

**Attachment C:
Software Escrow &
Penalty for Early Vendor Termination
of Services Agreement
for the
Learning Management System
for the
Des Moines Public Schools**

Month XX, 2016

DRAFT - FOR REVIEW AND DISCUSSION ONLY

SOFTWARE ESCROW and PENALTY FOR EARLY TERMINATION of SERVICES AGREEMENT

THIS AGREEMENT made effective as of the ____ day of _____, _____. (the "Agreement")

BETWEEN:

_____ (insert name of LMS Vendor)
_____ (insert complete address)
(the "Owner")

-AND-

_____ (insert name of escrow agent)
_____ (insert complete address)
(the "Escrow Agent")

-AND-

_____ (FWISD / District)
_____ (insert complete address)
(the "Licensee")

This Software Escrow Agreement ("Escrow Agreement") is entered into by and among the Owner, who owns certain LMS Software, the Escrow Agent, and the Licensee, a licensee of the aforementioned LMS Software, with reference to the following facts:

- A. Licensee has entered into a Master Software and Services Contract, the terms of which are made a part hereof, whereby Licensee has the right to use Owner’s computer programs identified therein (the “LMS Software”).
B. Licensee has entered into a Software Maintenance Services Agreement, the terms of which are made a part hereof, whereby Owner will support Licensee in the use of Owner’s Software (the “Software Maintenance”).
C. The uninterrupted availability of the Software is mission-critical to Licensee in the conduct of its business.
D. As a consequence of the foregoing, Owner has agreed to enter into this Escrow Agreement to provide for the availability of the source code, as well as any corrections, changes, modifications and enhancements to such source code, in accordance with the terms and conditions hereinafter set forth.

NOW THEREFORE based upon the premises and respective promises and obligations contained herein, the parties agree as follows:

1. Deposits in Escrow

Upon signing this Escrow Agreement and every six (6) months thereafter, Owner shall deposit with Escrow Agent the source code for the Software, including all relevant commentary, explanations and other documentation, as well as instructions to compile the source code, plus all revisions to the Software source code encompassing all corrections, changes, modifications and enhancements made to the Software by Owner (the “Escrow Material”). Within seven (7) days after such deposit with Escrow Agent,

both Owner and Escrow Agent shall give written notice of receipt to Licensee. The Escrow Agent is empowered to return to Owner, seven (7) days after the issuance of the written notice of receipt, all previous versions of the Escrow Material. The cost of preparation of the escrow material shall be borne by Owner. The Owner must identify any restrictions and limitations on the use of the Escrow Material, including any updates thereto, and documentation.

2. Term

This Escrow Agreement shall remain in effect during the term of the Master Software and Services Contract. The Escrow Agreement, however, shall terminate automatically upon delivery of the Escrow Material to Licensee in accordance with the provisions herein.

3. Access to Escrow Material / Default by Owner

Owner is deemed to be in default, as defined herein; and Licensee may obtain the Escrow Material upon either of the following conditions:

A default by Owner shall be deemed to have occurred under this Escrow Agreement upon the occurrence of any of the following:

- (a) if Owner has availed itself of, or been subjected to by any third party, a proceeding in bankruptcy in which Owner is the named debtor; an assignment by Owner for the benefit of its creditors; the appointment of a receiver for Owner; or any other proceeding involving insolvency or the protection of or from creditors, and same has not been discharged or terminated without any prejudice to Licensee's rights or interests under the Master Software and Services Contract within thirty (30) days; or
- (b) if Owner has ceased its ongoing business operations, or
- (c) if Owner has ceased the sale, licensing, software enhancement, maintenance or other support of the Software; or
- (d) if Owner has sold or transferred Ownership of the Software to a Successor Owner and the Successor Owner ceases the sale, licensing, software enhancement, maintenance or other support of the Software; or
- (e) if any other event or circumstance occurs which demonstrates with reasonable certainty (in Licensee's sole discretion) the inability or unwillingness of Owner or Successor Owner to fulfill its obligations to Licensee under the Master Software and Services Contract, this Escrow Agreement, or the Software Maintenance Services Agreement between Owner and Licensee, including, without limitation, the correction of defects in the Software, a breach of the Master Software and Services Contract, change in ownership or control of Owner, and/or proposed material change or amendment to the Master Software and Services Contract by Owner.

4. Notice of Default

Licensee shall give written notice by certified mail to Escrow Agent and Owner of the occurrence of a default hereunder. Unless within ten (10) days thereafter Owner files with Escrow Agent its affidavit executed by a responsible executive officer clearly refuting each area of claimed default or showing that

the default has been cured, then Escrow Agent shall upon the eleventh (11th) day deliver to Licensee the Escrow Material and all revisions and additions thereto.

5. Penalties for Early Default

If Owner is deemed to be in default, as defined herein, within 5 years of the effective date of the Master Software and Services Contract, in addition to the release of the Escrow Material as described herein, Owner shall pay to Licensee the following Liquidated Damages as a percentage of the Software License fee and Owner Installation Services:

1-12 months:	75% of total fees paid at the time of default
13-24 months	60%
25-36 months	50%
37-42 months	40%
43-60 months	25%

6. Obligations of Escrow Agent

- (a) *Storage.* The Escrow Material shall be placed and maintained in a vault located at _____ . *(insert complete address of escrow company)*
- (b) *Control.* Control over access to the Escrow Material shall rest with Escrow Agent.
- (c) *Delivery.* Escrow Agent shall make delivery of the Escrow Material to the appropriate party or individual in accordance with the provisions of this Escrow Agreement.
- (d) *Disclosure.* Except as provided in this Escrow Agreement, Escrow Agent agrees that it shall not disclose or otherwise make available to any third party, or make any use of, the Escrow Materials without Owner's prior written consent.

7. Ownership of Escrow Material / License of Escrow Material

In all events, Owner or its successors or assigns, shall remain the owner of the Escrow Material. Licensee's right to and interest in the Escrow Material shall be as a licensee only. In the event of a release of Escrow Materials, Owner grants to Licensee a to use and modify the Escrow Materials solely for Customer to support its internal use of the LMS Software, but not the right to disclose or distribute, in any form, to any third party.

8. Confidentiality

Licensee shall at all times maintain the confidentiality of the Escrow Material and shall be liable for any breach of confidentiality for which Licensee is responsible. In no event shall Licensee be liable for incidental or consequential damages, including lost profits.

9. Compensation of Escrow Agent

- (a) *Initial Fee.* Upon execution of this Escrow Agreement, Licensee shall make payment to Escrow Agent of reasonable compensation for the escrow service in accordance with Escrow Agent's published fee schedule then in effect. The current fee is \$_____ *(insert amount)* per year minimum, and is due and payable at the initial set-up of the Escrow Agreement and escrow service for the first year.
- (b) *Annual Fee.* Thereafter, an annual fee at the then-published rate shall be payable by Owner on the anniversary date of each succeeding year for which Licensee seeks to extend this Escrow

Agreement. In the event of non-payment of Escrow Agent's fees by Owner, Escrow Agent shall give both parties sixty (60) days notice thereof. If the sixty (60) day notice period elapses without Escrow Agent having received payment from either party, Escrow Agent shall then have the option, without further notice to ask Licensee to pay the Escrow Agent fees. If Licensee does not wish to pay such fees, Escrow Agent may terminate this Escrow Agreement and to return to Owner all Escrow Material.

10. Indemnification of Escrow Agent

Escrow Agent shall not, by reason of its execution of this Agreement, assume any responsibility or liability for any transactions between Owner and Licensee other than for the performance of Escrow Agent's obligations with respect to the Escrow Material held by it in accordance with this Agreement. The party on whose behalf, or pursuant to whose directions the Escrow Agent acts, shall indemnify and hold harmless Escrow Agent from any and all liability, damages, costs, or expenses including reasonable attorneys' fees, which may be sustained or incurred by Escrow Agent as a result of the taking of such action.

11. Testing

Upon written notice to Owner and Escrow Agent, Licensee may conduct tests of the Escrow Material, under Owner's supervision and at a location other than Licensee's facilities, to confirm the conditions of the Escrow Material. Any direct costs associated with the testing of the Escrow Material, including expenses incurred by Owner, shall be borne by Licensee.

12. Resolution of Dispute

Any controversy or claim arising out of or relating to this Agreement, with the exception of injunctive relief sought by either party, shall be submitted to arbitration before an arbitrator agreed upon by the parties, or if the parties cannot agree upon an arbitrator within thirty (30) days, to an arbitrator selected by the American Arbitration Association. The arbitration shall be conducted under the rules then prevailing of the American Arbitration Association. The arbitrators may award attorneys' fees and costs as part of the award. The award of the arbitrators shall be binding and may be entered as a judgment in any court of competent jurisdiction.

13. Notices

All notices required by this Escrow Agreement shall be sufficiently given by mailing the same by certified or registered mail, return receipt requested, to the parties at their respective addresses, as follows:

Owner:
_____ (insert complete address)

Licensee:
_____ (insert complete address)

Escrow Agent:
_____ (insert complete address)

14. Succession

The rights and obligations hereunder shall enure to the benefit of and become the responsibility of the heirs, successors, and/or assigns of the parties hereto.

15. Entire Agreement

This Escrow Agreement and the documents marked as Exhibit "A" and Exhibit "B" hereto constitute the entire understanding of the parties. This Escrow Agreement may be amended or altered only by an instrument in writing signed by all parties hereto.

16. Governing Law

This Agreement shall be governed by and construed in accordance with the laws of the State of Texas and the parties hereby attorn to the jurisdiction of the courts of the State of Texas.

IN WITNESS WHEREOF, the parties hereto have executed this Agreement on the date first above written.

[NAME OF OWNER]:

[NAME OF LICENSEE]:

Signature

Signature

Print Name & Title (if any)

Print Name & Title (if any)

[NAME OF ESCROW AGENT]:

Signature

Print Name & Title (if any)

Exhibit "A"
To the Software Escrow Agreement
Between

_____ (*insert name of Owner*)

and

_____ (*insert name of Licensee*)

and

_____ (*insert name of Escrow Agent*)

Software License Agreement

Exhibit "B"
To the Software Escrow Agreement
Between

_____ (*insert name of Owner*)

and

_____ (*insert name of Licensee*)

and

_____ (*insert name of Escrow Agent*)

Software Maintenance Agreement