same manner that it protects the confidentiality of its own proprietary and confidential information of like kind (but in no event using less than reasonable care). If the Receiving Party is compelled by law to disclose Confidential Information of the Disclosing Party, it shall provide the Disclosing Party with prior notice of such compelled disclosure (to the extent legally permitted) and reasonable assistance, at Disclosing Party's cost, if the Disclosing Party wishes to contest the disclosure.

**7.4.2 Exclusion from Confidential Information.** Confidential Information shall not include information that: (1) is in the public domain at the time of disclosure to the Receiving Party; (2) becomes part of the public domain after disclosure by the Disclosing Party without obligation of confidentiality and without direct or indirect fault of the Receiving Party or person(s) acting on the Receiving Party's behalf; (3) was in the Receiving Party's possession before receipt from the Disclosing Party without an obligation of confidentiality; (4) is lawfully obtained from a third party who has the right to make such disclosure on a non-confidential basis; or (5) has been independently developed by the Receiving Party without reference to or use of the Confidential Information of the Disclosing Party.

**7.4.3 Injunctive Relief.** The Parties agree that any breach of this Section, including improper use or disclosure of the Confidential Information by the Receiving Party, would cause irreparable harm to the Disclosing Party, for which remedies at law would be inadequate, and the Disclosing Party shall be entitled to seek injunctive relief against any such breach or threatened breach, without posting any bond or showing of irreparable harm, in addition to any other remedy available to it.

## 8. INDEMNIFICATION.

8.1 Formative shall indemnify and defend Customer from any third-party claim alleging that the use of the Products by Customer as contemplated by this Agreement infringes a third party's U.S. patent issued as of the Effective Date, or any copyright, trademark, or trade secret rights of a third party. Formative shall pay any damages awarded in any final judgment entered by a court of competent jurisdiction with respect to any such claim or agreed to by Formative in any settlements arising out of such claim; provided, that (i) Customer promptly gives written notice of the claim to Formative; (ii) Customer gives Formative sole control of the defense and settlement of the claim (provided, that Formative shall not settle any claim unless it unconditionally releases Customer of all liability); (iii) Customer provides to Formative, at Formative's cost, all reasonable assistance; and (iv) the alleged infringement does not arise as a result of: (a) the combination, operation, or use of the Products with third party software, services, or other products or materials not furnished or authorized by Formative, (b) failure by Customer to timely implement any updates made available to Customer by or on behalf of Formative, or (c) Customer's or an Authorized User's violation of any laws, rules, and/or regulations applicable to its business. In the event of such a claim or threat thereof, Formative may, in its sole discretion, (1) obtain a license for the infringing part of the Products, (2) remove or alter the infringing part of the Products, so long as such removal or alteration does not materially affect the functionality of the Products, or (3) terminate this Agreement and Customer's license to the applicable

8.2 Customer shall indemnify, defend and hold harmless Formative and its Affiliates, and their respective owners, managers, directors, employees, and contractors from and against all losses, damages, liabilities and costs (including reasonable attorneys' fees) incurred in connection with any third party claim arising out of or relating to (i) the User Data, (ii) Customer's use of the Products or the results obtained therefrom, (iii) any of the exclusions set forth in Section 8.1(a)-(c) above, and/or (iv) Customer's breaches of Section 3.

## 9. LIMITATION OF LIABILITY.

9.1 IN NO EVENT SHALL EITHER PARTY BE LIABLE FOR ANY SPECIAL, CONSEQUENTIAL, INCIDENTAL, OR INDIRECT DAMAGES, HOWEVER CAUSED AND UNDER ANY THEORY OF LIABILITY ARISING OUT OF THIS AGREEMENT OR THE PRODUCTS, INCLUDING WITHOUT LIMITATION LOSS OF PROFITS, LOSS OF DATA, LOSS OF REVENUE OR LOSS OF USE, WHETHER OR NOT SUCH PARTY HAS BEEN ADVISED OF THE POSSIBILITY OF SUCH DAMAGES, AND NOTWITHSTANDING ANY FAILURE OF ESSENTIAL PURPOSE OF ANY REMEDY.

9.2 IN NO EVENT SHALL FORMATIVE'S TOTAL, AGGREGATE LIABILITY ARISING OUT OF OR RELATED TO THIS AGREEMENT EXCEED AN AMOUNT EQUAL TO THE FEES RECEIVED BY FORMATIVE FROM CUSTOMER IN THE SIX (6) MONTH PERIOD PRIOR TO THE EVENT GIVING RISE TO THE FIRST CLAIM BROUGHT UNDER THIS AGREEMENT.

9.3 NOTWITHSTANDING THE FOREGOING, THE ABOVE LIMITATIONS SHALL NOT APPLY TO CLAIMS ARISING FROM A PARTY'S INDEMNIFICATION OBLIGATIONS, A PARTY'S FRAUD OR WILLFUL MISCONDUCT, OR BREACHES OF SECTION 3 OF THIS AGREEMENT.

## 10. TERM AND TERMINATION.

10.1 **Term.** This Agreement shall continue for the Term set forth on the applicable Order Form, until: (i) this Agreement is terminated as provided herein, or (ii) the expiration or termination of all outstanding Order Forms. For the avoidance of doubt, this Agreement shall automatically terminate upon the expiration or termination of all outstanding Order Forms.

10.2 **Termination.** Either Party may terminate this Agreement for cause: (i) upon written notice to the other Party in the event of a material breach of this Agreement by the other Party which remains uncured thirty (30) days after receipt of written notice thereof; or (ii) if the other Party becomes the subject of a petition in bankruptcy or any other proceeding relating to insolvency, receivership, liquidation or assignment for the benefit of creditors and such petition or other proceeding is not dismissed within ninety (90) days of the filing thereof. Without limiting the foregoing, and in addition to any of its other termination rights set forth herein, Formative may terminate this Agreement in whole or in part, effective on written notice to Customer, if Customer: (a) fails to pay any amount when due hereunder, and such failure continues more than thirty (30) days after Formative's delivery of written notice thereof; or (b) breaches any of its obligations under **Section 3.5** (Restrictions) or **Section 7** (Ownership and Confidentiality).

10.3 **Effect of Termination.** Upon any termination or expiration of this Agreement: (i) all rights and licenses granted to Customer and Authorized Users shall cease, and Customer and its Authorized Users shall immediately discontinue use of the Products; (ii) each Party shall immediately discontinue use of the other



purposes in accordance with applicable Law; and (iii) Customer shall promptly pay all amounts due to Formative under the Agreement. The rights and obligations of the Parties set forth in Sections 4, 5, 7-9, 10.3, and 11 of this Agreement shall survive the termination of this Agreement.

## 11. MISCELLANEOUS.

**11.1 Publicity.** Except as expressly permitted herein, neither Party shall, without the other Party's prior written consent in each instance, use or distribute in advertising, publicity or other promotional endeavor, the name of the other Party or such other Party's trademarks, or issue a press release concerning the relationship of the Parties. Notwithstanding the foregoing, Customer agrees that Formative may identify Customer as a recipient of the Products and use Customer's trademarks, service marks, or logos in sales presentations and marketing materials in order to reference Customer as a customer of Formative.

**11.2 Force Majeure.** Neither Party shall be responsible for any failure of its obligations under this Agreement to the extent that such failure is due to causes beyond such Party's reasonable control, including without limitation acts of God, war, terrorism or threat thereof, acts of any government or agency thereof, fire, flood, earthquake, explosions, epidemics, quarantine restrictions, strikes or labor disputes, lockouts, embargoes, civil unrest, severe weather conditions, delay in transportation, computer, telecommunications, Internet service provider or hosting facility failures or delays involving hardware, software or power systems not within Formative's possession or reasonable control, denial of service attacks, or acts or omissions of vendors or suppliers (each, a "**Force Majeure Event**"); provided, however, that Customer's obligation to timely make payment of all fees for the Products may be temporarily delayed during the event, but shall not be excused or further delayed by this clause. In the event a Force Majeure Event extends for a period greater than thirty (30) days, Formative may terminate this Agreement upon notice to Customer. Formative shall not be in breach of its obligations under this Agreement during a Force Majeure Event if Formative offers a reasonable accommodation or substitute for the disrupted services, which Formative may offer in its sole discretion. For the avoidance of doubt, COVID-19 and its foreseeable consequences and effects shall not constitute a Force Majeure Event.

**11.3 Independent Contractors.** The Parties to this Agreement are independent contractors, and under no circumstances shall this Agreement be interpreted to create an agency, joint venture or partnership between the Parties. Neither Party is an agent, representative, or partner of the other Party. Neither Party shall have any right or authority to incur any obligation or liability of, or to otherwise bind, the other Party.

**11.4 No Third-Party Beneficiaries.** There are no third party beneficiaries to this Agreement.

**11.5 Notice.** Any notice, approval, or other communication under this Agreement must be given in writing and is be deemed to have been delivered (i) on the delivery date if delivered personally to the Party to whom the same is directed; or (ii) upon receipt as evidenced by a return receipt, after deposit with a commercial overnight carrier, or by U.S. mail, return receipt requested, postage and charges prepaid, to the following addresses, or to such other address as changed by a Party providing written notice in accordance with this Section:

**If to Formative:**

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Santa Monica, CA 90405

Attention: Kevin McFarland

**If to Customer:**

To the Customer's address as set forth on the Order Form.

**11.6 No Waiver; Entire Agreement; Amendment.** No failure or delay by either Party in exercising any right under this Agreement shall constitute a waiver of that right. This Agreement, including the Formative User Agreements, constitutes the entire agreement with respect to the transactions set forth herein and supersede any and all prior agreements, written or oral, of the Parties with respect to the transactions set forth herein. No modification or amendment of this Agreement shall be effective unless in writing and signed by the authorized representatives of each Party, except that the Formative User Agreements may be revised by Formative as provided herein.

**11.7 Assignment.** Neither Party is permitted to assign or transfer this Agreement, or any of its rights or obligations hereunder, without the prior written consent of the other Party; provided, that either Party may assign this Agreement in its entirety in connection with a merger, consolidation, change of control, acquisition, or sale of all or substantially all of the assets of such Party. Any assignment or transfer of this Agreement in violation of this Section is null and void. This Agreement is binding upon and inures to the benefit of the Parties hereto and their respective permitted successors and assigns.

**11.8 Severability.** If a court of competent jurisdiction finds any provision of this Agreement invalid or unenforceable, that provision of this Agreement will be amended to achieve as nearly as possible the intent of the Parties, and the remainder of this Agreement will remain in full force and effect.

**11.9 Dispute Resolution.** The Parties shall attempt to resolve any disputes that may arise between the Parties under this Agreement. If the Parties are unable to resolve the dispute within fifteen (15) business days, then the dispute shall be escalated to an executive-level officer for each Party for review and resolution. If the dispute is not resolved by the Parties' officers within fifteen (15) business days from escalation to the officers, either Party shall have the right to pursue any remedies permitted under this Agreement or at law or in equity. The Parties agree to continue performing their respective obligations under this Agreement while the dispute is being resolved unless and until such obligations are terminated in accordance with the provisions of this Agreement. All attempts to resolve any dispute shall be conducted in good faith by the Parties.

**11.10 Governing Law; Waiver of Jury Trial.** This Agreement and all claims relating to this Agreement shall be interpreted, construed and enforced in accordance with the laws of the State of Delaware without giving effect to its conflicts of laws rules. THE PARTIES HEREBY EXPRESSLY WAIVE ANY AND ALL RIGHT TO A TRIAL BY JURY WITH RESPECT TO ANY EQUITABLE RELIEF BEING SOUGHT.

**11.11 Electronic Signatures and Counterparts.** If either Party signs this Agreement through electronic signature, such electronic signature will have the same effect as a physical signature. This Agreement may be executed in any number of electronic, PDF or facsimile counterparts, each of which is deemed an original and all of which together constitute one and the same agreement.

Master  
Services  
Agreement  
PDF



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Get Started



Product

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Solutions

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Schools/Districts	Math			Training Center		Certified Educators
		Blog				
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		Team				Formative Champions
	ELA			Customer Support		
Library		Careers				
	World- Languages			Billing Support		
	Social Studies			Formative Support		
	SEL			1-833-463-6761		



Terms of Service	Privacy Policy	Data Processing Policy	Responsible Disclosure Policy
Accessibility Statement	Certifications and Compliance		

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