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Board Cover Memorandum

To Board of Education

From Kyla Johnson-Trammell, Superintendent
Sondra Aguilera, Chief Academic Officer
Lucia Moritz, Executive Director College and Career Readiness

Meeting Date September 8, 2021

Subject Client Agreement
Contractor: APEX Learning Digital Curriculum Solutions
Services for: High School Linked Learning Office

Ask of the Board Approval by the Board of Education of Memorandum of Understanding between the District and Apex Digital Curriculum Solutions, Seattle, WA, for the latter to provide eight 3-hour web conference sessions for a standards-based state approved program consisting of assessments and course certification to provide interventions for students in their efforts to become proficient in English Language Arts, math and basic literacy skills via the High School Linked Learning office for the period of August 26, 2021 through August 25, 2022, in an amount not to exceed \$70,000.00.

Background APEX Learning Digital Curriculum is a supplemental electronic standards-based state approved program consisting of assessments and course certifications to provide interventions for students in their efforts to become proficient in English Language Arts, math and basic literacy skills. The online curriculum is administered under the instruction and supervision of a certificated OUSD teacher. The Apex Learning Digital Curriculum has been used in prior years and provides students with additional academic support in the form of credit recovery of core academic coursework required for high school graduation and college admission. The curriculum is aligned with the content standards and framework of California and many of the Apex learning courses meet the “A-G” requirements of the University of California and California State University Systems.

Fiscal Impact Funding resource(s): 4127/ Title IV

Attachment(s)

- Client Agreement

**APEX LEARNING CLIENT AGREEMENT
for
DIGITAL CURRICULUM SOLUTIONS**

This Apex Learning Client Agreement for Digital Curriculum Solutions (“**Agreement**”) is effective on August 26, 2021 (“**Effective Date**”) and is made by and between Apex Learning Inc., a Washington corporation with its principal place of business at 1215 Fourth Avenue, Suite 1500, Seattle, WA 98161 (“**Apex Learning**”) and Oakland Unified School District, with its principal place of business at 1000 Broadway, Suite 680, Oakland, CA 94607 (“**Client**”).

RECITALS

Apex Learning provides digital curriculum solutions for secondary education.

Client desires to purchase the digital curriculum solutions described in Exhibit A and have its students, teachers, administrators, and staff access and use the Curriculum (as defined below), all pursuant to the terms and conditions set forth below.

In consideration of the covenants and conditions set forth below and for other good and valuable consideration, the adequacy of which the parties hereby acknowledge, the parties agree as follows:

AGREEMENT

1. **Definitions.** Each of the following initially capitalized terms has the meaning set forth below. All other initially capitalized terms have the meanings assigned in this Agreement.
 - 1.1. “**Apex Curriculum**” means the Apex Learning digital curriculum described in Exhibit A. The Apex Curriculum does not include any Course Materials that may be required.
 - 1.2. “**Third Party Curriculum**” means the third-party digital curriculum described in Exhibit A. The Third Party Curriculum does not include any Course Materials that may be required.
 - 1.3. “**Curriculum**” means the Apex Curriculum and the Third Party Curriculum.
 - 1.4. “**Client User**” means each Client teacher, administrator, and student, as well as each student parent/guardian, who registers with Apex Learning or its supplier (in the case of certain Third Party Curriculum) and establishes a password to access the Curriculum made available under this Agreement.
 - 1.5. “**Course Materials**” mean items or materials separate from the Curriculum that are identified as either required or optional for the Curriculum (e.g., calculators, microphones/headsets, textbooks, literature, and lab materials).
 - 1.6. “**Student Data Privacy and Protection Addendum**” means the addendum attached as Exhibit D.
 - 1.7. “**Term**” will have the meaning set forth in Section 10.1.
 - 1.8. “**User Support**” means the Apex Learning support services described in Exhibit C.
2. **Apex Learning Obligations.**
 - 2.1. **Curriculum.** Apex Learning will make the Curriculum available for access and use by Client Users pursuant to the terms of this Agreement.
 - 2.2. **User Support.** Apex Learning will provide Client Users with User Support throughout the Term, subject to Section 4 below.

- 2.3. **Uptime.** Apex Learning will use commercially reasonable efforts to make the Curriculum available for access by Client Users ninety-nine percent (99%) of the time, measured on a monthly basis, excluding Planned Outages, subject to Section 4 below. “**Planned Outages**” means the installation of upgrades, routine application, server, or network configuration changes, and other reasonable maintenance activities. Planned Outages will be conducted during off-peak Curriculum utilization times. Apex Learning will post an advance announcement of any Planned Outage on the Apex Learning website through which Client Users access the Curriculum.
- 2.4. **All Rights Reserved.** Apex Learning and its suppliers own all right, title and interest in and to the Curriculum. Other than granting Client Users the right to access and use the Curriculum as described in this Agreement, Apex Learning expressly reserves on behalf of itself and its suppliers all right, title, and interest therein.
3. **Client Obligations.**
 - 3.1. **Hardware/Software.** The Curriculum is made available to Client Users over the Internet through a web-browser interface. To access the Curriculum, therefore, Client Users must have a suitable Internet connection and access to an appropriately configured computer, as well as an appropriately configured computer network (where applicable) in accordance with the system recommendations posted at <http://www.apexlearning.com/systemrequirements/systemrecommendations.pdf>.
 - 3.2. **Terms of Use.** All Client Users who access the Curriculum must comply with the Apex Learning Terms of Use for Customer Websites (“**Terms of Use**”), subject to Section 4 below. The current version of such Terms of Use is posted at www.apexvs.com through which Client Users access the Curriculum. Apex Learning reserves the right to suspend or discontinue a Client User from accessing the Curriculum at any time if the Client User violates the Terms of Use. To the extent it has knowledge, Client will notify Apex Learning of any activity by its Client Users in violation of the Terms of Use. For the purpose of clarification, the Terms of Use are not part of this Agreement and do not modify or supplement the Agreement.
 - 3.3. **Laboratory Activities.** If hands-on laboratory activities included in the Curriculum are implemented by Client Users, Client is responsible for all such hands-on laboratory activities, including ensuring that qualified personnel are available to supervise such hands-on laboratory activities. Apex Learning will have no liability whatsoever regarding any hands-on laboratory activities.
 - 3.4. **No Resale Rights.** Client will not resell to any third party the right to access or use the Curriculum or provide any third party who is not a Client User with access to, or the ability to use, the Curriculum.
4. **Third Party Curriculum.** Apex Learning is an authorized reseller for certain third-party digital curriculum solutions. Notwithstanding any other provision of this Agreement, for any Third Party Curriculum identified in Exhibit A, Client agrees that such Third Party Curriculum is provided as is and without warranty of any kind from Apex Learning, and that Apex Learning shall not be liable for the acts or omissions of the third-party provider of such Third Party Curriculum or its employees. Further, if the Third Party Curriculum provider has separate contract terms, those terms are set forth in an Exhibit E to this Agreement, and by executing this Agreement, Client acknowledges and agrees to the terms of Exhibit E, which is an agreement between Client and such third party provider.
5. **Payment.**
 - 5.1. **General.** In consideration for the rights granted and services provided under this Agreement (including Exhibit E, if applicable), Client will pay Apex Learning the amounts set forth in Exhibit A. Apex Learning will issue invoices for such amounts pursuant to the invoice schedule in Exhibit B.
 - 5.2. **Payment Terms.** Client will pay all Apex Learning invoices properly issued under this Agreement within thirty (30) days of the invoice date. If payment is made via credit card Apex Learning will assess a processing fee equal to three percent (3%) of the amount charged to such card.

5.3. **Taxes.** Amounts stated under Section 5.1 do not include any applicable sales, use, gross income, occupational, or similar taxes; import or export fees; duties, imports, or tariffs; or any other taxes, duties, charges, or fees of any kind which may be levied in connection with the transactions covered under this Agreement. Any such taxes (if any are due) are the responsibility of Client. Client will indemnify and hold Apex Learning harmless from any liability with respect to such taxes. Apex Learning is solely responsible for Apex Learning's income and payroll taxes.

6. **Confidentiality.**

6.1. **Student Data Privacy and Protection.** Apex Learning and Client agree to comply with their respective obligations under the Student Data Privacy and Protection Addendum attached as Exhibit D.

6.2. **Protection of Other Confidential Information.** In addition to the parties' respective obligations under Section 6.1 above, each party agrees that it will not disclose to any third party any Confidential Information of the other party, except to the extent required by law or as otherwise expressly authorized herein. The term "**Confidential Information**" means all non-public information that either party designates as being confidential, or which, under the circumstances of disclosure ought to be treated as confidential. Apex Learning's Confidential Information includes, without limitation pricing for the Curriculum. Confidential Information does not include information that was known to the receiving party prior to the disclosing party's disclosure to the receiving party, or information that becomes publicly available through no fault of the receiving party. Nothing in this Section 6 precludes either party from disclosing Confidential Information when and as required by law. Further, if there is a conflict between this Section 6.2 and the Student Data Privacy and Protection Addendum, the Student Data Privacy and Protection Addendum will control with respect to that conflict.

7. **Representations and Warranties.**

7.1. **By Both Parties.** Each party hereby represents and warrants to the other party that it: (a) has the power and authority to enter into this Agreement and is permitted by applicable law and regulations to enter into this Agreement; and (b) will comply with all applicable laws in the performance of its obligations under this Agreement, including those laws identified in the Student Data Privacy and Protection Addendum.

7.2. **By Apex Learning.** Apex Learning further represents and warrants that Client Users' access to and use of the Apex Curriculum as described in this Agreement will not infringe any third-party copyright.

7.3. **WARRANTY DISCLAIMER.** EXCEPT AS SET FORTH IN SECTION 7.2, APEX LEARNING DISCLAIMS ANY AND ALL WARRANTIES, CONDITIONS, AND DUTIES OF ANY KIND (IF ANY), EXPRESS, IMPLIED, OR STATUTORY WITH RESPECT TO THE CURRICULUM, INCLUDING WITHOUT LIMITATION, ANY WARRANTY OF MERCHANTABILITY, OF FITNESS FOR ANY PARTICULAR PURPOSE. EXCEPT AS SET FORTH IN SECTION 7.2, THERE IS NO WARRANTY OF NON-INFRINGEMENT OR TITLE.

8. **Indemnity.**

8.1. **Duty to Indemnify.** Subject, in the case of Client, to any applicable laws restricting Client's ability to provide the indemnification described in this Section 8, each party will indemnify, defend, and hold the other party and its officers, employees, and agents harmless from any and all actions, causes of action, claims, demands, costs, liabilities, expenses and damages arising out of or in connection with any breach or alleged breach of any representation or warranty set forth in Section 7.

8.2. **Procedure.** If an action is brought for which indemnity is sought under this Section 8, the party seeking indemnity will send reasonably prompt written notice to the other party specifying the nature of the action and the total damages or other relief sought and will permit the indemnifying party to answer and defend such claim. The party seeking indemnity will provide the indemnifying party with such information and assistance as is reasonably necessary to assist the indemnifying party, at the indemnifying party's expense, in defending any such action. The party seeking indemnity reserves the right to employ separate counsel and participate in the

defense at its expense. The indemnifying party will not be responsible for any settlement made by the party seeking indemnity without the indemnifying party's written consent, which will not be unreasonably withheld or delayed, nor will the indemnifying party settle any claim under this Section 8 without first obtaining the written consent of the party seeking indemnity, which will not be unreasonably withheld or delayed.

9. **EXCLUSION OF CERTAIN DAMAGES & LIMITATION ON LIABILITY.**

9.1. **EXCLUSION OF CERTAIN DAMAGES.** NEITHER PARTY WILL BE LIABLE TO THE OTHER PARTY FOR ANY INDIRECT, INCIDENTAL, CONSEQUENTIAL, SPECIAL OR PUNITIVE DAMAGES ARISING OUT OF OR IN CONNECTION WITH THIS AGREEMENT, EVEN IF A PARTY HAS BEEN ADVISED OF THE POSSIBILITY OF SUCH DAMAGES OR IF SUCH POSSIBILITY WAS REASONABLY FORESEEABLE.

9.2. **LIMITATION ON LIABILITY.** IN NO EVENT WILL APEX LEARNING'S TOTAL AGGREGATE LIABILITY FOR ALL CLAIMS ARISING OUT OF OR IN CONNECTION WITH THIS AGREEMENT EXCEED THE TOTAL AMOUNTS ACTUALLY PAID BY CLIENT TO APEX LEARNING UNDER THIS AGREEMENT.

9.3. **APPLICATION.** THE EXCLUSION OF DAMAGES AND LIMITATION ON LIABILITY IN THIS SECTION 9 SHALL APPLY REGARDLESS OF THE FORM OR CAUSE OF ACTION OR THE ALLEGED BASIS OF ANY CLAIM AND EVEN IF THE REMEDIES OTHERWISE PROVIDED UNDER THIS AGREEMENT AT LAW OR IN EQUITY FAIL OF THEIR ESSENTIAL PURPOSE.

10. **Term and Termination.**

10.1. ***Term.*** This Agreement shall commence on the Effective Date and continue through August 25, 2022, unless earlier terminated as provided in this Section 10.

10.2. ***Termination.*** Either party may suspend performance or terminate this Agreement immediately upon written notice to the other party at any time if the other party is in material breach of any provision of this Agreement and has failed to cure that breach within thirty (30) days after receipt of written notice thereof. Without limiting the foregoing, Apex Learning may suspend performance or terminate this Agreement immediately upon written notice to Client if Client is thirty (30) days overdue on any payment due to Apex Learning under this Agreement.

10.3. ***Effect of Expiration/Termination.*** Upon the expiration or termination of this Agreement, all access to the Curriculum will promptly cease, and Client will immediately pay all amounts due to Apex Learning up to the date of expiration/termination. The following Sections will survive the expiration or termination of this Agreement: Sections 5 (with respect to amounts due and owing upon expiration/termination), 6, 7, 8, 9, 10.3, and 11, as well as applicable provisions of Exhibit D.

11. **Miscellaneous.**

11.1. ***Relationship of Parties.*** Client and Apex Learning are independent contractors with respect to one another, and nothing in this Agreement will be interpreted to create any agency, joint venture, employment or partnership relationship.

11.2. ***Force Majeure.*** For a reasonable time period, Apex Learning will be excused from delay, breach of this Agreement, or failure in performance under this Agreement due to causes beyond Apex Learning's reasonable control including without limitation, acts of God, government action, strikes, acts of public enemies, civil disturbance or riots, war, national emergency, floods, power outages, telecommunications failures, fires, earthquakes, storms, or other similar causes.

11.3. ***Notices.*** Any notices given under this Agreement shall be delivered in writing either by messenger or overnight delivery service, with a confirmation of delivery, and addressed to Apex Learning or Client at the address stated

in the table below, and shall be deemed to have been given on the day when received by the party to whom the notice is given.

	Apex Learning Contact	Client Contact
Individual Name and/or Title	Manager, Contracts	Sondra Aguilera
Organization	Apex Learning Inc.	Oakland Unified School District
Address	1215 Fourth Avenue, Suite 1500	1000 Broadway, Suite 680
City, State, Zip	Seattle, WA 98161	Oakland, CA 94607
Phone	206-381-5600	510-879-8200

- 11.4. **Assignment.** Neither party will assign this Agreement or any of its rights or obligations hereunder without the prior written consent of the other party. Notwithstanding the immediately preceding sentence, either party may assign this Agreement without the other party’s prior written consent as part of a merger, acquisition or a sale or transfer of a majority of the assigning party’s assets. This Agreement will be binding upon, enforceable by, and inure to the benefit of the parties and their respective successors and permitted assignees.
- 11.5. **Waiver/Severability.** No provision of this Agreement will be deemed waived unless the waiver is in writing and signed by the waiving party, and no such waiver will constitute a waiver of any other provision(s) or of the same provision on another occasion. If any term of this Agreement is found by a court of competent jurisdiction to be in whole or in part unenforceable, then such unenforceable term or portion thereof will be deemed superseded by a valid, enforceable provision that most closely matches the intent of the original provision and the allocation of risk among the parties reflected in the original provision, and the remainder of this Agreement shall continue in effect.
- 11.6. **Governing Law/Attorneys’ Fees.** This Agreement will be governed by and construed under the laws of the State of California (except to the extent federal law is controlling on the subject matter), without regard to its conflict of laws provisions. In any action to enforce any right or remedy under this Agreement or to interpret any provision of this Agreement, the prevailing party will be entitled to recover its costs, including reasonable attorneys’ fees.
- 11.7. **No Third-Party Beneficiaries.** This Agreement is for the benefit of, and shall be enforceable by, the parties only. This Agreement is not intended to confer any right or benefit on any third party. No action may be commenced or prosecuted against a party by any third party claiming as a third-party beneficiary of this Agreement.
- 11.8. **Entire Agreement.** This Agreement, including without limitation all Exhibits attached hereto, constitutes the entire agreement between the parties with respect to its subject matter and supersedes all prior and contemporaneous agreements, oral or written, regarding such subject matter. Changes, modifications or waivers to this Agreement must be in writing and signed by both parties.
- 11.9. **Execution in Counterparts/Electronic Signatures.** This Agreement may be executed in any number of separate counterparts, each of which together shall constitute a single agreement, but each together shall constitute one and the same instrument. Each party agrees that it will not contest the validity of the execution of this Agreement solely on the basis of the exchange of signed counterparts in .pdf format or the use of a mutually agreed-upon electronic signature process. Any copy of this Agreement electronically signed by both parties pursuant to any such mutually-agreed electronic signature process will be deemed to be an original.

[Signature page to follow]

IN WITNESS WHEREOF, the authorized representatives of Apex Learning and Client identified in the signature block below agree to the terms and conditions set forth in this Agreement.

Apex Learning Inc.

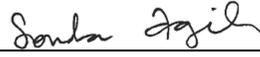
By: 

Print Name: Chuck Lanphier

Title: Sr. Vice President, Client Services

Date: 8/6/2021

Oakland Unified School District

By: 

Print Name: Sondra Aguilera

Title: Chief Academic Officer

Date: 8/10/2021

EXHIBIT A
Digital Curriculum Solutions

1. Curriculum:

- **Apex Learning Courses:** 1,000 Courses single enrollment subscriptions from August 26, 2021 through August 25, 2022. Courses subscriptions do not include access to Technology Courses.

Price: \$70,000.00

Each single enrollment subscription provides access for one student enrolled in any one course. If a student completes or withdraws from the course in which he or she is enrolled, the subscription may be reused to enroll that student or another student in any one course. The number of course enrollments at the same time may not exceed the number of subscriptions purchased. Client may purchase additional subscriptions for access from August 26, 2021 through August 25, 2022 at \$70.00 per subscription.

2. Apex Learning Professional Services:

- Four 6-hour onsite sessions.

Price: No charge

Total Price: \$70,000.00

EXHIBIT B
Invoice Schedule

Apex Learning will invoice Client in the amount of \$70,000.00 on August 25, 2021.

EXHIBIT C

User Support

1. **General.** Apex Learning will provide Client Users with support via a toll-free phone number (for U.S. calls only), online chat and/or email. Phone support will be available from Apex Learning Monday–Friday from 5:00 a.m. to 7:00 p.m. Pacific Time. Apex Learning will give Client Users notice of any intermittent or seasonal changes to the phone support schedule by posting an announcement on the Apex Learning website through which Client Users access the Apex Curriculum and/or by a voicemail greeting.
2. **Disclaimer.** Apex Learning’s ability to support Client Users with respect to the Apex Curriculum depends on Client (a) providing Apex Learning with prompt notice if Client becomes aware of any problem that affects the ability of Client Users to access and/or use the Apex Curriculum, (b) cooperating in a timely manner with Apex Learning’s efforts to diagnose the source of problems, (c) making available to Apex Learning appropriate staff and system information for resolving issues as they may arise, and (d) implementing reasonable technical solutions suggested by Apex Learning in a timely manner. In addition, Apex Learning is not responsible for Client User problems that stem from Client’s Internet connection, any Client or third-party hardware or software, or Client’s own network.

EXHIBIT D

Student Data Privacy and Protection Addendum California Education Code Section 49073.1 (AB No. 1584)

A. DEFINITIONS. The following terms will have the following meanings for purposes of this Addendum:

1. “**Deidentified Information**” means information that cannot be used to identify an individual Client student.
2. “**Eligible Pupil**” means a Client student who has reached 18 years of age.
3. “**Pupil-Generated Content**” means materials created by a Client student, including, but not limited to, essays, research reports, portfolios, creative writing, music or other audio files, photographs, and account information that enables ongoing ownership of Client student content. “**Pupil-Generated Content**” does not include Client student responses to a standardized assessment where Client student possession and control would jeopardize the validity and reliability of that assessment.
4. “**Pupil Records**” mean both of the following:
 - a. Any information directly related to a Client student that is maintained by Client, and
 - b. Any information acquired directly from a Client student through the use of Apex Curriculum assigned to the Client student by a teacher or other Client employee.

“**Pupil Records**” do not mean any of the following:

- a. Deidentified Information, including aggregated deidentified information, used by Apex Learning to improve educational products for adaptive learning purposes and for customizing student learning,
- b. Deidentified Information, including aggregated deidentified information, used to demonstrate the effectiveness of Apex Learning’s products in the marketing of those products, or
- c. Deidentified Information, including aggregated deidentified information, used for the development and improvement of educational sites, services, or applications.

B. ADDITIONAL TERMS REGARDING PUPIL RECORDS/PUPIL-GENERATED CONTENT

1. Pupil Records obtained by Apex Learning under this Agreement are and will continue to be the property of and under the control of Client.
2. Notwithstanding Section 1 above, Client students may retain possession and control of their own Pupil-Generated Content created using the Apex Curriculum as follows:

Students may retain a copy of each item of Pupil-Generated Content as it is generated (*e.g.*, by making a digital or hard copy).

3. Apex Learning will not use any information in any Pupil Record for any purpose other than those purposes required or specifically permitted by this Agreement. For clarification, these purposes include use of Pupil Records as reasonably necessary for Apex Learning to provide the Apex Curriculum and related services and support to Client and Client students under this Agreement.

4. A parent, legal guardian or Eligible Pupil may review personally identifiable information in a Client student's Pupil Records and correct erroneous information as follows:

Client students have access to their Pupil Records through their access to the Apex Curriculum. A parent, legal guardian or Eligible Pupil may contact Client to request a correction to erroneous personally identifiable information and Apex Learning will make such changes as directed by Client.

5. Apex Learning takes the following actions to protect the security and confidentiality of Pupil Records:

Pupil Records will be stored in electronic memory (on servers or other computers) operated and maintained by or on behalf of Apex Learning in the United States. The measures that Apex Learning will take to protect the security and confidentiality of Pupil Records containing personally identifiable Client student information while it is stored in that manner include, but are not necessarily limited to: encryption to protect personally identifiable information while in motion or at rest; restricted physical access to the servers/computers; software-based solutions intended to prohibit unauthorized entry such as regularly updated virus scans, firewalls, and use of passwords; and administrative controls such as selective user access rights, and including the designation and training of responsible individuals.

6. In the event of an unauthorized disclosure of a Client student's Pupil Records, the following procedures will be followed for notifying the parent, legal guardian or Eligible Pupil:

Apex Learning shall notify Client without unreasonable delay of any breach of security resulting in an unauthorized release of a Client student's personally identifiable information in a Pupil Record, by Apex Learning or its assignees in violation of applicable state or federal law.

7. Apex Learning certifies that Pupil Records will not be retained or available to Apex Learning upon completion of the terms of this Agreement. This certification will be enforced as follows:

As a term of this Agreement, the parties agree that following the expiration or termination of this Agreement, Apex Learning will store Pupil Records for renewed access by Client (*i.e.*, by way of renewal of this Agreement or execution of a subsequent Agreement with Apex Learning) until such time as Client provides written notice to Apex Learning that Client no longer wishes to have Apex Learning provide such ongoing storage. Within a reasonable time period following receipt of any such written notice from Client, Apex Learning will deidentify all such Pupil Records (*i.e.*, modify Pupil Records so that they cannot be used to identify an individual Client student and therefore no longer qualify as "Pupil Records").

8. Client agrees to work with Apex Learning to ensure compliance with the federal Family Educational Rights and Privacy Act (if applicable) pursuant to procedures agreed upon by the parties.
9. Apex Learning is prohibited from using personally identifiable information in Pupil Records to engage in targeted advertising.