

**CONTRACT NAME: AGREEMENT BETWEEN DYNAVOX SYSTEMS LLC AND  
DAVIS JOINT UNIFIED SCHOOL DISTRICT**

**BRIEF DESCRIPTION OF CONTRACT:** This agreement provides access to Boardmaker Online, a tool to use for communication with students. Staff can create print and online, interactive materials to communicate with non-verbal students.

**FISCAL IMPACT:** The cost of this service is included in the approved budget.



Tobii Dynavox  
2100 Wharton St Ste 400  
Pittsburgh, PA 15203

Phone: 1-800-588-4548  
Fax: 1-866-585-6260

## Boardmaker Online District Quote

Quote Number: Q009288

Expiration Date: 01/31/2019

Sales Consultant: Linsey Brown  
Phone: (631) 553-1632  
Email: linsey.brown@tobiidynavox.com

Contact Name: Pamela Gilleste  
Phone: (530) 757-5300  
Email: pgilleste@djud.net

Bill To Name: Davis Joint Unified Sch. Dist  
Bill To: 526 B Street  
Davis, California 95616

Ship To Name: Davis Joint Unified Sch. Dist  
Ship To: 526 B Street  
Davis, California 95616

**Start Date:** 11/28/2018  
**Initial Term:** 12 Months  
**Renewal Term:** 12 Months  
**Auto Renew:** No

**Billing Method:**  
**Payment Method:**  
**Payment Term:** Net 30  
**Currency:** USD

Product	Quantity	List Price	Discount	Sales Price	Total Price
Boardmaker Online - District	20	179.10	0%	179.10	\$3,582.00
				<b>Subtotal:</b>	\$3,582.00
				<b>Discount:</b>	\$0.00
				<b>Tax:</b>	\$0.00
				<b>TOTAL:</b>	<b>\$3,582.00</b>

### Notes

Accepting this quote indicates you agree to the Boardmaker Online Terms of Service.

# Boardmaker Online

The World's Favorite Solution for Creating Endless Communication Supports!

Boardmaker Online lets you create engaging print and interactive materials, like communication boards, behavior supports, sequences and visual schedules. You'll also get access to our community of over 450,000 teachers, therapists and parents who have already shared more than 56,000 ready-made print and interactive materials.

Free 30 day trial available!

[Learn More](#)



Create & Edit	Print & Play	Find & Share	Assign & Track
Create interactive activities in minutes Edit anywhere Access to over 30,000 symbols	Print anywhere Access engaging activities on your technology	Save time with ready-made activities Find categorized activities in over 1,100 public groups.	Student access to personalized instruction anywhere Track progress and measure student success
Personal	Professional	District	
1 Instructor	1 Instructor and logins for students they serve directly	10 Student logins for every instructor login	
\$99 / Year or \$9.99 / Month	\$199 / Year Or \$19.99 / Month	Call for a quote and ask about our competitive pricing through Boardmaker District Solutions! 1 (800) 588-4548	

Davis Joint Unified School District

Boardmaker

Terms of Service

## Jurisdiction, Venue, & Interpretation

The Terms of Service shall be governed by and construed in accordance with the laws of the State of California. Each party consents to personal jurisdiction and venue in Yolo County. The United Nations Convention on Contracts for the International Sale of Goods is specifically disclaimed. If a court of competent jurisdiction rules as invalid any provision of this agreement or the application of any provision to any person or circumstance, the parties agree that the court should endeavor to give effect to the parties' intentions as reflected in the provision, and all other provisions shall remain in full force and effect. You agree that regardless of any statute or law to the contrary, any claim or cause of action arising out of or related to the Service, the use of the POWTOON Site or iOS Apps, or the Terms of Service must be filed within one (1) year after such claim or cause of action arose or be forever barred.

Accepted as addendum to Terms and Conditions

By:

Title:

Lingli Lindsay St. Clair, Customer Service  
manager

Date:

10/26/18

This Terms of Service (the “Agreement”) is an agreement between DynaVox Systems LLC, a Delaware limited liability company with its principal place of business at 2100 Wharton Street, Suite 400, Pittsburgh, PA 15203 (“**DynaVox**”), and the individual or entity that has subscribed to the Software (“**Customer**”). By subscribing for access to, and use of, the Software (as defined below) Customer agrees to be bound by these Terms of Service. If Customer does not agree to these Terms of Service, do not subscribe to, access or use the Software.

- **DEFINITIONS**

- **“Confidential Information”** means all confidential and business proprietary information of a party hereto (including, with respect to Customer, User Data) disclosed in connection with the provision or receipt, as the case may be, of Services hereunder; provided, however, that the term “Confidential Information” does not include any information that (i) is or becomes a part of the public domain through no act or omission of the receiving party; (ii) was in the receiving party’s lawful possession prior to the disclosure and had not been obtained by the receiving party, either directly or indirectly, from the disclosing party; (iii) is lawfully disclosed to the receiving party by a third party without restriction on disclosure; or (iv) is independently developed by the receiving party.
- **“Data Storage”** means space allocated for electronic storage of Customer and User documents, images, videos, activities, reports, data generated with the system, and other files. Data Storage does not include application code files and data needed for the operation of the Software for the benefit of all Customers and Users.
- **“Documentation”** means written materials, videos, or other communications that explain the operation of the Software delivered in printed or electronic format.
- **“HIPAA”** means The Health Insurance Portability and Accountability Act of 1996, as amended, and the rules and regulations promulgated thereunder.
- **“Login”** the unique combination of username and password designed to provide access for a single individual to the Software.
- **“Order”** means the request to start a Trial Subscription or purchase a Subscription issued to DynaVox by Customer pursuant to which DynaVox provides access to Software, and which explicitly states the optional components and associated quantities to which Customer is subscribing.

- **“Professional Development”** means training services (delivered onsite or online) that may be provided by DynaVox to Customer and authorized Users, as identified on an Order.
- **“Professional Services”** means engineering, custom account administration or other consulting services that may be provided by DynaVox to Customer, as identified on an Order.
- **“Service Start Date”** means the date on which DynaVox delivers to Customer a Login name and temporary password to access and use the Software.
- **“Services”** means individually or collectively, the Professional Services, the Support Services and/or any additional agreed upon services provided by DynaVox to Customer hereunder.
- **“Software”** means (a) the computer software programs owned or licensed by DynaVox in object code form, (b) educational content activities and templates, (c) related explanatory written materials or files (“Documentation”), and (d) symbols, images, audio files, videos and other included media, that Customer has subscribed to as set forth in an Order and are provided as part of the Subscription.
- **“Standard Rate”** means, with respect to any Service, DynaVox’s standard rate for such Service (including, if applicable, time and material charges), as set forth in DynaVox’s standard fee schedules, as in effect from time to time.
- **“Student”** means a User who is granted access to use the Software in the role of a student.
- **“Student Data”** means all User Data related to a Student that either captures the result of using the Software or was entered by Customer or User into the Software. For the avoidance of doubt, the term “Student Data” does not include any information that has been de-identified as contemplated by Section 3.3 hereof.
- **“Subscription”** means a DynaVox pricing model, as indicated on an Order, which may apply individually with respect to any product or module constituting part of the Software, or to a bundled group of products or modules, pursuant to which Customer is assessed a fixed annual or other periodic fee (which may be waived in the case of a Trial Subscription, and which may change from time to time) for each period of use of such product or modules (or functionality contained therein).
- **“Support Services”** means those services provided by DynaVox as set forth in the Support Policy and which may change from time to time in the sole and absolute discretion of DynaVox.
- **“Terms of Service”** means these terms, including any Exhibit hereto agreed to by Customer or applicable to the Software and Services used

by Customer, in all cases, as such may be updated, revised, modified or amended from time to time as permitted herein.

- **“Use”** or **“Using”** means to log in, access, view, run, install, download or otherwise benefit from using the functionality of the Software in accordance with the Documentation.
- **“User”** means a single person who is granted explicit access to use the Software by the Customer through a Login.
- **“User Data”** means all information or files related to an individual User.
- **USE OF SOFTWARE**
  - Right to Use Software.
    - Use. During the term of the Agreement, DynaVox grants to Customer a non-exclusive, non-sublicensable, non-assignable, non-transferable right for Users to access and use the Software set forth in an Order. Customer shall be entitled to Use the Software solely for Customer’s own purposes. The Software may be used to access or play materials onscreen by Customer or authorized Users only. The Software may be Used to create materials in print or electronic form only for the students, patients, clients, or other individuals who receive instruction, therapy, supervision, assessment, care, or other services directly from Customer or authorized User. Customer may charge those individuals (students, patients, clients, or other individuals) for the costs associated with Customer’s provision of services in connection with Customer’s use of the Software. Otherwise, materials created with the Software may not be sold without the prior written consent of DynaVox, which consent may be withheld in DynaVox’s sole discretion. Any breach by a User of the obligations of Customer hereunder shall be considered a breach by Customer hereunder.
    - Electronic distribution of Materials. Materials created with the Software, containing Picture Communication Symbols (PCS), and distributed electronically must be distributed solely in Boardmaker or Boardmaker Studio file formats designated with a “.bm2”, “.bmg”, “.bpf”, “.bptf”, “.bstf”, “.zip”, or “.zbp” file extension, or distributed within the context of the Boardmaker Online platform. Electronic distribution of any content or materials using PCS in other formats (e.g., .pdf or PDF, .ppt or PowerPoint, .doc or WORD, or similar software formats used to display and/or transmit text and/or images) is not permitted without the prior written consent of DynaVox.



- Customer shall not transfer, sell, lease, or lend the Software, or any software or systems used to provide the Software, or any content, information, tools, and resources therein, to any third party. Customer shall not (i) allow any third party (apart from authorized Users) to access or Use the Software, (ii) access or use, or allow any User to access or use, the Software for third-party training, commercial time-sharing, software hosting, rental or service bureau use, (iii) allow, or allow any User to allow, use of the Software by more Users than specified in the Order, or (iv) permit, or allow any User to permit, any other individual or entity to take any of the foregoing actions.
- Customer shall not download, modify, create derivative works from (including translation or localization), reverse engineer, decompile or disassemble or otherwise attempt to discover any trade secret contained in the Software or in any software or system used by DynaVox in connection with providing the Software. Customer shall not: (i) copy or otherwise reproduce the Software except as provided in this Agreement, (ii) separate Software, which is delivered as a single product, into its component parts, (iii) remove or alter any trademark, logo, copyright or other proprietary notices, legends, symbols or labels from the Software, Upgrades, the Documentation, or any other materials provided therewith, or (iv) publish any results of benchmark tests run on Software to a third party without DynaVox's prior written consent.
- Customer may not access the Software if Customer is a direct competitor of DynaVox or provide access to a direct competitor of DynaVox, except with DynaVox's prior written consent. In addition, Customer may not access the Software for purposes of monitoring its availability, performance or functionality, or for any other benchmarking for competitive purposes. Any action of this kind is likely to result in serious harm to DynaVox for which Customer agrees that DynaVox will be entitled to immediate injunctive relief together with other legal and equitable remedies.
- Rights. As between the parties, DynaVox or its suppliers (as the case may be) retain all title, copyrights, patent rights, trade secrets, and other proprietary rights in the Software and any software or other intellectual property developed by DynaVox as part of the Services. Customer does not acquire any rights, express or implied, in the Software or any software or other intellectual property developed by DynaVox as part of the Services, other

than the right to access and use the Software as set forth in the Agreement. DynaVox may terminate or suspend Customer's access to and use of the Software (in whole or in part) at any time, with or without notice, if DynaVox has reason to believe that Customer has violated the terms set forth in this Section 2.1.

- **Verification of proper Use.** DynaVox or its agents shall have the right to monitor use of the Software by Customer to ensure compliance with the terms of Section 2.1 of this Agreement. This audit right includes, but is not limited to electronic monitoring at any time.
- **Updates.** The Software or components of the Software may be periodically updated by DynaVox, at its sole discretion, to provide programming fixes or programming modifications without prior notice ("**Updates**"). These Updates may be automatically applied to the Software or in some cases offered as an optional download. If the Software is an Update to a previous version of the Software or component, Customer must have a current Subscription in order to Use such Update. Customer does not retain the right to continued use of the older Software version if the Update is applied automatically. Use of the Update will continue to be governed by this Agreement, unless a new agreement is provided with the Update, in which case, Customer's use of the Update will be governed by the new agreement.
- **Upgrades.** DynaVox, in its sole discretion, reserves the exclusive right to add additional features or functionality to the Software ("**Upgrades**"). DynaVox may choose to provide these Upgrades as part of an ongoing Subscription to the Software or charge additional fees for access to the new features or functionality. DynaVox has no obligation to add any features or functionality to the Software. Use of the Upgrade will continue to be governed by this Agreement, unless a new agreement is provided with the Upgrade, in which case, Customer's use of the Upgrade will be governed by the new agreement.
- **Trial Subscription.** At its sole discretion, DynaVox may offer a Trial Subscription, which will make Software features available on a trial basis, free of charge, until the earlier of (a) the end of the trial period for which Customer registers to use the Software or (b) the start date of any Subscription ordered by the Customer ("**Trial Subscription**"). Additional trial terms and conditions may appear on the trial registration web page. Any such additional

terms and conditions are incorporated into this Agreement by reference and are legally binding.

ANY CUSTOMER OR USER DATA, AND ANY CUSTOMIZATIONS MADE TO CUSTOMER ACCOUNT DURING FREE TRIAL WILL BE PERMANENTLY LOST UNLESS CUSTOMER PURCHASES A SUBSCRIPTION TO THE SAME SERVICES AS THOSE COVERED BY THE TRIAL BEFORE THE END OF THE TRIAL PERIOD.

NOTWITHSTANDING SECTION 6.2 (WARRANTIES AND DISCLAIMERS), DURING THE FREE TRIAL THE SOFTWARE AND SERVICES ARE PROVIDED “AS-IS” WITHOUT ANY WARRANTY.

- Additional Terms. Company’s Use of the Software shall also be subject to any additional applicable terms and conditions set forth on DynaVox’s website or Customer or User portal provided by DynaVox, including, without limitation, terms of use applicable to specific Subscription Services and/or Subscription levels.
- SERVICES
  - Provision of Support Services and Professional Services.
    - Support Services. DynaVox shall provide basic support for the Software to Customer and authorized Users at no additional charge, and/or upgraded support if purchased separately.
    - Professional Development Ordered by Customer is billed at DynaVox’s then-current Standard Rate. All travel costs for Professional Development provided onsite at Customer’s premises will be billed separately, as incurred by DynaVox. Customer shall be responsible for (i) all non-refundable airfare fees, and (ii) one day of fees for Professional Development for all cancellations or rescheduling that occurs less than 7 days prior to the first day on which Professional Developments will be provided.
    - All Professional Development (onsite and web-based) Ordered by Customer must be utilized by Customer within 90 days from the Service Start Date or Order Date (whichever is later) listed on the Order pursuant to which the Professional Development was purchased unless otherwise noted in the Order. If Customer does not utilize the Professional Development within the 90 day period, the Professional Development will be considered as having been delivered and no refund or other compensation shall be issued by DynaVox (except in those cases where the failure to utilize the

Professional Development is a result of DynaVox's inability to deliver the Professional Development).

- Professional Services Ordered by Customer will be covered under a separate agreement with provisions specific to the work being requested.
- Security of User Data. DynaVox agrees to maintain the security of User Data using industry-standard data security protocols, and other methods reasonably deemed to be adequate for secure business data. DynaVox shall take commercially reasonable precautions to prevent the loss of or alteration to Customer's Data, but DynaVox does not guarantee against any such loss or alteration, and shall not be required to store such User Data for any extended period of time. DynaVox is not and will not be Customer's official record keeper and/or storage provider.
- De-Identification. Depending on the type of account, Customer may have an option to turn on or off De-Identification within their account. It is the Customer's sole responsibility to manage that account setting to meet any policy or legal requirements they may be under.
- Data Storage. Data Storage limits may be set forth in the Order. DynaVox may, in its sole discretion, allow Data Storage in excess of the stated limit, or offer incremental storage, which may be subject to additional fees.
- Archived Student Accounts. During the term of this Agreement, a Student account may be archived by a User with Organization Admin privileges. Archiving stores that Student Data in a read-only fashion until the account is either reactivated or deleted. Archiving an account frees that license to be used by a different Student with a different Login. A limit on the number of Student accounts which may be in the archived state at any given time may be set forth in the Order. DynaVox may, in its sole discretion, allow storage for archived Student accounts in excess of the stated limit, which may be subject to additional fees.
- Student Data Export and Retention. On termination of a Subscription and for 10 days following termination of a Subscription, Customer may request export of a file of the Student Data subject to a data export fee. Customer agrees and acknowledges that (i) DynaVox is not obligated to retain any Student Data for longer than 30 days after termination, and (ii) DynaVox has no obligation to retain Student Data, and may delete Student Data, if Customer has breached this Agreement, including but not limited to failure to pay outstanding fees. Upon termination resulting from an uncured breach, Customer's right to access or use Student Data immediately ceases, and DynaVox shall have no obligation to maintain or make available for download any Student Data.

- System Availability. DynaVox shall use commercially reasonable efforts to make the Software available 24 hours a day, 7 days a week, except for: (a) planned downtime (of which DynaVox shall use commercially reasonable efforts to give at least 8 hours' notice and which shall be scheduled to the extent practicable during the weekend hours from 6:00 p.m. Friday to 3:00 a.m. Monday Eastern Time), or (b) any unavailability caused by circumstances beyond DynaVox's reasonable control, including without limitation, acts of God, acts of government, floods, fires, earthquakes, civil unrest, acts of terror, strikes or other labor problems, Internet service provider failures or delays, or denial of service attacks.
  - Internet Delays. DYNAVOX'S SERVICES MAY BE SUBJECT TO LIMITATIONS, DELAYS, AND OTHER PROBLEMS INHERENT IN THE USE OF THE INTERNET AND ELECTRONIC COMMUNICATIONS. DYNAVOX IS NOT RESPONSIBLE FOR DELAYS, DELIVERY FAILURES, OR OTHER DAMAGE RESULTING FROM SUCH PROBLEMS NOT CAUSED BY DYNAVOX.
- CUSTOMER OBLIGATIONS AND RESPONSIBILITIES
  - Customer Representations and Covenants.
    - Customer represents and warrants to DynaVox that (i) Customer's use of the User Data in connection with the Services (including, without limitation, the right to upload, replicate, transfer, store, process and cache User Data in connection with the use of the Software) complies with all applicable federal, state and local laws and regulations, and any policies applicable to Customer's organization, and that Customer has received all necessary third party approvals with respect to the Services and its use of the Software and the User Data, and (ii) the User Data, and Customer's use of the User Data (including, without limitation, storage, processing, uploading, replicating, transferring and caching of User Data), do not infringe the intellectual property rights of any third party or violate any applicable federal, state or local laws and regulations, or any policies applicable to Customer's organization, and (iii) Customer agrees to indemnify and hold DynaVox harmless from any third-party claims or resulting liability arising from Customer's breach of this Agreement, including without limitation, Customer's or its Users' use of the User Data and the Software in connection with the Services.

- Customer shall comply with all federal, state and local laws and regulations and policies applicable to Customer's conduct of its business, including, without limitation, obtaining and maintaining all federal, state and local licenses.
- Data Import Limitations. Customer is responsible for providing all User Data in the format specified by DynaVox for the creation of User accounts. Customer acknowledges and agrees that the User Data available in the Software will be a reflection of the quality of the data provided by the Customer. DynaVox is not responsible for inability to perform or access Services or Software due to improperly formatted or corrupt files. Customer shall maintain (on a server owned or under the control of Customer, or in any other manner Customer shall elect) an accurate backup copy of all data provided to DynaVox. Customer acknowledges that transferring User Data in connection with the use of the Software is subject to the possibility of human and machine errors, omissions, and losses, including inadvertent loss of data that may give rise to loss or damage. Customer is responsible to adopt reasonable measures to limit the impact of such problems.
- Software and Hardware Requirements.
  - Customer is responsible for obtaining access to the Internet using software and hardware that meet DynaVox's published system requirements, including security requirements.
  - Customer agrees to access the Software, and to store and retrieve data using third party programs, including (without limitation) Internet "browser" programs, that support data security protocols compatible with those specified by DynaVox. Customer agrees that all software it uses to access the Software will support the Secure Socket Layer (SSL) protocol.
- Account Name and Passwords.
  - Customer may designate User account names and passwords for the number of Users stated in the Order. Customer is responsible for safeguarding the confidentiality and use of account names and passwords, and agrees to take any and all actions necessary to maintain the privacy of such information.
  - Customer shall be liable and responsible for any and all activities conducted through its account, whether or not such activities have been authorized by Customer. DynaVox will deem any communication, data transfer, or use of the Software received under Customer's account names and passwords to be for Customer's benefit and use.

- Customer will promptly notify DynaVox if account names or passwords are lost, stolen, or are being used in an unauthorized manner. Upon DynaVox's request, Customer will provide DynaVox with accurate and complete registration information of Users, and any additional permitted authorized Users, that have access to the Software.
- Ownership of User Data. As between the parties, Customer is the owner of all User Data; provided, however, that nothing herein shall prevent DynaVox from (i) disclosing such User Data as may be required by law, or as otherwise permitted in this Agreement, or (ii) from using User Data consistent with applicable law (including, without limitation, HIPAA) to develop products or services involving the aggregation of User Data from multiple Customers (provided that the identity of the User cannot be determined from the aggregated data).
- **TERM AND TERMINATION**
  - Term. Subject to the termination rights set forth in the Agreement, Subscriptions commence on the Service Start Date specified in the applicable Order and continue for the Subscription term specified therein. Except as otherwise specified in the applicable Order (or as defined by a Trial Subscription), all Subscriptions shall automatically renew for additional periods equal to the expiring Subscription term or one year (whichever is shorter), unless either party gives the other notice of non-renewal at least 30 days before the end of the relevant Subscription term. The per-unit pricing during any such renewal term shall be the same as that during the prior term unless DynaVox has provided notice of a pricing increase at least 30 days before the end of such prior term, in which case the pricing increase shall be effective upon renewal and thereafter. In the event that an Order contains services or products added to an existing Subscription, such added services or products shall be billed on a pro-rated basis and will be coterminous with the initial Service term or applicable renewal Service term of such Order.
  - Termination for Cause. Either party may terminate the Agreement at any time, if the other party commits a material breach of any representation, warranty, agreement or covenant set forth in the Agreement that remains uncured after sixty (60) days written notice (five (5) days written notice for non-payment) specifying the nature of the breach and identifying the measures required to correct the breach.
  - Additional DynaVox Termination Rights.
    - DynaVox may terminate the Agreement immediately if Customer becomes insolvent, generally stops paying its debts as they become due or seeks protection under any bankruptcy,

receivership, trust deed, creditors arrangement, composition or comparable proceeding, or if any such proceeding is instituted against Customer and not dismissed within 90 days after commencement of one of the foregoing events.

- DynaVox may terminate the Agreement immediately in the event Customer, Users, Students or its employee(s) includes in the Software any content that is obscene, offensive, threatening or malicious, or which violates any applicable law or regulation or which otherwise exposes DynaVox to civil or criminal liability.
  - DynaVox may suspend or terminate the Agreement immediately in the event of any wrongful or unauthorized access to or use of the Software by Customer or other third party.
- Effect of Termination. Upon termination of the Agreement, access to and use of the Software and all Services shall be terminated. Termination of the Agreement (i) shall not relieve any party from any liability that may have arisen prior to such termination, nor shall such termination (other than for termination by Customer under Section 5.2 above relieve Customer of its obligation to pay all fees that have accrued or are otherwise owed by Customer under the Agreement, and any unpaid fees related to the initial term or any renewal term, and (ii) shall not limit either party from pursuing other remedies available to it, including injunctive relief. Upon any termination of the Agreement, DynaVox shall have the right to maintain a copy of all User Data in accordance with, and for the period of time it determines is required or permitted by, applicable law. Sections 1, 5, 6, and 8 shall survive any termination of this Agreement.
- INDEMNITY, WARRANTIES, LIMITATION ON LIABILITY; REMEDIES
  - DynaVox Ownership; Infringement Indemnity.
    - All computer programs and related Documentation made available, directly or indirectly, by DynaVox to Customer as part of the Services are the exclusive property of DynaVox or the third parties from whom DynaVox has secured the rights to such services or products. All rights, title and interest in or to any copyright, trademark, service mark, trade secret and other proprietary right relating to the Software and the Services are reserved.
    - DynaVox shall indemnify, defend and hold harmless Customer from and against any and all suits, proceedings, claims, demands, or causes of action by a third party that the Software infringe upon or misappropriate any United States copyright, patent, trade secret



or other intellectual or industrial property right of any kind or nature whatsoever (a “**Claim**”).

- DynaVox shall have no liability under this Section 6.1 to the extent a Claim is attributable to (i) combination or use of the Software with any item, component, product, material, software or process not provided by DynaVox, if liability would not have arisen but for such combination or use with such item, component, product, material, software or process; (ii) use of the Software in any way not authorized nor contemplated by the Agreement, if liability would not have arisen but for such unauthorized use; or (iii) any breach by Customer of the Agreement, if liability would not have arisen but for such breach.
  - In the event the Software is held by a court of competent jurisdiction to, or is believed by DynaVox to, infringe or misappropriate any third party right, DynaVox shall have the option, at its expense, to (i) modify the Software to be non-infringing, (ii) replace the Software with a non-infringing substitute, (iii) resolve any Claim to allow use of the Software, (iv) obtain for Customer a subscription to continue using the Software, (v) terminate the Subscription for the infringing Software, or (vi) terminate the Agreement.
  - The indemnification obligations set forth in this Section 6.1 are subject to the following conditions: (i) Customer shall give DynaVox written notice of any Claim for which Customer intends to claim indemnification within 30 days of the Claim; (ii) Customer shall give DynaVox the sole right to control and direct the investigation, defense and settlement of the Claim, including selection of defense counsel; and (iii) Customer shall reasonably cooperate with DynaVox in the investigation, defense and settlement of the Claim. Reasonable out-of-pocket expenses incurred by Customer in providing such assistance will be reimbursed by DynaVox. Customer shall not settle or compromise any Claim, and any such settlement or compromise shall be void as against DynaVox and shall terminate DynaVox’s obligation to indemnify Customer with respect to such Claim.
  - Customer acknowledges and agrees that the remedies provided in this Section 6.1 are the sole and exclusive remedies of Customer, and consequently the sole and exclusive liability of DynaVox, with respect to any Claim.
- DynaVox Warranties; Time Period; Disclaimers.

- Warranty for the Software and Services. Subject to Customer's compliance with its obligations under Section 4.2, DynaVox represents and warrants that the Software and Services will perform in all material respects in accordance with the Documentation provided by DynaVox within the Software, website, paper, or CD copies of such Documentation. This warranty shall apply for a period of thirty (30) days following the Service Start Date, and any breach not reported within such period will be deemed waived and accepted by Customer.
- Warranty for Other Services. DynaVox warrants that the Support Services, the Training Services and any other service set forth in an Order agreed to by Customer (excluding services contemplated by Sections 6.2.1 and **Error! Reference source not found.**) will be performed in a manner that is consistent with generally accepted industry standards for such Service. With respect to Training Services, DynaVox does not guarantee any specific results, and the results Customer may realize are primarily dependent on Customer's ability to utilize and implement ideas, concepts, and practices presented in the Training Services. Any breach not reported to DynaVox by Customer within thirty (30) days of performance of such Services will be deemed waived and accepted by Customer.
- Disclaimers. THE WARRANTIES SET FORTH IN THIS SECTION 6.2 ARE EXCLUSIVE AND IN LIEU OF ALL OTHER WARRANTIES, WHETHER EXPRESS OR IMPLIED, INCLUDING ANY ORAL REPRESENTATIONS OR WARRANTIES MADE BY OR ON BEHALF OF DYNAVOX AND THE IMPLIED WARRANTIES OF MERCHANTABILITY AND FITNESS FOR A PARTICULAR PURPOSE. DYNAVOX AND ITS SUPPLIERS DO NOT AND CANNOT WARRANT THE PERFORMANCE OR RESULTS OBTAINED BY USING THE SOFTWARE.

DynaVox does not warrant that the Software will operate in the combinations that Customer may select for use, that the Software will meet Customer's requirements, that the operation of the Software will be uninterrupted or error-free, free of viruses or any other malicious code, or fit for its intended purpose, or that all Software errors will be corrected. Any description of the Software contained on DynaVox's website or promotional materials is for the sole purpose of identifying them, and any such description is

not a part of the basis of the bargain and does not constitute a warranty or representation.

- Exclusive Remedies. For any breach of the representations and warranties contained in Section 6.2, Customer's exclusive remedy, and DynaVox's entire liability, shall be as follows:
  - With respect a breach of the representation and warranty set forth in 6.2.1, DynaVox shall correct the errors that caused DynaVox to breach its warranty to Customer.
  - With respect a breach of the representation and warranty set forth in 6.2.2, DynaVox shall re-perform the applicable Service.
  - If correction of the errors or re-performance of the applicable Service is not feasible or commercially reasonable, DynaVox may refund the fees paid by Customer for the applicable Software or Service at issue.
- Exculpation of Certain Claims; Limitation on Liability.
  - Customer shall be liable for (and Customer hereby waives any and all claims which Customer may have against DynaVox for), (i) any inaccuracy in User Data provided by Customer or its Users, (ii) the consequences of any instructions Customer may give to DynaVox, and (iii) Customer's failure to protect User account names and passwords. In addition, DynaVox is not responsible for (x) Customer's access to the Internet, (y) interception or interruptions of communications through the Internet or (z) changes or losses of data through the Internet.
  - **Limitation of Liability. In no event shall DynaVox be liable under the Agreement for any indirect, incidental, special, consequential or punitive damages, or damages for business interruption, loss of profits, revenue, data or use, or cost of cover suffered by Customer or by any third party, whether in an action in contract or tort, and even if DynaVox has been advised of or is aware of the possibility of such damages. DynaVox's total liability for damages suffered by Customer or any of its affiliates under the Agreement or related to the Services shall in no event exceed an amount equal to three (3) times the average monthly fee paid by Customer to DynaVox under the Agreement.**
  - This Section 6.4 sets forth the full extent of DynaVox's liability for damages resulting from this Agreement and the Services, regardless of the form in which such liability of claim for damages may be asserted. The provisions of the Agreement

allocate the risks between DynaVox and Customer. The parties agree that DynaVox's pricing and other terms and conditions of the Agreement reflect the allocation of risk and the limitation of liability specified herein, and Customer acknowledges that without such limitation on liability and Customer's agreement to maintain redundant copies of all data provided to DynaVox in connection with the Services, DynaVox would not have entered into this Agreement.

- **PAYMENT PROVISIONS**

- Fees, Invoicing and Payment; Suspension of Service.
  - Customer shall pay the fees set forth on the Order (or any Addendum, as the case may be) for the Software and Services.
  - Invoices for payment of all Services shall be in accordance with the applicable Order agreed to by Customer. In the absence of specific provisions in the applicable Order agreed to by Customer, (i) fees for one-time Professional Services or Professional Development (e.g., set-up and Training Services) are due upon acceptance of any Order and prior to delivery of the applicable Service, (ii) recurring fees (e.g., fees for Services) begin on the Service Start Date, and if a monthly payment schedule, shall be payable no less than monthly in advance and due in full on the first day of each month, and (iii) fees that are variable and dependent on actual usage shall be billed monthly in arrears and due upon receipt.
  - Administrative Fees include, but are not limited to; (i) late charges for any invoice not paid by the applicable due date shall be charged for each 30 days thereafter that such invoice remains unpaid. Additionally, any amounts payable by Customer hereunder which remain unpaid after the due date shall be subject to a finance charge equal to the lesser of 1.5% per month or the maximum amount permitted under applicable law, from the due date until the date such amount is paid, (ii) DynaVox will charge a fee for each occurrence if checks or electronic (ACH) payments are returned unpaid or rejected by the issuing bank. Non-sufficient Funds checks or rejected ACH payments must be remitted within 5 working days after the Customer has been notified of the returned check or rejected ACH payment. The rejected amount and all future payments must be in the form of certified check or credit card. If, the NSF check or rejected ACH payment is not remitted within 5 working days, the Customer's access to, and use of, Software and Services will be terminated.

- Without limiting the additional fees and charges that shall be payable by Customer pursuant to Section 7.1.3, if applicable, DynaVox shall have the right, exercisable in its sole and absolute discretion, to suspend Customer's access to, and use of, the Software and Services, in the event that Customer has not paid any amounts due hereunder by the time such payment is due.
  - Customer's payment obligations hereunder with respect to the Services may (if authorized by Customer) be made by direct withdrawal from Customer's bank account. In the event Customer has given such authorization, such withdrawal is subject to the operating rules of the National Automated Clearing House Association ("NACHA"). DynaVox and Customer each agree to be bound by and comply with the NACHA rules applicable to it with respect to such withdrawals. Any authorization given by Customer shall remain in effect unless and until revoked in writing by an authorized representative of Customer and until Customer's bank and DynaVox have each received such notice and have had reasonable time to act upon such notice.
- Taxes. The fees listed in the Agreement (including the Order) do not include taxes; there shall be added to all payments hereunder amounts equal to any applicable taxes levied or based on this Agreement, exclusive of taxes based on DynaVox's net income. If DynaVox is found to be responsible for the withholding and payment of taxes on behalf of Customer, Customer agrees to indemnify DynaVox with respect to the full amount of taxes due, together with applicable interest and penalties. If Customer is required to withhold any tax from any payment, then the amount of the payment will be automatically increased to completely offset such tax so that the amount remitted to DynaVox, net of all taxes, equals the amount invoiced or otherwise due.
- Variable Use Service Fees. Variable use service fees are subject to external costs (such as postage rates, paper, etc.) and therefore are subject to change with 30-day written notice to Customer.
- GENERAL TERMS
  - Confidential Information.
    - All Confidential Information disclosed hereunder will remain the exclusive and confidential property of the disclosing party. The receiving party will not disclose the Confidential Information of the disclosing party and will use at least the same degree of care, discretion and diligence in protecting the Confidential Information of the disclosing party as it uses with respect to its own confidential information, but in no case less than reasonable care;

provided, however, that DynaVox may disclose Confidential Information in accordance with the terms of this Agreement. The receiving party will limit access to Confidential Information to its affiliates, employees and authorized representatives with a need to know and will instruct them to keep such information confidential. Notwithstanding the foregoing, the receiving party may disclose Confidential Information of the disclosing party (i) to the extent necessary to comply with any law, rule, regulation or ruling applicable to it, (ii) as appropriate and with prior notice where practicable, to respond to any summons or subpoena or in connection with any litigation, and (iii) to any vendor with which DynaVox has an API (if Customer has elected to use such API).

- Customer acknowledges that DynaVox or its affiliates may from time to time communicate directly with Customer for the purpose of marketing its products and services or those of its recommended vendors, and may use Confidential Information to do so.
- The obligations of DynaVox set forth in this Section 8.1 shall not apply to any suggestions and feedback for product or service improvement, correction, or modification provided by Customer in connection with any present or future DynaVox product or service, and, accordingly, neither DynaVox nor any of its customers or business partners shall have any obligation or liability to Customer with respect to any use or disclosure of such information. In addition, subject to any limitations imposed by HIPAA, if applicable, Customer hereby consents to DynaVox's use of internet/website analytics software tools and programs that collect, transmit, store, disclose and analyze certain information about the actual use of the Software by Customers and/or Users (such as, but not limited to, pages viewed, links clicked, functions used and other workflow information), and such information shall not be considered Confidential Information hereunder and may be used by DynaVox for the purpose of license administration, error resolution and product analysis and improvement.
- Governing Law and Dispute Resolution. The Agreement, and all matters arising out of or relating to the Agreement, shall be governed by the internal substantive laws of the Commonwealth of Pennsylvania excluding its conflicts of law provisions. Any controversy or claim arising out of or relating to the Agreement, or breach thereof, shall be submitted to the following procedure: (i) direct negotiation in a settlement conference to be scheduled as soon as possible after the

dispute arises; (ii) if no resolution is reached within sixty (60) days of the settlement conference, the parties will submit the dispute to non-binding mediation in Pittsburgh, Pennsylvania under the mediation rules of the American Arbitration Association; and (iii) if no settlement is reached within sixty (60) days of the start of mediation, either party may seek legal redress in a forum of competent jurisdiction. Notwithstanding the above, neither party shall be prevented from seeking immediate injunctive or other equitable relief in connection with any breach of the confidentiality or ownership provisions set forth herein.

- Notice. Customer agrees to notify DynaVox of any changes to Customer's business address, business contact, and support contact within ten (10) days of any change thereto. All notices required or permitted hereunder shall be given in writing or as specifically set forth in the applicable section of the Agreement. To expedite order processing, Customer agrees that DynaVox may treat documents emailed or faxed by Customer to DynaVox as original documents; nevertheless, either party may require the other to exchange original signed documents to evidence an order for Services.
- Other Terms.
  - The waiver by either party of any default or breach of the Agreement shall not constitute a waiver of any other, or subsequent, default or breach.
  - Except for actions for nonpayment or breach of DynaVox's proprietary rights in the Software, no action, regardless of form, arising out of the Agreement may be brought by either party more than thirty (30) days after the cause of action has accrued.
  - The Agreement constitutes the complete agreement between the parties and supersedes all prior or contemporaneous agreements or representations, written or oral, concerning the subject matter of the Agreement.
  - DynaVox may assign this Agreement or any rights or obligations under the Agreement to a third party. Customer may not assign the Agreement or any rights or obligations hereunder without the prior written consent of DynaVox, which consent shall not be unreasonably withheld or delayed; any such assignment without the prior consent of DynaVox shall be void. DynaVox may use subcontractors to perform Services under this Agreement; provided, however, that such subcontracting shall not relieve DynaVox from responsibility for performance of its duties hereunder.

- DynaVox has no obligation to any third party by virtue of this Agreement, including any student of any Customer.
- If any of the provisions of the Agreement shall be invalid or unenforceable, such invalidity or unenforceability shall not invalidate or render unenforceable the entire Agreement, but rather the parties hereto agree to replace such invalid or unenforceable term or provision with a valid and enforceable term or provision that will achieve, the fullest extent possible, the economic, business and other purposes of the Agreement.
- Customer acknowledges and agrees that calls to and from DynaVox may be monitored or recorded.
- DynaVox may modify or amend the terms of the Agreement between the parties, including these Terms of Service and any incorporated Order, upon written notice, e-mail or otherwise, to Customer. Following any such notification, Customer shall have the right for a period of thirty (30) days from receipt to inform DynaVox in writing that it does not accept the modification or amendment of the Agreement. If Customer does not notify DynaVox in writing that it does not accept such modification or amendment within such thirty (30) day period, and continues to access and use the Software and/or receive the Services, this shall be deemed agreement by the Customer to the modification or amendment. If Customer properly notifies DynaVox that it does not accept the new terms within the thirty (30) day period, then Customer may continue to access and use the Software until the end of Customer's then-current term, at which time the Agreement, and Customer's access to and use of the Software and its receipt of Services, shall terminate.