



**State of Oklahoma**  
**Office of Management and Enterprise Services**

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**ADDENDUM 1 TO  
STATE OF OKLAHOMA CONTRACT WITH APEX LEARNING  
RESULTING FROM SOLICITATION NO. 0900000281**

This Addendum 1 (“Addendum”) is an Amendment to the Contract awarded to Apex Learning (“Apex Learning”) in connection with Solicitation 0900000281 (“Solicitation”) and is effective December 20, 2017.

**Recitals**

Whereas, the State of Oklahoma by and through the Office of Management and Enterprise Services on behalf of the Statewide Virtual Charter School Board (“State”) issued a Solicitation for proposals to provide qualified vendors for providing online course curriculum for K-12 education, as more particularly described in the Solicitation;

Whereas, Apex Learning submitted a proposal which contained exceptions to the Solicitation terms and various other Contract Documents; and

Whereas, the State and Apex Learning have negotiated the final terms under which Apex Learning will provide the online course curriculum and related services under the Contract.

Now, therefore, in consideration of the foregoing and the mutual promises set forth herein, the receipt and sufficiency of which are hereby acknowledged the parties agree as follows:

**1. Addendum Purpose.**

This Addendum memorializes the agreement of the parties with respect to negotiated terms of the Contract that is being awarded to Apex Learning as of even date with execution of this Addendum. The parties agree that Supplier has not yet begun performance of work contemplated by the Solicitation.

2. Negotiated Documents of the Contract.


2.1. The parties have negotiated certain terms of the Contract as follows:

- i. certain exceptions to the Solicitation as contained in Attachment A to this Addendum titled "Negotiated Exceptions and Additional Terms to the Solicitation"
- ii. revisions to Apex Client Agreement, as contained in Attachment B to this Addendum, titled "Client Agreement for Apex Learning Digital Curriculum Solutions"

Contract Documents shall be read to be consistent and complementary. Any conflict among these documents shall be resolved by giving priority to these documents in the order listed above.

2.2. Accordingly, any reference to a Contract Document refers to such Contract Document as it may have been amended. If and to the extent any provision is in multiple documents and addresses the same or substantially the same subject matter but does not create an actual conflict, the more recent provision is deemed to supersede earlier versions. For avoidance of doubt, the document titled "Exceptions to Solicitation Terms and Conditions" submitted with Apex's response is superseded in its entirety by this Addendum.

State of Oklahoma

By: 

Name: James L. Reese, II

Title: Chief Information Officer

Date: 1/23/18

Apex Learning Inc.

By: 

Name: Cheryl Vedoe

Title: CEO

Date: 1/10/18

**Attachment A to  
Addendum 1 to  
State of Oklahoma Contract with APEX LEARNING INC.  
Resulting from Solicitation Number 0900000281**

**Negotiated Exceptions and Additional Terms to the Solicitation**

The Solicitation is hereby amended as set forth below and supersedes all prior Exceptions and additional terms submitted by Apex Learning Inc. or discussed by the parties.

**Solicitation, Section A General Provisions, Subsection A.18.1 is hereby deleted in its entirety and replaced with the following:**

The Supplier may terminate this Contract in whole or in part for default upon a thirty (30) day written notification to the State. The State may terminate this Contract in whole or in part for default upon a thirty (30) day written notification to the Supplier.

**Solicitation, Section B Special Provisions, Subsection B.15. is hereby added:**

The State requires any entity hosting Oklahoma client data to submit to a State Certification and Accreditation Review process to assess initial security risk. Supplier submitted to the review and met the State's minimum security standards at time the Contract was executed. Failure to maintain the State's minimum security standards during the term of the Contract, including renewals, constitutes a material breach.

**Solicitation, Section B Special Provisions, Subsection B.16. is hereby added:**

Supplier marked the following confidential: Client Agreement and Pricing Information. Supplier and State hereby acknowledge and affirm that the Client Agreement and Pricing Information will not be kept confidential.

**ATTACHMENT B TO ADDENDUM 1 to  
State of Oklahoma Contract with APEX LEARNING  
Resulting from Solicitation Number 0900000281**

The Client Agreement for Apex Learning Digital Curriculum Solutions is hereby amended as set forth below and supersedes all prior documents submitted by Apex Learning or discussed by the parties.

**CLIENT AGREEMENT  
for  
APEX LEARNING DIGITAL CURRICULUM SOLUTIONS**

This Client Agreement for Apex Learning Digital Curriculum Solutions (“**Agreement**”) is a Contract Document in connection with the contract issued as a result of Solicitation No. 0900000281 (the “**Contract**”), the terms of which are incorporated herein, and is entered into between Apex Learning Inc. (“**Apex Learning**”) and the State of Oklahoma by and through the Office of Management and Enterprise Services (“**OMES**”) on behalf of the Statewide Virtual Charter School Board (“**SVCSB**”).

This Client Agreement applies to Apex Learning’s provision of the Apex Curriculum (defined in Section 1.1 below) and related services (collectively, the “**Services**”). The Agreement for the Services consists of this Agreement and the applicable Quote (which references the purchased Services, term, pricing, and other terms of the order). This Agreement is applicable to the products and/or Services to be provided to a school, school district or other education institution or organization (“**Customer**”) by Apex Learning pursuant to an order under the Solicitation by Customer in the form of an Apex Learning price quote signed by Customer (“**Quote**”) and issuance of Customer’s purchase order for the full amount specified in the Quote.

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 curriculum offerings identified in the Contract and purchased by Customer via Quote. The Apex Curriculum includes both single enrollment subscriptions and Apex Learning Virtual School course enrollments. For the avoidance of doubt, when Customer Users utilize the Apex Learning Virtual School courses, such Customer Users are not enrolling in an online school but are purchasing courses from Apex Learning entitled Apex Learning Virtual School.
  - 1.2. “**Customer Data**” means all data supplied by or on behalf of the Customer in connection with a Customer User’s use of the Apex Curriculum, including but not limited to Student Data (defined in Section 1.6 below) containing confidential personally identifiable information as defined under FERPA (“**PII**”) (FERPA is defined in Section 6.3.1 below) from an Education Record (as defined under FERPA) maintained by Customer.
  - 1.3. “**Customer User**” means each Customer student and Customer teacher, administrator or staff member, who registers with Apex Learning and establishes a password to access the Apex Curriculum made available under this Agreement.
  - 1.4. “**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, novels, other literature, lab manuals, and lab materials).
  - 1.5. “**Professional Services**” mean the Apex Learning professional services to support program strategy, design, planning, and implementation.

- 1.6. **“Student Data”** means PII from an Education Record (as defined under FERPA) maintained or processed by Apex Learning in connection with the provisions of its Services to Customer.
- 1.7. **“Term”** means the period during which Customer Users are granted access to the Apex Curriculum under the Quote.
- 1.8. **“User Support”** means the Apex Learning support services described in Section 2.2.

2. **Apex Obligations.**

- 2.1. **Apex Curriculum.** Commencing on the date of purchase by Customer pursuant to a Quote and continuing throughout the Term, Apex Learning will host and make available the Apex Curriculum for access and use by Customer Users.
- 2.2. **Implementation and User Support.** Apex Learning will provide Customer and Customer Users with the following throughout the Term:
  - 2.2.1. **Educator Academy.** At no additional cost, Apex Learning will provide Customer User teachers, administrators, and staff with access to Apex Learning’s *Educator Academy*, a self-service, online learning portal available 24/7, that provides on-demand training and implementation resources in support of access to the Apex Curriculum.
  - 2.2.2. **General.** At no additional cost, Apex Learning will provide all Customer Users with support via a toll-free phone number (for U.S. calls only) and 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 Customer Users notice of any intermittent or seasonal changes to the phone support schedule by posting an announcement on the Apex Learning website through which Customer Users access the Apex Curriculum and/or by a voicemail greeting.
  - 2.2.3. **Disclaimer.** Apex Learning’s ability to support Customer and Customer Users with respect to the Apex Curriculum depends on Customer or Customer User:
    - (a) providing Apex Learning with prompt notice if Customer or Customer User becomes aware of any problem that affects the ability of Customer 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 Customer User problems that stem from Customer’s Internet connection, any Customer or third party hardware or software, or Customer’s own network.
- 2.3. **Uptime.** Apex Learning will use commercially reasonable efforts to make the Apex Curriculum available for access by Customer and Customer Users 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 Customer Users access the Apex Curriculum. Customer and Customer Users shall be notified at least twenty-four (24) hours in advance of any Planned Outage. Apex Learning may perform emergency maintenance services at any time

during the term of this Agreement without prior notice to Customer, provided that Apex Learning will notify Customer that it has performed emergency maintenance services as soon as feasible but in no event later than twenty-four (24) hours of performing the emergency maintenance services.

- 2.4. **Professional Services.** Intentionally Omitted. Apex Learning is not offering Professional Services under this Contract.
- 2.5. **Course Materials.** Certain Apex Learning courses have required or optional books (e.g., literature for English courses, lab manuals for science courses) or other ancillary materials (e.g., a calculator for math courses, a microphone for world language courses, lab materials for science courses). Many of these Course Materials may already be available to Customer Users for use, or may be purchased from Apex Learning or another supplier. The price for access to the Apex Curriculum does not include the cost of such Course Materials.
- 2.6. **All Rights Reserved.** Apex Learning and its suppliers own all right, title and interest in and to the Apex Curriculum. Other than granting Customer 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. **Customer Obligations.**
  - 3.1. **Hardware/Software.** The Apex Curriculum is made available to Customer Users over the Internet through a web-browser interface. To access the Apex Curriculum, therefore, Customer Users must have a suitable Internet connection and access to an appropriately configured computer, as well as an appropriately configured computer network (where applicable).
  - 3.2. **Parental Consent.** Customer will obtain any necessary parental consent for each Customer User student to access and use the Apex Curriculum.
  - 3.3. **Terms of Use.** All Customer Users that access the Apex Curriculum must comply with the Apex Learning Terms of Use for Customer Websites for use of the Apex Curriculum ("**Terms of Use**") posted at [www.apexvs.com](http://www.apexvs.com) through which Customer Users access the Apex Curriculum. Apex Learning reserves the right to suspend or discontinue a Customer User from accessing the Apex Curriculum at any time if the Customer User violates the Terms of Use so long as Apex Learning has provided Customer User notice of such violation and an opportunity to cure. Apex Learning agrees the following Terms of Use will not apply to Customer Users: Laboratory Activities; Customer Warranty Disclaimers; Limitation of Liability; Indemnity; Governing Law, Jurisdiction. The Terms of Use, as applicable to Customer Users, may be modified by Apex Learning only to the extent that such change does not enlarge or add to the State, Customer, or Customer User obligations hereunder or result in a material reduction in services provided by Apex Learning. If, during the Term, Apex Learning makes a material change to the Terms of Use that imposes an additional obligation on Customer Users, or otherwise negatively impacts the rights or remedies of Client Users (versus a change that provides additional information to Customer Users), such change will not take effect with respect to Customer Users unless approved by Customer in writing.
  - 3.4. **Laboratory Activities.** If hands-on laboratory activities included in the Apex Curriculum are implemented by Customer Users, Customer 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 with regard to any hands-on laboratory activities so long as Apex Learning has informed the Customer Users of the proper method to conduct the hands-on laboratory activities and has provided Customer Users notice of this provision.
  - 3.5. **No Resale Rights.** Customer 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 Customer User with access to, or the ability to use, the Apex Curriculum.

#### 4. Hosting; Data and Security; and Breach Obligations

##### 4.1. **Security.**

4.1.1. Generally, Apex Learning will implement and use commercially reasonable security measures, consistent with industry standards, to provide security for the Apex Curriculum and Customer Data, and to protect against both unauthorized access to the hosting environment, and unauthorized communication between the hosting environment and Customer's browser.

4.1.2. Viruses. Apex Learning represents and warrants to the Customer that the Apex Curriculum and hosting equipment will be routinely checked with a commercially available, industry standard software application with up-to-date virus definitions. The first check will take place before first use by the Customer. Apex Learning will regularly update the virus definitions to ensure that the definitions are as up-to-date as is commercially reasonable. Apex Learning will promptly purge all viruses discovered during virus checks. If there is a reasonable basis to believe that a virus may have been transmitted to the Customer by Apex Learning, Apex Learning will promptly notify the Customer of such possibility in a writing that states the nature of the virus, the date on which transmission may have occurred, and the means Apex Learning has used to remediate the virus. Should the virus propagate to State asset IT infrastructure, Apex Learning is responsible for costs incurred by State for State to remediate the virus.

4.1.3. Apex Learning acknowledges that it is liable to maintain the security and privacy of Customer Data and may be held liable for a breach of its security which results in the improper or unauthorized release of protected information.

4.2. **Incident Response** Apex Learning may need to communicate with outside parties regarding a security incident, which may include contacting law enforcement, fielding media inquiries and seeking external expertise as mutually agreed upon, defined by law or contained in the Contract. Discussing security incidents with Customer should be handled on an urgent as-needed basis, as part of Apex Learning communication and mitigation processes and mutually agreed upon, defined by law or contained in the Contract.

4.3. **Security Incident Reporting Requirements.** Apex Learning shall inform Customer of any security incident or data breach. Apex Learning shall report a security incident to the Customer identified contact set forth herein immediately as defined in this Agreement.

4.4. **Breach Reporting Requirements.** If Apex Learning has actual knowledge of a confirmed data breach that affects the security of any of Customer's content that is subject to applicable data breach notification law, Apex Learning shall (1) promptly notify the appropriate Customer identified contact set forth herein within 24 hours or sooner, unless shorter time is required by applicable law, and (2) take commercially reasonable measures to address the data breach in a timely manner.

4.5. **Breach Responsibilities:** This section only applies when a data breach occurs with respect to Customer Data within the possession or control of Apex Learning.

4.5.1. Apex Learning, unless stipulated otherwise, shall immediately notify the Customer identified contact set forth herein by telephone in accordance with the agreed upon security plan or procedures if it reasonably believes there has been a security incident.

4.5.2. Apex Learning, unless stipulated otherwise, shall promptly notify Customer identified contact within 2 hours or sooner by telephone, unless shorter time is required by applicable law, if it conforms that there is, or reasonably believes that there has been a data breach. Apex Learning shall (1) cooperate with Customer as reasonably requested by Customer to investigate and resolve the data breach, (2) promptly implement necessary remedial measures, if necessary, and (3) document responsive actions taken related to the data breach, including any post-incident review of events and

actions taken to make changes in business practices in providing the Services, if necessary.

- 4.5.3. Unless otherwise stipulated, if a data breach is a direct result of Apex Learning's breach of its obligation to encrypt personal data and Customer Data or otherwise prevent its release, Apex Learning shall bear the costs associated with (1) the investigation and resolution of the data breach; (2) notifications to individuals, regulators or others required by state law; (3) credit monitoring services required by state or federal law; (4) a website or toll-free numbers and call center for affected individuals required by state law – all not to exceed the per record per person cost calculated for data breaches in the United States on the most recent Cost of Data breach Study: Global Analysis published by the Ponemon Institute at the time of the data breach; and (5) complete all corrective actions as reasonably determined by Apex Learning based on root cause.

5. **Payment.**

- 5.1. **General.** In consideration for the rights granted and Services provided under this Agreement, Customer will pay Apex Learning the amounts set forth in each Quote in accordance with the Contract and Oklahoma law.
- 5.2. **Payment Terms.** As applicable, the parties shall comply with applicable Oklahoma law invoicing and making payments. Customer will pay all Apex Learning invoices issued under this Agreement within forty-five (45) days of the invoice date.
- 5.3. **Taxes.** Amounts stated under Section 5.1 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. Pursuant to Section 6.A. of the Oklahoma Constitution and 68 O.S. §§ 1404, 1352, and 1356, Customer is exempt from the assessment of State sales, use, and excise taxes.

6. **Confidentiality and Public Disclosure.**

- 6.1. **Confidentiality.** Each party agrees 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. Apex Learning's Confidential Information includes, without limitation, information relating to unreleased offerings. Customer's confidential information includes all Customer Data. Confidential Information does not include information that was known to the receiving party or in receiving party's possession prior to the disclosing party's disclosure to the receiving party; information that becomes publicly available through no fault of the receiving party; is lawfully obtained from a third party who has the right to make such disclosure; or has been independently developed by one party without reference to any Confidential Information of the other party. Nothing in this Section 6 precludes either party from disclosing Confidential Information when and as required by law.
- 6.2. **Public Disclosure.** The parties acknowledge that Customer is subject to certain laws governing the disclosure of public records. The parties also acknowledge that this Agreement includes terms and conditions regarding the business practices of Apex Learning that Apex Learning considers proprietary information. Accordingly, Customer agrees that it will not disclose the terms of this Agreement to any third party except and only to the extent that Customer is required to do so under applicable public disclosure laws. Further, if Customer receives a request to disclose any terms of this Agreement, then to the extent permitted by law Customer will provide Apex Learning with notice of such request, reasonably in advance of any disclosure, and give Apex Learning an opportunity to identify and enforce any authorized exceptions to public disclosure that may apply to such request.
- 6.3. **FERPA Compliance and Confidentiality.**
- 6.3.1. Apex Learning's ability to provide the Services under this Agreement requires Customer to share



Student Data from Education Records maintained by Customer with Apex Learning. Apex Learning agrees to comply with all state and federal laws relating to Student Data and privacy, including the Family Educational Rights and Privacy Act, (20 U.S.C § 1232g; 34 CFR Part 99), as amended from time to time (“FERPA”).

- 6.3.2. If Apex Learning determines that there is a legitimate need to receive or access additional student data from Customer and that such data is necessary to perform required duties, Apex Learning shall submit a written request to Customer detailing the data needed and state the purpose of the disclosure. If Customer determines that access is necessary and appropriate, this Agreement may be modified in accordance with the request. No additional data shall be provided until the Agreement is modified to reflect the additional data disclosures.
- 6.3.3. Apex Learning will safeguard the confidentiality and integrity of all data received pursuant to this Agreement, place limitations on its use, and maintain compliance with all applicable privacy laws. Apex Learning shall establish appropriate administrative, technical and physical safeguards to ensure the security and confidentiality of all Student Data.
- 6.3.4. Student Data cannot be published in a way that would allow individual students or their parents to be identified. Any reports or published information that is a result of or derived from Student Data provided by Customer shall not allow individuals to be directly or indirectly identified and shall contain no individual student level data. Apex Learning may use Student Data to perform contractual duties as required by this Agreement, but any published results must be presented in a manner which protects the privacy and confidentiality of students. Customer shall be provided the opportunity to review all results prior to publication.
- 6.3.5. Apex Learning shall require all Apex Learning staff to comply with the data security and confidentiality provisions set forth herein. Only those employees that are directly involved in performing tasks outlined herein and who have a legitimate interest in providing the Services according to the terms of this Agreement shall be entitled to access Student Data. Apex Learning shall take steps to maintain the confidentiality of Student Data.
- 6.3.6. This Agreement does not constitute a release of Student Data for Apex Learning’s discretionary use. Access to (or disclosure of) Student Data pursuant to the terms of this Agreement shall not constitute an assignment of ownership of the information provided. Customer retain all applicable rights to the Student Data transferred to Apex Learning pursuant to this Agreement, and Apex Learning shall not obtain any right, title, or interest in any of the Student Data furnished by Customer.
- 6.3.7. Data transferred pursuant to this Agreement may only be used to carry out the responsibilities throughout the duration of the projects, task and assignments specified herein. Any unauthorized use of the data files beyond the terms specified in the Agreement is not permitted. Apex Learning shall not use the data for purposes other than the projects, task and assignments identified herein.
- 6.3.8. Apex Learning shall immediately notify Customer if there is any unauthorized access or breach to the data provided by Customer and take reasonable steps to mitigate any breach. In the event a breach occurs, Apex Learning will take reasonable steps and implement corrective procedures to ensure that further breaches do not occur.
- 6.3.9. Customer shall be notified immediately if Apex Learning receives a request from any party other than Customer, the student, and/or the student’s parent or legal guardian for the Student Data provided by Customer. If Apex Learning becomes legally compelled to disclose any PII (whether by judicial or administrative order, applicable law, rule or regulation, or otherwise), then Apex Learning shall use all reasonable efforts to provide Customer with prior notice before disclosure so that Customer may seek a protective order or other appropriate remedy to prevent the disclosure. If a protective order or other remedy is not obtained prior to when any legally compelled disclosure is required, Customer shall only disclose that portion of the Student Data

that it is legally required to disclose.

- 6.3.10. Apex Learning may determine that it is necessary to employ a contractor or subcontractor to fulfill contractual obligations under the Contract. Apex Learning shall ensure, by written agreement, that any contractor or subcontractor employed by Apex Learning remains in compliance with FERPA.
- 6.3.11. Customer will immediately terminate this Agreement and this Agreement shall not be renewed due to the intentional breach of any of the terms and conditions of the data security and confidentiality provisions set forth herein by Apex Learning, and Customer, OMES, and/or SVCSB may revoke any other existing RFP's or contract with Apex Learning.
- 6.3.12. Customer may seek monetary, restitutive and punitive damages against Apex Learning for a breach of any of the terms and conditions of the data security and confidentiality provisions set forth herein as allowed by law.
- 6.3.13. Upon notification of a breach in the terms and conditions of the data security and confidentiality provisions set forth herein, Customer will not release any additional Student Data maintained by Customer to Apex Learning until corrective procedures have been implemented to ensure further breaches do not occur, if Customer has not terminated this Agreement pursuant to Section 6.3.11 above.
- 6.3.14. Upon completion of the Services detailed in this Agreement or upon termination of this Agreement, Apex Learning shall immediately destroy the Student Data that was disclosed by Customer and provided to Apex Learning for the purposes detailed in this Agreement. Within ten (10) days of destruction, Apex Learning shall provide written notification to Customer of the date and method of destruction of the Student Data.

## **7. Representations and Warranties.**

- 7.1. ***By Both Parties.*** Each party hereby represents and warrants to the other party that: (a) it 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) it will comply with all applicable laws in the performance of its obligations under this Agreement, and in particular applicable federal and state regulations regarding student records, student privacy, and the commercial use of student information, including FERPA.
- 7.2. ***By Apex Learning.*** Apex Learning further represents and warrants that (1) Customer's and Customer Users' access to and use of the Apex Curriculum as described in this Agreement will not infringe any third party copyright; (2) the Services, including with limitation any information delivered as part of the Services and content, will be delivered, provided, and performed in a professional and workmanlike manner; (3) the Services will perform and conform to the documentation specifications, and any other descriptions and warranties set forth herein; (4) the Services and any information or content delivered or furnished by Apex Learning will be in compliance with all applicable laws, rules, regulations, and determinations of government agencies, judicial orders, and regulatory or administrative rules or orders having jurisdiction over the subject matter; (5) there are no protections, encryption, security, or lock-out devices, whether triggered by the passage of time, the use or operation of the equipment, remotely or otherwise which might in any way interrupt, discontinue or otherwise adversely affect the Apex Curriculum or use thereof.
- 7.3. **WARRANTY DISCLAIMER.** EXCEPT AS SET FORTH IN SECTIONS 7.1 AND 7.2 ABOVE, 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 7.2 ABOVE AND IN THE CONTRACT, THERE IS NO WARRANTY OF NON-INFRINGEMENT OR TITLE.

8. **Indemnity.**

- 8.1. **Duty to Indemnify.** Apex Learning will indemnify, defend, and hold Customer 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 7 above and in accordance with the Contract.
- 8.2. **Procedure.** If an action is brought for which indemnity is sought under Section 7 of this Agreement and/or the Contract, Customer will send reasonably prompt written notice to Apex Learning specifying the nature of the action and the total damages or other relief sought and to the extent authorized by the Attorney General of the State, allows Apex Learning to control the defense and any related settlement negotiations. If the Attorney General of the State does not authorize sole control of the defense and settlement negotiations to Apex Learning, Apex Learning shall be granted authorization to equally participate in any proceeding related to this section but Apex Learning shall remain responsible to indemnify the State for all associated costs, damages and fees incurred by or assessed to the State.

9. **LIMITATION ON LIABILITY.**

- 9.1. Except for amounts payable with respect to the indemnification obligations set forth in the Contract; the confidentiality obligations set forth in Section 6 of this Agreement; and the hosting, data security and breach obligations set forth in Section 4 of this Agreement, in no event shall either party have liability with respect to its obligations under the Contract for special, consequential, exemplary, incidental or indirect damages for or loss of business profits. Apex Learning's sole liability, including liability arising out of the Contract, negligence, and strict liability in tort, shall not exceed the total amounts actually paid by Customer to Apex Learning under the Contract, including this Agreement. The parties agree that the foregoing limitations of liability are a condition and material consideration for their entry into the Contract.
- 9.2. With respect to the indemnification obligations set forth in the Contract; the confidentiality obligations set forth in Section 6 of this Agreement; and the hosting, data security, and breach notification obligations set forth in Section 4, neither party shall be liable to the other for lost profits or for any special, punitive, or exemplary damages in connection with the Contract including this Agreement, the services or the systems, however caused, under any theory of liability.
- 9.3. Notwithstanding anything to the contrary in the Contract, including this Agreement, the foregoing provisions of this Section shall not apply to or limit damages, expenses, costs, actions, claims and liabilities arising from or related to property damage, bodily injury or death caused by Apex Learning; the bad faith, gross negligence or intentional misconduct of Apex Learning or its employees agents and subcontractors; or other acts for which applicable law does not allow exemption from liability.

10. **Termination.**

- 10.1. Either Customer or Apex Learning 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 Customer if Customer is fifteen (15) days overdue on any payment due to Apex Learning under this Agreement after Apex Learning has first provided written notice of a payment being overdue and Customer has failed to make the payment within fifteen (15) days after receipt of written notice thereof.
- 10.2. **Effect of Expiration/Termination.** Upon the expiration or termination of this Agreement, all access to the Apex Curriculum will promptly cease, and Customer will pay all amounts due to Apex Learning up to the date of expiration/termination in accordance with Oklahoma law. The following Sections will survive the

expiration or termination of this Agreement: Section 5, Payment (with respect to amounts due and owing upon expiration/termination); Section 6, Confidentiality and Public Disclosure; Section 7, Representations and Warranties; Section 8, Indemnity; Section 9 Limitation on Liability; Section 10.2; and Section 11, Miscellaneous.

11. **Miscellaneous.**

- 11.1. ***Relationship of Parties.*** Customer and Apex Learning are independent contractors with respect to one another, and nothing in this Agreement or the Contract will be interpreted to create any agency, joint venture, employment or partnership relationship.
- 11.2. ***Force Majeure.*** For a reasonable time period, Apex Learning will be excused from delay, breach of this Agreement or the Contract or failure in performance under same 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.
- 11.3. ***Notices.*** Any notices given under this Agreement shall be delivered either by messenger or overnight delivery service, or sent via certified or registered mail, postage prepaid and return receipt requested, and addressed to Apex Learning, State of Oklahoma, SVCBS, or Customer at the addresses stated below, and shall be deemed to have been given on the day when received by the party to whom the notice is given.

**Notices to Apex Learning must be copied as follows:**

Manager, Contracts  
Apex Learning Inc.  
1215 Fourth Avenue, Suite 1500  
Seattle, WA 98161  
Telephone No. 206-381-5600

**Notice to State of Oklahoma must be copied as set forth below: Notice to the State of Oklahoma is required for the hosting; data security; and breach obligations set forth in Section 4 of this Agreement and the confidentiality obligations set forth in Section 6 of this Agreement.**

Chief Information Officer  
3115 North Lincoln Blvd.  
Oklahoma City, Oklahoma 73105  
Telephone No. 405-522-8855

And

Chief Information Security Officer  
3115 North Lincoln Blvd.  
Oklahoma City, Oklahoma 73105  
Telephone No. 405-522-4531

And

Information Services Deputy General Counsel  
3115 North Lincoln Blvd.  
Oklahoma City, Oklahoma 73105

**Notice to Statewide Virtual Charter School Board must be copied as follows:**

OSOCP Specialist  
2115 North Lincoln Blvd., Suite 4-37  
Oklahoma City, Oklahoma 73105

Telephone No. 405-522-0465

**Notice to Customer must be copied as follows:**

Name and Title of Customer Contact specified on Quote

Organization specified on Quote

Address specified on Quote

- 11.4. **Assignment.** Neither Customer or Apex Learning will assign this Agreement or any of its rights or obligations hereunder without the prior written consent of the other party. This Agreement will be binding upon, enforceable by, and inure to the benefit of the parties and their respective successors and permitted assignees.
- 11.5. **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.
- 11.6. **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.