



esped.com Application Subscription Services Agreement

THIS AGREEMENT (the "Agreement") is entered into between esped.com, Inc., with offices at 6 Riverside Drive, Andover, MA 01810 ("esped") and Wayland Public Schools, PO Box 408, Wayland, MA 01778-0408 ("Customer") on the following terms and conditions:

1. Agreement.

(a) Generally. This Agreement governs Customer's relationship with esped as well as its (and its Authorized User's) use of esped.com's Online Services. The Agreement is comprised of the provisions that follow and any additional or different terms that may from time to time be implemented under Subsection (b) ("Changes to Agreement") by esped.

(b) Changes to Agreement. esped may change or add provisions to this Agreement from time to time in its sole discretion by publishing a notice in the Online Services. All changes are effective upon publication. Customer's continued use of Online Services after the effective date of any amendment to this Agreement will constitute Customer's acceptance of the amendment. If Customer does not agree with a proposed change, Customer may exercise Customer's termination rights under Section 10 ("Term & Termination").

2. Online Services.

(a) Generally. esped will make available to Customer certain application services listed in Schedule A ("Price and Term for Online Services"). Customer may also purchase additional services from esped upon mutual agreement of the parties and which shall be set forth on separate schedules and attached hereto from time to time. For purposes of this Agreement, all features, access privileges, application services, including all optional or enhanced services, and any additional services purchased by the Customer and set forth on schedules attached hereto from time to time, shall be collectively referred to as Online Services ("Online Services"). esped may in its sole discretion upgrade, change, add, suspend or discontinue any Online Service(s) at any time.

(b) Third Party Interaction. Customer and its Authorized User's may enter into correspondence with, purchase goods and/or services from, or participate in promotions of third party advertisers or sponsors showing their goods and/or services through Online Services. Any such activity, and any terms, conditions, warranties or representations associated with such activity, is solely between Customer, its Authorized Users and the applicable third party. esped is not a party to any transaction between Customer and any third party selling goods and/or services through the Online Services. esped shall have no liability, obligation or responsibility for any such correspondence, purchase or promotion between Customer, its Authorized Users and any such third party. ESPED DISCLAIMS ALL REPRESENTATIONS AND WARRANTIES REGARDING GOODS OR SERVICES CUSTOMER PURCHASES OR OBTAINS FROM THIRD PARTY SUPPLIERS. CUSTOMER AGREES TO LOOK SOLELY TO THIRD PARTY SUPPLIERS FOR ALL CLAIMS REGARDING SUCH GOODS OR SERVICES.

3. Access to Online Services.

(a) Remote Access Software. Customer may access Online Services through any third party software that meets the compatibility requirements from time to time published by esped. Customer assumes all risk for ensuring the ongoing compatibility of third party software with the Online Services.

(b) Remote Access Equipment. Customer is responsible at Customer's own expense to obtain, install, configure and maintain equipment to access and use the Online Services. Customer assumes all risk for ensuring the ongoing compatibility of remote access equipment with the Online Services.

(c) Telecommunications. Customer will access the Online Services through the Internet. Customer is solely responsible for the cost, installation, performance, integrity, maintenance and integration of its Internet connection.

(d) Customer Support. esped shall provide Customer with e-mail and telephone technical support as part of this agreement. esped shall not provide any user training unless contracted for such services.



4. Use of Online Services.

(a) Authorized Users. Customer agrees Online Services will be used only by Customer's own employees and agents (Authorized Users) for the beneficial purposes described in Subsection 4(b) ("Permitted Uses"). Customer shall notify each Authorized User of any and all obligations in this Agreement that relate to permitted and prohibited uses, user conduct, the security and confidentiality of data, passwords, and other requirements that are reasonably expected to be understood and undertaken by Authorized Users. To apply for a user account, Authorized Users must complete the registration process by providing esped with current, complete and accurate information as prompted by the registration form. Further, Customer certifies that to the best of its knowledge and belief, information provided by its Authorized Users during registration for an Online Services Account shall be accurate, current and complete. During registration, Authorized Users must enter a valid electronic mail address, which shall function as their Login ID. A secret password for obtaining access to the Online Services through each Authorized User's account will be assigned by esped or chosen by the Authorized User. It is the Authorized User's responsibility to safeguard and protect his or her password from disclosure or use by others. Authorized User will promptly change his or her password and Customer will immediately notify esped if Authorized User or Customer has reason to believe any of Customer's Authorized Users' accounts are being accessed or used by others. Authorized Users' accounts cannot be "shared" or used by more than one individual. Customer agrees to maintain a single user account for each of its Authorized Users. Customer and its Authorized Users are solely responsible for any and all activities that occur under Authorized Users' account and for ensuring that Authorized Users properly exit or log off from their accounts at the end of each session of use. esped is not responsible for any unauthorized access to, or alteration of, Customer's or its Authorized Users' transmissions or Data.

(b) Permitted Uses. Subject to timely payment of applicable Service Fee, Customer is granted during the Term of this Agreement a non-exclusive, nontransferable, limited license to access and make permitted use of the Online Services. For purposes of this Agreement, permitted use ("Permitted Use") means to execute Remote Access Software supplied by Customer (or available System Commands), to display information derived from the Online Services on Customer's computer or terminal screen, to download and store in nonvolatile memory insubstantial parts of such information in machine readable form indefinitely, and to print a reasonable number of copies of such information. In addition, Customer may download, store, load and execute on Customer's Remote Access Equipment any JAVA applets or similar client-side routines made available by esped for such purpose.

(c) Prohibited Uses. Except as authorized under Subsection 4(b) ("Permitted Uses"), Customer may not display, copy, download, store, reproduce, transmit, distribute, resell or otherwise commercially exploit any part of the Online Services, including any data or information derived from the Online Services, in any format or through any technology or media now existing or hereafter developed. Customer is specifically prohibited from disseminating any part of the Online Services, data or information in a manner that potentially would usurp the market for the Online Services, including transmittal of copyrighted material from the Online Services without the owner's express authorization and the prior written consent of esped.

(d) User Conduct. Customer and its Authorized Users agree to abide by all applicable local, state, national and foreign laws, treaties and regulations in connection with Customer and its Authorized Users' use of the Online Services. In addition, Customer certifies its Authorized Users shall not, without limitation, use Online Services or information from Online Services to: (i) harvest, collect, gather or assemble information or data regarding other users, including e-mail addresses, without their consent; (ii) transmit through or post on the Online Services unlawful, immoral, libelous, abusive, harassing, tortuous, defamatory, threatening, harmful, invasive, vulgar, obscene or otherwise objectionable material of any kind or nature which is harmful to minors in any way; (iii) transmit through or post to the Online Services any material that may infringe the intellectual property rights or other proprietary rights of third parties, including trademark, copyright or right of publicity; (iv) transmit any material that contains software viruses or other harmful or deleterious computer code, files or programs such as trojan horses, worms, time bombs or cancelbots; (v) interfere with or disrupt the integrity of any data or computer-based information or any servers or networks connected to the Online Services or violate the regulations, policies or procedures of such networks; (vi) attempt to gain unauthorized access to the Online Services, other accounts, computer systems or networks connected to the Online Services; or (viii) harass or interfere with another Customer's use and enjoyment of the Online Services.



(d) No Assignment. Customer agrees to use Online Services strictly in support of Customer's Internal operations and to process Customer's own data. Customer may not assign, transfer, sublicense, rent, lease or loan any of Customer's rights, nor delegate any of Customer's obligations under this Agreement and any attempt to the contrary shall be void and a material breach of this Agreement.

(e) Certain Law-Related Features. Customer may use certain law-related features in the Online Services for general reference only and subject to the following conditions. None of the Online Services, including communications Customer may have with esped will establish an attorney-client relationship or constitute "legal advice". Customer will not claim detrimental reliance on any information obtained from the Online Services but instead will independently verify through outside sources the accuracy, completeness and fitness of all such information.

5. Price & Payment.

(a) Application Service Fees. esped shall provide Customer with Online Services in consideration for the annual "Service Fee" set forth in Schedule A ("Price and Term for Application Services"). Customer's most recent Federal Child Count, which Customer agrees to provide to esped, will be used as the basis for calculating the annual Service Fee. esped shall bill Customer annually in advance of the Subscription Service Renewal Date established in Schedule A. This Agreement shall automatically renew each year thereafter on the anniversary of the Subscription Service Renewal Date unless terminated by Customer according to the provisions of Section 10 ("Term & Termination"). Customer agrees to pay all Service Fee adjustments, billed monthly, for additional usage. Customer also agrees to maintain all records necessary to accurately calculate Service Fees and adjustments, including its Federal Child Count Report, and to make such records and reports available to esped for review and verification.

(b) Payment & Late Charges. Customer agrees to pay all charges set forth in Schedule A as well as any adjustments invoiced for additional usage. All charges for Online Services (including any Third Party Supplier charges) shall be invoiced and due prior to the first day of the Term. Customer will pay all sales, use, value-added, personal property or other governmental tax or levy imposed on the goods or services provided to Customer (including interest and penalties imposed thereon) other than taxes based on the net income or profits of esped. If Customer fails to pay any amount when due, then this Agreement (including any license to software) may, at esped's option, be suspended or terminated. Customer agrees to pay all costs of enforcement, including reasonable legal fees.

6. Certain Proprietary Rights.

(a) Confidential Information Ownership. Customer acknowledges and agrees that all right title and interest in and to the Online Services and the features provided therein are the exclusive property of esped or other owner designated in the Online Services and that the Online Services constitute the confidential and proprietary information of esped or such other designated owner. Customer will at all times use due diligence to safeguard and protect all such confidential and proprietary information.

(b) Account Information and Data Rights. esped will NOT monitor, edit or willfully disclose any Data except as may be required by law, subpoena, or other government request. In the event that esped receives such a request or demand for Data, esped will take commercially reasonable steps to inform Customer in advance, to the extent permitted by law. For purposes of this Agreement, "Data" shall mean any student specific biographic or demographic information or material, including student name, address, social security or other identification number that Customer's Authorized Users submit to the Online Services. esped may access Customer accounts, including its Data, to respond to service or technical problems. Customer is solely responsible for the accuracy, completeness, quality, integrity, legality, reliability and copyright of such Data, and esped shall not be responsible or liable for the deletion, correction, loss or failure to store Data. esped reserves the right to withhold, remove and/or discard Data without notice for any breach of this Agreement by Customer, including, without limitation, non-payment.

(c) Copyrights. Customer agrees that all right, title and interest (including all copyrights and other intellectual property rights) in the Online Services belong exclusively to esped or other owner designated in the Online Services. Customer grants esped and its users a royalty free, perpetual, irrevocable, non-exclusive license to use, copy, modify, prepare derivative works of and redistribute any suggestions, ideas, feedback, recommendations or other information, including learning goals and objectives, (in whole or in part) submitted by Customer and its Authorized Users to the Online Services ("Submissions") on a world-wide basis through technologies now existing or hereafter developed. esped retains exclusive ownership of all "compilation" and "collective work" copyrights in the selection, coordination and arrangement of such Submissions as a whole.



(d) Certain Trade Secrets. The Online Services are provided to Customer in machine readable form. Customer agrees not to disassemble, decompile or reverse engineer any of the Online Services features. Customer also agrees that any information obtained in violation of this restriction will be confidential and information automatically and irrevocably deemed assigned to and owned exclusively by the owner of the original feature. Customer will at all times use due diligence to safeguard and protect all such confidential and proprietary information.

(e) Identifying Marks. Customer will ensure that all marks, notices or legends pertaining to the origin, identity or ownership of the Online Services and any data, information or other content obtained from such Online Services remain intact and clearly legible.

(f) Confidentiality. esped will use commercially reasonable efforts to maintain the confidentiality of any student record information submitted by Customer and its Authorized Users to the Online Services and will only disclose such student record information to those of its employees, consultants or agents who have a need to know such information in order to perform esped's duties hereunder

7. Force Majeure. esped is excused from any failure or delay in performance of responsibilities otherwise imposed by this Agreement for any cause beyond its reasonable control. Such causes include, without limitation, fires, floods, storms, earthquakes, civil disturbances, disruption of telecommunications, transportation, utilities or necessary supplies, governmental action, computer viruses and incompatible or defective equipment, software or services not supplied by esped. Nothing herein enlarges any warranty or diminishes any disclaimer provided in Section 8 ("Warranties").

8. Warranties. The following provisions are subject to Section 9 ("Limitation of Remedies & Liabilities").

(a) Noninfringement Warranty.

(i) esped Content. esped warrants to the best of its knowledge and belief that it has the rights needed to enter into this Agreement and that Permitted Uses by Customer of features in the Online Services created by esped ("esped Content") will not infringe or misappropriate any United States copyright, trademark, patent, or the trade secrets of any third persons. If promptly notified of any claim to the contrary, esped shall (i) defend through litigation or obtain through negotiation Customer's right to continue using the esped Content; (ii) rework the esped Content to make it non-infringing, or (iii) replace the esped Content with functionally equivalent content.

(ii) User Content. Customer warrants that any Authorized User Content ("Authorized User Content") uploaded by Customer to the Online Services will not infringe or misappropriate any copyright, trademark, patent, or the trade secrets of any third persons, or otherwise violate this Agreement or any applicable law. Customer also agrees to have all Authorized User Content contributed through Customer's account screened for software viruses and will use due diligence to remove any viruses capable of being detected with commercially available detection programs.

(iii) Security. esped represents that it will utilize commercially reasonable administrative, technical, and physical measures to maintain the confidentiality and security of the student record information submitted by Customer. esped expressly disclaims any warranty that these security measures will be 100% effective or error-free.

(b) Regulatory Changes. esped warrants that the Online Services shall comply with all applicable federal and state laws and regulations. All compliance updates to the Online Services are included at no additional cost as part of Customer's annual application service subscription fee set forth in Schedule A ("Price and Term for Online Services").

(c) Third Party Content. esped is a distributor (and not a publisher) of any features, contributions or content supplied by third party vendors and available to Authorized Users of the Online Services. It has no more editorial control over such content than does a public library, book store or newsstand. As such, esped is not responsible for screening, policing, editing or monitoring such content. If notified of allegedly infringing, defamatory, damaging, illegal or offensive material, esped may investigate the allegation and determine in good faith and in its sole discretion whether to remove or request the removal of such material from the Online Services. If esped elects to perform (or not to perform) any such activities, it shall be held harmless from all claims so long as it acts in good faith.

(d) Disclaimer. Except as provided in this Section, Customer agrees that the Online Services are provided strictly on an "as is" and "as available" basis without any express or implied warranty, guarantee or other assurance of quality, conformity with specifications, reliability or functionality. Customer accepts all risk concerning suitability, use, performance or



nonperformance of the Online Services. ESPED MAKES NO REPRESENTATION, WARRANTY OR GUARANTEE AS TO THE RELIABILITY, TIMELINESS, QUALITY, SUITABILITY, AVAILABILITY, ACCURACY OR COMPLETENESS OF THE ONLINE SERVICES OR ANY CONTENT INCLUDED THEREIN. ESPED DOES NOT REPRESENT OR WARRANT THAT: (I) THE USE OF THE ONLINE SERVICES WILL BE UNINTERRUPTED OR ERROR-FREE OR OPERATE IN COMBINATION WITH ANY HARDWARE, SOFTWARE, SYSTEM OR DATA; (II) THE ONLINE SERVICES OR THE QUALITY OF ANY PRODUCTS, SERVICES, INFORMATION OR OTHER MATERIAL PURCHASED OR OBTAINED BY CUSTOMER OR ITS AUTHORIZED USERS THROUGH THE ONLINE SERVICES WILL MEET ITS REQUIREMENTS OR EXPECTATIONS; (III) ANY DATA STORED WILL BE ACCURATE, COMPLETE OR RELIABLE; (IV) THE ONLINE SERVICES OR THE SERVER(S) THAT MAKE THE ONLINE SERVICES AVAILABLE ARE FREE OF VIRUSES OR OTHER HARMFUL COMPONENTS. ESPED MAKES NO REPRESENTATION, WARRANTY, EXPRESS OR IMPLIED, AND DISCLAIMS TO THE MAXIMUM EXTENT PERMITTED BY APPLICABLE LAW ALL IMPLIED WARRANTIES OF MERCHANTABILITY, TITLE, FITNESS FOR A PARTICULAR PURPOSE AND NON-INFRINGEMENT OF THIRD PARTY RIGHTS. SOME STATES DO NOT ALLOW LIMITATIONS ON HOW LONG AN IMPLIED WARRANTY LASTS, SO THE ABOVE LIMITATION MAY NOT APPLY TO CUSTOMER. THIS LIMITED WARRANTY GIVES CUSTOMER SPECIFIC LEGAL RIGHTS. CUSTOMER MAY HAVE OTHER RIGHTS, WHICH VARY FROM STATE TO STATE.

(e) Indemnification. Customer will defend, indemnify and hold esped, its directors, employees and agents, harmless from all liability and expense (including attorney fees) arising from any third party claim that a) the Data has been subject to unauthorized access, use or disclosure, b) any Authorized User has failed to comply with the requirements of this Agreement, particularly with respect to User Content and User authentication, and c) the Data or User Content infringes intellectual property rights of the claimant.

9. Limitation of Remedies & Liabilities. The following provisions are a material condition of this Agreement and reflect a fair allocation of risk:

(a) Remedies. Customer agrees that if the esped violates any warranty or other provision of this Agreement, and esped determines that repair or other corrective action is not economically or technically feasible, Customer's sole and exclusive remedy will be to obtain a refund, prorated based on the Term of this Agreement as provided in Schedule A, of amounts paid for Online Services by Customer during the previous twelve (12) months. Customer also agrees that legal remedies alone provide inadequate protection of intellectual property rights described in Section 6 ("Certain Proprietary Rights") and that, in addition to other relief, esped or other owner may go to court and without necessity of posting bond obtain temporary and permanent injunctions to enforce those rights. Customer will defend, indemnify and hold esped harmless from all claims and expenses (including reasonable legal fees) arising from any violation by Customer of this Agreement or applicable law.

(b) Liabilities. ESPED IS NOT LIABLE FOR ANY AMOUNT EXCEEDING THE PRICE PAID AND/OR DUE FROM CUSTOMER FOR ONLINE SERVICES IN THE TWELVE (12) MONTH PERIOD IMMEDIATELY PRECEDING THE EVENT GIVING RISE TO ANY CLAIM. IN NO EVENT SHALL ESPED BE LIABLE, WHETHER IN CONTRACT, TORT (INCLUDING NEGLIGENCE) OR OTHERWISE, FOR ANY INDIRECT, PUNITIVE, SPECIAL, EXEMPLARY, INCIDENTAL OR CONSEQUENTIAL DAMAGES OF ANY TYPE OR KIND (INCLUDING LOST SAVINGS, PROFIT, REVENUE, LOST DATA, BUSINESS INTERRUPTION, USE, OTHER ECONOMIC ADVANTAGE OR ATTORNEYS FEES EVEN IF NOTIFIED IN ADVANCE OF SUCH POSSIBILITY) INCURRED BY CUSTOMER, OR ARISING OUT OF, OR IN ANY WAY CONNECTED WITH ONLINE SERVICES, INCLUDING BUT NOT LIMITED TO CUSTOMER'S USE OR INABILITY TO USE THE ONLINE SERVICES. FOR PURPOSES OF THIS SUBSECTION, "ESPED" INCLUDES ALL THIRD PARTY SUPPLIERS AND ANY DISTRIBUTOR, PUBLISHER OR RESELLER FROM WHOM CUSTOMER OBTAINED THE ONLINE SERVICES OR OTHER COMPONENTS. SOME STATES DO NOT ALLOW THE EXCLUSION OR LIMITATION OF LIABILITY FOR INCIDENTAL OR CONSEQUENTIAL DAMAGES, SO THE FOREGOING LIMITATION MAY NOT APPLY TO CUSTOMER.

10. Term & Termination.

(a) Generally. esped shall, during the "Term" defined in Schedule A ("Price and Term for Application Services"), provide Customer with Online Services in consideration for the "Service Fee" also set forth in Schedule A. This Agreement will automatically renew each year on the anniversary of the service term start date and shall continue in full force and effect until terminated by either party upon thirty (30) days written notice. esped shall issue an invoice to Customer in advance of their annual renewal date according to the billing procedure described in Subsection 5(a) ("Application Service Fees"). Notwithstanding the foregoing, (i) esped may suspend or terminate this Agreement at any time without notice if Customer breaches any provision of it, and (ii) Customer may terminate this Agreement at any time if Customer does not agree to any amendment published under Subsection 1(b) ("Changes to Agreement").



(b) Effect of Termination. Termination of this Agreement will terminate Customer's right to access or use the Online Services. Termination will have no effect on payment of amounts due under Section 5 ("Price & Payment"), proprietary rights and obligations under Section 6 ("Certain Proprietary Rights"), indemnifications or disclaimers under Section 8 ("Warranties"), limitations under Section 9 ("Limitation of Remedies & Liabilities") or continuing assurances made under Section 12 ("Export Regulations"). Upon Termination for cause, Customer's right to access or use Data immediately ceases, and esped shall have no obligation to maintain any Data stored in Customer's account or to forward any data to Customer or any third party. In the event that Customer terminates this Agreement for reason other than its breach of this Agreement, esped shall make available to Customer a file of its Data if Customer so requests its Data at the time of its notification of termination.

11. Disputes, Choice of Law. Except actions for certain injunctive relief authorized under Section 9 ("Limitation of Remedies & Liabilities"), which may be brought in a court of competent jurisdiction at any time, the parties agree that all disputes shall be submitted to a single arbitrator for nonbinding arbitration under proceedings conducted in accordance with the Commercial Arbitration Rules of the American Arbitration Association. The award of the arbitrator shall be limited to remedies otherwise available in court and shall include a written explanation of the decision. If the parties are still unable to reconcile their differences after the arbitrator issues its award, the dispute then may be taken to court by either party. THIS AGREEMENT SHALL BE GOVERNED BY AND CONSTRUED IN ACCORDANCE WITH THE SUBSTANTIVE LAWS OF THE UNITED STATES AND MASSACHUSETTS, AND ANY ACTION SHALL BE INITIATED AND MAINTAINED IN A FORUM OF COMPETENT JURISDICTION IN SUCH DESIGNATED STATE. ANY ACTION OR OTHER PROCEEDING BY CUSTOMER SHALL BE INITIATED WITHIN ONE (1) YEAR AFTER THE CAUSE OF ACTION AROSE, OR BE BARRED.

12. Export Regulations.

(a) Export Control. esped's Online Services rely on software and technology that may be subject to United States export controls administered by the U.S. Department of Commerce, the United States Department of Treasury Office of Foreign Assets Control, and other U.S. agencies and the export control regulations of the European Union. Customer acknowledges and agrees that Online Services shall not be used, and none of the underlying information, software or technology may be transferred or otherwise exported or re-exported to Afghanistan, Burma, Cuba, Iraq, Iran, Libya, Sudan or any other countries to which the United States and/or the European Union maintains an embargo (collectively, "Embargoed Countries"), or to or by a national or resident thereof, or any person or entity on the U.S. Department of Treasury's List of Specially Designated Nationals or the U.S. Department of Commerce's table of Denial Orders (collectively, "Designated Nationals"). The lists of Embargoed Countries and Designated Nationals are subject to change without notice. By using the Online Services, Customer agrees to comply strictly with all U.S. and European Union export laws and assumes sole responsibility for first obtaining licenses to export or re-export as may be required. This provision and the assurances made herein shall survive termination of this Agreement.

(b) International Use. Online Services may use encryption technology that is subject to the licensing requirements under the U.S. Export Administration regulations, 15 C.F.R. Parts 730-774 and Council Regulation (EC) No. 1334/2000. esped makes no representation that the Online Services is appropriate or available for use outside the United States. Customer is solely responsible for compliance with all applicable laws for use of Online Services outside the United States, including export or import regulations of other countries.

13. Miscellaneous. This Agreement constitutes the entire and exclusive agreement between the parties with respect to this subject matter and supersedes all other communications, whether written or oral. This Agreement may be amended as provided in Section 1(b) ("Changes to Agreement"). Any other amendment shall require a writing signed by esped, regardless of any course of conduct or trade practice between the parties. This document and Customer's signature in electronic form, or a hardcopy duplicate in good form, shall be considered an original document with authenticated signature admissible into evidence unless the document's authenticity is genuinely placed in question. Customer may issue a purchase order for administrative convenience, but it will have no substantive effect on the terms or conditions of this Agreement. Any provision hereof found by a tribunal of competent jurisdiction to be illegal or unenforceable shall be automatically conformed to the minimum requirements of law and all other provisions shall remain in full force and effect. Waiver of any provision hereof in one instance shall not preclude enforcement of it on future occasions. Headings are for reference purposes only and have no substantive effect.