

FOURTH AMENDMENT TO AGREEMENT

THIS FOURTH AMENDMENT TO AGREEMENT is made and entered into as of this ____ day of _____, 2020, by and between

THE SCHOOL BOARD OF BROWARD COUNTY, FLORIDA
(hereinafter referred to as “SBBC”),
a body corporate and political subdivision of the State of Florida,
whose principal place of business is
600 Southeast Third Avenue, Fort Lauderdale, Florida 33301

and

INSTRUCTURE, INC.
(hereinafter referred to as “INSTRUCTURE”),
having its principal place of business is
6330 South 3000 West East, Suite 700, Salt Lake City, Utah 84121

WHEREAS, SBBC and VENDOR entered into an Agreement that commenced on June 15, 2016 and concludes on June 30, 2021 (hereafter “Agreement”); and

WHEREAS, the Agreement is to provide a Learning Management System (LMS); and

WHEREAS, on December 17, 2017, SBBC and VENDOR entered into a First Amendment to Agreement; and

WHEREAS, on June 12, 2018, SBBC and VENDOR entered into a Second Amendment to Agreement; and

WHEREAS, on May 7, 2019, SBBC and VENDOR entered into a Third Amendment to Agreement; and

WHEREAS, the parties mutually desire to amend certain provisions of the Agreement through this Fourth Amendment to Agreement (hereafter “Fourth Amendment”).

NOW, THEREFORE, in consideration of the premises and of the mutual covenants contained herein and other good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, the Parties hereby agree as follows:

1.01 **Recitals.** The Parties agree that the foregoing recitals are true and correct and that such recitals are incorporated herein by reference.

1.02 **Amended Provisions.** The parties hereby agree to the following amended provisions to the Agreement:

a) **The following provision shall replace sections 2.7, 2.8, and 3.10 of the Agreement:**

2.7 Intentionally Omitted.

2.8 Intentionally Omitted.

3.10 Intentionally Omitted.

b) **The following provision shall be added to Section 2.20, entitled “Fees,” of the Agreement, by interlineation, as follows:**

2.20.3 Additional Payment of “Services” for year 5 Instructure shall submit a proper and appropriate invoice to SBBC for Certica Formative Assessment Item Bank Student Subscription and MasteryConnect Subscription which allows SBBC to engage Instructure to enhance the Canvas learning management system to include additional functionality.

c) **The following provisions - sections 2.35, 2.36, 2.37, and 2.38 -shall be added to the Agreement, by interlineation, as follows:**

2.35 **SBBC Disclosure of Education Records.**

2.35.1 The education records listed in this section are provided to INSTRUCTURE through the District’s third-party integration system, Pinnacle (SBBC’s grade book software) and INSTRUCTURE’s Learning Tools Interoperability (LTI) application for the following purposes:

2.35.1.1 rostering of classes inside INSTRUCTURE’s learning management solution (Canvas) for teachers; and

2.35.1.2 synching student grades between Canvas and Pinnacle; and

2.35.1.3 synching third party instructional applications at the request of SBBC through the LTI.

2.35.2 SBBC will provide the following education records to INSTRUCTURE:

2.35.2.1 student first and last name;

2.35.2.2 student identification number;

2.35.2.3 student grade level; and

2.35.2.4 student course number, selection and title; and

2.35.2.5 student schedule information.

2.35.3 In addition, INSTRUCTURE will have access to student’s work, including quizzes, tests, assignments and grades earned as assigned by the teacher.

2.35.4 INSTRUCTURE will redisclose information to third parties as required for third party instructional applications, which are safeguarded through contracts between the third party and SBBC.

2.35.5 INSTRUCTURE is considered a “school official” with a legitimate educational interest to receive the aforementioned types of information from SBBC student education records for the purposes listed above. Pursuant to the Family Education Rights and Privacy Act (FERPA), 34 CFR 99.31(a)(1), these records may be provided without prior parental consent. Prior written consent of the parent or student age eighteen (18) or over is needed for any types or purposes of disclosures of education records beyond those listed above.

2.35.6 This provision supersedes any of INSTRUCTURE’s privacy policies regarding collecting and using student information.

2.36 **INSTRUCTURE Confidentiality of Education Records.**

2.36.1 Notwithstanding any provision to the contrary within this Agreement, INSTRUCTURE shall:

2.36.1.1 fully comply with the requirements of Sections 1002.22, 1002.221, and 1002.222, Florida Statutes; the Family Educational Rights and Privacy Act, 20 U.S.C § 1232g (FERPA) and its implementing regulations (34 C.F.R. Part 99), and any other state or federal law or regulation regarding the confidentiality of student information and records;

2.36.1.2 hold any education records in strict confidence and not use or redisclose same except as required by this Agreement or as required or permitted by law unless the parent of each student or a student age 18 or older whose education records are to be shared provides prior written consent for their release;

2.36.1.3 ensure that, at all times, all of its employees who have access to any education records during the term of their employment shall abide strictly by its obligations under this Agreement, and that access to education records is limited only to its employees that require the information to carry out the responsibilities under this Agreement and shall provide said list of employees to SBBC upon request;

2.36.1.4 safeguard each education record through administrative, physical and technological safety standards to ensure that adequate controls are in place to protect the education records and information in accordance with FERPA’s privacy requirements;

2.36.1.5 utilize the education records solely for the purposes of providing products and services as contemplated under this Agreement; and shall not share, publish, sell, distribute, target advertise, or display

education records to any third party except as permitted under this Agreement;

2.36.1.6 notify SBBC immediately upon discovery of a breach of confidentiality of education records by telephone at 754-321-0300 (Manager, Information Security), and 754-321-1900 (Privacy Officer), and email at privacy@browardschools.com, and take all necessary notification steps as may be required by federal and Florida law, including, but not limited to, those required by Section 501.171, Florida Statutes;

2.36.1.7 fully cooperate with appropriate SBBC staff, including Privacy Officer and/or Information Technology staff to resolve any privacy investigations and concerns in a timely manner;

2.36.1.8 prepare and distribute, at its own cost, any and all required breach notifications, under federal and Florida Law, or reimburse SBBC any direct costs incurred by SBBC for doing so, including, but not limited to, those required by Section 501.171, Florida Statutes;

2.36.1.9 be responsible for any fines or penalties for failure to meet breach notice requirements pursuant to federal and/or Florida law;

2.36.1.10 provide SBBC with the name and contact information of its employee who shall serve as SBBC's primary security contact and shall be available to assist SBBC in resolving obligations associated with INSTRUMENTURE's security breach of confidentiality of education records; and

2.36.1.11 securely erase education records from any media once any media equipment is no longer in use or is to be disposed; secure erasure will be deemed the deletion of the education records using a single pass overwrite Secure Erase (Windows) or Wipe (Unix).

2.36.2 All education records shall remain the property of SBBC, and any party contracting with SBBC serves solely as custodian of such information pursuant to this Agreement and claims no ownership or property rights thereto and, within 90 days of termination of this Agreement shall, at SBBC's request, return to SBBC or dispose of the education records in compliance with the applicable Florida Retention Schedules and provide SBBC with a written acknowledgment of said disposition.

2.36.3 INSTRUMENTURE shall, for itself, its officers, employees, agents, representatives, contractors or subcontractors, fully indemnify and hold harmless SBBC and its officers and employees for any violation of this section, including, without limitation, defending SBBC and its officers and employees against any complaint, administrative or judicial proceeding, payment of any penalty imposed upon SBBC, or payment of any and all costs, damages, judgments or losses incurred by or imposed upon SBBC arising out of a breach of this covenant by INSTRUMENTURE, or an officer, employee, agent, representative, contractor, or sub-contractor of INSTRUMENTURE to the extent that INSTRUMENTURE or an officer,

employee, agent, representative, contractor, or sub-contractor of INSTRUMENT either intentionally or negligently violates the provisions of this section or of Sections 1002.22 and/or 1002.221, Florida Statutes. This section shall survive the termination of all performance required or conclusion of all obligations existing under this Agreement.

2.37 **SBBC Disclosure of Employee Records.**

2.37.1 The employee records listed in this section are provided to INSTRUMENT through an import from Pinnacle, import from text file and manually created by SBBC staff to generate a user account, provide support to SBBC users and for contract administration.

2.37.2 SBBC will provide the following employee records to INSTRUMENT:

- 2.37.2.1 first and last name; and
- 2.37.2.2 personnel number; and
- 2.37.2.3 SBBC email address; and
- 2.37.2.4 school number; and
- 2.37.2.5 section number.

2.37.3 In addition, INSTRUMENT will also have access to training history, instructional class and course work submitted.

2.37.4 INSTRUMENT shall not use the employee records listed in this section for any purpose other than those listed above or re-disclose the records to any outside source without the prior written consent of the employee, except as required or allowable by law. This provision supersedes any of INSTRUMENT's privacy policies regarding collecting and using employee records.

2.38 **INSTRUMENT Safeguarding Confidential Employee Records.**

Notwithstanding any provision to the contrary within this Agreement, INSTRUMENT shall:

2.38.1 fully comply with the requirements of state or federal law or regulation regarding the confidentiality of employee records;

2.38.2 hold the employee records in strict confidence and not use or disclose same except as required by this Agreement or as required or permitted by law;

2.38.3 only share employee records with those who have a need to access the information in order to perform their assigned duties in the performance of this Agreement;

2.38.4 protect employee records through administrative, physical and technological safeguards to ensure adequate controls are in place to protect the employee’s records and information;

2.38.5 notify SBBC immediately upon discovery of a breach of confidentiality of employee records by telephone at 754-321-0300 (Manager, Information Security), and 754-321-1900 (Privacy Officer), and email at privacy@browardschools.com; and take all necessary notification steps as may be required by federal and Florida law, including, but not limited to, those required by Section 501.171, Florida Statutes;

2.38.6 prepare and distribute, at its own cost, any and all required notifications, under federal and Florida Law, or reimburse SBBC any direct costs incurred by SBBC for doing so; and

2.38.7 be responsible for any fines or penalties for failure to meet notice requirements pursuant to federal and/or Florida law. This section shall survive the termination of all performance or obligations under this Agreement.

d) The following provision shall replace section 3.17 of the Agreement:

3.17 **Incorporation by Reference** Exhibits A, B, C, D, E, F, G, H, I, and J attached hereto and referenced herein shall be deemed to be incorporated into this Agreement by reference.

e) The following provision shall be added to Attachment A of the Agreement on page 35 of 65 below the title “Year 5 Costs 7/1/2020 – 6/30/2020,” “Subscription Services,” by interlineation, as follows:

Year 5 Costs 7/1/2020 – 6/30/2021

Description	Total Cost
Subscription Services	
Certica Formative Assessment Item Bank Student Subscription – 227,890 Users	\$ 296,257.00
MasteryConnect Subscription - 227,890 Users	\$ 0.00

f) The following shall replace Exhibit C of the Agreement:

Exhibit C

Intentionally Omitted

1.03 **Order of Precedence among Agreement Documents.** In the event of conflict between the provisions of the Agreement and the provisions contained herein, the provisions of the following documents shall take precedence in this order:

- a) this Fourth Amendment to Agreement; then
- b) the Third Amendment to Agreement; then
- c) the Second Amendment to Agreement; then
- d) the First Amendment to Agreement; then
- e) the Agreement.

1.04 **Other Provisions Remain in Force.** Except as expressly provided herein, all other portions of the Agreement remain in full force and effect.

1.05 **Authority.** Each person signing this Fourth Amendment to Agreement on behalf of either party individually warrants that he or she has full legal power to execute this Fourth Amendment to Agreement on behalf of the party for whom he or she is signing, and to bind and obligate such party with respect to all provisions contained in this Fourth Amendment to Agreement.

IN WITNESS WHEREOF, the Parties hereto have made and executed this Fourth Amendment to Agreement on the date first above written.

FOR SBBC:

(Corporate Seal)

THE SCHOOL BOARD OF BROWARD COUNTY, FLORIDA

ATTEST:

By _____
Donna P. Korn, Chair

Robert W. Runcie, Superintendent of Schools

Approved as to Form and Legal Content:

Office of the General Counsel

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FOR INSTRUCTURE:

Pursuant to Section 92.525, Florida Statutes, and under penalties of perjury, I declare that I have read the foregoing and that the facts stated herein are true.

(Corporate Seal)

ATTEST:

, Secretary

-Or-

Witness

Witness

INSTRUCTURE, INC.

By _____
Signature

DocuSigned by:
Elizabeth Powell
3415CBF9A62B404...
Elizabeth Powell

Printed Name: _____

Title: _____ Senior Manager, Deal Desk

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