

GENERAL TERMS AND CONDITIONS

These General Terms and Conditions are those referred to in the Master Application Service Provider Agreement.

1. **Definitions.** In addition to terms defined in the Master Application Service Provider Agreement or elsewhere herein, the below capitalized terms shall have the following meanings:

1.1. **“Applicable Laws”** means all laws, rules, and regulations, including any Internet regulations or policies and export laws, applicable to the provision of Services or of Customer’s or Users’ access to or use of the SMART System.

1.2. **“SMART System”** means the software and hardware infrastructure owned, operated and hosted by School Management and Record Tracking, Inc. (“SMART” or the “Company”) through which Customer and Users may access and utilize the software applications set forth on the Master Application Service Provider Agreement.

1.3. **“Services”** has the meaning ascribed to it in Section 2.2 below.

1.4. **“Users”** has the meaning ascribed to it in Section 2.4 below.

1.5. **“Visitors”** has the meaning ascribed to it in Section 2.5 below.

1.6. **“Website”** means SMART’s website found at <https://onlinesmart.net/>.

1.7. **“Website Terms”** has the meaning ascribed to it in Section 5.1 below.

2. **Provision of Services and Definitions.**

2.1. **License.** During the term of this Agreement and subject to its term and conditions, SMART hereby grants to Customer a per location, nonexclusive, revocable, limited, nontransferable license for Customer and its Users to access and use, solely for its own internal business use, the SMART System, to the extent stated in the Master Application Service Provider Agreement. Customers with online and/or multiple programs are subject to SMART’s written approval and may require additional fees and/or license(s).

2.2. **Services.** Subject to the terms and conditions of the Agreement, SMART will provide the installation and implementation, and support and maintenance services purchased by Customer (the “Services”) as listed in the Master Application Service Provider Agreement.

2.2.1. **Set-Up Services.** Set-Up Services include backend administrative tasks needed for initial set-up for SMART products only. Set-Up Services may include remote advice, review and consultation of Customer’s local workstation configuration, local network design, local server (if any), printers, remote access, login scripts, templates, and software configuration. Set-Up Services may further include remote assistance in initial customization of the configurable options in the SMART System, initial assistance in designing Customer’s workflow as it relates to use of the SMART System and initial hands-on User training. Customer or Customer’s contractor shall do all the actual workstation, local

server, local network, printer, and remote access configuration and software configuration required to access the SMART System and its related applications and modules. Customer must comply with SMART’s then current “Customer Requirements” for host and workstation setups. Installation of the desktop SMARTTime (Biometric Time Clock) application must be performed by SMART in order for the clock warranty to be valid. Set-Up Services in excess of one host and two workstations is subject to additional charge.

2.2.2. **Training.** Customer’s in-house trainers, system administrators, and Users will receive initial training, as delegated by SMART at the time of purchase either through a group webinar or pre-recorded session hosted on a third-party application. At Customer’s request, and subject to SMART’s availability, SMART may provide additional training (online or on-site) subject to payment of SMART’s then-current fees.

2.2.3. **Other Services.** If it is determined that specific activity is considered to be outside the scope of the activities identified above or as Support Services set forth on the Master Application Service Provider Agreement, SMART will recommend retaining additional assistance for that specific activity. Any additional services to be provided by SMART will be billed on a time and materials basis.

2.3. **Customer Information.** SMART will rely upon technical information and requirements it obtains from Customer for any Services provided by SMART hereunder. Customer shall be responsible to SMART for the consequences of inaccuracies or incompleteness of information that it provides to SMART.

2.4. **Users.** “Users” means identifiable unique persons consisting of Customer’s employees or agents who are authorized and registered to access and use the SMART System as determined by Customer, but not exceeding the maximum number of users paid for. At SMART’s request, Customer will provide to SMART a list of Users. Customer shall remove all access to the SMART System for each User who is no longer associated with Customer, or who no longer has a need or right to access the SMART System. SMART shall not be liable for Customer’s failure to notify SMART of any change in the identity of Users or Customer’s failure to limit or modify access for any former employee, contactor, or agent of Customer, or any other person to whom Customer provided access to the SMART System and/or Software.

2.5. **Visitors.** “Visitors” means students, parents or other individuals authorized and registered by Customer to access and use the Website as determined by Customer. At SMART’s request, Customer will provide to SMART a list of Visitors. Customer shall remove all access to the SMART System for each Visitor who is no longer associated with Customer, or who no longer has a need or right to access the Website. SMART shall not be liable for Customer’s failure to notify SMART of any change in the identity of Visitors or Customer’s failure to limit or modify access for any former student, parent or other person to whom Customer provided access to the Website.

2.6. **ASP and Hosting of SMART System.** Subject to the terms and conditions of the Agreement, SMART will be responsible for using its commercially reasonable efforts to maintain the hardware and software infrastructure necessary to make the SMART System available to its Customers as provided herein. Customer acknowledges and agrees that Customer retains entire responsibility for Customer's assets of any kind or nature, including (but not limited to) hardware and software assets.

2.7. **Support Services.** Support Services make up a portion of and are included with SMART System Monthly License Subscription Fees. During the term of this Agreement, so long as Customer is listed as a "Verified" customer and continues to timely pay the relevant Monthly License Subscription Fees, SMART will use its commercially reasonable efforts to provide to Customer support via telephone, modem, or email for the SMART System. Onsite visits are not offered or covered as part of these Support Services and will incur an additional charge for services and travel expenses. Support Services consist of responding to questions and assisting in troubleshooting. Support Services relate solely to SMART System issues/errors, short SMART System usage training (10 minutes or less pending availability of SMART's support personnel), and expressly exclude consulting relating to anything other than the SMART Systems and training sessions over 10 minutes in length. There will be no reduction to or refund of monthly fees if Support Services are not utilized. Customer acknowledges that the availability of SMART's support personnel may be subject to demands of other customers from time to time. SMART Support hours are 7:00 am to 4:00 pm, Monday through Friday, Mountain Standard Time (MST)(Arizona), excluding all major holidays.

3. **Time Clock.** The following provisions apply to the purchase of a time clock from SMART for use in conjunction with the SMART System (the "Time Clock"):

3.1. SMART warrants that the Time Clock shall be free from defects in workmanship and material for a period of ten (10) months after delivery of the Time Clock (the "Warranty Period").

3.2. Customer shall give SMART, within ten (10) days of the discovery of any warranty claim, written notice of the claimed defect and satisfactory proof thereof. SMART shall, within ten (10) days of the receipt of the returned Time Clock, provide Customer with written notice of the results of investigation and, if subject to repair or replacement under the warranty, the scheduled reworked or replaced Time Clock delivery schedule. Following repair or replacement of the Time Clock, SMART will return the Time Clock to the Customer using a SMART-authorized handler by way of ground shipping. At Customer's request and at its sole cost, SMART will use expedited shipping services.

3.3. SMART's warranty does not extend to (i) any damage or loss due to misuse, accident, disaster, abuse, neglect, normal wear, or damage or loss due to work not performed by SMART or its contractors, (ii) a Time Clock that was improperly stored, maintained, assembled or installed, or (iii) a Time Clock that has been repaired or altered by Customer or a third party without SMART's prior written approval.

3.4. SMART'S OBLIGATION AND CUSTOMER'S EXCLUSIVE REMEDY UNDER THIS WARRANTY SHALL BE LIMITED TO REPAIR OR REPLACEMENT BY SMART AT ITS COST OF THE TIME CLOCK THAT PROVES

DEFECTIVE WITHIN THE WARRANTY PERIOD OR, AT SMART'S DISCRETION, A REFUND OF THE PURCHASE PRICE OF SUCH DEFECTIVE TIME CLOCK. REPLACEMENT TIME CLOCKS ARE WARRANTED ONLY FOR THE REMAINING WARRANTY PERIOD OF THE ORIGINAL TIME CLOCK.

3.5. EXCEPT AS EXPRESSLY PROVIDED HEREIN, SMART MAKES NO REPRESENTATION OR WARRANTY OF ANY KIND, EXPRESS OR IMPLIED, AS TO MERCHANTABILITY, FITNESS FOR A PARTICULAR PURPOSE OR ANY OTHER MATTER WITH RESPECT TO THE TIME CLOCK.

3.6. SMART grants to Customer a limited, personal, non-commercial, non-exclusive, non-sublicensable, non-transferable, non-assignable license to access and use the SMART software embedded in and integrated with the Time Clock and as installed on Customer's host and workstation hardware (the "Time Clock Software") solely for its own internal business purposes to track the time and attendance and to utilize the other functionality provided by the SMART System. The term SMART System will be deemed to include the Time Clock Software.

4. **Hardware and Bandwidth Minimum Requirements.**

4.1. Customer shall be responsible for obtaining and maintaining any equipment and ancillary services needed to connect to, access or otherwise use the Services, including, without limitation, modems, hardware, servers, software, operating systems, networking, web servers and the like.

4.2. Customer must ensure that it has the following minimum required hardware and bandwidth in order to use the SMART System.

4.2.1. **Hardware.** Any Processor/CPU that can operate a Windows or Macintosh supported operating system. Please communicate with SMART prior to implementing a newly released operating system and/or Macintosh.

4.2.2. **Internet Connection.** Any high-speed cable internet connection. The speed requirement will depend on your local (home or office) usage requirement; such as number of users and applications running concurrently.

4.2.3. **Web Browser.** Please communicate with SMART prior to utilizing a browser.

5. **Use of the Services.**

5.1. **Acceptable User Policy:** Customer shall adhere to, will ensure that each User and each Visitor adheres to, and will be liable to SMART in the event of any breach by any User or Visitor of, SMART's website terms and conditions as set forth on <https://onlinesmart.net/Home/UsageAgreement>, as amended from time to time, or as otherwise provided in writing to Customer from time to time (the "Website Terms"). Upon notice to Customer, SMART, in its sole discretion, may modify the Website Terms. Customer shall be notified of such modifications via electronic communication, including without limitation e-mail or a pop-up or click-through form of electronic notification. Customer shall irrevocably accept any such modification by electronic response (whether via email, clicking "OK" or otherwise accepting a pop-up or click-through notification), or by continuing to use the Service after

receiving such electronic notification of the modified Website Terms. Customer shall be responsible for notifying its Users and Visitors of any modifications to the Website Terms within five (5) business days after Customers' receipt of such modifications. Customer shall notify SMART immediately if Customer becomes aware or otherwise is informed of any violation by Customer or any of its Users or Visitors of Applicable Laws or the Website Terms.

5.2. **Suspension or Termination of Services.** If SMART becomes aware of or suspects any unlawful use of the Services or the SMART System by a User or Visitor, or any use in violation of the Website Terms or this Agreement, SMART shall attempt to notify Customer and provide reasonable detail of such violation. However, SMART reserves the right to immediately suspend or terminate access to the SMART System to any User or Visitor or the Customer in the event of any use that SMART determines in its sole discretion may be unlawful or in violation of the Website Terms or this Agreement, or when reasonably necessary to protect SMART's interests.

5.3. **Additional Restrictions.** Unless specifically authorized in an advance writing by SMART, Customer agrees that Customer will not, and will not permit any third party (including any User or Visitor), to: (i) use the SMART System other than as expressly permitted under the Agreement and subject to its terms and conditions; or (ii) attempt to download or otherwise obtain a copy of any software on the SMART System; (iii) decompile, disassemble, modify, copy, reverse engineer, or otherwise attempt to derive source code from any software on the SMART System, and/or distribute any software on the SMART System; or (iv) create any import or export feature or function relating to any software on the SMART System.

5.4. **Customer, User and Visitor Data.** Customer shall have obtained all consents from Users, Visitors, and relevant third parties permitting SMART to create, store, distribute and transmit any information entered into or through the SMART System by Customer or its Users or Visitors. Upon Customer's written request from time to time during the term of this Agreement, SMART shall use its commercially reasonable efforts to make extracts from Customer's database available to Customer in such format and upon payment of such fees as are reasonably determined by SMART from time to time, provided that such request complies with Applicable Law and Customer is otherwise in compliance with its payment and other obligations hereunder. Customer shall be responsible for responding to requests from its Users and Visitors (whether such requests are directed to SMART or to Customer) with respect to information entered into or through, the SMART System by Customer or its Users or Visitors.

5.5. **Modification.** SMART reserves the right to modify the features and functionality of the SMART System from time to time, provided that SMART will not modify the SMART System in a manner that would have a significant adverse effect on Customer's use of, or ability to use, the Services without providing at least five (5) business days prior notice to Customer of any such modification except in the event of circumstances beyond SMART's reasonable control.

5.6. **Storage Limitation.** The Monthly License Subscription fee entitles Customer to utilize storage on SMART's servers up to the following limits: (i) up to 10GB for Customer's database; and (ii) up to 25GB for general file storage (measured by uploads from Customers and from its

Users and Visitors). SMART may agree in its discretion to make additional storage in either or both categories available to Customer upon payment of such fees as are reasonably determined by SMART from time to time.

6. **Proprietary Rights.** SMART shall retain all proprietary rights in and to the Services and the SMART System. All software, applets, source and object code, specifications, designs, processes, techniques, concepts, improvements, discoveries, and inventions (whether patentable or not) made or developed by SMART, Customer or any User in connection with the SMART System or the Services shall be the sole and exclusive property of SMART. Copyright laws and international copyright treaties, as well as intellectual property laws and treaties protect the Services and the SMART System. Customer's possession, access, or use of the Services and the SMART System does not transfer any ownership of the products and services or any of the intellectual property rights to Customer.

7. **Payment Terms; Certain Remedies.**

7.1. **General Payment Terms.** All amounts payable under this Agreement shall be made in U.S. dollars. Customer shall be responsible to pay any sales, use, excise, property or any other taxes, duties, or governmental fees, other than any federal or state taxes based on SMART's net income, associated with the provision of Services or of Customer's or Users' access to or use of the SMART System. Customer may not set-off against payments due any amounts owed or claimed to be owed by SMART to Customer. If Customer believes that Company has billed Customer incorrectly, Customer must contact SMART no later than 60 days after the closing date on the first billing statement in which the error or problem appeared, in order to be eligible to receive an adjustment or credit. Customer is responsible for maintaining updated payment information on file

7.2. **Due Date; Remedies.** Payment for all goods and services is due upon execution of Agreement(s). All Monthly License Subscriptions Fee payments are due on the first day of each calendar month (for example, payments for the month of January are due on the first day of January) unless a different due date is expressly set forth in the Master Application Service Provider Agreement. Commencing five (5) days after the due date, any unpaid fees shall bear interest at the rate of 1.5% per month, or, if less, the maximum amount allowed by Applicable Law, until paid. If full payment has not been received by SMART within ten (10) days after the due date, or if Customer fails to maintain valid and current payment information on file to facilitate timely payment as contemplated in the Master Application Services Provider Agreement, SMART reserves the right to immediately suspend access to the SMART System to any User or the Customer, and SMART may also require a User Reactivation fee of Fifty Dollars (\$50.00). Utilization of the foregoing remedies does not waive any other remedy available to SMART under the Agreement or Applicable Law, including termination of the Agreement as provided elsewhere herein.

7.3. **SMART's Adjustment of Fees.** SMART reserves the right to change the applicable fees or charges and to institute new charges and fees at the end of the Initial Term or then-current renewal term, upon thirty (30) days prior notice to Customer (which may be sent by email).

7.4. **Desktop SMARTTime.** Should Customer request that the Desktop SMARTTime application be

removed from the list of Goods & Services being purchased hereunder, Customer acknowledges and agrees that no reduction in monthly subscription fees will be effective with respect to such removal unless and until Customer has permitted SMART access to Customer's system for installation of an appropriate update.

8. Disclaimer of Warranties.

8.1. **NO WARRANTIES.** Company shall use commercially reasonable efforts consistent with industry standards to provide the SMART System in a manner which minimizes errors and interruptions in the and shall perform the Services in a professional and workmanlike manner. The SMART System and/or the Services may be temporarily unavailable for scheduled maintenance or for unscheduled emergency maintenance, either by Company or by third-party providers, or because of other causes beyond Company's reasonable control, but Company shall use reasonable efforts to provide advance notice in writing or by e-mail of any scheduled service disruption. THE SERVICES AND ACCESS TO THE SMART SYSTEM ARE PROVIDED BY SMART TO CUSTOMER, USERS AND VISITORS "AS IS." SMART MAKES NO WARRANTY OF ANY KIND, WHETHER EXPRESS OR IMPLIED, REGARDING THE SERVICES OR THE SMART SYSTEM AND SPECIFICALLY DISCLAIMS THE IMPLIED WARRANTIES OF MERCHANTABILITY, FITNESS FOR A PARTICULAR PURPOSE AND NON-INFRINGEMENT OF THIRD PARTY RIGHTS, TO THE MAXIMUM EXTENT PERMITTED BY LAW.

8.2. **INTERNET USAGE.** SMART MAKES NO WARRANTIES REGARDING THE QUALITY, RELIABILITY, TIMELINESS OR SECURITY OF THE SERVICES OR THE SMART SYSTEM OR THAT THE SERVICES OR THE SMART SYSTEM WILL BE UNINTERRUPTED OR ERROR FREE. SMART ASSUMES NO RESPONSIBILITY OR LIABILITY FOR THE DELETION OR FAILURE TO STORE, OR TO STORE PROPERLY, ANY ELECTRONIC DATA OTHER THAN AS REQUIRED UNDER APPLICABLE LAW. CUSTOMER, USERS AND VISITORS ASSUME THE ENTIRE RISK IN DOWNLOADING OR OTHERWISE ACCESSING ANY DATA, FILES, OR OTHER MATERIALS OBTAINED FROM THIRD PARTIES AS PART OF THE SERVICES OR BY MEANS OF THE SMART SYSTEM, EVEN IF CUSTOMER, USER OR VISITOR HAS PAID FOR VIRUS PROTECTION SERVICES FROM SMART.

8.3. **Security.** SMART takes commercially reasonable precautions to protect User, Visitor and Customer information. Each password owner is responsible for keeping the password secret and confidential, and for notifying SMART if the password may have been stolen or might otherwise be misused. SMART will use commercially reasonable efforts to protect User information off-line by restricting access to Users' sensitive or personally identifiable information only to those employees who need the information to perform a specific job (e.g., technical support personnel, account reps or customer service representatives). In addition, the SMART System is hosted in a secure server environment that uses firewall protection to deter interference or access from unauthorized outside access. NOTWITHSTANDING THE FOREGOING, CUSTOMER ACKNOWLEDGES THAT SMART CANNOT WARRANT, AND EXPRESSLY DISCLAIMS ANY WARRANTY OR REPRESENTATION, THAT THERE WILL BE NO UNAUTHORIZED ACCESS TO THE SMART SYSTEM OR CUSTOMER, USER OR VISITOR INFORMATION.

8.4. **General.** SMART and Customer have specifically negotiated the disclaimers of warranties set forth in Sections 8.1 through 8.3 above and the limitation of liability set forth in Section 9 in lieu of a higher price. Customer shall be solely responsible for any warranties made by Customers to any third parties with respect to the Services or the SMART System.

9. **Limitation of Liability.** NOTWITHSTANDING ANYTHING TO THE CONTRARY, SMART AND ITS SUPPLIERS (INCLUDING BUT NOT LIMITED TO ALL EQUIPMENT AND TECHNOLOGY SUPPLIERS), OFFICERS, AFFILIATES, REPRESENTATIVES, CONTRACTORS AND EMPLOYEES SHALL NOT BE RESPONSIBLE OR LIABLE WITH RESPECT TO ANY SUBJECT MATTER OF THIS AGREEMENT OR TERMS AND CONDITIONS RELATED THERETO UNDER ANY CONTRACT, NEGLIGENCE, STRICT LIABILITY OR OTHER THEORY: (A) FOR ERROR OR INTERRUPTION OF USE OR FOR LOSS OR INACCURACY OR CORRUPTION OF DATA OR COST OF PROCUREMENT OF SUBSTITUTE GOODS, SERVICES OR TECHNOLOGY OR LOSS OF BUSINESS; (B) FOR ANY INDIRECT, EXEMPLARY, INCIDENTAL, SPECIAL OR CONSEQUENTIAL DAMAGES; (C) FOR ANY MATTER BEYOND SMART'S REASONABLE CONTROL; OR (D) FOR ANY AMOUNTS THAT, TOGETHER WITH AMOUNTS ASSOCIATED WITH ALL OTHER CLAIMS, EXCEED THE FEES PAID BY CUSTOMER TO SMART FOR THE SERVICES UNDER THIS AGREEMENT IN THE 12 MONTHS PRIOR TO THE ACT THAT GAVE RISE TO THE LIABILITY, IN EACH CASE, WHETHER OR NOT SMART HAS BEEN ADVISED OF THE POSSIBILITY OF SUCH DAMAGES.

10. Confidential Information.

10.1. **Maintenance of Confidentiality.** Each party agrees to keep confidential and to use only for purposes of performing under this Agreement, any proprietary or confidential information of the other party disclosed pursuant to this Agreement which is appropriately marked as confidential or which could reasonably be considered of a proprietary or confidential nature ("**Confidential Information**"), and, except as otherwise permitted by this Section, the terms of this Agreement and all negotiations relating thereto (but not the existence of the Agreement generally). The obligation of confidentiality shall not apply to: (i) information that is already public at the time of its disclosure or becomes public through no unlawful act of the receiving party; (ii) is known by the receiving party at the time of disclosure as evidenced in writing; (iii) is rightfully obtained from a third party who has the right to disclose it; or (iv) which is required by a court to be disclosed following sufficient notice to the disclosing party of any motion to obtain any court order to such effect. The disclosing party's Confidential Information remains the property of the disclosing party. Upon any termination of this Agreement, the receiving party will return the disclosing party's Confidential Information to the disclosing party, and all copies thereof, in the possession or control of the receiving party unless otherwise provided in this Agreement.

10.2. **Use of Party's Name.** Notwithstanding Section 10.1, SMART may release Customer's name, location and products licensed, in a standard news release and in SMART publications that state an overall or partial listing of customer names and products. Except as set forth above, during the term of this Agreement, either party may use the

other party's name and may reference this Agreement in news releases, articles, brochures, marketing materials, advertisements, and other publicity or promotions, subject to the other party's prior written approval, which approval will not be unreasonably withheld, conditioned or delayed.

10.3. **Information Requests from Third Parties.**

Customer acknowledges and understands that, subject to the next sentence of this Section 10.3, it is SMART's policy to use commercially reasonable efforts to notify Customer when SMART receives legal process from a third party requesting data of Customer or its Users or Visitors. Generally, except where a court or regulatory agency order (and not just the request for information itself) requires delayed notification or no notification, or except where notification is otherwise prohibited by law or where SMART, in its sole discretion, believes that providing notice would be futile, ineffective or would create a risk of injury or bodily harm to an individual or group, or to SMART's property, SMART will endeavor to provide reasonable prior notice to Customer of the request for such data in the event Customer wishes to seek appropriate protective relief. SMART has no obligation under any circumstance to so notify any of Customer's Users or Visitors.

11. **Indemnification.**

11.1. **SMART Indemnity.** Customer will promptly notify SMART of any third party claim or notification that Customer's or any of its User's use of the Services or the SMART System infringes any third party's proprietary rights. Further, if any portion of the Services or the SMART System becomes, or in SMART's opinion is likely to become, the subject of a claim of infringement, whether as a result of Customer's notice or otherwise, then SMART may, at its sole option and expense: (i) procure for Customer the right to continue using such Services or SMART System; (ii) replace or modify the Services or the SMART System so that they become non-infringing; or (iii) terminate this Agreement and reimburse to Customer an amount equal to the fees paid to SMART by Customer for the three-month period prior to termination. The obligations set forth in this Section are contingent upon Customer giving prompt written notice to SMART of any such claim(s). These obligations do not include any claims to the extent they are based on use of the Services or the SMART System in violation of this Agreement, outside of the scope of the license granted under this Agreement, or in combination with any other software or hardware, or any modification to the Services or the SMART System pursuant to Customer's specifications. Notwithstanding anything to the contrary elsewhere in this Agreement, the foregoing remedy states SMART's entire liability, and Customer's exclusive remedy, for infringement claims.

11.2. **Customer Indemnity.** Customer shall defend, indemnify and hold SMART harmless for, from and against any and all fees, expenses, claims, disputes or causes of action ("**Claims**") arising from, in connection with, or regarding any conduct, act or omission of Customer or any of its Users or Visitors, including any violation of any law or breach of a term or condition of this Agreement by Customer or any of its Users or Visitors. Customer's obligations of defense and indemnification shall include SMART's costs, including attorney fees, resulting from any Claim, paid as and when incurred by SMART. Customer further agrees to indemnify and hold SMART harmless for, from and against Claims arising from subpoenas or other third-party information requests.

12. **Term and Termination.**

12.1. **Term.** This Agreement will commence on the Effective Date and continue for the period set forth on the Master Application Service Provider Agreement ("**Initial Term**"). Thereafter, the Agreement will automatically renew for additional full one-year terms (unless SMART expressly agrees in writing to renewal on a monthly basis) (in either case, a "**Renewal Term**") unless either party provides the other with written notice of its intent not to renew at least thirty (30) days prior to the end of the then current Renewal Term. (For the avoidance of doubt, Customer may terminate this Agreement effective only on the final day of a Renewal Term.) The Initial Term and any Renewal Term(s) are collectively referred to as the "**Term.**" SMART is not required to reactivate the account of a terminated Customer that requests reactivation except to the extent SMART so determines in its sole discretion, provided that any Customer requesting reactivation should expect to pay all fees otherwise owing to SMART during the deactivated period.

12.2. **Termination for Breach.** Either party may terminate this Agreement by giving to the other party written notice of such termination upon the occurrence of any of the following events: (i) the other party fails to make any payment required hereunder when due; (ii) the other party materially breaches or defaults in any of the material terms or conditions of this Agreement and fails to cure such breach or default within thirty (30) days of receipt of written notice thereof; (iii) the other party makes any assignment for the benefit of creditors, is insolvent or unable to pay its debts as they mature in the ordinary course of business; or (iv) any proceedings are instituted by or against the other party in bankruptcy or under any insolvency laws or for reorganization, receivership or dissolution. The foregoing shall not limit any other remedy available under the Agreement or Applicable Law, including without limitation remedies set forth in Section 7.2.

12.3. **Effects of Termination.** Upon any termination of this Agreement each party will immediately return to the other party (or destroy upon the other party's written request) the other party's Confidential Information in the receiving party's possession or control, provided that (i) SMART's obligation to return Customer's Confidential Information is conditioned upon payment by Customer of all amounts due to SMART; (ii) SMART may elect to retain a copy of Customer's information after termination (subject to compliance with Section 10) for up to three years for SMART's use in responding to post-termination inquiries by or relating to Customer; and (iii) if SMART has any claims against Customer or any of its Users or Visitors, then SMART may elect to hold and preserve any and all such materials for potential evidentiary use in any court proceedings or arbitration until final resolution of any such claims). Upon termination of this Agreement, Customer shall pay all unpaid fees due to SMART.

12.4. **Survival.** All provisions of the Agreement that are intended by their nature to survive termination of the Agreement (including without limitation Sections 6, 7, 8, 9, 10, 12.3, 12.4, 13 and 14) and all provisions of any Exhibits (except those requiring the continuation of Services) will survive any expiration or termination of this Agreement.

13. **Non-solicitations.** Customer agrees that it will not, without SMART's consent, hire, either as employees or as independent contractors, former SMART employees or contractors who have worked on the set-up, deployment, implementation or support for the Services to be provided

under the Agreement until two years after payment by Customer to SMART of the last amount due under this Agreement. Customer and SMART acknowledge that the loss or damage to SMART resulting from a breach of this non-solicitation covenant is difficult to ascertain at this time; however, a sum equal to two times the amount that Customer has paid or will pay to the former SMART employee or contractor on an annual basis is a reasonable estimate of the damages resulting from loss of such employee or contractor to SMART. Accordingly, if Customer breaches this non-solicitation covenant, Customer shall promptly pay to SMART, as liquidated damages and not as a penalty, an amount equal to two times the amount that Customer has paid or will pay to the former SMART employee or contractor on an annual basis.

14. Miscellaneous.

14.1. **Notices.** Notices under this Agreement must be in writing and will be deemed given when delivered personally, by facsimile (with confirmation of receipt), on the third business day after deposit with the U.S. Post Office of conventional mail (registered or certified, postage prepaid with return receipt requested), or by the date of delivery by Federal Express or Airborne Freight. Notices will be addressed to the parties at the address appearing on the General Information Sheet of this Agreement, but each party may change the address by written notice in accordance with this paragraph. Notice may also be given to a party via the email address indicated in the Contact Information Sheet attached to the Master Application Services Provider Agreement, provided that email notice to SMART shall not be effective for any purpose unless and until it has been acknowledged by SMART via return email.

14.2. **Assignment.** This Agreement will be binding upon and inure to the benefit of the parties, their successors, and permitted assigns. Customer may not transfer, sublicense or otherwise assign this Agreement or any of its rights or obligations hereunder without SMART's prior written consent, and SMART may for any reason or no reason withhold its consent. Any purported assignment in contravention of this Section will be deemed void.

14.3. **Force Majeure.** Neither party shall be responsible for any delays, errors, failures to perform, interruptions or disruptions in the Services or the SMART System caused by or resulting from any act, omission or condition beyond a party's reasonable control, whether or not foreseeable or identified, including without limitations acts of God, strikes, lockouts, riots, acts of war, governmental regulations, fire, power failure, earthquakes, severe weather, floods or other natural disasters, third party's hardware, software or communications equipment or facilities, spam, denial of service attacks or other third party breaches of the SMART System or Services, provided that the foregoing shall not apply to any party's payment obligations.

14.4. **Compliance with Applicable Laws.** Customer is solely responsible for compliance by Customer and each of Customer's Users and Visitors with all Applicable Laws (including without limitation the Family Educational Rights and Privacy Act and the Children's Online Privacy Protection Act, as amended, as applicable to Customer's operations) relating to the use of the SMART System, the Services and the information and data related thereto. Customer may not remove or export from the United States or allow the export or re-export of the SMART System, Services, Software or anything related thereto, or any direct product thereof in

violation of any restrictions, laws or regulations of the United States Department of Commerce, the United States Department of Treasury Office of Foreign Assets Control, or any other United States or foreign agency or authority.

14.5. **Relationship of Parties.** Nothing contained in this Agreement is intended or is to be construed to create a partnership, joint venture or agency relationship between SMART and Customer.

14.6. **Severability.** If any provision of this Agreement is held invalid, illegal, or unenforceable, such provision will be reformed only to the extent necessary and in such a manner to effect the original intention of the parties; all remaining provisions continue in full force and effect.

14.7. **Waiver.** Any failure by either party to strictly enforce any provision of this Agreement will not operate as a waiver of that provision or any subsequent default or breach of the same or a different kind.

14.8. **Injunctive Relief.** Customer agrees that SMART shall be entitled to obtain injunctive and related equitable relief against Customer to enforce any breach relating to unauthorized use of Confidential Information or use of the Services and SMART System in breach of the terms and restrictions set forth in this Agreement. Customer further agrees that in the event of any such breach, SMART will suffer irreparable harm for which a monetary award will be inadequate. Customer therefore agrees that injunctive relief and related equitable relief may be obtained by SMART without the posting of any bond by SMART. Customer agrees that nothing herein is to be construed as any waiver, discharge or release by SMART of any other rights or remedies available to it in law or equity.

14.9. **Enforcement and Collection Costs.** If either party institutes an action or proceeding to enforce any rights arising under this Agreement (including without limitation utilization of a collection agency or similar), the party prevailing in such action or proceeding will be paid all reasonable attorneys' fees and costs to enforce such rights by the other party, such fees and costs to be set by the court, not by a jury, and to be included in the judgment entered in such proceeding.

14.10. **Counterparts.** This Agreement may be executed in several counterparts, all of which taken together constitute a single agreement between the parties.

14.11. **Facsimile and Electronic Signatures.** Signatures received via facsimile or other electronic means, including in a digitally produced format (.tif, .pdf, .doc, .gif., etc.), will be deemed originals, unless otherwise expressly set forth in a clear and conspicuous manner elsewhere on the page or file that contains the facsimile or electronic signature.

14.12. **Dispute Resolution.** The Parties agree that in the event of a dispute arising from this Agreement, the aggrieved party shall give written notice of the dispute to the non-complying party (provided, however, that this Section 14.12 shall not apply to payment disputes). Upon receipt of such notice, the parties will negotiate in good faith to resolve the dispute for a seven-day period following notice to the non-complying party (or such longer period to which the aggrieved party may consent in its sole discretion, if any).

14.13. **Waiver of Trial by Jury.** THE PARTIES HEREBY KNOWINGLY AND VOLUNTARILY WITH THE BENEFIT OF COUNSEL WAIVE TRIAL BY JURY IN ANY ACTIONS, PROCEEDINGS, CLAIMS OR COUNTER-CLAIMS, WHETHER IN CONTRACT OR TORT OR OTHERWISE, AT LAW OR IN EQUITY, ARISING OUT OF OR IN ANY WAY RELATING TO THIS AGREEMENT.

14.14. **Governing Law; Venue.** This Agreement will be governed by and construed in accordance with the laws of the State of Arizona exclusive of its conflict of law principles. SMART and Customer each hereby submit

to the exclusive jurisdiction of the state and federal courts located in Maricopa County, Arizona, and waive any objection of *forum non conveniens*.

14.15. **Entire Agreement.** This Agreement constitutes the entire agreement of the parties and supersedes any and all agreements, whether oral or written, between the parties hereto, with respect to the subject matter of this Agreement. Except as otherwise expressly provided herein, this Agreement may be modified only in writing and signed by an authorized representative of each party.