



ELS TERMS AND CONDITIONS

1 Definitions

- 1.1 “Agreement” means the agreement made between ELS and Customer according to the Order Documents and these Terms and Conditions.
- 1.2 “Assessment Content” means individual items, materials associated with the items such as reading passages and graphics, assessments, and scoring materials created by ELS.
- 1.3 “Customer” means the party identified as the customer in the Order Documents.
- 1.4 “Education Records” means records that contain personally identifiable information of Customer students.
- 1.5 “Effective Date” means the date of the last required signature affixed to the Order Documents.
- 1.6 “ELS” means Educational Leadership Solutions, Inc., a Mississippi corporation.
- 1.7 “License” means the license to access and use the Products as described in Section 2.2 and other relevant provisions of this Agreement.
- 1.8 “Order Documents” means the quote and order Agreement executed by ELS and Customer which references these Terms and Conditions.
- 1.9 “Products” means any of the ELS Products described in this document.
- 1.10 “Services” means services provided to the Customer by ELS.
- 1.11 “Term” means the period starting on the Effective Date and running through the remainder of the school term referenced in the Order Documents.
- 1.12 “Terms and Conditions” means the terms and conditions set forth in this document.
- 1.13 “User” means designated user of ELS Products created by Customer.

2 ELS Products

- 2.1 ELS Products are web-based applications which help educators manage data. Products Include:
 - 2.1.1 Test Tracker, a test data warehouse application, including longitudinal/growth projections for student benchmarks
 - 2.1.2 Student Tracker, an application for analyzing student performance and tracking growth over time
 - 2.1.3 Pathways, an assessment and reporting platform, including access to purchased assessment content
 - 2.1.4 EZ Lesson Planner, an instructional management application
 - 2.1.5 EZ Evaluation, a teacher evaluation application
 - 2.1.6 Student Support Network, a student data collection application
- 2.2 License. During the Term referenced in the Order Documents, ELS grants to Customer a non-transferable, non-exclusive, non-sublicenseable, and revocable License to access and use of Products. ELS owns the copyright on Products, and Customer has no right to copy Products, or to use Products except as provided herein. The grant of License herein is limited to Customer and its employees, and Customer is not authorized to give anyone other than Customer Users access to Products or otherwise share Products with anyone outside Customer. ELS may terminate the Agreement if the Terms of the License are breached as set out in this Agreement.
- 2.3 Ownership. Customer acknowledges that the Products and all system files are and shall be solely owned by ELS, and ELS acknowledges that Customer owns the data used by Customer with and on the Products. Notwithstanding the foregoing, Customer grants ELS permission to access and manage Customer data periodically for backup and maintenance.
- 2.4 Term. The Term of the Agreement shall be for the remainder of the school year as listed on the Order Documents, unless either party shall terminate the Agreement by notifying the other party in writing not less than thirty (30) days prior to the then current termination date.

3 ELS Assessment Content

- 3.1 Content created and maintained by ELS which includes individual items, materials associated with the items such as reading passages and graphics, tests, and scoring materials.
- 3.2 License. Subject to the Terms and Conditions herein stated, Customer is hereby granted a limited, non-exclusive, non-transferable right and License to access and use of Assessment Content to provide non-commercial access and use of any or all Assessment Content to students registered within the Customer’s schools/districts for the sole purpose of performing

formative assessments of those students.

- 3.3 **Terms.** The payment and delivery Terms, duration of this grant of License, scope and limitations of specific Assessment Content, and other pertinent Terms and information are contained in the Order Documents. If there are inconsistencies in the Terms and the Order, the Terms of the Order that is accepted by ELS will constitute an amendment of the Terms for that Order.
- 3.4 **Limitations.** All rights, licenses and privileges not expressly granted to the Customer under the License will remain exclusive to ELS. Without limiting the generality of the foregoing, the Customer acknowledges that ELS retains all rights under copyright and all other intellectual property rights in and to the Assessment Content, all Assessment Content included therein, and all modifications and derivative works created therefrom.
- 3.5 **Term, Termination.** The Term of the Agreement is described on the Order Documents unless earlier terminated as follows: If Customer breaches or fails to perform any obligation under the Agreement, ELS may give Customer written notice of default specifying the failure, and ELS shall have the right to immediately terminate the Agreement and all of Customer's rights hereunder after such notice of default if Customer shall not have corrected the default to ELS's reasonable satisfaction within ten (10) business days after ELS sent such notice of default; provided, however, that ELS will have the right to terminate the Agreement immediately upon written notice if Customer infringes ELS's rights with respect to the Assessment Content or any ELS intellectual property, or otherwise uses or misuses ELS's intellectual property in any way other than expressly authorized under the Agreement. Customer acknowledges that use of Assessment Content and all modifications and derivative works thereof after termination of the License is strictly prohibited and would constitute infringement of ELS's proprietary rights. Upon termination or expiration of the Agreement, (i) all amounts owed by Customer to ELS shall become immediately due and payable, (ii) the all Licenses shall be immediately revoked, (iii) Customer shall destroy any and all copies of Assessment Content, in whole or in part, and shall purge, all electronic versions of Assessment Content, in whole or in part from its platform and, within days of their return or destruction, provide the ELS a written certification of such return or destruction of Assessment Content and any other intellectual property of ELS.
- 3.6 **Intellectual Property.** Customer agrees and acknowledges that as between ELS and Customer, Assessment Content, and all copyrights and other intellectual property rights therein and thereto, is and shall remain the exclusive property of ELS. Customer acknowledges that the Agreement does not convey to Customer any intellectual property rights held by ELS related to such Assessment Content.

4 **Professional Development Services**

- 4.1 Professional Development is delivered remotely via "webinar" or "onsite" at Customer's facility. Customer will be responsible for providing its own computers and sufficient internet connections for "webinar" Professional Development. Customer will be responsible for providing a suitable meeting area and audio-visual equipment for "onsite" Professional Development.

5 **ELS Support Services**

- 5.1 In connection with Customer's purchase of ELS Products and Assessment Content specified on the Order Documents, ELS will provide support relative to the Products and content. ELS will use commercially reasonable efforts to provide support for requests from the Customer's primary contact relative to products, assessments, items, or item bank content.

6 **Data**

- 6.1 **FERPA.** The Family Educational Rights and Privacy Act ("FERPA"), 20 U.S.C. § 1232g and 34 C.F.R. Part 99, is a federal law that affords parents and students over the age of 18 the right to consent to the disclosure of student personally identifiable information ("student PII") from Education Records. ELS and Customer desire to protect Customer student PII consistent with FERPA and other applicable privacy laws in carrying out all of their respective obligations under the Agreement.
- 6.1.1 The Customer hereby acknowledges and agrees that ELS is a "school official" (as defined by FERPA and in accordance with the Customer's internal policies and procedures) and has a "legitimate educational interest" (as defined by the Customer and in accordance with the Customer's internal policies and procedures) to receive student PII without parental consent.
- 6.1.2 In accordance with the "school official" exception at 34 C.F.R. §99.31(a)(1)(i)(B), ELS shall use student PII only for the purpose of providing the Services specified herein, which may include sharing student PII with third parties that help ELS provide such Services, and shall not re-disclose student PII except as authorized or required by law.
- 6.1.3 Nothing in the Agreement shall be construed to limit ELS's use or retention during and after expiration or termination of the Agreement of Education Records or information from Education Records from which all personally identifiable information has been removed such that a student's identity may not reasonably be ascertained.
- 6.2 **Data Usage.** ELS may use the information it obtains relating to Customer, including Customer's IP address, name, mailing address, and email address, for its internal business purposes and for purposes of communicating with Customers regarding ELS Products and Services. ELS will not disclose, sell, or otherwise distribute Customer's information to third parties.

7 Protection of Customer Data

- 7.1 ELS will utilize Secure Socket Layer (SSL) encryption technology for all applications on <https://apps.k12els.com>. When the Customer accesses ELS Products via web browser, SSL technology will protect Customer Education Records using both server authentication and data encryption designed to ensure that Customer data is safe, secure, and available only to registered Customer Users. The technology is designed to prevent Customer data from being accessed by unauthorized Users.
- 7.2 ELS will provide each User with a unique username and password that must be entered each time a User logs on. The applications on <https://apps.k12els.com> issue a session "cookie" only to record encrypted authentication information for the duration of a specific session. The session "cookie" will not include either the username or password of the User. The website <https://apps.k12els.com> will not use "cookies" to store other confidential User and session information, but instead implements more advanced security methods based on dynamic data and encoded session IDs.
- 7.3 The website <https://apps.k12els.com> will be hosted in a secure server environment that uses a firewall and other advanced technology to prevent interference or access from outside intruders. ELS will fully endeavor to protect student information, and makes commercially reasonable efforts to do so, including but not limited to those discussed herein; but cannot guarantee, in any event that no breach of security will occur.
- 7.4 ELS will work to ensure the security, safety, and privacy of all Education Records by implementing security measures including but not limited to the following:
- 7.4.1 For all accounts of ELS employees, ELS contractors, and any other non-Customer accounts with access to the Education Records: (a) Two-factor authentication; (b) Individual usernames (no general admin logins); (c) Logging of all access; (d) Implemented policies and procedures as to access rights and authorizations for all ELS employed or directed Users with access to the Education Records, including policies that grant access only when absolutely required; (e) Industry standard physical security and access controls; (f) Firewalls for all external data connections; (g) Backup of the Education Records to at least one site separated geographically from the primary site by at least 250 miles; and (h) Implementation of a procedure for and regular and timely installation of all necessary software patches on any systems storing or with access to Education Records.
- 7.5 ELS will require all vendors and sub-vendors with access to the Customer Education Records to implement security measures including but not limited to those listed above.

8 Warranties and Limitation of Liability

- 8.1 The parties acknowledge, understand and agree that some governmental entities presently may have no authority to contractually limit or exclude certain implied warranties. Notwithstanding this, to the extent permitted by applicable law and except as otherwise provided in section 9 below:

WARRANTIES. ELS MAKES NO WARRANTY WHATSOEVER, WHETHER STATUTORY, EXPRESS OR IMPLIED, INCLUDING, WITHOUT LIMITATION, ANY IMPLIED WARRANTY OF MERCHANTABILITY, FITNESS FOR A PARTICULAR PURPOSE, ACCURACY, NON-INFRINGEMENT, OR TITLE. ELS IS NOT RESPONSIBLE FOR THE VALIDITY, FAIRNESS OR QUALITY OF ASSESSMENTS THAT ARE ULTIMATELY PREPARED BY CUSTOMER USING ASSESSMENT CONTENT. ELS WILL HAVE NO RESPONSIBILITY WITH RESPECT TO ANY USE OF ASSESSMENT CONTENT (A) TO THE EXTENT THAT ANY ASSESSMENT CONTENT HAS BEEN MODIFIED WITHOUT PRIOR WRITTEN APPROVAL OF ELS OR (B) FOR ANY PURPOSE OTHER THAN FOR FORMATIVE STUDENT ASSESSMENTS OR (C) FOR FAILURE TO USE ASSESSMENT CONTENT IN ACCORDANCE WITH THE LICENSE OR THE AGREEMENT. ELS IS NOT RESPONSIBLE FOR THE COMPLETENESS OR ADEQUACY OF ANY STATE STANDARDS ACCESSIBLE THROUGH THE COVERED PLATFORM.

LIMITATION OF LIABILITY. ELS WILL NOT BE LIABLE FOR ANY INCIDENTAL, INDIRECT, CONSEQUENTIAL, SPECIAL, EXEMPLARY OR PUNITIVE DAMAGES INCLUDING, WITHOUT LIMITATION, IN CONNECTION WITH ANY INTERRUPTION OF DISTRICT BUSINESS OR ANY LOST FUNDING, APPROPRIATIONS, CONTRIBUTIONS OR REVENUE, INCOME OR PROFIT OR ANY LOSS OF ANTICIPATED SAVINGS OR ANY LOST OPPORTUNITY OR GOODWILL, ALL AS MAY BE INCURRED OR SUFFERED AND REGARDLESS OF WHETHER ELS HAS BEEN INFORMED OF THE POSSIBILITY OR LIKELIHOOD OF SUCH DAMAGES. IN NO EVENT WILL ELS' TOTAL LIABILITY HEREUNDER FROM ALL CAUSES OF ACTION OF ANY KIND OR NATURE IN CONNECTION WITH THIS AGREEMENT OR THE SERVICES OR OTHER EXCEED THE TOTAL AMOUNT PAID BY DISTRICT TO ELS HEREUNDER DURING THE TWELVE (12) MONTH PERIOD IMMEDIATELY PRECEDING THE DATE THE LAST OF THE CAUSES OF ACTION AROSE. THESE LIMITATIONS AND EXCLUSIONS APPLY IRRESPECTIVE OF THE CAUSE OF ACTION, INCLUDING BUT NOT LIMITED TO BREACH OF CONTRACT, NEGLIGENCE, STRICT LIABILITY, TORT, BREACH OF WARRANTY, MISREPRESENTATION OR ANY OTHER LEGAL THEORY AND WILL SURVIVE A FUNDAMENTAL BREACH.

9 Indemnification

- 9.1 **By Customer.** Customer will defend ELS and its affiliates, and their employees, officers, and directors (the “ELS Indemnified Parties”) from and against third party claims, actions, and demands arising from allegations that Customer data, unauthorized use of the Products by Customer or its end Users, or ELS’s processing of data pursuant to Customer’s instructions infringes a third party’s intellectual property right or privacy right, and Customer shall indemnify and hold the ELS Indemnified Parties harmless against any damages, reasonable attorneys’ fees, and costs finally awarded against ELS Indemnified Parties as a result of, or for any amounts paid by the ELS Indemnified Parties under a Customer-approved settlement of any such claim against ELS.
- 9.2 **By ELS.** ELS will defend Customer and their employees, officers, and directors (together the “Customer Indemnified Parties”) from and against third party claims, actions, and demands alleging that Customer’s authorized use of the Products infringes or misappropriates any copyright, trade secret, U.S. patent, or trademark right of that third party, and ELS shall indemnify and hold the Customer Indemnified Parties harmless against any damages, reasonable attorneys’ fees, and costs finally awarded against Customer Indemnified Parties as a result of, or for any amounts paid by the Customer Indemnified Parties under an ELS-approved settlement of any such claim against Customer; provided, however, in no event will ELS have any obligations or liability under this section to the extent such claim against Customer arises from: (a) Customer or any end User’s use of the Products other than as permitted under this Agreement; or (b) use of the Products in a modified form or in combination with Products, Services, content, or data not furnished to Customer by ELS.

10 **Notices**

- 10.1 All notices or other communications required or permitted to be given hereunder shall be in writing and shall be deemed given to a party when delivered by U. S. Mail (including Express, Priority or Certified Mail, all with Proof of Delivery or Return Receipt Requested). Any notices sent to ELS shall be sent to: Educational Leadership Solutions, 1430 Hwy 19 N, Meridian, MS 39307, Attn: Paul K. Shelly, President. Any notices sent to Franchisee shall be sent in the manner described above to Franchisee’s address as listed on the Order Documents. Any party may change its contact information for notices and other communications hereunder by notice to the other party.

11 **Miscellaneous**

- 11.1 The Agreement constitutes the entire understanding between the parties with reference to the subject matter hereof and may be amended only by an agreement in writing.
- 11.2 The Agreement shall be governed by the laws of the State of Mississippi (without reference to its conflicts of laws principles).
- 11.3 If any provision of the Agreement shall be held by a tribunal of competent jurisdiction to be contrary to law, then the remaining provisions of the Agreement shall remain valid and in full force and effect to the maximum possible extent, and the parties shall agree upon a new, lawful provision which most likely reflects the intent of the parties with respect to the stricken provision.
- 11.4 Customer may not assign the Agreement or the License granted hereunder without the prior written consent of ELS.
- 11.5 **Force majeure.** Neither Party shall be held liable to the other Party for failure of performance where such failure is caused by supervening conditions beyond that Party’s control, including acts of god, civil disturbance, disease pandemic, strikes or labor disputes.
- 11.6 The Agreement is executed by duly authorized representatives of the parties on the Order Documents.