

**HOUGHTON MIFFLIN HARCOURT PUBLISHING COMPANY  
BIG DAY FOR PRE-K  
TERMS AND CONDITIONS**

These Big Day for Pre-K Terms and Conditions (together with any Exhibits, attachments and other referenced or linked documentation, the "Agreement") are made effective as of the date agreed to by Customer (whether by "clicking" to agree, or through another similar mechanism during Customer's purchase or set-up process) ("Effective Date"), by and between Houghton Mifflin Harcourt Publishing Company ("HMH") having an address at 222 Berkeley Street, Boston, MA 02116, and the customer identified on the purchasing or registration materials or Cover Sheet (the "Customer").

**1. Definitions.** Capitalized terms shall be defined as set forth below, or elsewhere in this Agreement.

(a) "Customer" means the legal entity identified on the purchasing or registration materials or Cover Sheet. For purposes of this Agreement and any licenses or other rights granted herein, Customer includes affiliates specifically listed in a purchase order or in other purchasing or registration materials accepted by HMH in connection with this Agreement ("Purchase Order"). Such affiliates agree to be bound by the terms of this Agreement. Customer is responsible for compliance with the terms of this Agreement by all affiliates, subsidiaries and subdivisions purchasing Services hereunder.

(b) "Customer Data" means student education record data and other user data (including, without limitation, personally identifiable information (as defined in Section 7(b)) that may be accessed, obtained, received, extracted or otherwise used by HMH (or which may be disclosed in any manner to HMH by or on behalf of Customer), in individualized or aggregate form, in connection with Customer's use of the Software and Services, in whole or in part, pursuant to this Agreement, as well as in connection with any services provided by HMH in connection with the Software and Services.

(c) "Customer Materials" means any data, information, content and materials provided by Customer to HMH, or submitted or otherwise posted or uploaded to the System (as defined in Section 2(a) below), which are used in connection with the Software or the Services, including, for example, technical information, functional specifications and Customer Data.

(d) "License Configuration" means the scope of Customer's license with respect to a particular Software, including, without limitation, whether such license is perpetual or on a subscription basis, the version(s) of the particular components of the Software that have been licensed and the number of seats or the site(s) licensed to access and use each such component of the Software licensed to Customer, subject to the end user license agreement for such Software (the "End User License Agreement"). Customer agrees to abide by the End User License Agreement (as may be updated by HMH from time to time), the terms of which are incorporated herein by this reference. The current version of the End User License Agreement is incorporated herein and located at <http://www.hmhco.com/product-support/content/techsupport/sam/manuals/EULAv8.pdf>.

(e) "Mobile App Agreement" means an agreement, license or terms of use associated with the use of any HMH-provided mobile device-based application in connection with access to materials, Software and Customer Materials.

(f) "Named User" means any individual for whom there is a designated user login account or equivalent permitting such individual to access and use a component of the Software.

(g) "Services" means the Hosting Services and/or Product Support Services provided by HMH as ordered by Customer on a Purchase Order, or other technical services that HMH may provide, as further described in and pursuant to the terms of this Agreement.

(h) "Software" means those components of the version(s) of Big Day for Pre-K, which have been licensed by Customer from HMH under the Purchase Order and pursuant to the End User License Agreement, in object code form only, and expressly designated by Customer to be subject to the Services hereunder. "Software" as used herein includes any maintenance releases or updates provided to Customer or new versions separately purchased by Customer.

**2. The Services.**

(a) Hosting Services.

(i) Subject to the terms and conditions of this Agreement, during the Hosting Term (as defined below), HMH shall provide to Customer access to a computer system with the capability of making materials, Software and Customer Materials accessible by Customer and Named Users through an online means set forth by HMH (such system, the "System," and all of the foregoing, collectively, the "Hosting Services"). HMH may offer Hosting Services with respect to Software licensed on a subscription basis ("Subscription Services") or Hosting Services with respect to Software licensed on a perpetual basis. HMH will provide Customer with a number of Named User credentials with respect to each Software equal to (A) if a seat license, the number of seats licensed by Customer under the End User License Agreement and applicable Purchase Order(s) or (B) if a site license, the appropriate number of Named Users for the applicable site.

(ii) The Hosting Services (including, without limitation, the Subscription Services) shall be included in the term “Services” as that term is defined and used herein, and are further described on Exhibit A, attached hereto and incorporated herein. The initial term of the Hosting Services (the “Initial Hosting Term”) shall begin on the Effective Date or other date specified on the applicable Purchase Order and shall continue for the initial Hosting Services term specified on the applicable Purchase Order. Notwithstanding the foregoing, if by the end of the Initial Hosting Term or any renewal term thereof (each a “Renewal Hosting Term” and, such end date, the “End Date”) Customer has not renewed the term of the Hosting Services (the “Hosting Term”), the Hosting Term shall automatically be extended for a sixty (60) day grace period (the “Grace Period”). If, by the end of the Grace Period, Customer has not renewed the Hosting Term, the Hosting Term shall terminate as of the end of the Grace Period. If, prior to the end of the Grace Period, Customer renews the Hosting Term, the Hosting Term will be deemed to have been renewed for a Renewal Hosting Term as of the End Date. If Customer’s license to Software hosted by HMH on the System terminates for any reason or the Hosting Term expires, Customer shall have no further access to such Software or the data retained therein on the System or to the Hosting Services, as applicable.

(b) Product Support Services. During the Hosting Term, HMH shall provide to Customer product support services (the “Product Support Services”) as described in the terms provided at (and incorporated herein) <http://www.hmhco.com/product-support/content/techsupport/sam/manuals/prodsupport.pdf> (the “Product Support Terms and Conditions”).

### **3. Grant of Rights.**

(a) HMH Rights Grant. Subject to the terms of this Agreement, HMH hereby grants Customer a limited, non-exclusive, non-sublicensable and non-transferable (other than among Named Users) right for the number of seats or sites identified on the applicable Purchase Order as within the scope of Customer’s license to the Software to use the Services to access the applicable Software through the Hosting Services pursuant to the terms and conditions of this Agreement and any other applicable terms and conditions, restrictions or instructions provided by HMH to Customer. Any rights not expressly granted by HMH in this Agreement are expressly reserved to HMH. For the avoidance of doubt, Software is licensed to Customer pursuant to the terms of the End User License Agreement and the associated Purchase Order. The term of Customer’s license to any given Software shall be as set forth in the End User License Agreement and the applicable Purchase Order.

(b) Customer License Grant. Customer, for Customer and on behalf and with the authority of all Named Users, hereby grants to HMH a royalty-free, worldwide, perpetual, assignable, sub-licensable license to use, reproduce, modify, store, host on its servers, publish, display, distribute and maintain the Customer Materials and the information and content submitted or otherwise posted or uploaded to the System in connection with the Services and otherwise use such information, content and materials as permitted in this Agreement or as necessary to provide and maintain the System, and to use or incorporate into the Services any suggestions, ideas, enhancement requests, feedback, recommendations or other information provided by Customer relating to the operation of the Software or Services. Customer understands and agrees that HMH may be accessing the Customer Materials, including without limitation, Customer Data, in order to provide the Services.

(c) License Configuration. Customer shall upgrade its license(s) to the Software to a larger number of licensed seats or sites if the number of individual persons who, or sites that, are accessing and using, or will access and use, a Software or the Services exceeds the number of seats or sites, as applicable, permitted by the then current License Configuration. Customer may elect to license additional Software components or add seats or sites.

**4. Additional Services.** HMH may also perform certain additional support, technical or professional services, which additional services shall be set forth in writing and which shall be subject to the terms and conditions hereof. Such additional services shall be provided at HMH’s then-current rates for such services and may also be subject to additional terms and conditions.

**5. Customer Responsibilities.** Without limitation of anything else set forth herein, Customer shall be solely responsible for the “Customer Responsibilities” set forth in this Section 5, which shall include: (a) the quality and accuracy of all Customer Materials and other information provided to HMH hereunder; (b) procuring and maintaining any necessary hardware, software and infrastructure not limited to network and bandwidth for accessing and using the Services; (c) ensuring that the Services and Software are not used for or in connection with any spidering, “screen scraping,” “database scraping,” or harvesting of e-mail addresses or other personal information; (d) ensuring that no information or material which constitutes or contains a virus, spyware, or other harmful component, or which contains any embedded links, advertising, chain letters or pyramid schemes of any kind, is uploaded, posted, published, distributed or otherwise transmitted on or through the Services or Software; (e) ensuring that no information, software, products, services or benefits obtained from or through the Software or Services are modified, copied, distributed, transmitted, translated, adapted, displayed, performed, reproduced, published, licensed, used to create derivative works, transferred, or sold; (f) not reverse-engineering, disassembling, or decompiling the Software or Services or otherwise attempting to discover the source code or structural framework of the Services or Software; (g) not renting, leasing, loaning, selling, transferring, publishing, displaying, distributing, disclosing or making the Software or Services available to third parties or using (or permitting the user of) the Software or Services, or any portion thereof, in a service bureau, time-sharing or outsourcing service or otherwise use the Software for the benefit of third parties (other than enrolled students); (h) not removing or altering any proprietary rights notices on the Software or Services; (i) not disclosing, without HMH’s prior written approval, the Software or any code, information or materials contained or related to the Software, license keys, analysis or performance information, results of Software performance benchmarks or documentation to any entity (except to Customer’s

employees having a need to know for purposes of authorized use hereunder and who are informed in writing of the obligations of this section) or using any of the foregoing other than as expressly authorized hereunder; (j) ensuring that the Software and Services are not used for any purpose that would infringe on any third party rights (in or outside the jurisdiction in which Customer is located), or that is unlawful, objectionable or otherwise prohibited by this Agreement or any applicable law of any relevant jurisdiction; and (k) ensuring that any and all information or content posted or otherwise uploaded to or through the Software or Services by it or its Named Users or other users shall not include anything that actually or potentially violates any applicable law, or infringes or violates the copyright, trade secret, trademark or other intellectual property, privacy or other proprietary right of any third party. Customer is responsible and liable for the accuracy, completeness, quality, integrity, legality, reliability and appropriateness of all such information and content and any third party claims regarding same. **Customer shall not provide social security numbers to HMH in connection with the provision of the Services.**

Customer shall take all reasonable security measures to prevent unauthorized access to the System as established and maintained by Customer. Customer shall not sublicense, lease, rent, sell, donate, assign or transfer any part of the Services or Software or the rights granted hereunder or make copies of Services or Software, except as expressly authorized hereunder. Customer is responsible for obtaining and maintaining, at its expense, all necessary hardware, software, modems, Internet connections and other items necessary for Customer and its Named Users to access and use the Services or Software.

Customer agrees to accept all responsibility for all activities that occur under Customer's or Customer's employees' or other Named Users' user name(s) or password(s) (which may be provided to Customer by HMH in connection with the Services or a specific Software program hereunder). Customer agrees not to sell, transfer or assign its account or allow others to use it. Customer agrees to immediately notify HMH of any unauthorized use of any password or account assigned to Customer or any Named User, or any other breach of security or confidentiality thereof, and in such event HMH shall have the right, without limitation of any other rights under this Agreement, at law or in equity, to terminate any such account or this Agreement in its entirety.

Customer acknowledges that Named Users and Customer's employees may have the ability to access some or all of the materials, Software and Customer Materials on mobile devices through applications specifically designed by HMH for distribution to such mobile devices. Customer further acknowledges that prior to accessing such materials, Software or Customer Materials through such an application, Named Users and employees may be required to agree to the terms of a Mobile App Agreement. Customer agrees to accept all responsibility for violations of the terms of such Mobile App Agreements by Named Users and Customer's employees.

HMH shall have no obligation to monitor the content of data or other Customer Materials sourced through or hosted in connection with the Services, but HMH reserves the right to do so and to remove or disclose any information or materials as necessary to satisfy any applicable law, regulation, legal process or governmental request, and HMH will use reasonable efforts to notify Customer reasonably in advance if any such information or materials relate to Customer. HMH shall have no liability hereunder for any delay or failure to perform any portion of the Services, which arises as a result of the failure of Customer to perform any of Customer's Responsibilities or other obligations of Customer under this Agreement.

## **6. Payment Terms.**

(a) **Fees.** The fees for access to and use of the Software and Services hereunder (collectively, the "Fees") shall be as set forth in the Purchase Order, shall be paid annually and in advance, and will be fixed for the initial term of the license to the Software, the Initial Hosting Term and the Initial Support Term. Fees for the Hosting Services may include, without limitation, an initial setup fee plus an annual (or other periodic) per-license or per-server fee (or other structure of fee offered by HMH), as set forth in the Purchase Order. Fees for Product Support Services may be further addressed in the Product Support Terms and Conditions. Modifications to Fees may be made at the beginning of any renewal Software license term, Renewal Hosting Term or Renewal Support Term and at such times during the term of this Agreement that Customer purchases additional hosted products or Software licenses from HMH as described in Section 6(b). HMH shall provide Customer with prior notice of any increase in fees for Renewal Hosting Terms or Renewal Support Terms. During the term of the Agreement, the Fees are based on Customer's then-current License Configuration. All payments are due within 30 days of receipt of invoice. All rights and licenses granted herein are subject to timely payment of all applicable fees. All prices and payments under this Agreement are exclusive of all taxes, and Customer agrees to pay all applicable national, state and local sales, use, value-added and other taxes, customs duties and similar tariffs and fees based on the Services provided hereunder, other than taxes imposed on HMH's net income.

(b) **Changes to License Configuration.** If Customer elects to increase or decrease Customer's License Configuration by, for example, adding or decreasing additional Software components and/or option modules, or adding or decreasing the number of licensed seats or sites, Customer's Fees may increase or decrease accordingly. The increase or decrease in the Fees will be invoiced to Customer and paid in accordance with the terms of the Agreement.

## **7. Ownership.**

(a) **Services.** As between HMH and Customer, HMH is the sole and exclusive owner, and shall retain all right, title and interest in and to the Software and Services, including without limitation all related software, services, specifications, documentation, and technical information; copyrighted and other proprietary content, information and other materials (the "**System Content**"), of both HMH, its licensors and other third parties; as well as corrections, modifications, additions, improvements and enhancements to and all intellectual property rights in the foregoing.

(b) Customer Materials. All rights, title and interest in and to the Customer Materials (including, without limitation, any Customer Data and personally identifiable information) are owned and retained by Customer, including, without limitation, all proprietary rights inherent therein or appurtenant thereto, subject to the license granted to HMH pursuant to Section 3(b). As used herein, “personally identifiable information” shall mean any information regarding or that identifies (or that could be used to identify) any individual, including, for example and without limitation, any individual student or parent name, address, personal identifiers such as Social Security numbers or school- or district-issued student identification numbers, and any other information or combination of information that would make the identity of the student or parent easily traceable.

(c) Customer shall not reproduce the System Content in whole or in part by any means without the express prior written consent of HMH, provided, however, that certain databases or other resources within the Services and Software and System Content may provide the ability to save and print portions thereof for the personal, noncommercial use of the Customer, so long as Customer ensures that all copyright or other proprietary notices embedded within those portions are preserved and unchanged. Customer acknowledges and agrees that all copyrights, trademarks, trade secrets, patents and other intellectual property rights in and to the Services and Software and System Content are and shall remain vested in HMH and its designees. Customer shall not modify, publish, transmit, participate in the transfer or sale of, reproduce (except as otherwise provided herein), create new works from, distribute, perform, display or in any way exploit, any of the Services, Software or System Content in whole or in part.

**8. FERPA; Applicable Laws.** The Family Educational Rights and Privacy Act (20 U.S.C. Sec. 1232(g)) and the regulations thereunder (34 CFR Part 99) (collectively, “FERPA”), as well as other laws, rules and regulations, as each may be amended from time to time (collectively, including FERPA, “Applicable Privacy Laws”), impose obligations and restrictions onto “educational institutions or agencies” and other persons (such as Customer), including, without limitation, with respect to the handling and disclosure of personally identifiable information contained in the educational records Customer maintains regarding its students and with respect to the online collection of personal information from individuals under the age of thirteen. With respect to Customer Data, Customer hereby: (1) agrees to provide to HMH, or otherwise permit HMH to receive, Customer Data, for HMH’s use in accordance with its Privacy Policy, in compliance with Applicable Privacy Laws and any applicable privacy policy; (2) without limiting the generality of the foregoing, represents and warrants that solely Customer is responsible for obtaining, and Customer hereby represents and warrants to HMH that it has obtained, prior to such provision to or receipt by HMH, all necessary rights and permissions to provide the Customer Data to HMH (and for HMH to use such Customer Data) for the purposes of providing the Program and for any other purpose agreed to in writing by the parties from time to time, including, without limitation, HMH’s use of Customer Data in accordance with its Privacy Policy; (3) represents that it will fully comply with all applicable laws, rules and regulations, including, without limitation, Applicable Privacy Laws, in connection with its use of the Program; (4) acknowledges and agrees that HMH can rely, is relying and will continue to rely on Customer’s full compliance with the applicable obligations imposed by Applicable Privacy Laws; (5) acknowledges and agrees that solely Customer is responsible for responding to any request from a parent or legal guardian of an end user of the Program for access to, or other action with respect to, such end user’s personal information; and (6) expressly waives and releases HMH from and against any and all claims, actions, damages and liability arising in connection with Customer’s provision of Customer Data to HMH (and any required consents in connection therewith) and HMH’s receipt and use of Customer Data on behalf of Customer. To the extent that the document at the links to the Privacy Policy in this Agreement is different from the Privacy Policy applicable to Program located at [www.hmhco.com](http://www.hmhco.com), the policy at [www.hmhco.com](http://www.hmhco.com) shall govern.

**9. Warranty.**

(a) Mutual Warranties. Each party represents and warrants to the other that: (i) it is a duly organized entity, validly existing and in good standing under the laws of its formation; (ii) it has the requisite power and authority to execute and deliver this Agreement and to fully perform its obligations hereunder; and (iii) it is not subject to any contractual or other legal obligation that would reasonably be expected to interfere in any way with its full performance hereof.

(b) Customer Warranties. Customer represents, warrants and agrees that for all Customer Materials provided to HMH hereunder, and for all Named User access to and use of the Services and Software, Customer is solely responsible for obtaining, and Customer hereby represents, warrants and covenants to HMH that (i) it has or will have obtained, prior to any such provision or disclosure, all of the necessary and applicable rights, permissions and consents to provide (and permit Named Users to provide) the Customer Materials to HMH (and for HMH to use such Customer Materials) for the purposes of providing the Services and for any other purpose agreed to in writing by the parties from time to time, including, without limitation, HMH’s use of Customer Data in accordance with the HMH Educational Technology Privacy Policy located here: , and (ii) Customer is and will continue to be in compliance in all respects with all Applicable Law.

(c) Warranty Disclaimer. EXCEPT AS EXPRESSLY SET FORTH IN THIS AGREEMENT, THE SERVICES ARE PROVIDED “AS IS” AND NEITHER PARTY MAKES ANY WARRANTY, EXPRESS OR IMPLIED, BY OPERATION OF LAW, STATUTORY OR OTHERWISE. HMH SPECIFICALLY DISCLAIMS ANY AND ALL WARRANTIES INCLUDING BUT NOT LIMITED TO THE WARRANTY OF MERCHANTABILITY, FITNESS FOR A PARTICULAR PURPOSE, TITLE, SYSTEM INTEGRATION, DATA ACCURACY OR NONINFRINGEMENT OF THIRD PARTY RIGHTS WITH RESPECT TO THE SOFTWARE, SERVICES, SYSTEM CONTENT, DOCUMENTATION, AND ANY DELIVERABLES PROVIDED BY HMH HEREUNDER. HMH DOES NOT WARRANT OR MAKE ANY REPRESENTATIONS REGARDING THE USE OR THE RESULTS OF THE USE OF THE SYSTEM CONTENT IN TERMS OF ITS CORRECTNESS, ACCURACY, RELIABILITY, OR OTHERWISE, INCLUDING, BUT NOT LIMITED TO, ANY THIRD-PARTY CONTENT ACCESSED THROUGH HYPERTEXT LINKS INCLUDED WITHIN THE SYSTEM CONTENT. HMH EXPRESSLY DISCLAIMS ANY ENDORSEMENT OF,

RESPONSIBILITY FOR, OR RELATIONSHIP OF ANY KIND WITH ANY THIRD-PARTY SITES OR CONTENT ACCESSIBLE THROUGH SUCH HYPERTEXT LINKS. NO ADVICE BY HMH OR A HMH-AUTHORIZED REPRESENTATIVE SHALL CREATE A WARRANTY HEREUNDER. OTHER THAN AS DESCRIBED IN THIS AGREEMENT, HMH DOES NOT WARRANT THAT THE OPERATION OF THE SERVICES WILL BE UNINTERRUPTED, VIRUS-FREE OR ERROR-FREE. FURTHER, HMH MAY USE THIRD PARTY SUPPLIERS AND PROVIDERS WHO MAY ASSIST IN THE PROVISION OF SERVICES TO CUSTOMER, AND HMH SHALL NOT BE HELD LIABLE FOR DAMAGES TO CUSTOMER RESULTING FROM ACTIONS OF SUCH THIRD PARTIES.

#### **10. Indemnification.**

(a) Indemnity. To the extent permitted by law, each party (the "indemnifying party") will defend, indemnify and hold harmless the other party (the "indemnified party"), its affiliates and its and their members, directors, officers, shareholders, employees, contractors and agents from and against any claims, liabilities, losses, damages, costs, and expenses, including but not limited to reasonable attorneys' fees and costs, associated with any third party claim arising out of or in connection with an alleged breach by the indemnifying party of any obligation, representation or warranty set forth in this Agreement. The indemnified party will promptly notify the indemnifying party in writing of any claim and allow the indemnifying party to control the defense and all related settlement negotiations. The indemnified party will fully cooperate with the indemnifying party, at the indemnifying party's sole cost and expense. Notwithstanding anything to the contrary herein, HMH shall have no obligation to indemnify, defend or hold Customer harmless in the event Customer: (1) fails to comply with its obligations and/or the specification(s) in this Agreement; (2) uses the Software, System Content or the Services in connection with other products and/or services not provided by HMH; (3) modifies the Software, System Content or the Services without the consent of HMH; or (4) uses the Software, System Content or the Services in a manner inconsistent with this Agreement or any other instructions or specifications provided to Customer by or on behalf of HMH. Further, to the extent permitted by law, Customer agrees to defend, indemnify and hold harmless HMH, its officers, directors, employees, agents, consultants, customers, clients and partners, from and against any claims, liabilities, obligations, losses, damages, costs, fees, penalties, fines, charges or other expenses of any kind (including, but not limited to, reasonable attorneys' fees), arising out of or in connection with HMH's receipt of, access to or use of any Customer Materials as contemplated hereunder.

#### **11. Limitation of Liability.**

(a) EXCEPT AS SET FORTH HEREIN, NEITHER HMH NOR ITS SUPPLIERS SHALL IN ANY EVENT BE LIABLE FOR ANY DIRECT, INDIRECT, INCIDENTAL, OR CONSEQUENTIAL DAMAGES ARISING OUT OF OR IN CONNECTION WITH THE USE, INABILITY TO USE, OR THE SERVICES, INCLUDING, BUT NOT LIMITED TO, LOST REVENUE, LOST PROFITS, REPLACEMENT GOODS OR SERVICES, COST OF REPLACEMENT GOODS OR SERVICES, LOSS OF TECHNOLOGY, DATA, CUSTOMER INFORMATION, RIGHTS OR SERVICES, OR INTERRUPTION OR LOSS OF USE OF SERVICE, INFORMATION OR EQUIPMENT, EVEN IF ADVISED OF THE POSSIBILITY OF SUCH DAMAGES, WHETHER SUCH LIABILITY ARISES FROM ANY CLAIM BASED UPON CONTRACT, WARRANTY, TORT OR OTHERWISE. SOME JURISDICTIONS DO NOT ALLOW LIMITATION OR EXCLUSION OF INCIDENTAL OR CONSEQUENTIAL DAMAGES, SO THE ABOVE LIMITATION OR EXCLUSION MAY NOT APPLY TO CUSTOMER. THE PARTIES AGREE THAT THE LIMITATION AND EXCLUSIONS OF LIABILITY AND DISCLAIMERS SPECIFIED IN THIS AGREEMENT WILL SURVIVE AND APPLY EVEN IF FOUND TO HAVE FAILED OF THEIR ESSENTIAL PURPOSE.

(b) IN NO EVENT SHALL HMH'S AGGREGATE CUMULATIVE LIABILITY FOR ANY DAMAGES, DIRECT OR INDIRECT, IN CONNECTION WITH THE SERVICES, SYSTEM CONTENT OR THE SOFTWARE EXCEED THE AMOUNTS PAID BY CUSTOMER HEREUNDER DURING THE SIX (6) MONTHS PRECEDING THE DATE THE CLAIM FIRST AROSE, WHETHER SUCH LIABILITY ARISES FROM ANY CLAIM BASED UPON CONTRACT, WARRANTY, TORT OR OTHERWISE. HMH HEREBY DISCLAIMS, TO THE EXTENT PERMITTED BY APPLICABLE LAW, ALL WARRANTIES BY ITS SUPPLIERS AND ALL LIABILITY BY SUPPLIERS FOR ANY DAMAGES, WHETHER DIRECT, INDIRECT, OR CONSEQUENTIAL, ARISING FROM, CONNECTED WITH, OR RELATED TO THE USE OF THE SERVICES, SYSTEM CONTENT OR THE SOFTWARE.

#### **12. Term and Termination.**

(a) Term. The term shall begin on the Effective Date and shall remain in effect for as long as Services are provided by HMH.

(b) Termination for Convenience. Customer may terminate this Agreement at any time during the Term, for any reason or no reason at all, by giving HMH no less than thirty (30) days prior written notice. If Customer elects to terminate early, Customer shall receive a prorated refund of the unused portion of any fees paid in advance for Services that were not provided.

(c) Termination With Breach. Either party may terminate this Agreement upon thirty (30) days written notice to the other party of a material breach by the other party of its obligations set forth herein and an opportunity to cure, provided that if Customer terminates this Agreement as a result of HMH's uncured breach, HMH's sole and exclusive liability and obligation will be to promptly refund any fees actually paid by Customer for any period during which HMH did not perform the Services as provided herein.

(d) Return of Customer Data. Upon non-renewal of this Agreement or Services, or termination of this Agreement,

upon Customer's written request only, subject to any data retention policies of or requirements imposed onto HMH and subject to any functionality constraints inherent in, or other limitations of, certain Software products, HMH shall return Customer Data maintained by HMH in the Hosting Environment (as such term is defined in Exhibit A hereto). Data may be requested in the form of a CSV export file or a SQL database backup. After ninety (90) days following non-renewal of this Agreement or Services, or termination of this Agreement, HMH shall have no obligation to maintain or return Customer Data to Customer. Customer understands and acknowledges that while HMH performs periodic backups of data for disaster recovery purposes, it does not keep an ongoing archive of the Customer Data. Keeping an ongoing archive of Customer Data is the sole responsibility of Customer.

### **13. Confidential Information.**

(a) Definition. "Confidential Information" means information disclosed by one party (the "Disclosing Party") to the other (the "Receiving Party") that is in written, graphic, or other tangible form and is marked "Confidential" or "Proprietary." HMH's Confidential Information includes the Software, Services, System Content and documentation, including any and all trade secrets therein, as well as this Agreement, and all other information disclosed to Customer in such a way that Customer should reasonably understand that it is confidential, regardless of whether it is marked. Customer's Confidential Information includes Customer Data, regardless of whether it is marked.

(b) Obligations. Each party will protect the other party's Confidential Information with at least the same care that it uses to protect its own information of similar importance, but with at least reasonable care. Each party will only use the other's Confidential Information for the purposes of this Agreement, and will only disclose the other's Confidential Information to those of its employees, contractors and subcontractors who need to know it for the purposes of this Agreement, and who have an obligation to protect such Confidential Information. Each party also will return (or destroy, if the other party so requests) the other party's Confidential Information after the other party's request or upon termination of this Agreement.

(c) Exclusions. The obligations described in Section 13(b) do not apply to Confidential Information that the Receiving Party can prove: (i) became publicly known through no fault of the Receiving Party; (ii) it obtained from a source that is not prohibited from disclosing it; (iii) it developed without using the Disclosing Party's Confidential Information; or (iv) it possessed before the Effective Date as shown by the Receiving Party's files and records.

(d) Injunctive Relief. Notwithstanding any other provision of this Agreement, Customer acknowledges that the unauthorized disclosure of HMH's Confidential Information could cause substantial harm that could not be remedied by the payment of damages alone. Accordingly, HMH shall be entitled to seek preliminary and permanent injunctive relief and other equitable relief for any breach of this Section 13.

(e) Notice of Misuse & Survival. Customer shall promptly notify HMH in the event Customer becomes aware that Customer, its employees, agents or contractors have violated this Section 13. For the avoidance of doubt, the provisions of this Section 13 shall survive the termination or expiration of this Agreement.

### **14. Miscellaneous.**

(a) Audit. Customer agrees to maintain accurate and detailed records of the number of and other information relating to the Named Users licensed to use the Software and Services hereunder. HMH shall have the right to verify the number of Named Users. Customer agrees that HMH shall have the right to audit Customer's records for compliance with this Agreement at any time during Customer's normal business hours upon reasonable notice, during the term. Customer agrees that it shall pay the deficiency, and if any underpaid fees are in excess of five percent (5%) of the total fees due under this Agreement, then Customer shall pay the deficiency and HMH's reasonable costs of conducting the audit.

(b) Entire Agreement. This Agreement, together with the Cover Sheet (if any) and any and all Exhibits hereto and documents linked to and incorporated herein by reference, shall constitute the parties' entire agreement with respect to the Services. All Exhibits and linked documentation are incorporated into this Agreement by reference, and all references to "this Agreement" in any Exhibit include all other Exhibits hereto. This Agreement may not be modified by Customer except by written instrument signed by both parties and referring to the particular provisions to be modified. This Agreement may not be modified by a Purchase Order issued by Customer. This Agreement may be modified or updated by HMH. Failure by either party to enforce any provision of this Agreement will not be deemed a waiver of future enforcement of that or any other provision. This Agreement may be executed in one or more counterparts, each of which shall be deemed an original for all purposes, and together shall constitute one and the same agreement.

(c) Governing Law. This Agreement and the rights and obligations of the parties hereunder shall be construed in accordance with and shall be governed by the internal laws of the State of New York, excluding its conflict of law principles. The United Nations Convention on Contracts for the International Sale of Goods and Uniform Computer Information Transaction Act are expressly disclaimed. Any suit or other proceeding to enforce or interpret this Agreement shall be brought in, and each party hereby consents to the jurisdiction and venue of, the courts of New York County in the State of New York, United States of America or of any federal court located in such state.

(d) Notices. Any official notices under this Agreement shall be in writing and shall be hand delivered or sent by registered mail return receipt requested. If such notice is given to Customer, it shall be sent to the address specified on the Cover Sheet or on Customer's purchasing or registration materials (or such other address as Customer may designate in

writing to the other party). For HMH, notices shall be sent to: HMH, 222 Berkeley St., Boston, MA 02116 Attn: EVP & General Counsel.

(e) Force Majeure. Neither party shall be in default if its failure to perform any obligation under this Agreement (other than obligations to make payments when due) is caused solely by supervening conditions beyond that party's reasonable control, including without limitation, acts of God, war, terrorism, civil commotion, strikes, labor disputes, Internet service interruptions or slowdowns, vandalism or "hacker" attacks, failure or unavailability of third-party systems or services, or governmental demands or requirements (each of the foregoing, a "Force Majeure").

(f) Publicity. No public statement, press release or other announcement relating to this Agreement or the Services or the other party shall be issued by either party hereunder without the prior written consent of the other party. Notwithstanding the foregoing, HMH may use Customer's name in customer lists.

(g) Non-Solicitation. Customer will not, while HMH is providing Services and for a period of one-year following the completion of any Services provided by HMH hereunder, directly or indirectly solicit any of HMH employees to leave his or her employment with HMH.

(h) Injunctive Relief. Customer acknowledges that the breach or threatened breach of this Agreement could give rise to irreparable injury to HMH which would be inadequately compensated in money damages. Accordingly, HMH may seek a restraining order and/or an injunction prohibiting such breach in addition to any other legal remedies which may be available. Customer agrees that HMH will not be required to post a bond in seeking injunctive relief under this Agreement.

(i) Export Controls. Customer agrees not to directly or indirectly export or re-export the Software except as authorized by the laws and regulations of the United States and any other applicable jurisdiction. Customer will not permit the Software to be accessed and used at any location or by any person that would violate such laws and regulations. To the extent permitted by law, Customer will defend, indemnify and hold HMH harmless from and against any violation of such laws or regulations by Customer or any of Customer's agents, officers, directors or employees.

(j) Assignment; Subcontractors. Except as expressly provided herein, this Agreement (and any amendments or modifications thereto) and any rights or licenses granted to Customer hereunder, are non-transferable, non-exclusive, non-assignable, limited and personal to Customer. Customer shall not assign Customer's interest in this Agreement without HMH's prior written consent. HMH may transfer and/or assign some or all of this Agreement without prior notice to Customer or Customer's consent. This Agreement will inure to the benefit of and be binding upon the parties' successors and permitted assigns. Customer hereby expressly acknowledges and agrees that HMH may use subcontractors or third party service providers in its provision of Services hereunder, which subcontractors may have access to or otherwise use Customer Materials on HMH's behalf.

**EXHIBIT A**  
**SOFTWARE HOSTING SERVICES**  
**TERMS AND CONDITIONS**

This Exhibit sets forth the additional terms and conditions under which HMH will provide the Hosting Services pursuant to this Agreement.

**1. Software Hosting Services.**

(a) Installation and Configuration. HMH will install and configure the Software and Services on the Hosting Environment (as defined below), and HMH will host the Software and any Customer Materials used in conjunction with the Services for Customer using the Hosting Environment (as defined below) during the Hosting Term for so long as Customer's license to the applicable Software continues to be effective. After Customer has accepted this Agreement, or executed and submitted the Cover Sheet and applicable purchase order(s) to HMH, HMH will begin such installation and configuration in accordance with a mutually agreed upon schedule.

(b) Technical Audit. Customer shall provide to HMH the information required for HMH to assess the sufficiency of HMH's systems and technical infrastructure (e.g., bandwidth and hardware configuration) to properly access and use the Hosting Environment, Hosting Services and hosted Software (such assessment, a "Technical Audit"). Customer has the sole responsibility for ensuring that such information is accurate. HMH shall have no responsibility for ensuring that such information is accurate or for making corrections if the Software or Services do not work properly because of an inaccuracy in the HMH Technical Audit. The completed HMH Technical Audit for Customer is incorporated herein by reference. If a Technical Audit reveals that Customer's systems or technical infrastructure does not meet HMH's recommended specifications for access to or use of the Hosting Environment, Hosting Services or hosted Software and Customer elects to purchase Hosting Services notwithstanding such assessment, HMH shall not be responsible or have any liability for the inability of Customer to access or use the Hosting Environment, Hosting Services, or hosted Software.

(c) Hosting Environment. HMH will provide all hardware, software, telecommunication services and other items necessary for the proper operation and hosting of the Software and Customer Materials (the "Hosting Environment"). The Hosting Environment is part of the "System," as such term is defined in the Agreement. Customer is responsible for providing client-side computers, equipment, Internet connections, software and other system requirements.

(d) Network and Hardware Requirements. In order for Customer to access and use the Software and Services in accordance with this Agreement, Customer's network and computer hardware must meet the requirements set forth at [http://www.hmhco.com/product-support/content/techsupport/sam/documentation/HMHSys\\_Req\\_v2\\_5.pdf](http://www.hmhco.com/product-support/content/techsupport/sam/documentation/HMHSys_Req_v2_5.pdf), incorporated herein by reference.

(e) Loading of and Accessing Customer Materials. Customer Materials can usually be uploaded into and accessed from the Hosting Environment directly by Customer using the Software interface without intervention by HMH's hosting staff. If any Customer Materials cannot be uploaded or accessed through the Software interface, then Customer must provide such files or other materials to HMH via a secure file transfer program as indicated by HMH.

(f) Security. HMH will maintain the Hosting Environment with a reputable third party Internet service provider (the "Service Provider") in HMH's discretion and determination, where it is subject to commercially reasonable security precautions designed to prevent unauthorized access to the Hosting Environment. However, Customer acknowledges that, notwithstanding such security precautions, use of or connection to the Internet provides the opportunity for unauthorized third parties to circumvent such precautions and illegally gain access to the Hosting Environment, Software and Customer Materials. Accordingly, HMH cannot and does not guaranty the privacy, security or authenticity of any information so transmitted over or stored in any system connected to the Internet. Notwithstanding anything to the contrary in this Agreement, Customer acknowledges that the Service Provider may have the right to suspend or terminate HMH's or Customer's access to or use of the Hosting Environment (e.g., in the event Customer's use of the Hosting Environment violates the acceptable use policy or terms of use applicable to the services provided by the Service Provider), and HMH shall not be liable to Customer for any such suspension or termination. Customer shall comply with all acceptable use policies and terms of use applicable to the services provided by the Service Provider, which HMH will provide to Customer upon request.

(g) Access Times. The Hosting Environment will operate 24 hours per day except as set forth herein. Product Support will be available from 7:00 a.m. to 8:00 p.m. EST, Monday through Friday, except for national holidays and scheduled interruptions for maintenance or updates to the Hosting Environment. Upon receipt of notice that service to the Hosting Environment is interrupted HMH will take reasonable steps to restore such service as soon as practicable. An interruption in service to the Hosting Environment shall be subject to the service levels and remedies set forth herein, and shall not be considered a breach of HMH's obligations hereunder if: (i) HMH take reasonable steps to restore such service as soon as practicable, or (ii) the interruption in service results from causes beyond HMH's reasonable control. However, Customer will still be entitled to the remedies, if applicable, set forth in Section 3(e).

**2. Secure Socket Layer (SSL).** HMH, through its Software, provides for all Customer Materials being encrypted via SSL encryption technology when transmitted to HMH as provided hereunder. If Customer transmits Customer Materials to HMH outside of HMH's Software, Customer agrees to use a secure conduit (e.g., HTTPS).

### 3. Service Levels.

(a) Availability and Monitoring. HMM will use commercially reasonable efforts to make available the Hosting Environment at least 99% of the portion of each month that is not Excluded Downtime (as defined in Section 3(e) below) (the “Measured Period”). The percentage of minutes during the Measured Period when the Hosting Environment is available shall be referred to as the “Uptime”. The Hosting Environment is tested for availability every 5 minutes by performing the complete user login process. For this purpose, and to enable HMM to troubleshoot problems as necessary, HMM uses an administrator account on Customer’s Hosting Environment and HMM may also utilize a packet sniffer or similar technology to monitor network traffic and other usage activity. If the Hosting Environment fails to respond to HMM’s automated testing, then HMM uses manual testing to confirm such failure. The Hosting Environment is considered unavailable from the time of first failure to respond until service is restored.

(b) Scheduled Maintenance/Emergencies. HMM may conduct regular maintenance each night between midnight – 5 am EST to maintain the proper operation of the Hosting Environment and Services. Due to the system redundancies to the Hosting Environment, HMM can perform most maintenance without any service interruption. Any other non-emergency shutdown that requires the Hosting Environment to be unavailable will be scheduled in advance with notice to Customer of the interruption times. Customer acknowledges that emergency situations may arise in which no advance notice of service interruption or shutdown is possible.

(c) System Backups and Restoration. HMM will provide backups to the Hosting Environment as follows: (i) an incremental backup will be conducted every day; and (ii) not less than once per week, a backup will be sent off site and stored. HMM will perform restorations to the Hosting Environment from such backup media in the event of a service failure. HMM will use commercially reasonable efforts to respond to Customer’s requests for restoring files.

(d) Response Times. HMM uses commercially reasonable efforts to provide proactive monitoring of the Hosting Environment. The Service Provider staff are automatically notified by the monitoring systems of an outage or problem with the Hosting Environment. Customer agrees to direct any inquiries regarding the operation and status of the Hosting Environment to HMM’s customer support team. The customer support team will coordinate resolution with the Service Provider staff.

(e) Service Levels. The Uptime for each month will be measured by dividing the number of minutes of such month during which the Hosting Environment is available by the number of minutes in the Measured Period for such month.

(f) “Excluded Downtime” means time during which Customer is unable to access and use the Hosting Environment due to (i) a failure by the Service Provider, (ii) network maintenance on circuits provided by telecom companies or other common carriers, (iii) an external Internet Service Provider or an Internet exchange point, or a general Internet outage, (iv) acts or omission of Customer, its employee, other personnel or user, (v) technical issues associated with Customer’s equipment, facilities or applications including customer maintained workstations, LANs, WANs, Active Directory servers, (vi) scheduled maintenance or downtime, or emergency shutdowns, or (vii) acts of God, civil disorder, natural cataclysm, Force Majeure or other occurrences beyond the reasonable control of HMM.

In the event that Customer notifies HMM in writing that the Hosting Environment is unavailable, HMM will use commercially reasonable efforts to cure such unavailability and investigate the issue to verify the occurrence of such unavailability.

(g) Service Level Credits. If in any given month the Uptime of the Hosting Environment is not at least 99%, then Customer may request a service level credit (the “Service Level Credits”) in writing to [interventionsolutioninquiries@hmhco.com](mailto:interventionsolutioninquiries@hmhco.com) and, in such an event, Customer shall receive a Service Level Credit in the amount of three percent (3%) of the monthly Hosting Service Fee for such month.

Such Service Level Credits shall be redeemable until the end of the current school year in related HMM products or services. The Service Level Credits shall be Customer’s sole and exclusive remedy for a service interruption to and unavailability of the Hosting Environment.