

CLIENT AGREEMENT
for
APEX LEARNING DIGITAL CURRICULUM SOLUTIONS

This Client Agreement for Apex Learning Digital Curriculum Solutions (“**Agreement**”) is effective on April 15, 2021 (“**Effective Date**”) and is made by and between Apex Learning Inc., a Washington corporation with its principal place of business at 1215 Fourth Avenue, Suite 1500, Seattle, WA 98161 (“**Apex Learning**”) and Mount Diablo Unified School District, with its principal place of business at 1936 Carlotta Drive, Concord, CA 94519 (“**Client**”).

RECITALS

Apex Learning provides digital curriculum solutions for secondary education.

Client desires to purchase the digital curriculum solutions described in Exhibit A and have its students, teachers, administrators, and staff access and use the Apex Curriculum (as defined below), all pursuant to the terms and conditions set forth below.

In consideration of the covenants and conditions set forth below and for other good and valuable consideration, the adequacy of which the parties hereby acknowledge, the parties agree as follows:

AGREEMENT

1. **Definitions.** Each of the following initially capitalized terms has the meaning set forth below. All other initially capitalized terms have the meanings assigned in this Agreement.
 - 1.1. “**Apex Curriculum**” means the Apex Learning digital curriculum described in Exhibit A. The Apex Curriculum does not include any Course Materials that may be required.
 - 1.2. “**Client User**” means each Client teacher, administrator, and student, as well as each student parent/guardian, who registers with Apex Learning and establishes a password to access the Apex Curriculum made available under this Agreement.
 - 1.3. “**Course Materials**” mean items or materials separate from the Apex Curriculum that are identified as either required or optional for the Apex Curriculum (e.g., calculators, microphones/headsets, textbooks, literature, and lab materials).
 - 1.4. “**Student Data Privacy and Protection Addendum**” means the addendum attached as Exhibit D.
 - 1.5. “**Term**” will have the meaning set forth in Section 9.1.
 - 1.6. “**User Support**” means the Apex Learning support services described in Exhibit C.
2. **Apex Learning Obligations.**
 - 2.1. **Digital Curriculum Solutions.** Apex Learning will provide the digital curriculum solutions described in Exhibit A, including hosting the Apex Curriculum and making it available for access and use by Client Users.
 - 2.2. **User Support.** Apex Learning will provide Client Users with User Support throughout the Term.
 - 2.3. **Uptime.** Apex Learning will use commercially reasonable efforts to make the Apex Curriculum available for access by Client Users ninety-nine percent (99%) of the time, measured on a monthly basis, excluding Planned Outages. “**Planned Outages**” means the installation of upgrades, routine application, server, or network configuration changes, and other reasonable maintenance activities. Planned Outages will be conducted during

off-peak Apex Curriculum utilization times. Apex Learning will post an advance announcement of any Planned Outage on the Apex Learning website through which Client Users access the Apex Curriculum.

- 2.4. **All Rights Reserved.** Apex Learning and its suppliers own all right, title and interest in and to the Apex Curriculum. Other than granting Client Users the right to access and use the Apex Curriculum as described in this Agreement, Apex Learning expressly reserves all right, title, and interest therein.

3. **Client Obligations.**

- 3.1. **Hardware/Software.** The Apex Curriculum is made available to Client Users over the Internet through a web-browser interface. To access the Apex Curriculum, therefore, Client Users must have a suitable Internet connection and access to an appropriately configured computer, as well as an appropriately configured computer network (where applicable) in accordance with the system recommendations posted at <http://www.apexlearning.com/systemrequirements/systemrecommendations.pdf>.
- 3.2. **Terms of Use.** All Client Users who access the Apex Curriculum must comply with the Apex Learning Terms of Use for Customer Websites ("**Terms of Use**"). The current version of such Terms of Use is posted at www.apexvs.com through which Client Users access the Apex Curriculum. Apex Learning reserves the right to suspend or discontinue a Client User from accessing the Apex Curriculum at any time if the Client User violates the Terms of Use. To the extent it has knowledge, Client will notify Apex Learning of any activity by its Client Users in violation of the Terms of Use. For the purpose of clarification, the Terms of Use are not part of this Agreement and do not modify or supplement the Agreement.
- 3.3. **Laboratory Activities.** If hands-on laboratory activities included in the Apex Curriculum are implemented by Client Users, Client is responsible for all such hands-on laboratory activities, including ensuring that qualified personnel are available to supervise such hands-on laboratory activities. Apex Learning will have no liability whatsoever regarding any hands-on laboratory activities.
- 3.4. **No Resale Rights.** Client will not resell to any third party the right to access or use the Apex Curriculum or provide any third party who is not a Client User with access to, or the ability to use, the Apex Curriculum.

4. **Payment.**

- 4.1. **General.** In consideration for the rights granted and services provided under this Agreement, Client will pay Apex Learning the amounts set forth in Exhibit A. Apex Learning will issue invoices for such amounts pursuant to the invoice schedule in Exhibit B.
- 4.2. **Payment Terms.** Client will pay all Apex Learning invoices properly issued under this Agreement within thirty (30) days of the invoice date. If payment is made via credit card Apex Learning will assess a processing fee equal to three percent (3%) of the amount charged to such card.
- 4.3. **Taxes.** Amounts stated under Section 4.1 do not include any applicable sales, use, gross income, occupational, or similar taxes; import or export fees; duties, imports, or tariffs; or any other taxes, duties, charges, or fees of any kind which may be levied in connection with the transactions covered under this Agreement. Any such taxes (if any are due) are the responsibility of Client. Client will indemnify and hold Apex Learning harmless from any liability with respect to such taxes. Apex Learning is solely responsible for Apex Learning's income and payroll taxes.

5. **Confidentiality.**

- 5.1. **Student Data Privacy and Protection.** Apex Learning and Client agree to comply with their respective obligations under the Student Data Privacy and Protection Addendum attached as Exhibit D. With respect to the Children's Online Privacy Protection Act (COPPA), Apex Learning does not obtain parental consent for the collection of students' personal information directly, but rather relies upon Client's authorization as permitted under COPPA and FTC guidelines.

5.2. **Protection of Other Confidential Information.** In addition to the parties' respective obligations under Section 5.1 above, each party agrees that it will not disclose to any third party any Confidential Information of the other party, except to the extent required by law or as otherwise expressly authorized herein. The term "Confidential Information" means all non-public information that either party designates as being confidential, or which, under the circumstances of disclosure ought to be treated as confidential. Apex Learning's Confidential Information includes, without limitation pricing for the Apex Curriculum. Confidential Information does not include information that was known to the receiving party prior to the disclosing party's disclosure to the receiving party, or information that becomes publicly available through no fault of the receiving party. Nothing in this Section 5 precludes either party from disclosing Confidential Information when and as required by law. Further, if there is a conflict between this Section 5.2 and the Student Data Privacy and Protection Addendum, the Student Data Privacy and Protection Addendum will control with respect to that conflict.

6. **Representations and Warranties.**

6.1. **By Both Parties.** Each party hereby represents and warrants to the other party that it: (a) has the power and authority to enter into this Agreement and is permitted by applicable law and regulations to enter into this Agreement; and (b) will comply with all applicable laws in the performance of its obligations under this Agreement, including those laws identified in the Student Data Privacy and Protection Addendum.

6.2. **By Apex Learning.** Apex Learning further represents and warrants that Client Users' access to and use of the Apex Curriculum as described in this Agreement will not infringe any third-party copyright.

6.3. **WARRANTY DISCLAIMER.** EXCEPT AS SET FORTH IN SECTION 6.2, APEX LEARNING DISCLAIMS ANY AND ALL WARRANTIES, CONDITIONS, AND DUTIES OF ANY KIND (IF ANY), EXPRESS, IMPLIED, OR STATUTORY WITH RESPECT TO THE APEX CURRICULUM, INCLUDING WITHOUT LIMITATION, ANY WARRANTY OF MERCHANTABILITY, OF FITNESS FOR ANY PARTICULAR PURPOSE. EXCEPT AS SET FORTH IN SECTION 6.2, THERE IS NO WARRANTY OF NON-INFRINGEMENT OR TITLE.

7. **Indemnity.**

7.1. **Duty to Indemnify.** Subject, in the case of Client, to any applicable laws restricting Client's ability to provide the indemnification described in this Section 7, each party will indemnify, defend, and hold the other party and its officers, employees, and agents harmless from any and all actions, causes of action, claims, demands, costs, liabilities, expenses and damages arising out of or in connection with any breach or alleged breach of any representation or warranty set forth in Section 6.

7.2. **Procedure.** If an action is brought for which indemnity is sought under this Section 7, the party seeking indemnity will send reasonably prompt written notice to the other party specifying the nature of the action and the total damages or other relief sought and will permit the indemnifying party to answer and defend such claim. The party seeking indemnity will provide the indemnifying party with such information and assistance as is reasonably necessary to assist the indemnifying party, at the indemnifying party's expense, in defending any such action. The party seeking indemnity reserves the right to employ separate counsel and participate in the defense at its expense. The indemnifying party will not be responsible for any settlement made by the party seeking indemnity without the indemnifying party's written consent, which will not be unreasonably withheld or delayed, nor will the indemnifying party settle any claim under this Section 7 without first obtaining the written consent of the party seeking indemnity, which will not be unreasonably withheld or delayed.

8. **EXCLUSION OF CERTAIN DAMAGES & LIMITATION ON LIABILITY.**

8.1. **EXCLUSION OF CERTAIN DAMAGES.** NEITHER PARTY WILL BE LIABLE TO THE OTHER PARTY FOR ANY INDIRECT, INCIDENTAL, CONSEQUENTIAL, SPECIAL OR PUNITIVE DAMAGES ARISING OUT OF OR IN CONNECTION WITH THIS AGREEMENT, EVEN IF A PARTY HAS BEEN ADVISED OF THE POSSIBILITY OF SUCH DAMAGES OR IF SUCH POSSIBILITY WAS REASONABLY FORESEEABLE.

8.2. **LIMITATION ON LIABILITY.** IN NO EVENT WILL APEX LEARNING'S TOTAL AGGREGATE LIABILITY FOR ALL CLAIMS ARISING OUT OF OR IN CONNECTION WITH THIS AGREEMENT EXCEED THE TOTAL AMOUNTS ACTUALLY PAID BY CLIENT TO APEX LEARNING UNDER THIS AGREEMENT.

8.3. **APPLICATION.** THE EXCLUSION OF DAMAGES AND LIMITATION ON LIABILITY IN THIS SECTION 8 SHALL APPLY REGARDLESS OF THE FORM OR CAUSE OF ACTION OR THE ALLEGED BASIS OF ANY CLAIM AND EVEN IF THE REMEDIES OTHERWISE PROVIDED UNDER THIS AGREEMENT AT LAW OR IN EQUITY FAIL OF THEIR ESSENTIAL PURPOSE.

9. **Term and Termination.**

9.1. **Term.** This Agreement shall commence on the Effective Date and continue through September 16, 2022, unless earlier terminated as provided in this Section 9.

9.2. **Termination.** Either party may suspend performance or terminate this Agreement immediately upon written notice to the other party at any time if the other party is in material breach of any provision of this Agreement and has failed to cure that breach within thirty (30) days after receipt of written notice thereof. Without limiting the foregoing, Apex Learning may suspend performance or terminate this Agreement immediately upon written notice to Client if Client is thirty (30) days overdue on any payment due to Apex Learning under this Agreement.

9.3. **Effect of Expiration/Termination.** Upon the expiration or termination of this Agreement, all access to the Apex Curriculum will promptly cease, and Client will immediately pay all amounts due to Apex Learning up to the date of expiration/termination. The following Sections will survive the expiration or termination of this Agreement: Sections 4 (with respect to amounts due and owing upon expiration/termination), 5, 6, 7, 8, 9.3, and 10, as well as applicable provisions of Exhibit D.

10. **Miscellaneous.**

10.1. **Relationship of Parties.** Client and Apex Learning are independent contractors with respect to one another, and nothing in this Agreement will be interpreted to create any agency, joint venture, employment or partnership relationship.

10.2. **Force Majeure.** For a reasonable time period, Apex Learning will be excused from delay, breach of this Agreement, or failure in performance under this Agreement due to causes beyond Apex Learning's reasonable control including without limitation, acts of God, government action, strikes, acts of public enemies, civil disturbance or riots, war, national emergency, floods, power outages, telecommunications failures, fires, earthquakes, storms, or other similar causes.

10.3. **Notices.** Any notices given under this Agreement shall be delivered in writing either by messenger or overnight delivery service, with a confirmation of delivery, and addressed to Apex Learning or Client at the address stated in the table below, and shall be deemed to have been given on the day when received by the party to whom the notice is given.

	Apex Learning Contact	Client Contact
Individual Name and/or Title	Manager, Contracts	Jennifer Sachs
Organization	Apex Learning Inc.	Mount Diablo Unified School District
Address	1215 Fourth Avenue, Suite 1500	1936 Carlotta Drive
City, State, Zip	Seattle, WA 98161	Concord, CA 94519
Phone	206-381-5600	925-682-8000


10.4. **Assignment.** Neither party will assign this Agreement or any of its rights or obligations hereunder without the prior written consent of the other party. Notwithstanding the immediately preceding sentence, either party may assign this Agreement without the other party's prior written consent as part of a merger, acquisition or a sale or

transfer of a majority of the assigning party's assets. This Agreement will be binding upon, enforceable by, and inure to the benefit of the parties and their respective successors and permitted assignees.

- 10.5. **Waiver/Severability.** No provision of this Agreement will be deemed waived unless the waiver is in writing and signed by the waiving party, and no such waiver will constitute a waiver of any other provision(s) or of the same provision on another occasion. If any term of this Agreement is found by a court of competent jurisdiction to be in whole or in part unenforceable, then such unenforceable term or portion thereof will be deemed superseded by a valid, enforceable provision that most closely matches the intent of the original provision and the allocation of risk among the parties reflected in the original provision, and the remainder of this Agreement shall continue in effect.
- 10.6. **Governing Law/Attorneys' Fees.** This Agreement will be governed by and construed under the laws of the State of California (except to the extent federal law is controlling on the subject matter), without regard to its conflict of laws provisions. In any action to enforce any right or remedy under this Agreement or to interpret any provision of this Agreement, the prevailing party will be entitled to recover its costs, including reasonable attorneys' fees.
- 10.7. **No Third-Party Beneficiaries.** This Agreement is for the benefit of, and shall be enforceable by, the parties only. This Agreement is not intended to confer any right or benefit on any third party. No action may be commenced or prosecuted against a party by any third party claiming as a third-party beneficiary of this Agreement.
- 10.8. **Entire Agreement.** This Agreement, including without limitation all Exhibits attached hereto, constitutes the entire agreement between the parties with respect to its subject matter and supersedes all prior and contemporaneous agreements, oral or written, regarding such subject matter. Changes, modifications or waivers to this Agreement must be in writing and signed by both parties.
- 10.9. **Execution in Counterparts/Electronic Signatures.** This Agreement may be executed in any number of separate counterparts, each of which together shall constitute a single agreement, but each together shall constitute one and the same instrument. Each party agrees that it will not contest the validity of the execution of this Agreement solely on the basis of the exchange of signed counterparts in .pdf format or the use of a mutually agreed-upon electronic signature process. Any copy of this Agreement electronically signed by both parties pursuant to any such mutually-agreed electronic signature process will be deemed to be an original.

IN WITNESS WHEREOF, the authorized representatives of Apex Learning and Client identified in the signature block below agree to the terms and conditions set forth in this Agreement.

Apex Learning Inc.

By: 
Print Name: Chuck Lanphier
Title: Sr. Vice President, Client Services
Date: 3/12/2021

Mount Diablo Unified School District

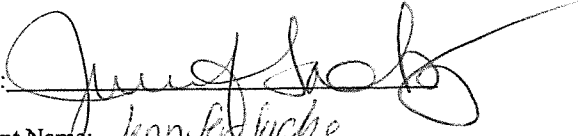
By: 
Print Name: Jennifer Bucke
Title: Chief, Educational Services
Date: 3/11/2021
* Per Board approval 3/24/21

EXHIBIT A
Digital Curriculum Solutions

1. **Apex Curriculum:**

- **Courses:** Commencing April 15, 2021 and continuing through September 16, 2021, Client's purchase of 250 Courses single enrollment subscriptions under Purchase Order Number 210677 is converted to unlimited enrollments district-wide in middle and high school courses. This does not include access to Technology Courses.

Price: \$54,589.17

- **Courses:** Unlimited enrollments district-wide in middle and high school courses from September 17, 2021 through September 16, 2022. This does not include access to Technology Courses.

Price: \$130,836.88

- **Tutorials:** 50 Tutorials subscriptions from September 17, 2021 through September 16, 2022.

Price: \$3,250.00

Each Tutorials subscription provides access for one student enrolled in any number of Tutorials at the same time. If a student completes or withdraws from all Tutorials in which he or she is enrolled, the subscription may be reused to enroll another student in any number of Tutorials. The number of students enrolled at the same time may not exceed the number of subscriptions purchased. Client may purchase additional subscriptions for access from September 17, 2021 through September 16, 2022 at \$65.00 per subscription.

2. **Professional Services:**

- Four 6-hour onsite sessions.

Price: \$8,800.00

Total Price: \$197,476.05

EXHIBIT B
Invoice Schedule

Apex Learning will invoice Client in the amount of (i) \$65,836.88 on April 15, 2021, (ii) \$68,250.00 on September 15, 2021, and (iii) \$54,534.17 on December 15, 2021, for a total of \$188,621.05.

For the purpose of clarification, \$188,621.05 is the equivalent of \$197,476.05 for Client's purchase under Exhibit A of this Agreement, less \$8,855.00 for Client's purchase of 250 Courses single enrollment subscriptions under Purchase Order Number 210677 for the period from April 15, 2021 through September 16, 2021, previously paid for by Client.

EXHIBIT C

User Support

1. **General.** Apex Learning will provide Client Users with support via a toll-free phone number (for U.S. calls only), online chat and/or email. Phone support will be available from Apex Learning Monday–Friday from 5:00 a.m. to 7:00 p.m. Pacific Time. Apex Learning will give Client Users notice of any intermittent or seasonal changes to the phone support schedule by posting an announcement on the Apex Learning website through which Client Users access the Apex Curriculum and/or by a voicemail greeting.
2. **Disclaimer.** Apex Learning’s ability to support Client Users with respect to the Apex Curriculum depends on Client (a) providing Apex Learning with prompt notice if Client becomes aware of any problem that affects the ability of Client Users to access and/or use the Apex Curriculum, (b) cooperating in a timely manner with Apex Learning’s efforts to diagnose the source of problems, (c) making available to Apex Learning appropriate staff and system information for resolving issues as they may arise, and (d) implementing reasonable technical solutions suggested by Apex Learning in a timely manner. In addition, Apex Learning is not responsible for Client User problems that stem from Client’s Internet connection, any Client or third-party hardware or software, or Client’s own network.

EXHIBIT D

Student Data Privacy and Protection Addendum California Education Code Section 49073.1 (AB No. 1584)

A. **DEFINITIONS.** The following terms will have the following meanings for purposes of this Addendum:

1. **“Deidentified Information”** means information that cannot be used to identify an individual Client student.
2. **“Eligible Pupil”** means a Client student who has reached 18 years of age.
3. **“Pupil-Generated Content”** means materials created by a Client student, including, but not limited to, essays, research reports, portfolios, creative writing, music or other audio files, photographs, and account information that enables ongoing ownership of Client student content. **“Pupil-Generated Content”** does not include Client student responses to a standardized assessment where Client student possession and control would jeopardize the validity and reliability of that assessment.
4. **“Pupil Records”** mean both of the following:
 - a. Any information directly related to a Client student that is maintained by Client, and
 - b. Any information acquired directly from a Client student through the use of Apex Curriculum assigned to the Client student by a teacher or other Client employee.

“Pupil Records” do not mean any of the following:

- a. Deidentified Information, including aggregated deidentified information, used by Apex Learning to improve educational products for adaptive learning purposes and for customizing student learning,
- b. Deidentified Information, including aggregated deidentified information, used to demonstrate the effectiveness of Apex Learning’s products in the marketing of those products, or
- c. Deidentified Information, including aggregated deidentified information, used for the development and improvement of educational sites, services, or applications.

B. **ADDITIONAL TERMS REGARDING PUPIL RECORDS/PUPIL-GENERATED CONTENT**

1. Pupil Records obtained by Apex Learning under this Agreement are and will continue to be the property of and under the control of Client.
2. Notwithstanding Section 1 above, Client students may retain possession and control of their own Pupil-Generated Content created using the Apex Curriculum as follows:

Students may retain a copy of each item of Pupil-Generated Content as it is generated (e.g., by making a digital or hard copy).

3. Apex Learning will not use any information in any Pupil Record for any purpose other than those purposes required or specifically permitted by this Agreement. For clarification, these purposes include use of Pupil Records as reasonably necessary for Apex Learning to provide the Apex Curriculum and related services and support to Client and Client students under this Agreement.

4. A parent, legal guardian or Eligible Pupil may review personally identifiable information in a Client student's Pupil Records and correct erroneous information as follows:

Client students have access to their Pupil Records through their access to the Apex Curriculum. A parent, legal guardian or Eligible Pupil may contact Client to request a correction to erroneous personally identifiable information and Apex Learning will make such changes as directed by Client.

5. Apex Learning takes the following actions to protect the security and confidentiality of Pupil Records:

Pupil Records will be stored in electronic memory (on servers or other computers) operated and maintained by or on behalf of Apex Learning in the United States. The measures that Apex Learning will take to protect the security and confidentiality of Pupil Records containing personally identifiable Client student information while it is stored in that manner include, but are not necessarily limited to: encryption to protect personally identifiable information while in motion or at rest; restricted physical access to the servers/computers; software-based solutions intended to prohibit unauthorized entry such as regularly updated virus scans, firewalls, and use of passwords; and administrative controls such as selective user access rights, and including the designation and training of responsible individuals.

6. In the event of an unauthorized disclosure of a Client student's Pupil Records, the following procedures will be followed for notifying the parent, legal guardian or Eligible Pupil:

Apex Learning shall notify Client without unreasonable delay of any breach of security resulting in an unauthorized release of a Client student's personally identifiable information in a Pupil Record, by Apex Learning or its assignees in violation of applicable state or federal law.

7. Apex Learning certifies that Pupil Records will not be retained or available to Apex Learning upon completion of the terms of this Agreement. This certification will be enforced as follows:

As a term of this Agreement, the parties agree that following the expiration or termination of this Agreement, Apex Learning will store Pupil Records for renewed access by Client (*i.e.*, by way of renewal of this Agreement or execution of a subsequent Agreement with Apex Learning) until such time as Client provides written notice to Apex Learning that Client no longer wishes to have Apex Learning provide such ongoing storage. Within a reasonable time period following receipt of any such written notice from Client, Apex Learning will deidentify all such Pupil Records (*i.e.*, modify Pupil Records so that they cannot be used to identify an individual Client student and therefore no longer qualify as "Pupil Records").

8. Client agrees to work with Apex Learning to ensure compliance with the federal Family Educational Rights and Privacy Act (if applicable) pursuant to procedures agreed upon by the parties.
9. Apex Learning is prohibited from using personally identifiable information in Pupil Records to engage in targeted advertising.