

EDUCATION CODE SECTION 49073.1 AMENDMENT TO
NAGLIERI-3 (NNAT3) USER LICENSE AGREEMENT BETWEEN
PALOS VERDES PENINSULA UNIFIED SCHOOL DISTRICT AND
NCS PEARSON, INC.

This Amendment ("Amendment") to the *Naglieri Nonverbal Ability Test, 3rd Edition (NNAT3) Terms of Use* Agreement by and between PALOS VERDES PENINSULA UNIFIED SCHOOL DISTRICT, a public school district duly organized and existing under Chapter 1 of Division 3 of Title 2 of the Education Code of the State of California ("District") and *NCS Pearson, Inc.* ("Vendor") ("Agreement") (a true and correct copy of which is attached hereto as Exhibit "A"), is hereby made and entered into as of **June 12, 2019** ("Effective Date") as follows:

WHEREAS, Vendor provides licenses to access and use NNAT3 for the purposes of administering assessments, subject to the terms and conditions of the Agreement.

WHEREAS, as a California public school district, the District is subject to the Education Code;

WHEREAS, Vendor is a "third party" under Education Code section 49073.1(6), which defines "third party" as a provider of digital educational software or services, including cloud-based services, for the digital storage, management, and retrieval of pupil records;

WHEREAS, Education Code section 49073.1 requires that any contract for the provision of services entered into between District and Vendor contain provisions specified in sections (b)(1) through (b)(9) of Education Code section 49073.1;

WHEREAS, the District and Vendor desire to amend the terms in their Agreement that will satisfy the requirements of Education Code section 49073.1.

NOW THEREFORE, DISTRICT AND VENDOR AGREE TO THESE TERMS IN COMPLIANCE WITH EDUCATION CODE SECTION 49073.1:

1. **Ownership and Control of Pupil Records.** Pupil records shall continue to be the property of and under the control of the District. For purposes of this Amendment and the Agreement, "pupil records" means both any information directly related to a pupil that is maintained by the District and information acquired directly from the pupil through the use of instructional software or applications assigned to the pupil by a teacher or other District employee. For purposes of this Amendment and the Agreement, "pupil records" does not mean deidentified information, including aggregated deidentified information, used by Vendor to improve educational products for adaptive learning purposes and for customizing pupil learning; to demonstrate the effectiveness of Vendor's products in the marketing of those products; or for the development and improvement of educational sites, services, or applications. For purposes of this Amendment and the Agreement, "deidentified information" means information that cannot be used to identify an individual pupil.

2. Ownership and Control of Pupil-Generated Content. Pupils may retain possession and control of their own pupil-generated content, or may transfer pupil-generated content to a personal account by notifying the **District's Assistant Superintendent, Educational Services/Designee** in writing of such request. The District will provide a written request to **Vendor's Account Representative** via and Vendor shall return the pupil-generated content in a format acceptable to the District within five (5) days of receiving the District's request. For purposes of this Amendment and the Agreement, "Pupil generated content" includes essays, research reports, portfolios, creative writing, music or other audio files, photographs, but does not include pupil responses to a standardized assessment where pupil possession and control would jeopardize the validity and reliability of that assessment.
3. Use of Pupil Records. Vendor shall not use any information in the pupil records for any purpose other than those required or specifically permitted by this Amendment and the Agreement.
4. Review of Pupil Records. A parent, legal guardian, or pupil who has reached the age of 18 may review personally identifiable information in the pupil's records and correct erroneous information by notifying the District in writing of such request. The District will meet with parent, legal guardian, or pupil who has reached the age of 18 to review and correct any information in the pupil's records. The District will notify Vendor of the need to review pupil records and or make corrections to any pupil records in writing. Vendor shall provide such records and/or correct such errors within five (5) days of receipt of written notice. Vendor shall cooperate with the District to review and/or correct pupil records.
5. Security and Confidentiality of Pupil Records. Vendor agrees to hold pupil records in strict confidence. Vendor shall not use or disclose pupil records received from or on behalf of District except as permitted or required by this Amendment and the Agreement, as required by law, or as otherwise authorized in writing by District. Vendor agrees that it will protect the pupil records it receives from or on behalf of District according to commercially acceptable standards and no less rigorously than it protects its own confidential information. Vendor will designate and train responsible individuals, to ensure the security and confidentiality of pupil records. Vendor shall develop, implement, maintain and use appropriate administrative, technical and physical security measures to preserve the confidentiality, integrity and availability of all electronically maintained or transmitted pupil records received from or on behalf of District. Pupil records shall not be stored or transmitted outside of the United States. These measures shall be extended by contract to all subcontractors used by Vendor.
6. Breach Notification Process. Vendor shall, as soon as practicable but in any event within five (5) calendar days of discovery, report to District any use or disclosure of pupil records not authorized by this Amendment and the Agreement or in writing by the District. Vendor's report shall identify: (i) the nature of the unauthorized

use or disclosure; (ii) the pupil records used or disclosed, (iii) who made the unauthorized use or received the unauthorized disclosure, (iv) what Vendor has done or shall do to mitigate any effect of the unauthorized use or disclosure, and (v) what corrective action Vendor has taken or shall take to prevent future similar unauthorized use or disclosure. Vendor shall provide such other information, including a written report, requested by District. In the event of an unauthorized disclosure of a pupil's records, affected parents, legal guardians, or pupils who have reached the age of 18 will be notified in writing and provided with details and next steps to address the specific breach. Compliance with these requirements shall not, in itself, absolve Vendor of liability in the event of an unauthorized disclosure of pupil records.

7. Retention and Destruction of Pupil Records. Vendor certifies that a pupil's records shall not be retained or available to Vendor upon completion of the term of the Agreement. At the termination of the Agreement, pupil records in the possession of Vendor shall be returned and/or destroyed. Upon termination, cancellation, expiration or other conclusion of the Agreement, Vendor shall return all pupil records to District in a format acceptable to District, or if return is not feasible, destroy any and all pupil records. Vendor shall comply with any litigation hold or order to preserve pupil records.
8. Compliance with Applicable Laws. The District and Vendor will jointly ensure compliance with the federal Family Educational Rights and Privacy Act (20 U.S.C. Sec. 1232g) through following the confidentiality provisions as set forth in this Amendment and the Agreement, as well as applicable District Board policies. The parties acknowledge and agree that the District is subject to federal and local laws relating to the protection of personally identifiable information of students ("PII"), including FERPA, and that Vendor is obtaining such PII as a "school official" under Section 99.31 of FERPA for the purpose of providing the services hereunder. In addition to FERPA, Vendor shall comply with all federal, State and local laws, rules, regulations and ordinances that are now or may in the future become applicable to Vendor; the services being provided by Vendor; Vendor's business, equipment and personnel engaged in operations covered by this Amendment and/or the Agreement; and the protection of pupil records and PII, including but not limited to Education Code section 49060 *et seq.*, the Children's Online Privacy Protection Act (COPPA) and the Student Online Personal Information Protection Act (SOPIPA). Vendor certifies that it is familiar with these laws, as well as any other applicable requirements for the storage and transmission of pupil records and Vendor will comply with all such requirements.
9. Prohibition on Targeted Advertising. Vendor shall not use PII in pupil records to engage in targeted advertising.
10. Insurance and Indemnity. Vendor shall obtain and maintain for the duration of the Agreement Two Million Dollars (\$2,000,000.00) in Cyber Liability Insurance to cover Security, Privacy, Business Interruption, Cyber Extortion, and Denial of

Service. Vendor shall indemnify, defend and hold the District harmless from all claims, liabilities, damages or judgments involving a third party, including District's costs and attorney's fees, which arise as a result of such unauthorized disclosures or misuse of pupil records, excluding those claims, liabilities, damages or judgments arising from the sole active negligence or willful misconduct of District.


11. Termination. If District reasonably determines in good faith that Vendor has materially breached any of its obligations under this Amendment or the Agreement, District, in its sole discretion, shall have the right to provide Vendor with written notice of a thirty (30) day period to cure the breach. If Vendor fails to cure a breach within that period of time, District may terminate the Agreement immediately. If, in its sole discretion, District determines that cure is not possible, District may provide written notice of immediate termination of the Agreement.
12. Effect of Amendment. If any provisions of this Amendment to the Agreement conflict or are otherwise contrary to the original terms of the Agreement, the terms of this Amendment prevail.

Except as specifically modified herein, all other terms and conditions contained in the Agreement between the District and Vendor shall remain unchanged and in full force and effect.

Dated this 13th day of June 2019.

Linsey Gotanda, Ed.D.
Assistant Superintendent, Education Services
Palos Verdes Peninsula Unified School District

Date: _____



Dan Merrill
VP of US Sales for Clinical Assessment
Authorized Representative

Date: May 16, 2019



EXHIBIT "A"

TERMS OF USE AGREEMENT

1. DEFINITIONS. NCS Pearson, Inc., the provider of the Product pursuant to this Agreement, is referred to herein as "Provider." The school, educator, or other entity accessing or using the Product is referred to herein as "User." Provider and User may each be referred to herein as a "Party" and collectively as the "Parties." This Terms of Use Agreement is referred to herein as the "Agreement." "Product" means the Naglieri Nonverbal Ability Test, 3rd Edition ("NNAT3") application and any other software embedded in the application as well as any assessment item content that User will access pursuant to this Agreement, now or in the future.

2. ACCESS RIGHTS.

2.1 Basic Terms. Subject to the terms and conditions of this Agreement, Provider grants to User a limited, non-exclusive, non-transferable, non-assignable right to access and use the Product for the purposes of administering assessments, subject to the terms and conditions of this Agreement.

2.2 Restrictions. The access rights granted hereunder do not grant any rights not explicitly expressed. User shall not (and shall not permit any employee, contractor or other party to (a) do anything to infringe upon, harm or take any action contrary to, or that would diminish or contest the validity of, any ownership rights in the Product; (b) remove or alter any copyright, trademark or patent notices that appear on any portion of the Product; (c) copy, rent, lease, sublicense, distribute publicly, modify, or create derivative works based on the Product or otherwise commercially exploit the Product; or (d) reverse engineer, decompile, disassemble or otherwise reproduce Product. User's rights in Product will be limited to those expressly granted herein, and Provider reserves all rights not expressly granted in this document.

2.3 Collection and Use of Data. Provider may collect and use data and related information including but not limited to technical information about User's device, system, and application software in order to make improvements to Provider products. Provider may use de-identified, aggregated student data for quality assurance, research and development purposes.

3. OWNERSHIP AND CONFIDENTIALITY.

3.1 Intellectual Property Rights. Product is proprietary to Provider and/or third parties and is protected by copyright, trade secret, and other intellectual property rights. The placement of a copyright notice on any portion of Product does not mean that such portion has been published and will not derogate any claim of trade secret protection for the same. Title to all complete or partial copies and all applicable rights to copyrights, patents, trademarks and trade secrets in Product, are and shall remain the property of Provider or their other owners, as applicable. If User submits feedback or suggestions to Provider regarding the Product or services, User acknowledges and agrees that Provider may use such feedback and suggestions in any manner it sees fit, and User hereby grants Provider a perpetual, irrevocable, and royalty-free license to all intellectual property rights User may have in such feedback and suggestions.

3.2 User's Confidentiality Obligations. User agrees to keep Product confidential and to prevent unauthorized disclosure or use of Product. User shall not transfer, assign, provide or otherwise make Product available to any other party without the prior written consent of Provider. Any attempted sublicense, assignment or transfer of any rights, duties or obligations by User in violation of this Agreement shall be void. User shall notify Provider immediately in writing



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of any unauthorized use or distribution of Product of which User becomes aware and shall take all steps necessary to ensure that such unauthorized use or distribution is terminated. User agrees to make all reasonable efforts to protect user identification technology and passwords and any unauthorized access to the Product.

4. DISCLAIMER OF WARRANTIES. PRODUCT IS PROVIDED "AS IS" AND "AS AVAILABLE" WITHOUT WARRANTY OF ANY KIND, AND PROVIDER AND ITS PROVIDERS EXPRESSLY DISCLAIM ALL OTHER WARRANTIES, EXPRESS OR IMPLIED, INCLUDING, BUT NOT LIMITED TO, ANY IMPLIED WARRANTIES OF MERCHANTABILITY, FITNESS FOR A PARTICULAR PURPOSE AND NON-INFRINGEMENT. PROVIDER DOES NOT WARRANT THAT THE FUNCTIONALITY CONTAINED IN THE PRODUCT WILL MEET USER'S REQUIREMENTS, OR THAT THE OPERATION OF THE PRODUCT WILL BE UNINTERRUPTED OR ERROR-FREE, OR THAT DEFECTS IN THE PRODUCT WILL BE CORRECTED. FURTHERMORE, PROVIDER DOES NOT WARRANT OR MAKE ANY REPRESENTATIONS REGARDING THE USE OR THE RESULTS OF THE USE OF THE PRODUCT IN TERMS OF ITS CORRECTNESS, ACCURACY, RELIABILITY OR OTHERWISE. USER AGREES THAT THE USE OF PRODUCT IS AT USER'S OWN RISK. NO ORAL OR WRITTEN INFORMATION OR ADVICE GIVEN BY PROVIDER OR A PROVIDER REPRESENTATIVE SHALL CREATE A WARRANTY OR IN ANY WAY INCREASE THE SCOPE OF ANY WARRANTY. SOME JURISDICTIONS MAY NOT ALLOW THE EXCLUSION OF CERTAIN IMPLIED WARRANTIES, SO THE ABOVE EXCLUSION MAY NOT FULLY APPLY TO USER. THE SPECIFIC FEATURES AND FUNCTIONALITY OF THE PRODUCT ARE SUBJECT TO CHANGE AND DISCONTINUATION IN PROVIDER'S SOLE DISCRETION.

5. LIMITATION OF LIABILITY. PROVIDER SHALL NOT BE LIABLE TO USER FOR ANY SPECIAL, EXEMPLARY, INDIRECT, INCIDENTAL OR CONSEQUENTIAL DAMAGES OF ANY KIND OR NATURE WHATSOEVER, INCLUDING WITHOUT LIMITATION LOST PROFITS, LOST FUNDING, LOST SAVINGS, OR LOST OR DAMAGED DATA; OR FOR CLAIMS OF A THIRD PARTY; ARISING OUT OF OR RELATED TO THIS AGREEMENT, PRODUCT, THIRD PARTY SOFTWARE, OR THE USE OR INABILITY TO USE ANY OF THE FOREGOING, EVEN IF PROVIDER HAS BEEN ADVISED OF THE POSSIBILITY OF SUCH DAMAGES OR THEY ARE FORESEEABLE. IN ANY EVENT, IN RESPECT OF ANY CLAIM, DEMAND OR ACTION ARISING OUT OF THIS AGREEMENT, USER SHALL BE LIMITED TO RECEIVING ACTUAL AND DIRECT DAMAGES IN A MAXIMUM AGGREGATE AMOUNT EQUAL TO THE CHARGES PAID BY USER TO PROVIDER HEREUNDER FOR THE APPLICABLE PRODUCT, ITEM OR SERVICE ON WHICH THE CLAIM IS BASED, OR \$50, WHICHEVER AMOUNT IS GREATER. THE LIMITATIONS SET FORTH IN THIS PARAGRAPH SHALL APPLY WHETHER SUCH LIABILITY IS ASSERTED ON THE BASIS OF CONTRACT, TORT, OR OTHERWISE, AND EVEN IF ANY OF THE LIMITED REMEDIES IN THE AGREEMENT FAILS IN THEIR ESSENTIAL PURPOSE.

6. INDEMNIFICATION. User will indemnify and hold Provider and its employees and affiliates harmless against: (a) third party claims based on User's negligent use of the Product; (b) any third party claim based on a claim that User has breached its obligations and responsibilities under this Agreement. Provider shall notify User promptly upon the receipt or occurrence of any such claim. Provider will indemnify and hold User and its employees and affiliates harmless against: (a) any third party claims that the Product infringes upon intellectual property belonging to a third party; and (b) any third party claim based on a claim that Provider breached its obligations and responsibilities under this Agreement. User shall notify Provider promptly upon the receipt or occurrence of any such claim.

7. TERMINATION. Notwithstanding any contrary provisions contained elsewhere in this Agreement, this Agreement and the rights and obligations of both parties may be terminated: (a) by Provider immediately if Section 3 of the Agreement has been breached; (b) by either party for cause, in the event the terminating party reasonably determines that the other party has committed a material breach and failed to cure such breach within thirty (30) days after receiving notice of such breach; (c) by Provider for convenience with five (5) days notice to User. Immediately upon any termination of this Agreement, User shall immediately cease use of and access to the Product. The following provisions shall survive termination or expiration of the Agreement or any portion thereof: Ownership and Confidentiality, Disclaimer of Warranties, Limitation of Liability, Indemnification, and General.



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8. GENERAL.

8.1 Governing Law. This Agreement shall be governed by the laws of the State of Minnesota, USA, excluding its choice of law principles that would require the application of the laws of another jurisdiction, and the Parties hereby consent to exclusive jurisdiction and venue in the State of Minnesota. Each party hereby waives any claim that any legal proceeding brought in accordance with the Agreement has been brought in an inconvenient forum or that the venue of that proceeding is improper. The United Nations Convention on Contracts for the International Sale of Goods, or the Uniform Computer Information Transaction Act (in its original form or in the form as enacted by any applicable jurisdiction) shall not apply to this Agreement.

8.2 Waiver and Severability. If any provision of this Agreement is invalid or unenforceable under any applicable statute or rule of law, this Agreement shall be enforced to the maximum extent possible to effectuate the original express intent of the Parties. Failure to enforce any provision of this Agreement shall not operate as a waiver of such provision or any other provision.

8.3 Notices. In the case of notices to Provider, such notices shall be sent to: NCS Pearson, Inc., Attn.: Contracts Department, 2510 North Dodge Street, MS 120, Iowa City, IA 52245. In the case of notices to User, such notices shall be sent to Provider's address of record for User. Either Party may change its notice address by notifying the other in like manner.

8.4 Independent Contractor. Provider and its employees are independent contractors and not employees of the User. Nothing herein shall be deemed to establish a partnership, joint venture, association or employment relationship between the Parties.

8.5 No Third Party Beneficiaries. The Parties agree that there are no third party beneficiaries to this Agreement and that no third party shall be entitled to assert a claim against either of the Parties based on this Agreement.

8.6 Entire Agreement. This Agreement, in conjunction with the Prime Contract, constitutes the complete and entire agreement between the Parties with respect to the subject matter detailed herein. This Agreement shall not be modified or amended without the written agreement of both Parties. These terms may only be amended in writing and signed by both parties.