

MASTER SERVICES AGREEMENT
BY AND BETWEEN
THE TEXAS A&M UNIVERSITY SYSTEM
AND D2L LTD.

This Services Agreement (“Agreement”) is entered into and effective upon final execution (the “Effective Date”), by and between The Texas A&M University System, an agency of the state of Texas (hereafter referred to as “A&M SYSTEM”), and D2L Ltd. (hereafter referred to as “PROVIDER”). A&M SYSTEM and PROVIDER are sometimes hereafter referred to as “Party” individually or “Parties” collectively.

A&M SYSTEM and PROVIDER hereby agree as follows:

1. SERVICES

- A. This Agreement is not a contract to perform specific work but is intended to establish the terms and conditions under which the A&M SYSTEM and its member universities and agencies may contract with the PROVIDER for the services and to license and use PROVIDER’s platform (“Services”). These Services include, but are not limited to, implementation and operation of the Brightspace learning management system. Participating Member(s) will contract with PROVIDER by executing an order form or purchase order in a form as is set out in Exhibit C (each an “Order Form”) with PROVIDER. The reference herein to “Member” or “Members” shall refer to the A&M SYSTEM or its member entity executing an Order Form. The A&M SYSTEM makes no guarantee of execution of an Order Form.
- B. The Order Form shall incorporate the specific Services requested by Member, the payment amount due to PROVIDER and the period of performance subject to the terms under this Agreement. The terms of this Agreement shall be incorporated into any Order Form executed by a Member and PROVIDER for the Services during the term of this Agreement and an Order Form shall reference this Agreement. The Order Form shall grant the Member a non-exclusive, non-sublicensable right and license to access and use the Services. Upon execution of such Order Form, such Member is only responsible for its own compliance with the terms and conditions of this Agreement.

2. TERM AND TERMINATION

- A. **Term.** The term of this Agreement begins on the Effective Date and continues for a period of five years unless earlier terminated as provided herein; provided, however, that the terms of this Agreement shall remain applicable to any Order Form that was executed prior to the expiration or termination of this Agreement but whose period of performance extends beyond the expiration or termination of this Agreement. This Agreement may be extended for two (2) additional two (2) year periods upon mutual written agreement executed by the Parties. Termination of this Agreement shall not terminate any Member specific agreement.
- B. **Termination with Cause.** Either Party may terminate this Agreement effective upon written notice to the other Party if the other Party materially breaches any term of this Agreement and fails to cure such breach in all material respects within forty-five (45) days after receiving written notice of the breach. Furthermore, A&M SYSTEM may immediately terminate this Agreement if (i) the PROVIDER’s insurance coverage required under this Agreement is cancelled or non-renewed; or (ii) the PROVIDER declares bankruptcy, is placed into involuntary bankruptcy or receivership or becomes insolvent.
- C. **Termination without Cause.** A&M SYSTEM may terminate this Agreement at any time

upon thirty (60) days prior notice to PROVIDER. Should A&M SYSTEM terminate this Agreement without cause, any active Order Form(s) between PROVIDER and any and all Members shall continue for the entire duration of the term set out in each such Order Form.

- D. **Termination of an Order Form.** The period of performance of any Order Form will be as provided in an Order Form. Either party to an Order Form may terminate such Order Form effective upon written notice to the other party if the other party materially breaches any term of this Agreement or an Order Form and fails to cure such breach in all material respects within thirty (30) days after receiving written notice of the breach. An Order Form may also be immediately terminated if (i) the PROVIDER's insurance coverage required under this Agreement is cancelled or non-renewed; or (ii) the PROVIDER declares bankruptcy, is placed into involuntary bankruptcy or receivership or becomes insolvent. In the event that the Member terminates an Order Form pursuant to this Section, the Member shall receive a pro-rata refund of any fees prepaid by the Member that cover Services that have not been delivered by PROVIDER as of the date of such termination. The termination of any one Order Form will not affect any other Order Form or this Agreement.

3. PAYMENT TERMS

- A. The A&M SYSTEM shall not pay any costs or fees as a direct result of this Agreement. The member identified in an Order Form will pay the amount due to PROVIDER under such Order Form. The fees paid by Member to PROVIDER for the Services requested under an Order Form shall be calculated based on the fee rate schedule attached as Exhibit A and made a part of this Agreement. The rate schedule may be renegotiated at the discretion of A&M SYSTEM upon renewal of this Agreement. Additional rates and fees may be negotiated on a Member specific Order Form, provided no less favorable than under this Agreement.
- B. PROVIDER shall invoice Member for amounts due consistent with the payment schedule as negotiated under an Order Form. Each invoice must reference an Order Form and Member's purchase order number (if applicable) and include a description of services provided along with documentation that Member may reasonably request to support the invoice amount. Member will make payment on a properly prepared and submitted invoice in accordance with Chapter 2251, Texas Government Code (the "Texas Prompt Payment Act"), which shall govern remittance of payment and remedies for late payment and non-payment.
- C. As an agency of the State of Texas, the A&M System and its Members are tax exempt. Tax exemption certification will be furnished to PROVIDER upon request.

4. DATA PRIVACY AND SECURITY

- A. The Member shall retain all right, title, and interest in and to all information, data or other content that the Member, its employees, contractors, students, or any other third party on behalf of Member enter, submit or upload to Services or otherwise provide to PROVIDER under this Agreement and the Order form (collectively, the "A&M System Data"). A&M System Data may include information relating to employees and students, including, but not limited to personally identifiable information, or data protected or made confidential by applicable federal, state, and local laws, rules, and regulations.
- B. PROVIDER shall safeguard and maintain the confidentiality of the A&M System Data in accordance with applicable federal, state, and local laws, rules, and regulations. PROVIDER shall only use or disclose A&M System Data for the purpose of fulfilling

PROVIDER's obligations under this Agreement, a Member's Order Form, as required by law, or as otherwise authorized in writing by the applicable Member. PROVIDER shall restrict disclosure of the A&M System Data solely to those employees, subcontractors or agents of PROVIDER that have a need to access the A&M System Data in order for PROVIDER to perform its obligations under this Agreement and a Order Form. PROVIDER shall require any such subcontractors or agents to comply with the same restrictions and obligations imposed on PROVIDER in this Agreement and PROVIDER agrees that it shall be responsible for its subcontractors' and agents' compliance with such obligations.

- C. PROVIDER must promptly notify the applicable Member of any legal request for A&M System Data from a third party and take (and assist Member in taking) appropriate steps not to disclose such A&M System Data.
- D. PROVIDER shall, within seventy-two (72) hours of discovery, report to the applicable Member any use or disclosure of A&M System Data not authorized by this Agreement or in writing by the applicable Member and A&M System CIO. PROVIDER's report must identify: (a) the nature of the unauthorized use or disclosure, (b) the A&M System Data used or disclosed, (c) who made the unauthorized use or received the unauthorized disclosure, (d) what PROVIDER has done or will do to mitigate any deleterious effect of the unauthorized use or disclosure, and (e) what corrective action PROVIDER has taken or will take to prevent future similar unauthorized use or disclosure. PROVIDER shall provide such other information, including a written report, as reasonably requested by the applicable Member.
- E. Within thirty (30) days of the expiration or termination of this Agreement or an Order Form, PROVIDER, as directed by a Member, shall make available in acceptable electronic format all A&M System Data in its possession (or in the possession of any of its subcontractors or agents) to such Member, and thereafter delete all such A&M System Data. PROVIDER shall confirm such deletion in writing upon Member's written request.

5. CONFIDENTIALITY

- A. The Parties anticipate that under this Agreement and an Order Form it may be necessary for a Party (the "Disclosing Party") to transfer information of a confidential nature ("Confidential Information") to the other Party (the "Receiving Party"). The Disclosing Party shall, where feasible, clearly identify Confidential Information at the time of disclosure by (i) appropriate stamp or markings on the document exchanged, or (ii) written notice, with attached listings of all material, copies of all documents, and complete summaries of all oral disclosures (under prior assertion of the confidential nature of the same) to which each notice relates, delivered within thirty (30) days of the disclosure to the other party. For clarity, Confidential Information includes the Disclosing Party's roadmaps, code, documents, designs, statements, specifications, trade secrets, inventions, or know-how related to the Disclosing Party's business, finances, clients, prospects, partners, operations, intellectual property, sales and marketing, strategy, results, and other sensitive information that the Disclosing Party would reasonably expect to be kept confidential.
- B. Confidential Information shall not include A&M System Data. "Confidential Information" does not include information that: (i) is or becomes publicly known or available other than as a result of a breach of this Agreement by the Receiving Party; (ii) was already in the possession of the Receiving Party as the result of disclosure by an individual or entity that was not then obligated to keep that information confidential; (iii) the Disclosing Party had disclosed or discloses to an individual or entity without confidentiality restrictions; or (iv)

the Receiving Party had developed or develops independently before or after the Disclosing Party discloses equivalent information to the Receiving Party.

- C. The Receiving Party shall handle Confidential Information with the same care that the Receiving Party uses to protect its own information of comparable sensitivity, but not less than reasonable care. The Receiving Party may use Confidential Information only for purposes of performing its obligations under this Agreement and an Order Form and may disclose Confidential Information only to the Receiving Party's employees, contractors, agents, and other representatives ("Representatives") having a need to know the Confidential Information to fulfill the Receiving Party's obligations under this Agreement and an Order Form, provided that they are subject to confidentiality obligations not less restrictive than those set forth herein, and the Receiving Party remains responsible for its Representatives' compliance with the obligations under this Section.
- D. The Receiving Party shall promptly notify the Disclosing Party of any known unauthorized disclosure, misappropriation, or misuse of Confidential Information and shall take prompt and effective steps to prevent a recurrence of such misappropriation or misuse.
- E. If the Receiving Party is legally required to disclose Confidential Information, the Receiving Party shall, to the extent allowed by law, promptly give the Disclosing Party written notice of the requirement so as to provide the Disclosing Party a reasonable opportunity to pursue appropriate process to prevent or limit the disclosure. If the Receiving Party complies with the terms of this Section, disclosure of that portion of the Confidential Information, which the Receiving Party is legally required to disclose, will not constitute a breach of this Agreement or an Order Form.
- F. The Receiving Party shall, upon request of the Disclosing Party, promptly return or destroy all materials embodying Confidential Information other than materials in electronic backup systems or otherwise not reasonably capable of being readily located and segregated except that the Receiving Party may securely retain one (1) copy in its files solely for record purposes. The Receiving Party's obligations as to Confidential Information will survive the termination or expiration of this Agreement or an Order Form for a period of one (1) year.

6. INTELLECTUAL PROPERTY

- A. PROVIDER shall retain all rights, title, and interest in and to the Services and to any developments related thereto. PROVIDER represents and warrants that: (i) it has the full right, power, and authority to grant the rights and licenses to Members; (ii) at the time of entering into this Agreement the Services do not infringe upon or violate any copyright, patent, trademark, or other proprietary or intellectual property rights of any third party; (iii) the Services will perform substantially in accordance with PROVIDER's marketing materials and documentation, including without limitation, any user guides, technical specifications, training materials, instructions, documented policies or other written materials regarding the Services that are posted, delivered or otherwise made available by PROVIDER to Members; and (iv) PROVIDER and each of its employees, subcontractors, or agents who will perform the Services has the necessary knowledge, skill, experience, and qualifications to provide and perform the Services in accordance with this Agreement, and the Services will be performed for and delivered to Members in a diligent, professional, workmanlike manner in accordance with industry standards.
- B. Subject to the statutory duties of the Texas Attorney General, PROVIDER shall indemnify, defend and hold harmless the A&M SYSTEM, Members, and their regents, employees, and agents (collectively, the "A&M System Indemnitees") from any Claim arising from or

related to an allegation that any of the Services infringe upon, misappropriate, or otherwise violate the intellectual property rights of a third party (“Infringement Claim”). If the Services become or are likely to become the subject of an Infringement Claim, then PROVIDER may, at its expense and option, either: (a) replace or modify the Services to make them non-infringing, while maintaining equivalent functionality; (b) procure for the Members the right to continue using the Services pursuant to this Agreement; or (c) terminate this Agreement and refund the Members, on a pro-rata basis, the amount of any prepaid fees.

7. COMPLIANCE WITH LAWS

- A. PROVIDER shall comply with all federal, state, and local laws, rules, and regulations applicable to the performance of its obligations under this Agreement.
- B. Each Party shall comply with U.S. export control regulations. If either Party desires to disclose to the other Party any information, technology, or data that is identified on any U.S. export control list, the disclosing Party shall advise the other Party at or before the time of intended disclosure and may not provide export-controlled information to the other Party without the written consent of the other Party. PROVIDER certifies that none of its personnel participating in the activities under this Agreement is a “restricted party” as listed on the Denied Persons List, Entity List, and Unverified List (U.S. Department of Commerce), the Debarred Parties Lists (U.S. Department of State), the Specially Designated Nationals and Blocked Persons List (U.S. Department of Treasury), or any similar governmental lists.
- C. If applicable, for purposes of the Family Educational Rights and Privacy Act (“FERPA”), Member hereby designates PROVIDER as a school official with a legitimate educational interest in any education records (as defined in FERPA) that PROVIDER is required to create, access, receive, or maintain in order to fulfill its obligations under this Agreement. PROVIDER shall comply with FERPA as to any such education records and is prohibited from redisclosure of the education records except as provided for in this Agreement or otherwise authorized by FERPA or Member in writing. PROVIDER is only permitted to use the education records for the purpose of fulfilling its obligations under this Agreement and shall restrict disclosure of the education records solely to those employees, subcontractors or agents who have a need to access the education records for such purpose. PROVIDER shall require any such subcontractors or agents to comply with the same restrictions and obligations imposed on PROVIDER in this Section, including without limitation, the prohibition on redisclosure. PROVIDER shall implement and maintain reasonable administrative, technical, and physical safeguards to secure the education records from unauthorized access, disclosure or use.

8. INDEMNIFICATION

Subject to the statutory duties of the Texas Attorney General and any other limitations set out herein and in any Order Form, PROVIDER shall indemnify, defend and hold harmless the A&M System Indemnitees from and against any third-party claim, damage, liability, expense or loss asserted against the A&M System Indemnitees (each, a “Claim”) arising out of PROVIDER’s negligence or willful errors or omissions under this Agreement.

9. INSURANCE

Insurance requirements as stated within Exhibit B, attached hereto.

10. INFORMATION TECHNOLOGY

- A. **Electronic and Information Resources.** PROVIDER represents and warrants that the electronic and information resources and all associated information, documentation, and support that it provides to a Member under this Agreement and an Order Form (collectively, the "EIRs") comply with the applicable requirements set forth in Title 1, Chapter 213 of the Texas Administrative Code and Title 1, Chapter 206 of the Texas Administrative Code (as authorized by Chapter 2054, Subchapter M of the Texas Government Code) (the "EIR Accessibility Warranty"). If PROVIDER becomes aware that the EIRs, or any portion thereof, do not comply with the EIR Accessibility Warranty, PROVIDER shall, at no cost to the Member and in a manner and timeframe commensurate with the severity of the non-compliance, either (1) perform all necessary remediation to make the EIRs satisfy the EIR Accessibility Warranty or (2) replace the EIRs with new EIRs that satisfy the EIR Accessibility Warranty. In the event that PROVIDER fails or is unable to do so, A&M SYSTEM and the Member may immediately terminate this Agreement and/or an Order Form.
- B. **Access to Agency Data.** Pursuant to Section 2054.138, Texas Government Code, PROVIDER shall implement and maintain appropriate administrative, technical, and physical security measures, including without limitation, the security control baseline required by the then-current risk and authorization management program established by the Texas Department of Information Resources ("TX-RAMP"), to safeguard and preserve the confidentiality, integrity, and availability of A&M System's data ("Security Controls"). Upon written request by the Member, PROVIDER shall periodically provide the Member with evidence or certification of its compliance with the Security Controls within thirty (30) days of such request.
- C. **Cloud Computing Services.** As of the Effective Date, PROVIDER represents and warrants that it complies with the then-current requirements of TX-RAMP. Pursuant to Section 2054.0593, Texas Government Code, PROVIDER shall maintain TX-RAMP compliance and certification, as may be amended from time to time, throughout the Term, including any renewal term of this Agreement. PROVIDER shall provide the Member with evidence of its TX-RAMP compliance and certification within thirty (30) days of the Member's request and at least thirty (30) days prior to the start of any renewal term of this Agreement. In the event that PROVIDER fails to maintain TX-RAMP compliance and certification throughout the Term, including any Renewal Term, A&M System and the Member may immediately terminate this Agreement and or an Order Form, and PROVIDER will provide a refund to the Member of any prepaid fees.
- D. **Cybersecurity Training Program.** Pursuant to Section 2054.5192, Texas Government Code, PROVIDER and its employees, officers, and subcontractors who have access to the Member's computer system and/or database must complete a cybersecurity training program certified under Section 2054.519, Texas Government Code, and selected by the Member. The cybersecurity training program must be completed by PROVIDER and its employees, officers, and subcontractors during the Term and any renewal period of this Agreement. PROVIDER shall verify completion of the program in writing to the Member within the first thirty (30) calendar days of the Term and any renewal period of this Agreement. PROVIDER acknowledges and agrees that its failure to comply with the requirements of this Section are grounds for A&M SYSTEM and the Member to terminate this Agreement and/or an Order Form for cause.

11. MISCELLANEOUS

- A. **Entire Agreement.** This Agreement constitutes the entire and only agreement between the Parties hereto and supersedes any prior understanding, written or oral agreements

between the Parties, or “side deals” which are not described in this Agreement. This Agreement may be amended only by a subsequent written agreement signed by authorized representatives of both parties. In the event of a conflict between the terms of this Agreement and any other documents constituting part of this Agreement, the terms of this Agreement shall control.

- B. **Authority to Contract.** Each Party represents and warrants that it has full right, power and authority to enter into and perform its obligations under this Agreement, and that the person signing this Agreement is duly authorized to enter into this Agreement on its behalf.
- C. **Representations & Warranties.** If PROVIDER is a business entity, PROVIDER warrants, represents, covenants, and agrees that it is duly organized, validly existing and in good standing under the laws of the state of its incorporation or organization and is duly authorized and in good standing to conduct business in the State of Texas, that it has all necessary power and has received all necessary approvals to execute and deliver this Agreement, and the individual executing this Agreement on behalf of PROVIDER has been duly authorized to act for and bind PROVIDER.
- D. **Independent Contractor.** Notwithstanding any provision of this Agreement to the contrary, the Parties hereto are independent contractors. No employer-employee, partnership, agency, or joint venture relationship is created by this Agreement or by PROVIDER’s Service to Member. Except as specifically required under the terms of this Agreement, PROVIDER (and its representatives, agents, employees and subcontractors) will not represent themselves to be an agent or representative of A&M SYSTEM or Members. As an independent contractor, PROVIDER is solely responsible for all taxes, withholdings, and other statutory or contractual obligations of any sort, including but not limited to workers’ compensation insurance. PROVIDER and its employees shall observe and abide by all applicable A&M SYSTEM and Members policies, regulations, rules and procedures, including those applicable to conduct on its premises.
- E. **Use of Name.** Each Party acknowledges that all rights in any trademarks, service marks, slogans, logos, designs, and other similar means of distinction associated with that Party (its “Marks”), including all goodwill pertaining to the Marks, are the sole property of that Party. Neither Party may use the Marks of the other without the advance written consent of that Party, except that each Party may use the name of the other Party in factual statements that, in context, are not misleading. The Parties will mutually agree in advance upon any public announcements, or communications to the media regarding this Agreement or the Services to be provided pursuant to this Agreement.
- F. **Non-Assignment.** PROVIDER shall neither assign its rights nor delegate its duties under this Agreement without the prior written consent of A&M SYSTEM or Members.
- G. **Severability.** In case any one or more of the provisions contained in this Agreement shall, for any reason, be held to be invalid, illegal, or unenforceable in any respect, such invalidity, illegality, or unenforceability shall not affect any other provisions hereof, and this Agreement shall be construed as if such invalid, illegal, and unenforceable provision had never been contained herein. The Parties agree that any alterations, additions, or deletions to the provisions of the Agreement that are required by changes in federal or state law or regulations are automatically incorporated into the Agreement without written amendment hereto and shall become effective on the date designated by such law or by regulation.

- H. **Survival.** Any provision of this Agreement that may reasonably be interpreted as being intended by the Parties to survive the termination or expiration of this Agreement will survive the termination or expiration of this Agreement.
- I. **Force Majeure.** Neither Party shall be held liable or responsible to the other Party nor be deemed to have defaulted under or breached this Agreement for failure or delay in fulfilling or performing any obligation under this Agreement if and to the extent such failure or delay is caused by or results from causes beyond the affected Party's reasonable control, including, but not limited to, acts of God, strikes, riots, flood, fire, epidemics, natural disaster, embargoes, war, insurrection, terrorist acts or any other circumstances of like character; provided, however, that the affected Party has not caused such force majeure event(s), shall use reasonable commercial efforts to avoid or remove such causes of nonperformance, and shall continue performance hereunder with reasonable dispatch whenever such causes are removed. Either Party shall provide the other Party with prompt written notice of any delay or failure to perform that occurs by reason of force majeure, including describing the force majeure event(s) and the actions taken to minimize the impact of such event(s).
- J. **Notices.** Any notice required or permitted under this Agreement must be in writing, and shall be deemed given: (i) three (3) business days after it is deposited and post-marked with the United States Postal Service, postage prepaid, certified mail, return receipt requested, (ii) the next business day after it is sent by overnight carrier, (iii) on the date sent by email transmission with electronic confirmation of receipt by the party being notified, or (iv) on the date of delivery if delivered personally. A&M SYSTEM and PROVIDER can change their respective notice address by sending to the other Party a notice of the new address. Notices should be addressed as follows:
- A&M SYSTEM: The Texas A&M University System
 301 Tarrow St., Suite 273
 College Station, Texas 77840
 Attention: Jeff Zimmermann
 Phone: (979) 458-6410
 E-mail: jzimmermann@tamus.edu
- PROVIDER: D2L LTD
 210 West Pennsylvania Ave, Suite 400A
 Towson, MD 21204
 Attention: Sebastia Jimenez
 Phone: 519-716-2925
 Email: Sebastian.Jimenez@D2L.com
- K. **Governing Law.** The validity of this Agreement and all matters pertaining to this Agreement, including but not limited to, matters of performance, non-performance, breach, remedies, procedures, rights, duties, and interpretation or construction, shall be governed and determined by the Constitution and the laws of the State of Texas.
- L. **Venue.** Pursuant to Section 85.18(b), *Texas Education Code*, mandatory venue for all legal proceedings against A&M SYSTEM or Members is to be in the county in which the principal office of A&M SYSTEM's or Member's governing officer is located.
- M. **Non-Waiver.** A&M SYSTEM and Members are an agency of the state of Texas and under the Constitution and the laws of the state of Texas possesses certain rights and privileges, is subject to certain limitations and restrictions, and only has authority as is granted to it under the Constitution and the laws of the state of Texas. PROVIDER expressly

acknowledges that A&M SYSTEM and Members are an agency of the state of Texas and nothing in this Agreement will be construed as a waiver or relinquishment by A&M SYSTEM and Members of their right to claim such exemptions, remedies, privileges, and immunities as may be provided by law, including the sovereign immunity of A&M SYSTEM and Members.

- N. **Dispute Resolution.** To the extent that Chapter 2260, Texas Government Code is applicable to this Agreement, the dispute resolution process provided in Chapter 2260, and the related rules adopted by the Texas Attorney General pursuant to Chapter 2260, shall be used by A&M SYSTEM, Members and PROVIDER to attempt to resolve any claim for breach of contract made by PROVIDER that cannot be resolved in the ordinary course of business. PROVIDER shall submit written notice of a claim of breach of contract under this Chapter to the Contracts Officer of A&M SYSTEM or the applicable Member, who shall examine PROVIDER's claim and any counterclaim and negotiate with PROVIDER in an effort to resolve the claim. This provision and nothing in this Agreement waives A&M SYSTEM's or Member's sovereign immunity to suit or liability, and A&M SYSTEM and Members have not waived their right to seek redress in the courts.
- O. **Public Information Act.** PROVIDER acknowledges that A&M SYSTEM and Members are obligated to strictly comply with the Public Information Act, Chapter 552, Texas Government Code, in responding to any request for public information pertaining to this Agreement, as well as any other disclosure of information required by applicable Texas law. Upon A&M SYSTEM's and Member's written request, PROVIDER will promptly provide specified contracting information exchanged or created under this Agreement for or on behalf of A&M SYSTEM or Members to A&M SYSTEM or Members in a non-proprietary format acceptable to A&M SYSTEM or Members that is accessible by the public. PROVIDER acknowledges that A&M SYSTEM and Members may be required to post a copy of the fully executed Agreement on its Internet website in compliance with Section 2261.253(a)(1), Texas Government Code. The requirements of Subchapter J, Chapter 552, Texas Government Code, may apply to this Agreement and PROVIDER agrees that this Agreement can be terminated if PROVIDER knowingly or intentionally fails to comply with a requirement of that subchapter.
- P. **Certification Regarding Business with Certain Countries and Organizations.** PROVIDER represents and warrants that it is not engaged in business with Iran, Sudan, or a foreign terrorist organization, as prohibited by Section 2252.152, Texas Government Code. PROVIDER acknowledges this Agreement may be terminated immediately if this certification is inaccurate.
- Q. **Certification Regarding Products from the Gaza Strip.** To the extent that PROVIDER is providing goods to a Member under this Agreement, PROVIDER represents and warrants that the goods are not produced in or exported from the Gaza Strip or from any organization or state actor with ties to Hamas.
- R. **Delinquent Child Support Obligations.** A child support obligor who is more than 30 days delinquent in paying child support and a business entity in which the obligor is a sole proprietor, partner, shareholder, or owner with an ownership interest of at least 25 percent is not eligible to receive payments from state funds under an agreement to provide property, materials, or services until all arrearages have been paid or the obligor is in compliance with a written repayment agreement or court order as to any existing delinquency. Under Section 231.006, Texas Family Code, PROVIDER certifies that it is not ineligible to receive the payments under this Agreement and acknowledges that this

Agreement may be terminated and payment may be withheld if this certification is inaccurate.

- S. **Payment of Debt or Delinquency to the State.** Pursuant to Sections 2107.008 and 2252.903, Texas Government Code, PROVIDER agrees that any payments owing to PROVIDER under this Agreement may be applied directly toward certain debts or delinquencies that PROVIDER owes the State of Texas or any agency of the State of Texas regardless of when they arise, until such debts or delinquencies are paid in full.
- T. **State Auditor's Office.** PROVIDER understands that acceptance of funds under this Agreement constitutes acceptance of the authority of the Texas State Auditor's Office, or any successor agency (collectively, "Auditor"), to conduct an audit or investigation in connection with those funds pursuant to Section 51.9335(c), Texas Education Code. PROVIDER agrees to cooperate with the Auditor in the conduct of the audit or investigation, including without limitation, providing all records requested. PROVIDER will include this provision in all contracts with permitted subcontractors.
- U. **HUB Subcontracting Plan.** It is the policy of the state of Texas, A&M SYSTEM and Members to encourage the use of Historically Underutilized Businesses ("HUB") in our contracts, purchasing transactions and through subcontracting opportunities. The goal of the HUB program is to promote equal access and equal opportunity to HUB vendors in A&M SYSTEM and Member contracting and purchasing. PROVIDER has indicated it will not subcontract any of its duties or obligations under this Agreement. If PROVIDER will subcontract any of its duties and obligations under this Agreement, PROVIDER will be required to provide prior written notice to A&M SYSTEM and Members and make a good faith effort to submit a HUB subcontracting plan as required under Section 20.285 of the Texas Administrative Code.
- V. **Prohibition on Contracts with Companies Boycotting Israel.** To the extent that Chapter 2271, Texas Government Code, is applicable to this Agreement, PROVIDER certifies that (a) it does not currently boycott Israel, and (b) it will not boycott Israel during the Term of this Agreement. PROVIDER acknowledges this Agreement may be terminated and payment withheld if this certification is inaccurate.
- W. **Verification Regarding Discrimination Against Firearm Entities and Trade Associations.** To the extent that Chapter 2274, Texas Government Code, is applicable to this Agreement, PROVIDER verifies that (1) it does not have a practice, policy, guidance, or directive that discriminates against a firearm entity or firearm trade association, and (2) will not discriminate during the term of this Agreement against a firearm entity or firearm trade association.
- X. **Verification Regarding Boycotting Energy Companies.** To the extent that Chapter 2274, Texas Government Code, is applicable to this Agreement, PROVIDER verifies that (1) it does not boycott energy companies, and (2) it will not boycott energy companies during the term of this Agreement. PROVIDER acknowledges this Agreement may be terminated and payment withheld if this verification is inaccurate.
- Y. **Loss of Funding.** Performance by A&M SYSTEM and Members under this Agreement may be dependent upon the appropriation and allotment of funds by the Texas State Legislature (the "Legislature"). If the Legislature fails to appropriate or allot the necessary funds, A&M SYSTEM and Members will issue written notice to PROVIDER and A&M SYSTEM and Members may terminate this Agreement without further duty or obligation hereunder. PROVIDER acknowledges that appropriation of funds is beyond the control of A&M SYSTEM and Members. In the event of a termination or cancellation under this

Section, A&M SYSTEM and Members will not be liable to PROVIDER for any damages that are caused or associated with such termination or cancellation.

- Z. **Prior Employment.** PROVIDER acknowledges that Section 2252.901, Texas Government Code, prohibits A&M SYSTEM and Members from using state appropriated funds to enter into an employment contract, a professional services contract under Chapter 2254, or a consulting services contract under Chapter 2254 with individual who has been previously employed by A&M SYSTEM and Members during the twelve (12) month period immediately prior to the effective date of the Agreement. If PROVIDER is an individual, by signing this Agreement, PROVIDER represents and warrants that it is not a former or retired employee of A&M SYSTEM or Members that was employed by A&M SYSTEM or Members during the twelve (12) month period immediately prior to the effective date of the Agreement.
- AA. **Conflict of Interest.** PROVIDER certifies, to the best of their knowledge and belief, that no member of the A&M System’s Board of Regents, nor any officer of A&M SYSTEM or Members, has a direct or indirect financial interest in PROVIDER or in the transaction that is the subject of the Agreement.
- BB. **Franchise Tax Certification.** If PROVIDER is a taxable entity subject to the Texas Franchise Tax (Chapter 171, *Texas Tax Code*), then PROVIDER certifies that it is not currently delinquent in the payment of any franchise (margin) taxes or that PROVIDER is exempt from the payment of franchise (margin) taxes.
- CC. **Not Eligible for Rehire.** PROVIDER is responsible for ensuring that its employees involved in any work being performed for A&M SYSTEM or Members under this Agreement have not been designated as “Not Eligible for Rehire” as defined in System policy 32.02, *Discipline and Dismissal of Employees*, Section 4 (“NEFR Employee”). In the event A&M SYSTEM or Member becomes aware that PROVIDER has a NEFR Employee involved in any work being performed under this Agreement, A&M SYSTEM or Member will have the sole right to demand removal of such NEFR Employee from work being performed under this Agreement. Non-conformance to this requirement may be grounds for termination of this Agreement by A&M SYSTEM or Member.

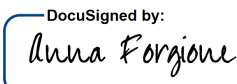
IN WITNESS WHEREOF, the Parties have entered into this Agreement as of the Effective Date.

The Texas A&M University System

D2L Ltd.

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 By: _____
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DocuSigned by:

 By: _____
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Name: _____
Jeff Zimmerman

Name: _____
Anna Forgiione

Title: _____
Executive Director, Procurement Services

Title: _____
Chief Legal Officer and Corporate Secretary

Date: _____
March 28, 2024 | 8:02 AM EDT

Date: _____
March 28, 2024 | 1:00 PM EDT

Exhibit A – Fee Rate Schedule

Pricing Schedule – Texas A&M Systems - October 1, 2023

Software Tier Pricing					
User/FTE Count	<2,000	2,000-5000	5,000-10,000	10,000—15,000	15,000+
Brightspace Core: Higher Education (FTE)	\$15.00	\$14.50	\$14.00	\$13.00	Call D2L
Brightspace Core: Higher Education (Active User PD / Continuing Education)	\$10.50	\$10.15	\$9.80	\$9.10	Call D2L

Software Add-Ons	
Performance Plus*	30% of Brightspace Core Pricing
Creator Plus*	30% of Brightspace Core Pricing
Performance & Creator Plus*	50% of Brightspace Core Pricing
*Requires a minimum of Plus Admin Support	

Support Options	
Basic Admin Support	Included
Select Admin Support	8% of Software Fees (minimum \$2,000 per year)
Plus Admin Support	15% of Software Fees (minimum \$3,000 per year)
Premium Admin Support	30% of Software Fees (minimum \$45,000 per year)

Implementation Package Options	
Higher Education Enhance Implementation	\$45,000
Higher Education Innovate Implementation	\$108,000

Implementation Add-Ons (all segments)		
User/FTE Count	0-50,000	50,000+
Performance Plus Implementation Options		
Brightspace Insights Implementation	\$1,300.00	Call D2L
Brightspace Student Success System Implementation	\$7,000.00	Call D2L
Brightspace LeaP Implementation	\$8,000.00	Call D2L
Additional Org & Business Unit Implementation Options		
Additional Org Implementation	\$4,000.00	Call D2L
Additional Org Annual Maintenance	\$500.00/yr.	Call D2L
Additional Business Unit – Standard Services	\$10,000.00	Call D2L
Additional Non-Production Environment - Cloud Services	\$5,000/yr.	Call D2L
Additional Non-Production Environment Annual Maintenance	\$4,500/yr.	Call D2L
Additional Non-Production Environment Implementation	\$3,500.00	Call D2L

Included with D2L's Implementation Package
Migrate Implementation includes Brightspace Guided Training, 2 seats in the Brightspace Certificate Program, 2 hours of training consultation and 10 hours of private training.
Enhance Implementation includes Brightspace Guided Training, 2 seats in the Brightspace Certificate Program, 2 hours of training consultation, 2 hours Q&A and 18 hours of private training.
Innovate Implementation includes Brightspace Guided Training, 4 seats in the Brightspace Certificate Program, 4 hours of training consultation, 2 hours Q&A and 30 hours of private training.

Training Add-Ons		
Description	Cost	Type
Brightspace Guided Training Premium - Up to 500 Users	\$3,900	Annual
Brightspace Guided Training Premium - 501 to 1000 Users	\$5,300	Annual
Brightspace Guided Training Premium - 1000 to 2000 Users	\$10,000	Annual
Brightspace Guided Training Premium - 2000+ Users	\$20,000	Annual
Additional Private Training - One Block	\$1,000	One-Time
Additional Private Training - Two Blocks	\$1,800	One-Time
Additional Private Training - Three Blocks	\$2,500	One-Time
Getting Started with Data (Core)	\$4,900	One-Time
Getting Started with Data (Performance+)	\$4,900	One-Time

Support Add-Ons		
Description	Cost	Type
Basic End User Support	\$2.25/User or FTE (minimum \$3,000/yr.)	Annual
Select End User Support	\$3.25/User or FTE (minimum \$15,000/yr.)	Annual
Branded End User Support**	\$4.25/User or FTE (minimum \$45,000/yr.)	Annual
Technical Account Manager 1:10	\$30,000	Annual
Technical Account Manager 1:5	\$60,000	Annual
Technical Account Manager 1:2	\$125,000	Annual
Technical Account Manager 1:1	\$250,000	Annual
Learning Administration Manager Select - Multi Year	\$28,500	Annual
Learning Administration Manager Select - Single Year	\$33,000	Annual
Learning Administration Manager Plus - Multi Year	\$47,500	Annual
Learning Administration Manager Plus - Single Year	\$62,000	Annual
Learning Administration Manager Premium - Multi Year	\$135,000	Annual
Learning Administration Manager Premium - Single Year	\$150,000	Annual
<i>**Minimum Plus Admin Support required</i>		

Integration Add-Ons		
Description	Cost	Type
Premium SIS Integration Implementation	\$18,500	One-Time
Premium SIS Integration Maintenance	\$6,500/yr.	Annual
Authentication (LDAP, SSO, SAML) Implementation	\$2,500	One-Time
Authentication (LDAP, SSO, SAML) Annual Maintenance	\$500/yr.	Annual

Course Merchant		
Description	Cost	Type
Course Merchant Implementation	\$10,000.00	One-Time

Course Merchant Full Day Training	\$1,250.00	One-Time
Course Merchant Work Pack	\$5,000.00	One-Time
1,500 Orders Annually	\$4,625.00	Annual
5,000 Orders Annually	\$7,625.00	Annual
10,000 Orders Annually	\$10,625.00	Annual
25,000 Orders Annually	\$19,625.00	Annual
100,000 Orders Annually	\$51,875.00	Annual
Over 100,000 Orders Annually	Contact D2L	Annual

Creative Services Add-Ons		
Description	Cost	Type
Learning and Creative Services	\$175	Hourly
Learning & Creative Services - Credentials	\$9,900	One-Time
Course Uplift	\$14,000	One-Time
Courseware Accessibility Audit	\$10,000	One-Time
HTML Templates	\$5,000	One-Time
Homepage Widget Expansion Pack – 1 Widget	\$2,000	One-Time
Language Pack	\$4,200	One-Time

Description	Cost	Type
Advisory & Consulting Services	\$200.00	Hourly
Data Solutions Consulting (Hourly)	\$275.00	Hourly
Data Solutions Consulting (1 Month)	\$8,500.00	One-Time
Data Solutions Consulting (3 Months)	\$24,500.00	One-Time
Data Solutions Consulting (6 Months)	\$44,000.00	One-Time
Data Solutions Consulting (12 Months)	\$82,000.00	One-Time
DSC - Data Analyst Subscription Premium	\$72,000.00	One-Time
DSC - Data Analyst Subscription Select	\$40,000.00	One-Time
Custom Data Report - Select (1 report)	\$5,000.00	One-Time
Custom Data Report - Plus (5 reports)	\$23,750.00	One-Time
Custom Data Report - Premium (10 reports)	\$45,000.00	One-Time
One Day Data Consulting	\$1,500.00	Daily
Services Customization Level 1	\$185.00	Hourly
Services Customization Level 2	\$215.00	Hourly
Services Customization Level 3	\$300.00	Hourly
Premium Disaster Recovery	\$25,000.00	One-Time

Additional Pricing Terms

1. D2L is pleased to offer new institutions where they are purchasing as part of the Texas Credentials Initiatives the following benefits:

- Course Merchant standard implementation at no additional cost (represents a \$10,000 value)
- Learning and Creative Services – Credentials at a reduced fee of \$5,000 (Priced at \$9,900).

2. D2L will also offer to any new customers our Performance Plus solution with no annual license fees for the first year of the initial contract term. A one-time implementation fee will apply (listed in the Implementation Add-Ons section) and requires either Plus Support or Platinum Support as detailed in the Support section in the pricing table.

- Contract term conditions: "5-year contract with 3% annual increase during initial contract term, with 50% transition discount for new D2L customers on Annual Fees in Year 1
- Pricing tiers are based on the total number of FTEs within a single institution or purchase.
- Minimum annual Brightspace Core license fees are set at \$20,000 per institution.

Note: This pricing shall be based with the understanding that each Member will determine which LMS to implement from the awarded Vendor according to its needs. D2L may provide additional pricing options that would provide discounts if multiple Members selected its LMS.

Exhibit B - Insurance

1. PROVIDER shall obtain and maintain, for the duration of this Agreement or longer, the minimum insurance coverage set forth below. All coverage shall be written on an occurrence basis. All coverage shall be underwritten by companies authorized to do business in the State of Texas or eligible surplus lines insurers operating in accordance with the Texas Insurance Code and have a financial strength rating of A- or better and a financial strength rating of VII or better as measured by A.M. Best Company or otherwise acceptable to MEMBER. By requiring such minimum insurance, MEMBER shall not be deemed or construed to have assessed the risk that may be applicable to PROVIDER under this Agreement. PROVIDER shall assess its own risks and if it deems appropriate and/or prudent, maintain higher limits and/or broader coverage. PROVIDER is not relieved of any liability or other obligations assumed pursuant to this Agreement by reason of its failure to obtain or maintain insurance in sufficient amounts, duration, or types. No policy will be canceled without unconditional written notice to MEMBER at least ten days before the effective date of the cancellation.

A. Worker's Compensation

Worker's compensation insurance with the following minimum limits of coverage:

Statutory Benefits (Coverage A)	Statutory
Employers Liability (Coverage B)	\$1,000,000 Each Accident
	\$1,000,000 Disease/Employee
	\$1,000,000 Disease/Policy Limit

Workers' compensation policy must include under Item 3.A., on the information page of the workers' compensation policy, the state in which work is to be performed for MEMBER. Workers' compensation insurance is required, and no "alternative" forms of insurance will be permitted.

B. Automobile Liability

Business auto liability insurance covering all owned, non-owned or hired automobiles, with limits of not less than \$1,000,000 single limit of liability per accident for bodily injury and property damage;

C. Commercial General Liability

Commercial general liability insurance with the following minimum limits of coverage:

Each Occurrence Limit	\$1,000,000
General Aggregate Limit	\$2,000,000
Products / Completed Operations	\$1,000,000
Personal / Advertising Injury	\$1,000,000
Damage to rented Premises	\$300,000
Medical Payments	\$5,000

The required commercial general liability policy must be issued on a form that insures PROVIDER's or its subcontractors' liability for bodily injury (including death), property damage, personal and advertising injury assumed under the terms of this Agreement.

D. Umbrella Liability Insurance \$5,000,000

E. Cyber Liability

PROVIDER shall procure and maintain, for the duration of this Agreement and for such length of time as is necessary to cover any and all claims, cyber liability insurance with limits not less than \$2,000,000 per occurrence or claim, \$2,000,000 aggregate. The cyber liability policy shall be sufficiently broad to cover PROVIDER's duties and obligations under this Agreement and include coverage for claims involving: invasion of privacy; loss, damage, theft, alteration or other misuse of data; unauthorized exposure or breach of data; privacy event expenses such as mandatory/voluntary notification costs, credit monitoring, call center services, forensic costs, and any other fees, costs, or expenses necessary to comply with any applicable breach notification laws; privacy regulatory proceedings (including fines and penalties); cyber extortion payments; and network security.

2. PROVIDER shall deliver to MEMBER evidence of insurance on a Texas Department of Insurance approved certificate form verifying the existence and actual limits of all insurance prior to the execution and delivery of this Agreement and prior to the performance of any services by PROVIDER under this Agreement. PROVIDER shall provide additional evidence of insurance on a Texas Department of Insurance approved certificate form verifying the continued existence of all required insurance no later than thirty (30) days after each annual insurance policy renewal.
3. Commercial General Liability and Auto Liability policies must be endorsed to name The Texas A&M University System Board of Regents ("Board of Regents"), The Texas A&M University System ("A&M System") and MEMBER as additional insureds up to the actual liability limits of the policies maintained by PROVIDER. The commercial general liability additional insured endorsements must include on-going and completed operations afforded by CG 20 10 (10 01 Edition or equivalent) and CG 20 37 (10 01 Edition or equivalent). Copies of each endorsement must be submitted with the certificate of insurance. The Umbrella policy, at minimum, must follow form.
4. All insurance policies will be endorsed to require the insurance carrier providing coverage to send notice to MEMBER thirty (30) days prior to the effective date of cancellation or non-renewal relating to any insurance policy.
5. Any deductible or self-insured retention must be declared to and approved by MEMBER prior to the performance of any services by PROVIDER under this Agreement. PROVIDER shall pay any deductible or self-insured retention for any loss. All deductibles and self-insured retentions must be shown on the certificates of insurance.
6. Certificates of Insurance and Additional Insured Endorsements as required by this Agreement will be forwarded to: SOProurement@tamus.edu
7. The insurance coverage required by this Agreement must be kept in force until all services have been fully performed and accepted by MEMBER in writing.
8. Certificate Holder should read as follow:

The Board of Regents for and on Behalf of The Texas A&M University System
The Texas A&M University System
301 Tarrow St.
College Station, TX 77840

Exhibit C – D2L Order Form and Standard Terms and Conditions

Order Form

ORDER# Q-xxxxx **D2L Ltd.**
ORDER DATE 210 West Pennsylvania Avenue, Suite 400A
OFFER EXPIRATION DATE Towson, MD 21204

CLIENT

Client Name ("Client")
Client Address

ORDER START DATE	ORDER END DATE
CURRENCY	U.S. Dollar

Pricing Summary

ITEM	YEAR 1
Fees Due	
Discounts	\$
Services	\$
Total	\$

Pricing quoted is in U.S. Dollar and does not include applicable taxes. Unless stated otherwise, pricing under this Order is valid for 30 days from the Order Date ("Offer Expiration Date").
If Client exceeds its entitled use under this Order, overage fees shall apply.

Pricing Details

Services

Services - Hourly Rate Level 2

Is your organization exempt from sales tax? If yes, kindly attach a copy of your sales tax exemption certificate to this Order Form.

Yes, sales tax exemption certificate is attached

No

SPECIAL TERMS AND CONDITIONS

This Order Form between D2L and Client is governed by the terms of the existing executed agreement between the Parties ("Agreement"), and may be accepted as a binding agreement under the Agreement provided that (a) it is signed and returned, or (b) a valid Purchase Order ("PO") referencing D2L's Order # above is provided. Unless otherwise indicated on this Order Form, all other terms of the Agreement remain in full force and effect. No modifications to this Order Form or supplemental terms provided on a PO or similar document will have any binding effect.

This Order Form is valid up to and inclusive of the Offer Expiration Date. D2L reserves the right to accept or reject any signed Order Form after the Expiration Date.

To accept this Order Form, sign
here: _____

Print Name: _____

Date: _____

Order Terms and Conditions

These terms and conditions, along with any document(s) signed or electronically agreed to by D2L and Client that accompany or reference these terms and conditions for D2L Services ("**Order**"), form the agreement ("**Agreement**") between the D2L entity signing the Order ("**D2L**") and the Client identified in the Order ("**Client**").

1. **Services.** D2L will provide the Services set out in the Order: "**Services**" means the applications made available to Client and/or any other material, duty, function or task D2L provides, facilitates, makes available or performs under this Agreement (including any Order and (if applicable) Statement of Work ("**SOW**"). D2L shall maintain and shall see that its vendors maintain commercially reasonable administrative, physical and technical safeguards for the security, privacy and integrity of Client Data (as defined in section 7 below), which may include relevant certifications such as ISO 27001 and SSAE 16 SOC 1 and SOC 2. Client acknowledges that Client's use of Services will involve transmission over the Internet and other networks, only part of which may be owned or controlled by D2L. D2L is not responsible for any Client Data which is delayed, lost, altered, intercepted or stored during the transmission of any data whatsoever across networks not owned or controlled by D2L. All Services, including implementation, training, consulting, and/or creative Services (collectively, "Professional Services") purchased by Client will be provided remotely unless otherwise agreed in a SOW. Client will provide to D2L at least five (5) days written notice prior to cancelling any scheduled Professional Services; if such prior notice is not provided, D2L may charge Client for the forfeited hours. Any changes to Professional Services provided under a SOW will be documented using a change request form that summarizes the agreed change and project impact (in terms of scope, budget, and schedule). If D2L believes that additional hours will be required under a SOW, D2L will notify Client and will not perform any additional hours unless Client has agreed in writing to the details. For clarity, D2L is under no obligation to perform any hours in excess of the number of hours agreed to in writing by the Client.

2. **Grant of Use.** Upon the start date listed in the relevant Order, D2L shall permit Client and its authorized users to use the Services in a non-exclusive, non-transferable, time-limited (revoked upon termination) manner as set forth in the Order by the specified number of users in the Order(s) for Client's own business purposes. Client may increase its number of such users upon paying the appropriate fee. Should Client not pay, D2L may terminate this Agreement. Client and its authorized users may use or access Services for its use only. D2L allocates up to 500MB of storage space per user for Brightspace Learning Environment and may charge additional fees of no more than \$8.00USD per GB per year in excess of the allocated amount. D2L may review the Client's usage no more than twice a year for the purpose of ensuring compliance by Client with the terms of this Agreement. If such review reveals that Client's use of Services exceeds its permitted use, Client shall pay D2L's then-current fees and reasonable administrative fees.

3. **Warranty.** D2L warrants that the Services will (i) achieve in all material respects, the functionality described in the applicable documentation, and (ii) be performed in accordance with industry standards and with the same level of care and skill as D2L provides to similarly-situated customers. Except as set forth in this Agreement, the Services are provided "as-is", and D2L makes no warranties, representations, or guarantees, express or implied, oral or written, with respect to the Services. D2L does not warrant that Services are error-free. D2L makes no warranties of merchantability, fitness for a particular purpose (including Client's compliance with its statutory or regulatory obligations), or arising from a course of performance, dealing, or usage of trade. There is no such thing as perfect security, and D2L cannot guarantee or warrant the security of any data that D2L receives and stores. Client assumes all responsibility for determining if the Services are sufficient for Client's purposes. To the extent that certain jurisdictions prohibit the exclusion of some warranties or provide additional warranties that are not provided above, such laws shall take precedence over this section.

4. **Confidentiality.** No party shall furnish **Confidential Information** (defined as technical, business, marketing, proprietary, trade secret, personal or other information in any form (e.g., oral, written, electronic)) to any unauthorized person or entity. No party shall be bound by confidentiality obligations if the Confidential Information (i) is required to be disclosed pursuant to court or regulatory order, provided that, where feasible, the owner of the Confidential Information is given a reasonable opportunity to limit the extent of disclosure; (ii) was already rightfully in its possession before the commencement of negotiations that led to this Agreement; (iii) is learned from a third party under no apparent duty of confidentiality and is not otherwise protected under law; or (iv) becomes part of the public domain other than as a result of a breach of this section and is not otherwise protected under law. If there is a Confidentiality Agreement ("**NDA**") in force between the parties, this section shall supersede and replace the NDA.

5. **Personal Information.** D2L shall not collect, use or disclose **Personal Information** (defined as any data, either alone or in combination with other information, by which a natural person can be identified or located, or that can be used to identify or locate a natural person) except to carry out its obligations under this Agreement. D2L shall limit access to Personal Information to those persons who require access in order to provide the Services hereunder. D2L shall handle Personal Information it receives from Client in accordance with applicable laws. D2L shall notify Client as soon as commercially practical of any inquiries regarding the collection, use or disclosure of Personal Information by D2L.

6. **Intellectual Property.** D2L and/or its vendors retains sole and exclusive ownership of and all intellectual property rights ("**IP**") in the Services, which include: tools, methodologies, questionnaires, responses, and proprietary research, data, requirements, specifications, and code generated in the course of performing the Services. The IP is protected by copyright laws and international copyright treaties, as well as other intellectual property laws and treaties. D2L reserves its rights and interests in connection with the IP, except as expressly granted to Client pursuant to this Agreement. D2L does not transfer any title to or interest in its IP. D2L may render services to others and develop work products that are competitive with, or functionally comparable to, the Services. Client may make the Services available to (i) its outside auditors and/or accountants, (ii) third parties who have signed appropriate confidentiality agreements with Client who are engaged by Client to review or implement suggestions or to further research the issues contained in the Services (provided such third parties are not competitors of D2L), and (iii) governmental or regulatory bodies as required by law. D2L shall not be restricted in its use of ideas, concepts, know-how, data and techniques acquired or learned in the course of performing the Services, provided that D2L shall not use or disclose any of Client's Confidential Information.

7. **Client Data and Branding.** Client owns and retains all right, title and interest to, or has appropriate possessory rights in any information, data, results, or other materials uploaded to or through the Service ("**Client Data**"). D2L makes no claim of title or ownership to or in Client Data, Client's logo, or Client's branding. Client permits D2L to use Client Data to the extent required to provide and perform the Services under this Agreement. D2L will comply with Client's branding guidelines where Client engages D2L to create a Client-branded offering of Services, and Client grants D2L non-exclusive, worldwide permission to use its logo and branding for the

sole purpose of creating, distributing and maintaining for Client a Client-branded version of Services. If Client provides D2L with materials owned or controlled by Client or with use of, or access to, such materials, Client grants to D2L all rights and licenses that are necessary for D2L to fulfill its obligations hereunder.

8. **Restrictions.** Client shall not (and shall not permit its users to) use or access the Services to: (i) decompile, disassemble, modify the source code of, or reverse engineer the IP; (ii) copy, modify, adapt, create derivative works, or translate the IP; (iii) rent, lease, license, lend, transfer, sublicense, assign, sell or otherwise transfer or provide access to the IP to any third party except as expressly authorized hereunder; (iv) use or allow anyone to use the Services to compete with D2L in any way; (v) alter, remove or cover proprietary notices in or on the IP. Any default in Client's obligations under this section may cause irreparable harm to D2L. If Client takes or threatens any action that may infringe on D2L's IP rights, D2L may seek injunctive or other equitable relief in addition to any damages to which D2L may be entitled.

9. **Support.** Support services are set out at <https://www.d2l.com/legal/d2l-support-schedule/> and are coterminous with this Agreement.

10. **Service Levels.** D2L will use reasonable commercial efforts to make the Brightspace Learning Environment available at least 99.9% of the time. Unavailability of the Services ("**Downtime**") may result in service credits under this section. Scheduled outages, maintenance windows, and other outages resulting from events beyond D2L's control are not included when calculating Downtime. Client shall report incidents to D2L Support that it considers Downtime immediately, but in no event later than 24 hours from when Client became aware of, or reasonably should have become aware of, the occurrence; failure to do so shall disentitle Client to any credit for that incident under this Agreement. In reporting, Client shall provide D2L sufficient information to investigate and classify the incident, including date, duration, and description of occurrence. D2L shall investigate and reasonably classify any reported outage/occurrences Downtime. In making its classification, D2L shall rely solely upon its own statistics software and monitoring equipment.

11. **Downtime Credit.** If after investigation and classification, D2L determines that Downtime during a calendar month was such that availability fell below the level stated in this section, Client may claim a credit on cloud hosting ("**Cloud Services**") fees during the relevant calendar month, calculated on the following basis:

Availability (x = Availability)	Client credit
99.9% <= x	N/A
99.5% <= x < 99.9%	1% of Client's Cloud Services fee for that calendar month
99% <= x < 99.5%	2.5% of Client's Cloud Services fee for that calendar month
98% <= x < 99%	5% of Client's Cloud Services fee for that calendar month
x < 98%	10% of Client's Cloud Services fee for that calendar month

For the purposes of calculating downtime credits for which Client may be eligible under this Agreement, the Cloud Service Fees for each Measurement Period shall be 1/12 of 20% of all annual Software Fees for the then-current contract year. For clarity, Support Fees are not included in the Software Fees if Support is priced separately. Any credit so determined may only be applied against subsequent Cloud Services fees invoiced for the next annual period and shall be Client's sole remedy if that Availability falls below the level stated in this section; provided, however, that if this Agreement or the relevant Order is terminated or expires such that the entire credit cannot be applied for Client's benefit, D2L shall promptly refund such amount to Client.

12. **Indemnification.** D2L shall defend Client from any direct costs, expenses, damages, judgments or settlements incurred because of an action or claim by third parties alleging that Client's use of the Services is an infringement of copyright, patent or registered trademark rights of a third party, but only if Client (i) promptly notifies D2L in writing of any claim; (ii) allows D2L to control the defense or settlement of the claim; and (iii) takes no action that, in D2L's reasonable judgment, impairs D2L's defense of the claim. This indemnity shall not apply to the extent that D2L is prejudiced by Client's delay or failure to notify D2L of a claim, or to the extent that the infringement claim results from (a) Client's unauthorized modification to the Services (b) Client's failure to install an update that would have avoided the claim; (c) the combination of the Services or deliverables with third party products where the third party products are not provided under this Agreement; (d) D2L's compliance with specifications furnished by Client; or (e) use of the Services or deliverables in a manner that is not in accordance with the documentation or applicable law. If a claim arises, D2L may (x) substitute equivalent non-infringing Services; (y) modify the Services so that they no longer infringe but remain functionally equivalent; or (z) if neither (x) nor (y) is reasonably commercially feasible, cancel the Agreement and refund any unused pro-rated amounts to Client. This section states the entire liability and obligation of D2L regarding infringement claims.

If a third party claims that any part of the Client Data infringes a copyright, patent or trademark or other intellectual property right of a third party, or there are claims arising out of Client's or its users' use of the Services in breach of this Agreement, Client will defend D2L against that claim at Client's expense and pay all costs, expenses, damages, and attorney's fees, provided that D2L: (i) promptly notifies Client in writing of any claim; (ii) allows Client to control the defense or settlement of the claim; and (iii) takes no action that, in Client's reasonable judgment, impairs Client's defense of the claim.

13. **Liability Limitations.** Except for (i) a party's indemnification obligations in section 12 or (ii) Disruptions as defined herein, a party's maximum aggregate liability for damages, costs, losses or expenses provided pursuant to this Agreement, in contract, tort or otherwise is limited to twelve (12) months of fees paid under the relevant Order under which the claim arose. The liability limitation is commensurate with the consideration paid under this Agreement. Neither party is liable for indirect, consequential or incidental damages, including loss of revenue, profits or data, even if the other party had advised of the possibility of such damages. Client is responsible for the Client Data and the content of its and its user's transmissions, including Client Data, over D2L's network. Client agrees that it and its users will not cause a "**Disruption**" defined as use of the Service for illegal purposes, to infringe the rights of a third party, or to interfere with or disrupt the Services, including distribution of unsolicited communications or chain letters, unsolicited advertising, defamatory, libelous or offending content, propagation of computer worms and viruses, unauthorized use of the network to enter, or attempt to enter, another system, or to affect or circumvent the integrity, performance or security of the Services through unauthorized tests, scans or probes, or an unreported vulnerability in Client's systems that could impact the Services. If a Disruption occurs, D2L may, in its reasonable discretion, immediately remove the Disruption, disable the mode of communication, suspend Client's and/or its user's access to the Services or terminate this Agreement, and Client is liable to D2L for claims arising from Client Data or any Disruption.

14. **Payment Terms and Taxes.** Client shall pay fees and rates as specified in an Order. Unless otherwise agreed, all Services are invoiced in advance, and payment is due within 30 days from Client's receipt of invoice. The number of users purchased according to the Order shall be the billable minimum number of such users for the term of the Agreement unless otherwise mutually agreed. Overdue amounts not subject to a good faith dispute may incur interest charges at a rate of 1.5% per month or 19.56% APR. All fees and rates stated in the Order do not include taxes of any kind, which taxes shall be added to Client's invoices and paid by Client. D2L may accept payment from any entity without accepting that entity as Client and without waiving any provision against assignment. D2L may accept partial payments for amounts due without waiving its right to payment in full of all outstanding amounts. In pursuit of D2L's mission to provide its clients with continuous and innovative enhancements to D2L services, over time our fees must increase to cover additional product development expenses associated with improving our services. The fees for the first pricing period shall be invoiced as set out on an Order. Unless otherwise stated, all subsequent pricing periods include a 5% annual increase ("Annual Increase"). If the inflation rate for the United States as published by the World Bank (www.data.worldbank.org) for the most recently reported twelve-month period ("CPI") exceeds the Annual Increase, then the fees for any subsequent annual periods may be increased, instead, by applying the applicable CPI rate. Annual fees for any renewal period may be increased by the greater of the Annual Increase or CPI as set out above.

15. **Orders.** Optional Products and Services set out on an Order and any other D2L offerings not on an Order may be subject to additional terms and conditions. Optional Products may have associated support costs. Certain Services under an Order may include functionalities that can make predictions, recommendations, decisions, generate text, images, or other media through the use of artificial intelligence models ("D2L Generative AI Services"). Client acknowledges and agrees to terms and conditions set out at <https://www.d2l.com/legal/d2l-generative-ai-services-terms/> as they related to D2L Generative AI Services. Travel and per diem expenses are not included in Consulting or Training fees and per diem and actual travel costs and will be billed to Client upon completion. The number of users purchased according to an Order shall be the billable minimum number of such users for the term of such Order, and the Order is binding for the entire term unless otherwise stated.

16. **Analyses.** To deliver, develop, test and improve the Services required under this Agreement and provide to its clients generally, D2L may collect, store, analyze, and interpret data elements acquired by, associated with, or provided in the use of the Services ("**Analysis**") All individual data elements of the Analysis are property of their respective owners. All usage data related to performance or use of the Services and algorithm, computational, or cumulative results of the Analysis are wholly owned by D2L. In the event Client wishes to access or generate any computational or cumulative results from Client Data using certain Services with analytic capabilities, additional fees may apply for such additional Services.

17. **Term and Termination.** This Agreement shall commence on the earlier of the start date of the first applicable Order between Client and D2L or the date this Agreement or an Order is first signed by Client and shall continue until all Orders expire or are terminated as set out in this section ("**Term**") or may be terminated as specified elsewhere in this Agreement. This Agreement may be terminated by either party if the other party materially or repeatedly (which in the aggregate is material) defaults in performing its duties or obligations under this Agreement for a period of 30 days after written notice is given to the defaulting party, unless the default is cured within the 30-day period. On termination, all rights and obligations of the parties cease except as set out in this section. Client shall return all copies of documentation and other materials to D2L within 30 days of termination. D2L will delete or destroy Client Data residing on D2L networks upon termination. Prior to termination, Client may use certain export tools within the Services to allow Client to export course content materials in a standard packaged format as well as to export grades and other specific data elements in the Services. If Client requires additional support, D2L shall provide such data export services for a fee under an Order. The Confidentiality, Intellectual Property, Restrictions, Indemnification (to the extent the claim arose before the relevant Order was terminated), Liability Limitations, Payment and the General sections shall survive termination of this Agreement, regardless of the reason for the termination.

18. **Renewal.** At the end of the initial term as set out in the Order, this Agreement may be extended for consecutive terms with duration to be agreed between the parties (each, a "renewal term"), and a party shall notify the other of its intent to renew, terminate or modify this Agreement at least 60 days before the end of the then-current term.

18. **General.** All notices shall be in writing and delivered (a) by hand, (b) by registered mail, postage prepaid, return receipt requested, (c) reputable overnight delivery service, or (d) by email, provided that the sender retains proof of successful transmission. All notices shall be deemed effective upon receipt. Notices shall be sent to the names, addresses and numbers set out in the Order. All notices to D2L shall include a copy to Legal Department, D2L Corporation, 137 Glasgow Street, Suite 560, Kitchener, Ontario, N2G 4X8, Canada, or, if sent by email, to Legal@D2L.com. If a party cannot perform any of its obligations under this Agreement because of natural disaster, actions of governmental bodies, strikes, lockouts, riots, pandemics or public health emergencies, acts of war, and other similar events or circumstances outside that party's control that could not be mitigated using commercially reasonable means including communication line failures, power failures, hacker attacks, existence or repair of software bug/virus/worm, fires, the party who cannot perform shall promptly notify the other in writing, and shall do everything reasonably possible to resume performance.

Upon receipt of notice, and except for accrued payment-related obligations, all obligations under this Agreement are immediately suspended for as long as the circumstances exist. The parties agree to comply with all applicable laws and regulations including but not limited to any applicable privacy or data protection regulations and any applicable export control laws. Client's delays may affect D2L's ability to perform Service under an Order. If D2L is unable to perform the Services due to Client's delays, D2L shall notify Client and, if Client is unable or unwilling to remedy the delays within 30 days from notification, all fees and related charges under the Order become due and payable and D2L may immediately invoice for such fees. This Agreement is governed by the laws of Texas without regard to its conflict of laws principles. No party may assign, including by operation of law, its rights or obligations hereunder, except to an affiliate of or successor by operation of law to D2L, without the prior written consent of the other party, such consent not to be unreasonably withheld. No amendment, modification, termination or waiver of any provision of this Agreement is effective unless it is in writing and signed by both parties. Any waiver or consent shall be effective only in the specific instance and purpose for which it was given. Terms or conditions that Client purports to include in a purchase order or similar instrument are void and of no force and effect. If a court declares void or unenforceable any term of this Agreement, the remaining terms and provisions of this Agreement shall remain unimpaired and the invalid term shall be replaced by a valid term that comes closest to the intention underlying the invalid term. Neither party is an agent, employee, partner, joint venturer or legal representative of the other, and D2L is an independent contractor to Client. Client agrees that D2L may use Client's name and logo in D2L's marketing communications including through third parties in accordance with Client's guidelines. Client agrees to cooperate with D2L to serve as a reference account upon D2L's request. These Terms and Conditions shall supersede the provisions of an Order, unless the Order refers to the provision of the Terms and Conditions it supersedes. This Agreement contains the entire understanding between the parties with respect to its subject matter. All prior agreements, representations, inducements and negotiations, and any and all existing contracts previously executed between the parties with respect to this subject matter are superseded hereby.