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OAKLAND UNIFIED
SCHOOL DISTRICT

Community Schools, Thriving Students

Memo

To Board of Education

From Jacqueline Minor, General Counsel 

Board Meeting Date June 27, 2012

Subject **APPROVAL OF THE MEMORANDUM OF UNDERSTANDING
BETWEEN THE DISTRICT AND EDUCATION ELEMENTS**

Action Requested **APPROVAL OF THE MEMORANDUM OF UNDERSTANDING
BETWEEN THE DISTRICT AND EDUCATION ELEMENTS**

Background In support of the Grant from the Rogers Family Foundation for implementation of the Blended Learning Pilot Program at four District schools it is necessary to enter into agreements with two companies that provide proprietary software and platform to support the analytics, assessments, and data gathering to implement the pilot program. Education Elements is one of the two companies.

Discussion Education Elements is providing its proprietary platform to support the Blended Learning Pilot Program being funded by the Rogers Family Foundation at four District Elementary schools for the 2012-13 school year.

Recommendation Approval of the Memorandum of Understanding.

Fiscal Impact Funding paid for by Oakland Schools Foundation from the Rogers Family Foundation Grant.

Attachment MOU with Education Elements.

MEMORANDUM OF UNDERSTANDING

This Memorandum of Understanding ("MOU") is made as of 11th day of June 2012 ("Effective Date"), between **Education Elements, Inc.**, a corporation organized under the laws of Delaware, whose business address is 999 Skyway Road, Suite 325, San Carlos, CA 94070 ("**Education Elements**"), **Oakland Unified School District**, ("**Customer**"), a unified public school district operating under the laws of the State of California, whose central office address is 1025 Second Avenue, Oakland, California and, **Oakland Schools Foundation** ("**OSF**"), a non-profit corporation, ("**OSF**"). The entities may be herein individually as a "Party" and collectively as "Parties."

1. Education Elements Services.

1.1 Services. Education Elements utilizes its proprietary platform ("Education Elements Platform") to provide Customer analytics, assessments, information gathering, hosting and dashboards for educational institutions, schools and education software providers to monitor, track and report on a student's education and learning progress and achievements, (collectively, the "Platform Service"). Any additional professional services ("Professional Services") Education Elements provides shall be governed by the terms of this MOU, as applicable, and Exhibit A, attached and hereby incorporated into this MOU.

1.2 Customer Account. Education Elements will create a Customer Account ("Account"), and provide Customer with usernames and passwords for up to three administrative users ("Administrative Users") for the Account that have authority to designate and create access controls for Customer's authorized users, including, teachers, students, administrators, staff and independent contractors, as applicable (collectively, "Authorized Users"). Customer shall be liable for any and all activity associated with the Account, including unauthorized activity by Customer's Authorized Users or Administrative Users and shall promptly notify Education Elements of (i) any unauthorized disclosure of passwords; (ii) any attempt to obtain unauthorized access to the Account or Platform Service, or (ii) any internal or external attempt to hack or otherwise disrupt the Education Elements Platform or Platform Service. Each person using the Platform Service must be an Authorized User with a named account; sharing of usernames and passwords between individuals is expressly forbidden by the terms of service.

1.3 Delivery and Cooperation. Customer acknowledges that Customer's cooperation is essential to the timely performance of the Platform Service. Customer shall, to the extent applicable and required in connection with the performance of the Platform Service: (i) provide Education Elements with any necessary Customer materials; (ii) provide Education Elements with any necessary access to Customer's personnel, facilities, computers, networks, or data; (iii) cause the appropriate personnel to cooperate with Education Elements as required for Education Elements to provide the Platform Service including, without limitation, responding promptly to questions or issues; (iv) comply with Education Element's resource requirements, as provided and updated from time to time, including, without limitation allowing access to third party content and removing firewalls, as applicable; (v) obtain, maintain and support internet access, computer

hardware and other equipment as necessary and required for the performance of the Service; and (vi) make all payments in a timely manner.

1.4 Upgrades and Modifications. At its sole discretion, Education Elements may, from time to time, add, improve, modify, enhance, discontinue, or alter any and all portions of the Platform Service, its features and/or functionality. Education Elements shall provide 120 days prior written notice to Customer regarding any material removals or reductions to the Education Elements Platform or Platform Services. Education Elements may obtain Customer approval of any such material modification and may implement without having to wait the entire 120 day period. In the event Education Elements discontinues offering the Platform Service in its entirety, Education Elements shall offer to license the necessary rights to a third party capable of providing the Platform Service. Customer shall be responsible for negotiating and paying any and all third party fees associated with such a transaction directly to the third party. Education Elements shall not be obligated to provide Customer notice for changes to the Platform Service for any of the following: (i) critical bug fixes, performance improvements, or security patches; (ii) changes, regardless of materiality, necessitated by changes required or made by third parties; and (iii) changes required, in Education Element's sole discretion, to maintain the safety, security and availability of the Platform Service for any of Education Element's Customers or Partners.

1.5 Customer Responsibilities. Customer shall ensure that Education Element's performance of the Platform Services does not violate any third-party API license terms, and Customer shall follow proper procedures and provide sufficient authorizations to allow Education Elements to utilize applicable third party APIs, facilitate and authorize Education Element's access to Customer or third-party systems containing School Data (as defined below) as reasonably required to perform the Platform Services. Customer shall not (i) use the Platform Service except as expressly authorized in this MOU; (ii) use any device, software, or routine that (a) interferes with any application, function, or use of the Platform Service, or (b) is intended to damage, detrimentally interfere with, surreptitiously intercept or expropriate any system, data or communication; (iii) access the Platform Service for the purpose of benchmarking or competitive purposes; or (iv) add any third party proprietary information into the Education Elements Platform.

1.6 Planned Functionality. Customer agrees that Customer's use of the Education Elements Platform and Platform Services is not contingent upon the delivery of any future functionality or features in the Education Elements platform or data services and is not dependent upon any oral or written public comments Education Elements may make with respect to future functionality or features.

2. Service Level MOU.

2.1 Service Commitment. Education Elements will use commercially reasonable efforts to make the Platform Service available at least: (a) 99.99% on weekdays between the hours of 7:00am and 5:00pm in the local time zone of Customer's primary location, for any Customer actively using the Education Elements Platform; and (b) 99% at all other times during any calendar month other than periods of planned maintenance pursuant to Section 2.2 ("Service Commitment").

2.2 Planned Maintenance. Education Elements will notify Customer via electronic mail to Customer's designated contacts at least forty-eight (48) hours prior to any planned maintenance activities are anticipated to cause the system to be unavailable for more than one minute. Planned maintenance activities will be scheduled to avoid the Customer's hours of operation whenever feasible. Education Elements reserves the right to conduct unplanned maintenance activities at any time and without notice when necessary to ensure the stability, security, or integrity of the Education Elements Platform.

2.3 Exclusions. The Service Commitment does not apply to any unavailability of the Platform Service caused by circumstances beyond Education Element's reasonable control, including, without limitation, acts of God, acts of government, flood, earthquakes, civil unrest, acts of terror, strikes or other labor problems, computer, telecommunications, Internet service provider or hosting facility failures or delays, power failures, denial of service attacks and any actions taken by Customer that result in a configuration preventing Customer's use of the system. Education Elements may, at its sole discretion, deactivate the Account of any Administrative Users or Authorized Users if Education Elements believes such Account or User has become or is about to become compromised, is being misused according to the terms of service, or is being used to attempt to circumvent or disrupt any portion of the Platform Service or Education Elements Platform.

2.4 Technical Support. As part of the Platform Service, Education Elements shall provide basic technical support ("Support") to a maximum of five (5) Authorized Users that Customer designates. The Support shall include email support during Education Element's weekday business hours, and for Platform Service malfunctions, the Support shall additionally include support via phone on weekdays between the hours of 7:00am to 5:00pm in Customer's local time zone for Platform Service outages or unavailability of major functionality. Such Support shall not include any training including, without limitation, explanation of data parameters, data analysis and individual teacher or student support and support with any other Platform Service features. Should Customer determine it needs additional support, the Parties may choose to enter into a separate Professional Service MOU. Should Customer require Education Element's support for its own IT infrastructure issues, Education Elements shall bill Customer at Education Element's then-standard rate for professional services, plus materials and travel expenses.

3. Personnel.

3.1 Personnel. Any Education Elements personnel that are physically located at Customer's facilities will comply with appropriate workplace standards and policies applicable to Customer's employees, including any health screening required by applicable law or regulations, provided Education Elements is aware of such standards and policies. At all times, Education Elements reserves the right to schedule personnel based on resource availability.

3.2 Background Checks. Upon Customer's request, Education Elements will provide acknowledgement that background checks have been performed for any Education Elements personnel working on-site with Customer and that the results of any such checks have been reviewed by the appropriate Education Elements staff.

3.3 Subcontractors. Education Elements may, in its reasonable discretion, use third-party contractors to perform any of its obligations hereunder. Education Elements will remain responsible for such subcontracted services.

4. Fees and Payment.

4.1 Payment. As the sole consideration for the Platform Service, OSF shall compensate Education Elements pursuant to an Order Form (as defined below). Any quotation for the Platform Service Education Elements provides is exclusive of any taxes, levies, duties or similar governmental assessments of any nature assessable by any local, state, provincial, federal or foreign jurisdiction (collectively, "Taxes"). OSF shall be responsible for paying all taxes associated with ordering or using the Platform Services. If at any point, Education Elements shall have a legal obligation to pay or collect Taxes for which OSF is responsible under this paragraph, the appropriate amount shall be invoiced to and paid by Customer.

4.2 Order Forms. Customer may order or renew Customer's access to the Platform Service by completing an order form(s) ("Order Form") attached as Exhibit B and hereby incorporated into this MOU. Customer shall be responsible for obtaining all requisite approvals associated with payment of the Order Forms from OSF. In consideration for Customer's access and use of the Platform Service, OSF shall pay Education Elements an annual fee as specified on each applicable Order Form(s) per enrolled student per academic year (July 1 through June 30). Once payment has been made for the Platform Services, such payment is final and OSF shall not receive any reimbursement or pro-rated payment refunds. The Order Form shall be automatically renewed unless Education Elements receives sixty (60) day prior written notice prior to the expiration of the Term or any subsequent renewals thereof from either Customer or OSF.

4.3 Invoicing and Payment. All invoices are due and payable within fourteen (14) days from the date of the invoice and will be paid in U.S. dollars. Late payments will bear interest at 1.5% per month or the maximum rate permitted by law, whichever is less, calculated from the date such amount was due until the date that payment is received by Education Elements, plus any expenses associated with collections.

4.4 Additional Costs. Unless previously agreed-upon in writing, any additional costs beyond those specifically listed in this MOU or on the Order Form(s) shall be the exclusive responsibility of each Party.

5. Term, Termination and Suspension.

5.1 Term. This MOU will commence on the Effective Date and shall (i) remain in effect until June 30, 2013 ("Term") and will automatically renew, for successive one year periods, after its expiration unless either Party provides sixty (60) days prior written notice of termination or (ii) until terminated pursuant to the terms of this Section.

5.2 Material Breach. In the event that either Party believes that the other has materially breached any obligations under this MOU, such Party shall so notify the breaching Party in writing. The breaching Party shall have thirty (30) days from the receipt of notice to cure the alleged breach and to notify the non-breaching Party in writing that cure has been effected, unless such breach is due to non-payment or failure to issue the requisite

written certificate pursuant to Section 6.4, in which case the breaching Party shall have ten (10) days to cure. If the breach is not cured within the respective number of days, the non-breaching Party shall have the right to terminate the MOU without further notice.

5.3 Effect of Termination. Upon the expiration or termination of this MOU, Customer will discontinue use of the Education Elements Platform and Platform Service and Education Elements shall have no further obligations to Customer unless expressly provided otherwise in this Section. Upon termination of this agreement, at Customer's written request, Education Elements will destroy Student Personal Identity Data. Upon termination, Education Elements will have no further obligation to maintain or provide access to any data collected during the Term and any renewals thereof. Termination shall not result in a refund of fees collected or proration of fees owed pursuant to Section 4 of this MOU.

5.4 Suspension. Without limiting any other available remedies, Education Elements may immediately suspend access to the Platform Service and/or terminate this MOU if: (i) Education Elements, in its sole discretion, determines that Customer's or its Administrative or Authorized Users' actions are likely to cause legal liability for Education Elements or its other customers; or (ii) Education Elements, in good faith and its sole discretion, determines Customer's (or those of its employees and/or agents) actions are threatening to the stability, security or integrity of the Platform Service or Education Elements Platform. Each Party shall act in good faith and shall not suspend performance of its obligations pursuant to this MOU in the middle of the academic school year unless such suspension is expressly allowed in the terms of this MOU.

5.5 Insolvency. Either Party shall be in default hereof if it becomes insolvent, makes an assignment for the benefit of its creditors, and/or a receiver is appointed or a petition in bankruptcy is filed with respect to such Party.

6. Data Collection and Use.

6.1 Definitions.

(a) "**Student Personal Identity Data**" ("**PID**") includes a student's name, address, phone number(s), school-assigned student identification number, profile photo(s), email address(es), any government-assigned identity numbers that have been transmitted to or received by Education Elements during the performance of the Platform Services or Professional Services.

(b) "**School Data**" includes (i) raw data that Education Elements receives from Customer; and (ii) any academic raw data (for example, test responses, homework assignments, and other data Customer's Administrative and Authorized Users or students enter directly into the Education Elements Platform) Education Elements receives from Customer's staff and students electronically through integration with Customer's and/or third party systems or services operating on behalf of Customer.

(c) "**Service Data**" includes (i) all data (other than School Data) that Education Elements collects, directly or indirectly, during the performance of the Platform Services or Professional Services; (ii) the results of processing Student Personal Identity Data and School Data, including, but not limited to, aggregation and analysis; and (iii) any data gathered as a result of implementing Education

Element's independent Proprietary Rights (as defined below).

(d) "**Platform Data**" includes all of the above.

6.2 Compliance. Education Elements shall utilize the Platform Data in accordance with applicable state and federal laws and regulations.

6.3 Removal of Student Identifiers. Throughout the Term, and any subsequent renewals thereof, of this MOU, Education Elements may obtain data from Customer and/or a third party that includes PID. Education Elements shall not use student PID except for the performance of the Platform Services or Professional Services.

6.4 Customer's Responsibilities. Notwithstanding anything to the contrary, Customer shall be solely responsible for (i) obtaining proper third-party (e.g. third-party online learning content providers) consent for the release of data prior to allowing Education Elements to have access to any and all data, including but not limited to Student Personal Identity and School Data; (ii) acting as Education Element's agent in obtaining all necessary consent from its Authorized Users including, without limitation, obtaining parental and/or student consent ("Consent") for use of the Education Elements Platform and Platform Services and release of any data. In obtaining such consent, Customer acknowledges it has reviewed Education Element's Privacy Policy, which details Education Element's treatment of the Platform Data; (iii) providing a written certificate confirming that proper Consent has been obtained within thirty (30) days of starting to utilize the Platform Service. Education Elements may discontinue providing the Platform Services immediately if Customer fails to provide such proof of Consent; (iv) assuring proper industry standard security measures are taken with respect to Customer and its Administrative and Authorized Users having the ability to download and remove data from the Education Elements Platform into another format (e.g. Microsoft Excel) as part of the Platform Service; (v) for not conducting performance analyses of the Education Elements Platform or Platform Services and not releasing such information publicly without Education Element's express written consent (conversely, Education Elements shall not publish, without Customer's express written consent, performance data about Customer when the Customer is identifiable by name or when a typical reader would understand that the data is about Customer); and (vi) for ensuring that Customer's use of the Platform Service complies with and does not violate any applicable law or regulation including, without limitation, compliance with the Family Educational Rights and Privacy Act ("FERPA") and the Child Online Privacy Protection Act ("COPPA").

6.5 Compelled Disclosure. Education Elements may disclose the Platform Data if Education Elements determines that such action is reasonably necessary: (i) to comply with legal or regulatory requirements, or legal or regulatory process; (ii) to enforce this MOU; or (iii) to respond to claims that Customer, its Administrative or Authorized Users, are using the Platform Service to perform or support activities that violate the law or the rights of third parties. Unless prohibited by law or the legal process, Education Elements will use commercially reasonable efforts not to disclose Student Personal Identity Data without giving Customer notice of the request for such disclosure and a reasonable period of time to respond to such request.

7. Representations and Warranties

7.1 Education Elements Warranties. Education Elements represents and warrants that: (i) it has validly entered into this MOU and has the legal power to do so; (ii) the major functionality of the Platform Services will not be materially decreased for a particular Term with less than one hundred twenty (120) days unless Customer consent has been obtained pursuant to Section 1.4 of this MOU.

7.2 Customer's Warranties. Customer represents and warrants that: (i) it has validly entered into this MOU and has the legal power to do so; (ii) this MOU does not violate the terms of Customer's agreements with any other third party; (iii) Customer shall comply with its responsibilities pursuant to Sections 1.5 and 6.4 of this MOU; (iv) Customer will comply with all applicable laws and regulations, including without limitation, those related to data privacy and transmission of personal information, pursuant to the terms of this MOU; (v) Per Section 6 of this MOU, Customer will obtain all requisite rights, consents and authorizations, in the proper format necessary for Education Elements to provide the Platform Service and collect the Platform Data; (vi) Customer shall take industry standard security measures to ensure only designated Administrative and Authorized Users have access to the Education Elements Platform and Platform Services; (vii) Customer shall utilize industry security measures including, without limitation, alphanumeric password protection of both the data and the computer(s) it is stored on, to safeguard any data Customer downloads and removes pursuant to Section 6.4 of this MOU.

7.3 Disclaimer. Education Elements makes no warranties about the accuracy, reliability, completeness, quality, or usefulness of the Platform Service or any content or information obtained through the Platform Service, or that the Platform Service will meet Customer's requirements or will be available on an uninterrupted, secure or error-free basis. If during the Term, Customer experiences bugs or malfunctions ("Malfunctions") with the Education Elements Platform or Platform Services, Education Elements shall use commercially reasonable efforts to remedy Malfunctions, in a manner and schedule appropriate to the severity of the Malfunction, using one of the following, at Education Element's sole discretion: (a) fixing the Malfunction; (b) providing a work-around in the software, documentation, or user training, or (c) disabling or removing the module(s) or function(s), provided that such removal would not be a material removal as described in Section 1.4. Customer's only recourse for Education Element's failure to remedy any such Malfunctions is termination of this MOU. Education Elements does not warranty and disclaims any and all liability to third parties or Customer for any data Customer downloads, exports or removals from the Education Elements Platform.

EXCEPT AS SET FORTH ABOVE, EDUCATION ELEMENTS HEREBY DISCLAIMS ANY AND ALL WARRANTIES, EXPRESS OR IMPLIED, INCLUDING WITHOUT LIMITATION THE IMPLIED WARRANTIES OF MERCHANTABILITY, FITNESS FOR A PARTICULAR PURPOSE, NON-INFRINGEMENT AND WARRANTIES ARISING OUT OF COURSE OF DEALING OR USAGE OF TRADE.

8. Proprietary Rights.

8.1 Reservation of Rights. Education Elements owns all worldwide right, title and interest in the Proprietary Rights (as defined below) including any customizations,

modifications and improvements to the Education Elements Platform, Platform Services or Professional Services made as a result of Customer's and its Administrative and Authorized Users' usage, suggestions, recommendations, ideas, bug reports, enhancement requests, recommendations and any additional feedback (collectively, "Customer Feedback") relating to the Platform Service, and all worldwide intellectual property rights therein. This MOU does not grant Customer any proprietary interest in the Proprietary Rights or rights of entitlement to the use thereof except as expressly set forth herein. The term "Proprietary Rights" shall mean the (i) Education Elements Platform, Platform Service, Customer Feedback, Service Data and any and all improvements thereto; (ii) all work associated with the performance of Professional Services, as well as intermediate versions and working papers and all copyrights, trade secrets, know-how, patents, trademarks, source, object and any other relevant code and all other intellectual property rights in the Professional Services and all inventions embodied therein; (iii) Education Elements-created trade secrets, inventions, ideas, know-how, improvements, research, confidential knowledge, processes, source, object and any other relevant code, raw data, learning maps, learning content, visualizations of data, other works of authorship, discoveries, developments, designs and techniques, performance metrics or any other information or materials that Education Elements treats or considers as proprietary; and (iv) information regarding plans for research, development, new products, marketing and selling, business plans, budgets and unpublished financial statements, licenses, prices and costs, suppliers and customers and any and all additional company information Education Elements treats or considers as proprietary.

8.2 Education Element's Grant of License. Education Elements hereby grants to Customer a non-transferable, non-exclusive, non-assignable, revocable, non-sublicensable license to the Education Elements Platform solely for the purpose of enabling Education Elements to provide the Platform Services described herein. This limited software license will automatically terminate upon the termination of the Platform Services. Education Elements shall also hereby grant to Customer a non-transferable, non-exclusive, non-assignable, revocable, non-sublicensable license to the data and analysis results displayed or exported to Customer through performance of Services ("Service Data Deliverables") solely for Customer's internal use with the right to share Service Data Deliverables with an outside third party and perform its own analysis for non-competitive purposes.

8.3 Unauthorized Customer Activity. Customer shall not (i) resell, sublicense, time-share, copy, perform, distribute, create derivative works of, make, use, reverse-engineer, decompile, disassemble the Education Elements Platform or derive its source code and/or algorithms, publicize any of Education Element's Proprietary Rights without prior written permission, conduct performance analyses of the Education Elements Platform or Platform Services, export and otherwise exploit the Platform Service in any manner or share the Platform Service with any third party nor (ii) authorize any third parties to engage in any of the above activities.

8.4 Customer's Grant of License for Use of Student Personal Identity Data. Customer owns all worldwide right, title and interest in the Student Personal Identity Data. Customer hereby grants to Education Elements a non-transferable, non-exclusive, non-assignable license in the Student Personal Identity Data for the Term, and any subsequent

renewals thereof, solely for the purpose of enabling Education Elements to provide the Platform Services or Professional Services.

8.5 Customer's Grant of License for Use of School Data. Customer owns all worldwide right, title and interest in the School Data. Customer hereby grants to Education Elements a transferable, non-exclusive, assignable, perpetual, royalty-free, worldwide, sublicensable license to copy, perform, distribute, incorporate, display, create derivative works of, make, export, and otherwise make use of the School Data.

8.6 NWEA Terms. If applicable, Customer must abide by the license terms as required pursuant to Education Element's MOU with the Northwest Evaluation Association as fully described on Exhibit C, attached and hereby incorporated into this MOU.

9. Confidential Information.

9.1 Education Elements understands that in the course of performing the Platform Services and Professional Services, Education Elements will have access to or receive confidential and proprietary business and technical information from Customer ("Customer Confidential Information" defined below), which may be trade secrets of Customer or third parties. Education Elements agrees to take strict precautions to safeguard the Customer Confidential Information and to limit access to such Customer Confidential Information to Education Element's authorized personnel who require such access and have agreed to abide by the terms of this MOU. Education Elements further agrees to promptly return all such Confidential Information and related materials to Customer upon termination of this MOU or at such time as may be requested by Customer. Education Elements shall not, other than for the purposes permitted under this MOU: (i) use any Customer Confidential Information; (ii) disclose the Customer Confidential Information to any third parties; (iii) reverse engineer, disassemble, or decompile any Customer Confidential Information, or make any derivatives or translations of the Customer Confidential Information, other than what is allowed pursuant to Section 8 of this MOU, without Customer's prior written consent. Additionally, neither Education Elements, nor any third party shall remove or alter any copyright or other proprietary notices shown on the Customer Confidential Information. Upon termination of this MOU, the terms of this paragraph shall remain in effect for 3 years or as long as the applicable Customer Confidential Information is treated by Customer as a trade secret.

9.2 The term "Customer Confidential Information" shall mean Customer's trade secrets, confidential knowledge, know-how, Student Personal Identity Data, or other proprietary information or materials of Customer or in Customer's possession and all information that a reasonable person would consider sensitive or confidential in nature.

9.3 Customer understands that in the course of receiving Education Element's services, Customer will have access to or receive confidential and proprietary business and technical information from Education Elements ("Education Elements Confidential Information" defined below), which may be trade secrets of Education Elements or third parties. Customer agrees to take strict precautions to safeguard the Education Elements Confidential Information and to limit access to such Education Elements Confidential Information to Customer's authorized personnel who require such access and have agreed

to abide by the terms of this MOU. Customer further agrees to promptly return all such Education Elements Confidential Information and related materials to Education Elements upon termination of this MOU or at such time as may be requested by Education Elements. Customer shall not: (i) use any Education Elements Confidential Information, other than for purposes permitted under this MOU; (ii) disclose the Education Elements Confidential Information to any third parties; (iii) reverse engineer, disassemble, or decompile any Education Elements Confidential Information, or make any derivatives or translations of the Education Elements Confidential Information without the prior written consent of Education Elements. Additionally, neither Customer, nor any third party shall remove or alter any copyright or other proprietary notices shown on the Education Elements Confidential Information. Upon termination of this MOU, the terms of this paragraph shall remain in effect for 3 years or as long as the applicable Education Elements Confidential Information is treated by Education Elements as a trade secret.

9.4 The term "Education Elements Confidential Information" shall mean the Education Elements Proprietary Rights, as well as any and all trade secrets, confidential knowledge, know-how, data, the terms of this MOU and any incorporated SOW(s) and Order Forms or other proprietary information or materials of Education Elements or in Education Element's possession and all information that a reasonable person would consider sensitive or confidential in nature.

9.5 Notwithstanding anything to the contrary, each Party grants the other Party permission to speak and/or write about the Platform Services or Professional Services Education Elements provides to Customer for the purposes of self-promotion including, without limitation, the use of each Party's name, provided, however, that no Customer or Education Elements Confidential Information is disclosed.

9.6 Each Party further understands and acknowledges that any breach of these terms and conditions will cause irreparable harm and injury for which there may not be adequate remedies. Therefore, the Parties agree that the injured Party shall be entitled to injunctive and/or equitable relief in addition to all other remedies provided under this MOU or available at law or equity.

10. Indemnification.

10.1 Education Elements Indemnification. Provided that Customer complies with its obligations set forth in this Section, Education Elements shall indemnify, defend, and hold Customer and Customer's affiliates, shareholders, directors, officers, employees, contractors, agents and other representatives ("Customer-Indemnified Parties") harmless from all third party claims, actions, causes of action, proceedings, suits, assessments, losses, damages, liabilities, settlements, judgments, fines, penalties, interest, costs and expenses (including fees and disbursements of counsel) of every kind based solely on an allegation that the Education Elements Platform infringes any U.S. patent, trademark, or copyright or other intellectual property right of any third party. Notwithstanding the foregoing, Education Elements shall have no obligation under this Section for any claim

of infringement to the extent that any such claim arises out of (i) use of the Education Elements Platform and/or Platform Service in a manner not permitted or authorized by Education Elements; (ii) infringement resulting from Customer's or its Authorized Users' failure to use any materials or follow any instructions provided by Education Elements with respect to the use of the Education Elements Platform and/or Platform Service to avoid such infringement claim (but only to the extent that such damages are incurred after the materials and/or instructions have been provided); (iii) Customer's continued use of the Service after a non-infringing alternative has been made available to Customer and (iv) a breach of Customer's Representations and Warranties pursuant to Section 7 of this MOU ("Indemnity Exclusions"). If Customer's use of the Education Elements Platform and/or Platform Service is, or in Education Element's opinion is likely to be, enjoined due to a claim as specified above, Education Elements may, at its sole option and expense (i) procure for Customer the right to continue using the Education Elements Platform or Platform Service pursuant to the terms of this MOU or (ii) replace or modify the Education Elements Platform or Platform Service and any and all applicable elements thereof so that such use is non-infringing.

10.2 Customer Indemnification. Provided that Education Elements complies with its obligations set forth in this Section, Customer shall indemnify, defend, and hold Education Elements and Education Element's affiliates, shareholders, directors, officers, employees, contractors, agents and other representatives ("Education Elements-Indemnified Parties") harmless from all third party claims, actions, causes of action, proceedings, suits, assessments, losses, damages, liabilities, settlements, judgments, fines, penalties, interest, costs and expenses (including fees and disbursements of counsel) of every kind resulting from any claim based on: (i) Customer's or its Authorized Users' improper or unauthorized use of the Platform Service; (ii) a violation of Customer's representations and warranties; and (iii) Customer's failure to comply with its responsibilities pursuant to Section 6 of this MOU.

10.3 Notice and Cooperation. A Party seeking indemnification pursuant to this Section shall: (i) provide prompt written notice of any such claim or proceeding; (ii) shall allow the indemnifying Party to direct the defense and settlement of the claim or proceeding; and (iii) shall provide the indemnifying Party with the authority, information, and assistance that such Party deems reasonably necessary for the defense and settlement of such claim or proceeding.

11. Limitation of Liability.

11.1. IN NO EVENT SHALL EDUCATION ELEMENTS BE LIABLE FOR CONSEQUENTIAL, SPECIAL, INDIRECT, INCIDENTAL, PUNITIVE OR EXEMPLARY DAMAGES (INCLUDING, WITHOUT LIMITATION, LOSS OF DATA, PROFITS, USE AND OPPORTUNITY COSTS) EVEN IF ADVISED OF THE POSSIBILITY OF SUCH DAMAGES. THE LIMITATIONS SET FORTH IN THE PROVISIONS OF THIS PARAGRAPH SHALL APPLY REGARDLESS OF THE FORM OF ACTION, DAMAGE, CLAIM, LIABILITY, COSTS, EXPENSE, OR LOSS, WHETHER IN CONTRACT, STATUTE, TORT (INCLUDING, WITHOUT LIMITATION, NEGLIGENCE), OR OTHERWISE. IN NO EVENT SHALL

EDUCATION ELEMENTS'S TOTAL LIABILITY UNDER THIS AGREEMENT EXCEED THE AMOUNTS PAID AND PAYABLE BY CUSTOMER.

12. General.

12.1 Independent Contractors. Each Party and its agents are independent contractors in relation to the other Party with respect to all matters arising under this MOU. Nothing herein shall be deemed to establish a partnership, joint venture, association or employment relationship between the Parties.

12.2 Assignment. Education Elements shall have the right to assign or transfer its rights or obligations under this MOU without the prior written consent of Customer. This MOU shall be binding upon the benefit of the Parties hereto and their respective successors or assigns. Customer shall not have the right to assign or transfer its rights or obligations under this MOU without Education Element's consent and any assignment or transfer without such consent shall be void.

12.3 Severability. If any provision of this MOU is for any reason declared to be invalid or unenforceable, the validity and enforceability of the remaining provisions shall not be affected thereby. Such invalid or unenforceable provision shall be deemed modified to the extent necessary to render it valid and enforceable, and if no modification shall render it valid and enforceable, this MOU shall be construed as if not containing such provision and the rights and obligations of the parties shall be construed and enforced accordingly.

12.4 Survival. The obligations set forth in Articles 4 through 12 will survive any termination or expiration of this MOU.

12.5 Third-Party Beneficiaries. The terms and provisions of this MOU shall be binding upon and inure to the benefit of the Parties, and their respective successors and assigns, and is made solely and specifically for their benefit. No other person shall have any rights, interest or claims hereunder or be entitled to any benefits under or on account of this MOU as a third-party beneficiary or otherwise.

12.6 Amendment, Waiver, Modification or Termination. No amendment, waiver or termination or modification of this MOU shall be binding unless it is in writing and signed by both Parties and dated subsequent to the Effective Date of this MOU.

12.7 Notice. Any notice which may be or is required to be given under this MOU shall be in writing. All written notices shall be sent by registered or certified mail, postage prepaid, return receipt requested, personal delivery, air freight (notice of receipt of which is required) or by e-mail. If notice is sent by e-mail, such notice shall be considered given if the Party sending notice receives confirmation of receipt from the other Party. All such notices shall be deemed to have been given when received, addressed as indicated below or to such other address with respect to which the receiving Party may from time to time give notice to the other Party.

If to Education Elements: Attention: COO
Education Elements
999 Skyway Road, Suite 325
San Carlos, CA 94070

If to Customer: Attention: General Counsel
1025 Second Avenue, 4th Floor
Oakland, CA 94609
Jacqueline.minor@ousd.k12.ca.us

If to OSF: Attention: Executive Director
P.O. Box 20238
Oakland, CA 94620
info@oaklandschoolsfoundation.org

12.8 Governing Law. This MOU shall be governed by and construed in accordance with the substantive laws of the State of California, without regard to its choice of law rules. The Parties will attempt to resolve any claim, controversy, or dispute arising out of or related to this MOU through consultation and negotiation in good faith and in a spirit of mutual cooperation. If those attempts fail, then such claim, controversy, or dispute may be resolved through litigation. Any litigation or other dispute resolution between the Parties shall take place in Alameda County, California, and the Parties hereby consent to the jurisdiction and venue therein for the resolution of any claims, controversies or disputes arising under or related to this MOU.

12.9 Entire MOU. This MOU, together with any and all executed Addendums and Exhibits, constitutes the complete and exclusive statement of the understandings between the Parties and supersedes all proposals and prior agreements (oral or written) between the Parties relating to the Platform Service provided hereunder. No subsequent agreement between the Parties concerning the Platform Service shall be effective or binding unless it is made in writing and subscribed to by authorized representatives of Education Elements and Customer.

12.10 Execution. This MOU may be executed in counterparts and each of such counterparts shall, for all purposes, be deemed to be an original, but altogether only one (1) MOU.

IN WITNESS WHEREOF, the Parties hereto have caused this MOU to be executed by their authorized representatives, effective as of the date first written above.

Education Elements

Oakland Unified School District

By: [Signature]

Name: Jeff McCoy

Title: Executive, Growth and Development

By: [Signature]
Jody London

Name: President, Board of Education

Title: Edgar Rakestraw, Jr., Secretary
Board of Education

Oakland Schools Foundation

By: [Signature]

Name: Dan C. Quigley

Title: Executive Director

OUSD or the District verifies that the Contractor does not appear on the Excluded Parties List at www.epis.gov/epis/search.do

OAKLAND UNIFIED SCHOOL DISTRICT
Office of General Counsel
APPROVED FOR FORM & SUBSTANCE
By: [Signature]
Attorney at Law

File ID Number: 12-1665
Introduction Date: 6-27-12
Enactment Number: 12-1690
Enactment Date: 6-27-12
By: [Signature]

EXHIBIT A

ADDITIONAL SERVICES

1. Education Elements Additional Services.

1.1 Services. Unless expressly stated otherwise, any and all services Education Elements provides pursuant to this Exhibit A shall be governed by the terms of the MOU. Any terms in this Exhibit A that differ from the terms of the MOU, shall apply only to the performance of Professional Services (as defined below). Education Elements shall provide Customer with the professional services ("Professional Services") according to the detailed specifications specifically set forth in one or more Statement(s) of Work ("SOW") in Schedule 1, attached and hereby incorporated into this MOU.

1.2 Statement of Work. Prior to Education Elements beginning the performance of any services, Customer and Education Elements shall work together in preparing an SOW that will include detailed specifications of the deliverables and a delivery schedule. Education Elements shall prepare a finalized SOW and Customer shall have ten (10) working days to review and approve it. Upon failure to do so, Education Elements has the option of terminating the Professional Services portion of the MOU with prior written notice to Customer. An SOW shall be deemed approved and final once it has been signed by both Parties. The Parties may need to negotiate additional SOW's during the Term (as defined below) of this MOU. Any such SOW's shall be added to Exhibit A and shall be incorporated into this MOU.

1.3 Change Requests. Any material change to the requirements outlined in an SOW will require the Parties to work together to modify the existing SOW. Any such modifications will become effective when both Parties sign a revised or additional SOW.

1.4 Section 1.4 of the MOU shall not apply to the performance of Professional Services pursuant to Exhibit A.

1.5 Section 1.5 of the MOU shall not apply to the performance of Professional Services pursuant to Exhibit A.

1.6 Section 1.6 of the MOU shall not apply to the performance of Professional Services pursuant to Exhibit A.

2. Acceptance of Deliverables.

2.1 Acceptance. Unless otherwise specified in a particular SOW, Customer shall perform acceptance testing for each deliverable to determine whether the deliverable met the relevant requirements and specifications listed in an SOW (collectively, the "Acceptance Criteria"). Education Elements shall notify Customer when a deliverable is ready for evaluation and Customer shall have ten (10) days ("Acceptance Testing Deadline") to inspect, test and evaluate the deliverable to determine whether it meets the

Acceptance Criteria. If Customer does not give written notice to Education Elements by the Acceptance Testing Deadline or any extension of that period that the deliverable does not meet the Acceptance Criteria, Customer shall be deemed to have accepted the deliverable. At Education Element's request, Customer shall provide a written acceptance of the deliverable. Customer shall not reject the deliverable without cause and shall only do so if the deliverable does not meet the Acceptance Criteria. If the deliverable does not satisfy the Acceptance Criteria, Customer shall give Education Elements written notice stating why the deliverable is unacceptable. Education Elements shall have thirty (30) days from the receipt of such notice to correct the deficiencies, unless agreed upon otherwise in an SOW. Customer shall then have ten (10) days to inspect, test and reevaluate the deliverable, unless agreed upon otherwise in an SOW. This process shall continue as is necessary and appropriate so long as Customer is acting in a commercially reasonable manner and in good faith.

2.2 Section 2.2 of the MOU shall not apply to the performance of Professional Services pursuant to Exhibit A.

2.3 Section 2.3 of the MOU shall not apply to the performance of Professional Services pursuant to Exhibit A.

2.4 Section 2.4 of the MOU shall not apply to the performance of Professional Services pursuant to Exhibit A.

2.5 For any deliverables provided according to this Exhibit A or any SOW, Education Elements may, in its sole discretion and without prior notice to Customer, deliver (i) critical bug fixes, performance improvements, or security patches; (ii) changes, regardless of materiality, necessitated by changes required or made by third parties; and (iii) changes required, in Education Element's sole discretion, to maintain the safety, security and availability of the Platform Service for any of Education Element's Customers or Partners.

3. Education Elements Personnel.

3.1 Personnel. Education Elements will provide the Professional Services using qualified personnel under the overall guidance of the individual identified in an SOW as the "Customer Project Manager." Education Elements personnel physically located at Customer's facilities will comply with appropriate workplace standards and policies applicable to Customer's employees, including any health screening required by applicable law or regulations, provided Education Elements is aware of such standards and policies. At all times, Education Elements reserves the right to schedule personnel based on resource availability.

3.2 See Section 3.2 of the MOU.

3.3 See Section 3.3 of the MOU.

3.4 Segmentation. Customer agrees that Customer's purchase of Services is not contingent upon the delivery of any current or future functionality or features in the Education Elements platform or data services and is not dependent upon any oral or written public comments made by Education Elements with respect to future functionality or features.

4. Fees and Payment.

4.1 Payment. As the sole consideration for the Services, OSF shall compensate Education Elements as set forth on a particular SOW. Any quotation for the Service Education Elements provides is exclusive of any taxes, levies, duties or similar governmental assessments of any nature assessable by any local, state, provincial, federal or foreign jurisdiction (collectively, "Taxes"). OSF shall be responsible for paying all taxes associated with the Services. If at any point, Education Elements shall have a legal obligation to pay or collect Taxes for which OSF is responsible under this paragraph, the appropriate amount shall be invoiced to and paid by Customer.

4.2 Section 4.2 of the MOU shall not apply to the performance of Professional Services pursuant to Exhibit A.

4.3 Section 4.3 of the MOU shall not apply to the performance of Professional Services pursuant to Exhibit A.

4.4 Additional Costs. Unless previously agreed-upon in writing, any additional costs beyond those specifically listed in this MOU or on a particular SOW shall be the exclusive responsibility of each Party.

5. Term, Termination and Suspension.

5.1 Term. Exhibit A shall be effective from the date when it is executed and shall continue in effect until (i) terminated by either Party on sixty (60) days prior written notice; (ii) terminated under any other provision of this MOU; or (iii) until completion of all services contemplated by this MOU (the "Term").

5.2 See Section 5.2 of the MOU.

5.3 Effect of Termination. Upon the expiration or termination of the Professional Services, Education Elements shall have no further obligations to Customer except for those obligations still remaining pursuant to the MOU. A termination of Exhibit A shall not result in the termination of the MOU.

5.4 Section 5.4 of the MOU shall not apply to the performance of Professional Services pursuant to Exhibit A.

5.5 See Section 5.5 of the MOU.

6. Data Collection and Use.

6.1 See Section 6.1 of the MOU.

6.2 See Section 6.2 of the MOU.

6.3 See Section 6.3 of the MOU.

6.4 Customer's Responsibilities. Notwithstanding anything to the contrary, Customer shall be solely responsible for (i) if applicable to the performance of Professional Services, obtaining proper third-party consent for the release of data prior to allowing Education Elements to have access to any and all data, including but not limited to Student Personal Identity and School Data; (ii) if applicable, utilizing consent language, as may be updated from time to time, Education Elements provides to obtain consent from parents (and from students if student is over 18) ("Consent") for the release of any

and all student data; (iii) providing a written certificate confirming that proper Consent has been obtained within thirty (30) days after Education Elements begins performing the Professional Services. Education Elements may discontinue providing the Professional Services immediately if Customer fails to provide such proof of Consent; (iv) for ensuring that Customer's use of the Professional Service complies with and does not violate any applicable law or regulation including, without limitation, compliance with the Family Educational Rights and Privacy Act ("FERPA") and the Child Online Privacy Protection Act ("COPPA").

6.5 Compelled Disclosure. Education Elements may disclose the Platform Data if Education Elements determines that such action is reasonably necessary: (i) to comply with legal or regulatory requirements, or legal or regulatory process; or (ii) to enforce this MOU. Unless prohibited by law or the legal process, Education Elements will use commercially reasonable efforts not to disclose Student Personal Identity Data without giving Customer notice of the request for such disclosure and a reasonable period of time to respond to such request.

6.6 See Section 6.6 of the MOU.

7. Representations and Warranties

7.1 Our Warranties. Education Elements represents and warrants that: (i) it has validly entered into this MOU and has the legal power to do so; (ii) it will perform the Services with the requisite degree of professional skill and expertise.

7.2 Customer's Warranties. Customer represents and warrants that: (i) it has validly entered into this MOU and has the legal power to do so; (ii) it shall comply with its responsibilities pursuant to Section 6.4 of Exhibit A; (iii) it will comply with all applicable laws and regulations, including without limitation, those related to data privacy and transmission of personal information, pursuant to the terms of this MOU.

7.3 Disclaimer. Education Elements makes no warranties about the accuracy, reliability, completeness, quality, or usefulness of the Professional Services above and beyond those warranties existing pursuant to Section 7.3 of the MOU.

EXCEPT AS SET FORTH ABOVE, EDUCATION ELEMENTS HEREBY DISCLAIMS ANY AND ALL WARRANTIES, EXPRESS OR IMPLIED, INCLUDING WITHOUT LIMITATION THE IMPLIED WARRANTIES OF MERCHANTABILITY, FITNESS FOR A PARTICULAR PURPOSE, NON-INFRINGEMENT AND WARRANTIES ARISING OUT OF COURSE OF DEALING OR USAGE OF TRADE.

8. **Proprietary Rights**. See Section 8 of the MOU.

9. **Confidential Information**. See Section 9 of the MOU.

10 Indemnification.

10.1 Education Elements Indemnification. Provided that Customer complies with its obligations set forth in this Section, Education Elements shall indemnify, defend, and hold Customer and Customer's affiliates, shareholders, directors, officers, employees,

contractors, agents and other representatives ("Customer-Indemnified Parties") harmless from all third party claims, actions, causes of action, proceedings, suits, assessments, losses, damages, liabilities, settlements, judgments, fines, penalties, interest, costs and expenses (including fees and disbursements of counsel) of every kind based solely on an allegation that the Education Elements Platform infringes any U.S. patent, trademark, or copyright or other intellectual property right of any third party. Notwithstanding the foregoing, Education Elements shall have no obligation under this Section for any claim of infringement to the extent that any such claim arises out of a breach of Customer's Representations and Warranties pursuant to Section 7 of Exhibit A ("Indemnity Exclusions").

10.2 Customer Indemnification. Provided that Education Elements complies with its obligations set forth in this Section, Customer shall indemnify, defend, and hold Education Elements and Education Element's affiliates, shareholders, directors, officers, employees, contractors, agents and other representatives ("Education Elements-Indemnified Parties") harmless from all third party claims, actions, causes of action, proceedings, suits, assessments, losses, damages, liabilities, settlements, judgments, fines, penalties, interest, costs and expenses (including fees and disbursements of counsel) of every kind resulting from any claim based on: (i) a violation of Customer's representations and warranties; and (ii) Customer's failure to comply with its responsibilities pursuant to Section 6 of Exhibit A and this MOU, as applicable.

11. **Limitation of Liability.** See Section 11 of the MOU.

12. **General.** See Section 12 of the MOU.

EXHIBIT B
ORDER FORM

EXHIBIT C
NWEA LICENSING TERMS

[Not Applicable]