

# **SYMPHONY LEARNING LICENSE AND REMOTE HOSTED SERVICES AGREEMENT**

## **PLEASE READ THIS LICENSE AND REMOTE HOSTED SERVICES AGREEMENT CAREFULLY BEFORE USING THIS WEB SITE**

BY CHOOSING THE "ACCEPT" BUTTON YOU ARE (1) REPRESENTING THAT YOU ARE OVER THE AGE OF 18 AND HAVE THE CAPACITY AND AUTHORITY TO BIND YOURSELF AND YOUR EMPLOYER, AS APPLICABLE, TO THE TERMS OF THIS LICENSE AND REMOTE HOSTED SERVICES AGREEMENT AND (2) CONSENTING ON BEHALF OF YOURSELF AND/OR AS AN AUTHORIZED REPRESENTATIVE OF YOUR EMPLOYER, AS APPLICABLE, TO BE BOUND BY THIS LICENSE AND REMOTE HOSTED SERVICES AGREEMENT. IF YOU ARE UNDER THE AGE OF 18, YOUR PARENT OR AUTHORIZED LEGAL GUARDIAN MUST REVIEW AND AGREE TO BE BOUND BY THE TERMS OF THIS LICENSE AND REMOTE HOSTED SERVICES AGREEMENT ON YOUR BEHALF. IF YOU DO NOT AGREE TO ALL OF THE TERMS HEREIN, CHOOSE THE "DECLINE" BUTTON, IN WHICH CASE YOU WILL NOT AND MAY NOT ACCESS, VIEW OR USE THE SOFTWARE.

Symphony Learning, LLC, a Delaware limited liability company ("Symphony Learning"), and the organization or individual evaluating and/or using Symphony Learning's goods and services under this License and Remote Hosted Services Agreement (the "Agreement") (such organization or individual referred to herein as "Customer") agree that the terms and conditions stated herein shall apply to (i) the software program(s) and the online administration panel hosted by Symphony Learning (the "Software") (ii) the hosting services for the Software provided by Symphony Learning to Customer as described in Section 2 (the "Hosting Services"), and (iii) the help desk support services for the Software as described in Section 3 (the "Support Services"). In consideration of the mutual promises contained herein, the parties agree as follows:

### 1. License.

1.1. Evaluation License Grant. Symphony Learning hereby grants a non-exclusive, nontransferable, limited right and license to remotely access and use the Software hosted for Customer by Symphony Learning (as set forth in Section 2 below), for the forty five (45) days of the Evaluation License Term and any applicable extensions thereof (as set forth in Section 3.1 below), on a concurrent user basis and solely for the purpose of evaluating the Software to consider purchasing a For-Fee License pursuant to Section 1.2 for use in providing support to educators and students (the "Evaluation License"). Customer shall limit access to and use of the Software, the Hosting Services and the Support Services (i) to its employees, contractors, and students who require access ("Users") for the purposes set forth in this Section 1.1, and (ii) to no more than five (5) concurrent users.

1.2. For-Fee License Grant. Subject to advance payment by Customer of the license and support fees set forth in an order schedule ("Order Schedule") signed by Customer and subject to the terms and conditions of this Agreement, Symphony Learning hereby grants a non-exclusive, nontransferable, limited right and license to remotely access and use the Software hosted for Customer by Symphony Learning (as set forth in Section 2 below), during the For-Fee License Term (as defined below) and any renewals thereof under Section 3.2, on a concurrent user basis and solely for the purpose of providing support to educators and students (the "For-Fee License"). Customer shall limit access to and use of the Software, the Hosting Services and the Support Services (i) to Users who require such access for the purposes set forth in this Section 1.2, and (ii) in accordance with the concurrent user restrictions set forth on the applicable Order Schedule.

1.3. License Restrictions. The Software is licensed, not sold, and all rights not specifically granted in this Agreement are reserved to Symphony Learning. Customer agrees to protect the Software, the Hosting Services, the Support Services and any associated documentation from unauthorized use, access and distribution and to ensure that Users observe Customer's obligations and restrictions as stated in this Agreement relating to Symphony Learning's intellectual

property and proprietary rights, including without limitation the Software, the Hosting Services, the Support Services and any associated documentation. Customer shall not modify, translate, reverse engineer, decompile, disassemble, or create derivative works based on the Software. In addition, Customer may only use the third party programs that are licensed and provided by Symphony Learning with and as a part of the Software hereunder only in conjunction with the Symphony Learning software program(s). Use of such third party software without the Symphony Learning software program(s) is not permitted. Further, Customer may not use such third party software programs for any purpose outside the scope defined in Sections 1.1 and 1.2 of this Agreement. Customer agrees (i) to treat the Software as a confidential trade secret and valuable asset of Symphony Learning and its licensors; (ii) not to develop a competing product based on the Software; and (iii) not to sell, rent, lease, sublease, assign, time-share, transfer or provide unlicensed third parties access by any means to the Software, the Hosting Services or the Support Services, in whole or in part, or any of Customer's rights under this Agreement.

1.4. Proprietary Rights and Acknowledgements. Customer acknowledges and agrees that (i) all right, title and interest in and to the Software, including any and all patents, copyrights, trade secret rights, trademarks, trade names and other proprietary rights therein and improvements thereto, are retained solely by Symphony Learning and its licensors; and (ii) Symphony Learning may from time to time implement password protection, anti-copying sub-routines or other software and hardware-based security measures with respect to the Software and the Hosting Services, and Customer shall cooperate with any such measures.

1.5. Proprietary Markings. Customer shall not alter, remove or conceal any government restricted rights notice or any copyright, trademark, trade name or other proprietary marking or notice that may appear in or on the Software.

1.6. Usernames and Passwords. Symphony Learning or its designee will be responsible for assigning and delivering via email a site administrator username and password to Customer for use by an administrator of Customer to generate and assign usernames and passwords for Users. Customer and Users shall not sell, rent, lease, sublease, assign, time-share, transfer or provide unlicensed third parties access by any means to such usernames and passwords.

1.7. Updates. Symphony Learning shall have the right, but not the obligation, to modify the functionality of all or any portion of the Software at any time and from time to time for general release and to be accessed in connection with the Hosting Services.

### 2. Hosting Services.

2.1. Hosting Services. During the Evaluation Term and the For-Fee License Term (as those terms are defined in Section 3 below) Symphony

Learning or its designee shall provide Symphony Learning-managed Hosting Services for User data and an online administration panel at a unique URL by means of the Internet for remote access and use by Customer and Users as set forth in Section 1 above, subject to the terms and conditions herein. Such Hosting Services shall be subject to certain hours of availability, gigabyte limits, available environments, administrative function restrictions and certain other restrictions, as may be imposed by Symphony Learning and communicated to Customer from time to time in Symphony Learning's sole discretion.

2.2. Performance and Hosting Environment. Symphony Learning provides no representations or warranties of any kind with respect to service performance, server availability, storage space and response times related to the Hosting Services. Symphony Learning reserves the right, at any time and without prior notice, to make the hosting server temporarily unavailable for use. In addition, Symphony Learning reserves the right to make changes, additions and replacements to its hosting environment at its discretion.

2.3. Non-Interference, Prohibited Uses, and Compliance with Laws. Customer warrants and represents that it will prevent conduct that would interfere with or disrupt other customers or licensees of Symphony Learning, or Symphony Learning's network or hosting services or network or hosting equipment. Customer acknowledges and agrees that the right to access and use the Software, the Hosting Services and the Support Services does not include the right to access the data or other information of any third party. Customer agrees that its access and that of Users shall be limited to information and portions of databases relating solely to Customer and such Users. Further, Customer shall not use the Hosting Services in any manner or for any purpose not contemplated by this Agreement, including without limitation, any unlawful or illegal purposes, spamming, or the violation or attempted violation of the security or integrity of a network, service or system of Symphony Learning or others. Customer shall indemnify, defend and hold harmless Symphony Learning from and against any fine, penalty, cost, loss, damage, injury, obligation, demand, assessment, claim, expense or liability, including reasonable attorneys' fees and expenses, asserted against or incurred by Symphony Learning arising out of Customer's or Users' use of the Hosting Services, the Support Services or the Software for unlawful or illegal purposes or in violation or other breach of this Agreement.

2.4. Support Services. Subject to payment by Customer of the license and support fees set forth in the applicable Order Schedule, Symphony Learning shall provide Support Services to Customer during the initial year of the For-Fee License Term at no cost to Customer. Subject to advance payment by Customer of the license and support fees set forth in the applicable Order Schedule, Symphony Learning shall provide Support Services to Customer during the For-Fee License Term subsequent to the initial one year term of the For-Fee License Term. Support Services are limited to email and phone support, Monday through Friday (excluding holidays), from 9:00 a.m. to 5:00 p.m. EST. Symphony Learning shall not be obligated to provide Support Services: (i) to Customer during the Evaluation License Term, or (ii) directly to Users at any time.

### 3. Term and Termination.

3.1. Evaluation License Term. The Evaluation License shall be effective as of the date on which Symphony Learning assigns and emails a site administrator username and password to Customer pursuant to Section 1.6, and shall remain in effect for forty five (45) days thereafter, unless earlier terminated in accordance with the provisions set forth in Sections 3.3 or 3.4 below (the "Evaluation License Term"). Upon request of Customer and at the sole discretion of Symphony Learning, Customer may obtain one or more forty five (45) day extensions of the Evaluation License Term, each such extension to begin running immediately upon the expiration of the previous forty five (45) days of the Evaluation License Term.

3.2. For-Fee License Term. The For-Fee License shall commence upon (i) the execution by the parties of this Agreement of an Order Schedule, and (ii) payment of the applicable license and support fees in such Order Schedule, and, unless earlier terminated in accordance with the

provisions of Sections 3.3 or 3.4 below, shall continue in effect for one (1) year (the "For-Fee License Term"). This Agreement and the For-Fee License Term shall renew automatically for subsequent one (1) year terms, subject to Customer's payment of the then-current applicable support fee. Symphony Learning reserves the right in its sole discretion to require that an additional Order Schedule be executed prior to such renewal in the event that additional fees or terms shall apply. Upon renewal, Symphony Learning shall renew for one (1) year the validity of Customer's site administrator username and password issued pursuant to Section 1.6. In the event that an additional Order Schedule is not required by Symphony Learning, the parties hereby agree that Customer's continued use of the Software, the Hosted Services and the Support Services shall indicate each party's respective agreement to renew this Agreement, the terms and conditions of which shall continue to govern Customer's use of the Hosting Services, the Support Services and the Software during the term of any such renewal, unless otherwise agreed to in writing by the parties.

3.3. Termination for Convenience. Either party may terminate this Agreement without cause by providing notice to the other party.

3.4. Effect of Expiration or Termination. Upon the expiration of the Term or any termination of this Agreement, (i) Symphony Learning shall discontinue the Hosting Services, (ii) the License shall be deemed immediately and automatically terminated, and (iii) Symphony Learning shall promptly, without notice to Customer, remove and destroy all Customer data residing on Symphony Learning's server at the time of such expiration or termination, without liability or further obligation to Licensee with respect thereto. The indemnification provisions of Section 2.3 and the provisions of Sections 1.4, 3.4, 4, 5, 6.2, 6.3, 7, 8, 9, 10 11, 12, and 13 shall survive any termination of this Agreement.

### 4. Confidentiality.

4.1. Confidential Information. Customer acknowledges that it shall have access to certain confidential information of Symphony Learning, including without limitation information regarding the Software ("Confidential Information"). Customer agrees that it shall use such Confidential Information only in the performance of this Agreement, shall not disclose such Confidential Information to any third party (except as required by law), and shall take reasonable precautions to protect the confidentiality of such Confidential Information. Such reasonable precautions shall include, but not be limited to, disclosing Confidential Information only to Users who have a need to have access solely for the performance of this Agreement and taking appropriate measures by instruction and agreement prior to disclosure to such Users to assure against unauthorized use or disclosure.

4.2. Exclusions. Confidential Information shall not include information that (i) is rightfully received by Customer from a third party without an obligation of confidentiality; (ii) is required to be disclosed by a judicial or governmental order, in which case Customer shall promptly notify the Symphony Learning and take reasonable steps to assist in contesting such order or in protecting the disclosing party's rights prior to disclosure; or (iii) was publicly known at the time of disclosure to Customer or becomes publicly known through no act or omission of Customer.

### 5. Infringement of Intellectual Property Rights.

5.1. Infringement. Except for claims that accrue during the Evaluation License Term, Symphony Learning shall, at Symphony Learning's expense, defend or settle any action brought against Customer based on a claim that the Software infringes a third party's United States patent, copyright, trade secret or other intellectual property right and shall pay all costs and damages finally awarded against Customer in any such action which are attributable to such claim, subject to the exclusions set forth in Section 5.2 below. In addition, should the Software or any part thereof become, or in Symphony Learning's opinion, be likely to become, the subject of a claim of infringement, Symphony Learning may, at its option and at its own expense, (i) procure for Customer the right to continue using such Software as contemplated hereunder; (ii) modify the Software to render it non-infringing; or (iii) replace the Software with functionally equivalent software. If Symphony Learning determines at its discretion that none of the foregoing is reasonably available to Symphony Learning,

then Symphony Learning may terminate this Agreement. Symphony Learning shall have no further liability to Customer with respect to any intellectual property infringement or misappropriation claim.

5.2. Exclusions. The obligations set forth in this Section 5 are contingent on prompt written notice by Customer to Symphony Learning of any third party claim, action or demand, sole control of the defense and settlement thereof by Symphony Learning and reasonable cooperation of Customer in such defense or settlement. Moreover, the obligations set forth herein shall not apply to any claim arising out of (i) the combination of the Software with other products not supplied by Symphony Learning; (ii) the modification of the Software by anyone other than Symphony Learning; or (iii) use of the Software in a manner not in accordance with the then current system administrator guide generally released by Symphony Learning to its licensees.

5.3. Entire Liability. THIS SECTION 5 STATES THE ENTIRE LIABILITY OF SYMPHONY LEARNING AND ITS LICENSORS FOR ANY LOSS AND DAMAGES WHATSOEVER ARISING OUT OF OR RELATING TO THE INFRINGEMENT OR MISAPPROPRIATION OF ANY COPYRIGHT, PATENT, TRADE SECRET OR OTHER INTELLECTUAL PROPERTY RIGHTS.

6. Warranty and Disclaimer.

6.1. Warranty. For the thirty (30) days following the purchase of a For-Fee License, Symphony Learning warrants that the then-current version of the Software shall operate substantially in accordance with the then-current documentation applicable to the Software, provided that the Customer uses the Software in accordance with such documentation and does not modify or otherwise alter the Software.

6.2. Sole Remedy. In the event the Software fails to perform as warranted in Section 6.1 above and Customer advises Symphony Learning in writing of a reproducible error in the Software, Symphony Learning shall use commercially reasonable efforts to correct such error. This Section 6.2 sets forth Customer's sole remedy, and Symphony Learning's sole obligation, relating to performance of the Software and for breach of the warranty in Section 6.1.

6.3. Disclaimer. EXCEPT FOR THE WARRANTY SET FORTH IN SECTION 6.1, THE SOFTWARE AND THE HOSTING SERVICES ARE PROVIDED AS IS AND WITHOUT WARRANTY OR SUPPORT SERVICES OF ANY KIND. THE EXPRESS WARRANTY SET FORTH IN SECTION 6.1 IS IN LIEU OF ALL OTHER WARRANTIES, EXPRESS OR IMPLIED, INCLUDING WITHOUT LIMITATION, ANY WARRANTY OF MERCHANTABILITY, NON-INFRINGEMENT, OR FITNESS FOR A PARTICULAR PURPOSE, AND ANY WARRANTY ARISING BY STATUTE OR OTHERWISE IN LAW, OR FROM A COURSE OF DEALING OR USAGE OF TRADE. SYMPHONY LEARNING SPECIFICALLY DOES NOT WARRANT THAT THE SOFTWARE SHALL MEET ALL OF CUSTOMER'S REQUIREMENTS OR SHALL OPERATE IN ALL THE COMBINATIONS WHICH MAY BE SELECTED FOR USE BY CUSTOMER; THAT THE OPERATION OF THE SOFTWARE SHALL BE ERROR-FREE OR UNINTERRUPTED; OR THAT ALL ERRORS OR DEFECTS IN THE SOFTWARE SHALL BE CORRECTED. IN ADDITION, SYMPHONY LEARNING SPECIFICALLY DOES NOT WARRANT THAT (i) HOSTING SERVICES WILL BE PROVIDED PURSUANT TO DEFINED SERVICE PERFORMANCE LEVELS, SERVER AVAILABILITY OR RESPONSE TIMES OR (ii) TRANSMISSIONS INITIATED BY CUSTOMER IN THE COURSE OF

USING THE HOSTING SERVICES CANNOT AND WILL NOT BE RECEIVED OR INTERCEPTED BY PERSONS OTHER THAN THE INTENDED RECIPIENTS.

7. Limitation of Liability. To the maximum extent permitted by law: (i) Symphony Learning's cumulative liability under this Agreement for any loss or damages resulting from any claims, demands or actions arising out of or relating to this Agreement shall be limited to direct damages and shall not exceed the amount of the license and maintenance fees, if any, paid by Customer to Symphony Learning hereunder; and (ii) IN NO EVENT SHALL SYMPHONY LEARNING BE LIABLE FOR ANY INDIRECT, INCIDENTAL, CONSEQUENTIAL, SPECIAL OR EXEMPLARY DAMAGES, INCLUDING ANY DAMAGES RESULTING FROM THE LOSS OF USE, LOSS OR THEFT OF DATA, LOSS OF PROFITS, OR LOSS OF BUSINESS, WHETHER OR NOT REASONABLY FORESEEABLE, AND EVEN IF SYMPHONY LEARNING HAS BEEN ADVISED OF THE POSSIBILITY OF SUCH DAMAGES AND REGARDLESS OF THE THEORY OF LIABILITY.

8. Force Majeure. Symphony Learning shall not be liable to Customer in any manner for any failure or delay in the fulfillment of any part of this Agreement because of acts of God, war, terrorism, governmental orders or restrictions, a communication line failure, power outage or fluctuations, the inability to obtain, or any delay in obtaining, local access using commercially reasonable efforts, or any other cause or circumstance beyond its reasonable control.

9. Assignment. This Agreement may not be assigned by Customer, whether by merger, consolidation, sale of assets or otherwise, without the prior written consent of Symphony Learning.

10. Severability. If for any reason one or more of the provisions of this Agreement are deemed by a court of competent jurisdiction to be unenforceable or otherwise void by operation of law, the remainder of this Agreement will be unaffected thereby and will be deemed to be binding and enforceable.

11. Waiver of Breach. No waiver by either party of any breach of this Agreement by the other party shall be deemed to be a waiver of any other breach of the same or of any other provision.

12. Governing Law. This Agreement will be governed by, and construed and enforced in accordance with, the laws of the state of New Hampshire, without regard to its conflict of laws provisions. Any litigation relating to this Agreement shall be subject to the exclusive jurisdiction of the state and federal courts of the state of New Hampshire.

13. Entire Agreement. This Agreement and any applicable Order Schedule sets forth the entire agreement and understanding of the parties relating to the subject matter hereof and supersedes any and all oral and prior written agreements, understandings and quotations relating thereto. The subject matter of this Agreement is limited to the rights expressly granted herein. The terms of this Agreement shall have no force and effect with respect to any claim based on the use of the Software outside the scope of the licenses and rights expressly granted herein. No alteration, modification, or cancellation of any of the provisions of this Agreement shall be binding unless made in writing and signed by officers of the parties.