

**EDUCATION CODE SECTION 49073.1 AMENDMENT TO TERMS OF USE**  
**AGREEMENT BETWEEN**  
**PALOS VERDES PENINSULA UNIFIED SCHOOL DISTRICT AND**  
**BRAINPOP LLC**

This Amendment (“Amendment”) to the Terms of Use and Privacy Policy as posted on [www.brainpop.com](http://www.brainpop.com) and as updated from time to time (“Terms of Use”) 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 ***BrainPOP LLC*** a limited liability company organized under the laws of the State of New York (“Vendor”) (“Agreement”) s hereby made and entered into as of August 14, 2019 (“Effective Date”) as follows:

**WHEREAS**, Vendor provides *subscription based services to online educational content*;

**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, “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 ***Deputy Superintendent/designee*** in writing of such request. The District will provide a written request to Vendor's ***representative*** 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, "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 Terms of Use.
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 ***Deputy Superintendent/designee*** 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 Terms of Use, 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 it receives 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. Vendor's obligation herein in respect to any subcontractors directly in contact with the District or any school thereof, and not subcontractors providing general ancillary services, such as hosting services.

6. Breach Notification Process. Vendor, within one (1) business day of discovery, shall 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 District will delete a pupil's records upon expiration of the subscription. At the expiration of the subscription, pupil records in the possession of Vendor shall be returned and/or destroyed by District. Upon termination, cancellation, expiration or other conclusion of the subscription, Vendor shall return or otherwise provide access to District to delete all pupil records, or if return is not feasible District to destroy any and all pupil records. District will have access to delete any and all pupil records at any time. All District deleted records will be purged from Vendor's server within two (2) weeks. 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 Terms of Use. 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 Terms of Use; and the protection of pupil records and PII, including but not limited to the Children's Online Privacy Protection Act (COPPA) and the Student Online Personal Information Protection Act (SOPIPA). Vendor certifies to the best of its knowledge 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. Indemnity. Vendor shall defend, indemnify, and hold harmless ("Indemnify") the District, its trustees, officials, directors, officers, employees, and agents from and against all liabilities, losses, expenses, claims, actions, or judgments (including attorney fees) recovered or made against the District for any damage, injury, or death to persons or damage to property caused by the negligent or intentional acts or omissions of Vendor, its officers, employees, agents, or subcontractors related to Vendor's performance under this Contract. Vendor's Indemnification extends to conditions created by this Contract or based upon violation of any statute, ordinance, or regulation. This provision is in addition to any common law or statutory liability and indemnification rights available to the District. Vendor's Indemnification of the District shall not apply to damage, injury, or death caused by the sole negligence or willful misconduct of the District, its officers, directors, employees, or agents. The District will promptly notify Vendor in writing of any such claim or demand to indemnify and shall cooperate with Vendor in a reasonable manner to defend such claim.

The District shall defend, indemnify, and hold harmless ("Indemnify") the Vendor, its trustees, officials, directors, officers, employees, and agents from and against all liabilities, losses, expenses, claims, actions, or judgments (including attorney fees) recovered or made against the Vendor for any damage, injury, or death to persons or damage to property related to Vendor's performance under this Contract. The District's Indemnification of the Vendor shall not apply to damage, injury, or death caused by the negligence or willful misconduct of the Vendor, its officers, directors, employees or agents.

11. Insurance. Vendor and its subcontractors shall insure its activities in relation to this agreement and keep in force and maintain the following:
  - A. Commercial General Liability insurance with limits of no less than \$1,000,000 per occurrence covering against bodily injury, property damage, and personal and advertising injury liability arising out of the alleged or actual omission, act or negligence of Vendor in the performance of the obligations under this Agreement.
  - B. Professional Liability insurance with limits of no less than \$1,000,000 per occurrence insuring against liability connected with the performance of "professional services" as defined by this Agreement.
  - C. Cyber Liability insurance with limits of no less than \$2,000,000 per occurrence to cover damages sustained by a third party from the unauthorized access to or theft of data, the unauthorized disclosure or use of personally identifiable information, Business Interruption, Cyber Extortion, and Denial of Services in connection with this Agreement. Such cyber liability policy shall cover consumer notification expenses, credit monitoring costs and any other liability, loss or expense of any nature whatsoever arising out of or related to the unauthorized access to or theft of data and the unauthorized

disclosure or use of personally identifiable information connected, in whole or part, to this Agreement.

D. Additional Insured Endorsement: The liability policies referenced in (A) and (D) shall be endorsed to name the District, its Board, officers, agents and employees as an additional insured. Vendor shall furnish a Certificate of Insurance and endorsements needed to evidence compliance with all listed insurance requirements upon execution of this Agreement. Vendor's obligation herein in respect to any subcontractors shall extend only to those subcontractors directly in contact with the District or any school thereof, and not subcontractors providing general ancillary services, such a hosting services.

11. Limitation of Liability IN NO EVENT SHALL VENDOR OR THEIR RESPECTIVE MEMBERS, DIRECTORS, OFFICES, EMPLOYEES, SHAREHOLDERS, PARTNERS OR AGENTS BE LIABLE FOR ANY INCIDENTAL, INDIRECT, INDIRECT OR CONSEQUENTIAL DAMAGES WHATSOEVER (INCLUDING, WITHOUT LIMITATION, DAMAGES FOR LOSS OF PROFITS, BUSINESS INTERRUPTION, OR ANY OTHER PECUNIARY LOSS) IN CONNECTION WITH THIS AMENDMENT OR TERMS OF USE. This section shall survive termination or expiration of the Amendment/Terms of Use.
12. Termination. If Vendor has materially breached any of its obligations under this Amendment or the Terms of Use, District, in its sole discretion, shall have the right to provide Vendor with written notice of a fifteen (15) day period to cure the breach. If Vendor fails to cure a breach within that period of time, District may terminate the subscription immediately. If, in its sole discretion, District determines that cure is not possible, District may provide written notice of immediate termination of the subscription.
12. Effect of Amendment. If any provisions of this Amendment to the Terms of Use conflict or are otherwise contrary to the Terms of Use, 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 14th day of August 2019.

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[INSERT NAME]  
[INSERT TITLE]  
Palos Verdes Peninsula Unified School District

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Dr. Avraham Kadar  
CEO and Founder  
BrainPOP LLC

**EXHIBIT “A”**

**PRIVACY POLICY:** [https://www.brainpop.com/about/privacy\\_policy/](https://www.brainpop.com/about/privacy_policy/)

**TERMS OF USE:** [https://www.brainpop.com/about/terms\\_of\\_use/](https://www.brainpop.com/about/terms_of_use/)