

## Membership Terms and Conditions

This Membership Agreement between of the Educational Records Bureau (“ERB”), a New York State not-for-profit educational corporation located at 470 Park Avenue South, New York, NY 10016, USA is effective as of the acceptance date of Member’s Application for Membership, and sets forth the terms and conditions by which Member shall be bound during the term of this Agreement.

WHEREAS, Member is a school or district in good standing, having successfully met the requirements set forth by ERB in its application for membership, and

WHEREAS, ERB is a U.S. not-for-profit assessment development and educational resource organization, comprised of Members pursuant to its bylaws, and

WHEREAS, Member wishes to utilize the assessment products, services and resources provided by ERB for the enrichment and education of its students.

NOW, Therefore, for good and valuable consideration, the parties hereby agree as follows:

1. Term. The term of this Agreement shall commence on the Effective Date and shall continue thereafter with automatic annual renewals, unless and until terminated by Member at the natural expiration of an annual renewal, or as provided in Section 2 herein.
2. Termination: This Agreement may be terminated prior to the expiration of the Term upon written notice:
  - a. by ERB, if the Member fails to pay any amount when due hereunder and such failure continues for ninety (90) days after the Member’s receipt of written notice of nonpayment;
  - b. by either Party, if the other Party breaches any material provision of this Agreement and either the breach cannot be cured or, if the breach can be cured, it is not cured by the breaching Party within fifteen (15) days after the breaching Party’s receipt of written notice of such breach.
  - c. By Member, upon provision of updated terms and conditions to this Agreement by ERB, pursuant to Section 16 herein, to which Member does not acquiesce.
3. Effect of Termination.
  - a. No Release. The expiration or termination of this Agreement, for any reason, shall not release either Party from any outstanding liability to the other Party, including any payment obligation that has already accrued hereunder, or ERB’s obligation to deliver any Products ordered by the Member as of the date of termination of this Agreement. Following the termination of this Agreement, ERB will promptly invoice the Member for any outstanding amounts and expenses due and owing under this Agreement, and the Member shall pay all such amounts and expenses to ERB in accordance with the payment terms set forth on the invoice.
  - b. Return of Materials. Member shall:
    - i. return to ERB all tangible documents and testing materials (and any copies), permanently erase all ERB’s Confidential Information from its computer systems, except for its own student records and data sets; and
    - ii. certify in writing to ERB that it has complied with the requirements of this clause.
4. Obligations of the Parties
  - a. Services. ERB shall provide all services as requested on any valid and applicable Order Form for test products, as well as any related ancillary services including, but not limited to: professional development, test interpretation services, workshops, data analysis, research, and other services (collectively, the “Services”) which are in keeping with ERB’s mission and activities allowed by law.
  - b. Fees. For all such Services, Member hereby agrees to pay the Fees for test products and Services, which shall be provided to Member on the ERB website, [www.erblearn.org](http://www.erblearn.org), and which shall be regularly updated as needed. Member agrees to pay the then prevailing fee for any such Services, and is responsible for obtaining the most relevant order forms and price schedules prior to ordering test products or Services.
5. Intellectual Property
  - a. Data Ownership.
    - i. Test Data. The Parties agree that all student test data (including but not limited to: item level data, test level data, written or keyed-in response data, statistics, norming data, and rank) is the property of ERB. Member hereby releases all claims to such test data for the purposes of research, publication, and test refinement practices. Further, Member expressly allows ERB to use such student test data in accord with industry best practices for the reporting of student results.
    - ii. Personal Information. Personal student or teacher/administrator information (including but not limited to: name, address, class, grade, student identification number) is the property of the Member, and ERB shall in no way release or publish any personally identifiable information (PII) without the express written permission of the

Member, and then only for relevant research purposes. PII is the property and responsibility of the Member, and Member expressly agrees to control and secure such PII in compliance with all federal, state, and local laws, most notably FERPA (20 U.S.C. § 1232g; 34 CFR Part 99) where applicable.

- b. **Test Material Ownership.** ERB is the sole owner and registrant of a number of legally valid, registered copyrights and trademarks. The use of these marks and materials does not in any way transfer any rights of ownership, rights of derivative use, or moral rights to the Member. Any unauthorized use of ERB's marks or materials will be considered a material breach of this Agreement, and shall trigger Section 2b herein, and all remedies available to ERB by law or equity. The following provides a non-exhaustive list of ERB's marks and secure test materials:
  - i. The Comprehensive Testing Program, including all test items, test blueprints, technical data, norms, statistics, and any other related test development item, including the marks "CTP," "CTP 4," "CTP Online," "Comprehensive Testing Program," "Independent School Norms," "Suburban School Norms,"
  - ii. The Writing Assessment Program, including all test items, test blueprints, technical data, norms, statistics, and any other related test development item, including the marks "WrAP," "Writing Assessment Program," and "WrAP Online,"
  - iii. The Independent School Entrance Exam, including all test items, test blueprints, technical data, norms, statistics, and any other related test development item, including the marks "ISEE," "ISEE Primary," "ISEE Online," and "Independent School Entrance Exam,"
  - iv. The Admission Assessment for Beginning Learners, including all test items, test blueprints, technical data, norms, statistics, and any other related test development item, including the marks "AABL" and "Admission Assessment for Beginning Learners."
6. **Confidentiality.** Member hereby agrees to protect all ERB secure test data, and shall not make any unauthorized copies, unauthorized downloads, distribute any unauthorized materials whether in printed or electronic form, or otherwise infringe on ERB's copyrighted and secure test materials, whether or not such materials are listed in this Agreement.
7. **Arbitration.** Any controversy or claim arising out of or relating to this contract, or the breach thereof, shall be settled by arbitration administered by the American Arbitration Association under its Commercial Arbitration Rules, and judgment on the award rendered by the arbitrator(s) may be entered in any court having jurisdiction thereof. Any judgment rendered shall be final and binding on the parties.
8. **Governing Law.** This Agreement and all related documents, and all matters arising out of or relating to this Agreement, are governed by, and construed in accordance with, the laws of the State of New York, United States of America, without regard to the conflict of laws provisions thereof to the extent such principles or rules would require or permit the application of the laws of any jurisdiction other than those of the State of New York. The parties agree that the United Nations Convention on Contracts for the International Sale of Goods does not apply to this Agreement.
9. **Force Majeure.** ERB shall not be liable or responsible to the other party, nor be deemed to have defaulted under or breached this Agreement, for any failure or delay in fulfilling or performing any term of this Agreement, when and to the extent such failure or delay is caused by or results from acts beyond the affected party's reasonable control, including, without limitation: (a) acts of God; (b) flood, fire, earthquake or explosion; (c) war, invasion, hostilities (whether war is declared or not), terrorist threats or acts, riot or other civil unrest; (d) government order or law; (e) actions, embargoes or blockades in effect on or after the date of this Agreement; (f) action by any governmental authority; (g) national or regional emergency; (h) strikes, labor stoppages or slowdowns or other industrial disturbances; and (i) shortage of adequate power or transportation facilities. The party suffering a Force Majeure Event shall give notice within three (3) days of the Force Majeure Event to the other party, stating the period of time the occurrence is expected to continue and shall use diligent efforts to end the failure or delay and ensure the effects of such Force Majeure Event are minimized.
10. **LIMITATION OF LIABILITY.** IN NO EVENT SHALL ERB OR ANY OF ITS REPRESENTATIVES BE LIABLE UNDER THIS AGREEMENT TO THE OTHER PARTY OR ANY THIRD PARTY FOR ANY CONSEQUENTIAL, INCIDENTAL, INDIRECT, EXEMPLARY, SPECIAL OR PUNITIVE DAMAGES, INCLUDING ANY DAMAGES FOR BUSINESS INTERRUPTION, LOSS OF USE, DATA, REVENUE OR PROFIT, WHETHER ARISING OUT OF BREACH OF CONTRACT, TORT (INCLUDING NEGLIGENCE) OR OTHERWISE, REGARDLESS OF WHETHER SUCH DAMAGES WERE FORESEEABLE AND WHETHER OR NOT ERB WAS ADVISED OF THE POSSIBILITY OF SUCH DAMAGES.
11. **MAXIMUM LIABILITY.** IN NO EVENT SHALL ERB'S AGGREGATE LIABILITY ARISING OUT OF OR RELATED TO THIS AGREEMENT, WHETHER ARISING OUT OF OR RELATED TO BREACH OF CONTRACT, TORT (INCLUDING NEGLIGENCE) OR OTHERWISE, EXCEED ONE (1) TIMES THE TOTAL AMOUNT PAID OR PAYABLE TO ERB PURSUANT TO THIS AGREEMENT IN THE YEAR PRECEDING THE EVENT GIVING RISE TO THE CLAIM OR \$2,500, WHICHEVER IS LESS. THE FOREGOING LIMITATIONS SHALL APPLY EVEN IF THE ERB'S REMEDIES UNDER THIS AGREEMENT FAIL OF THEIR ESSENTIAL PURPOSE.
12. **Compliance with Laws.** Each party shall at all times comply with all federal, state and local laws, ordinances, regulations and orders that are applicable to this Agreement and its performance hereunder. Without limiting the generality of the foregoing, each party shall at all times, at its own expense, obtain and maintain all certifications, credentials, authorizations, licenses and permits necessary to conduct its business relating to the exercise of its rights and the performance of its obligations under this Agreement.
13. **Survival.** In the event of termination of this Agreement, the parties hereby agree that Sections 5, 6, 7, 8, 10, and 11 shall survive any such termination, whether such termination is a result of the natural expiration of this Agreement, or of early termination pursuant to Section 2 herein.

14. Notice. Each Party shall deliver all notices, requests, consents, claims, demands, waivers and other communications under this Agreement (each, a "Notice") in writing and addressed to the other Party at its address set out below (or to any other address that the receiving Party may designate from time to time in accordance with this section). Each Party shall deliver all Notices by personal delivery, nationally recognized overnight courier (with all fees pre-paid), facsimile or e-mail of a PDF document (with confirmation of transmission) or certified or registered mail (in each case, return receipt requested, postage prepaid). Except as otherwise provided in this Agreement, a Notice is effective only (a) upon receipt by the receiving party and (b) if the party giving the Notice has complied with the requirements of this Section.

If to ERB  
470 Park Avenue South  
Second Floor South Tower  
New York, NY 10016  
Facsimile: (212) 370-4096  
E-mail: legal@erblearn.org  
Attention: General Counsel

15. Amendments. No amendment to or rescission, termination, cancellation or discharge of this Agreement is effective unless it is in writing, identified as an amendment to or rescission, termination, cancellation or discharge of this Agreement and signed by an authorized representative of each party to this Agreement.
16. Headings. The headings in this Agreement are for reference only and shall not affect the interpretation of this Agreement.
17. Terms Subject to Change. The terms of this Agreement may be unilaterally modified by ERB from time to time, with the exception of the Fees referenced in Section 4b which will be updated periodically as herein agreed. In the event that this Agreement is modified, the updates and modifications will be provided to Member as soon as reasonably practicable, and shall provide Member with the opportunity to accept or refuse the new terms. Any such refusal will terminate the Agreement between the parties, as contemplated in Section 2, and shall trigger all termination rights and responsibilities.