

**CALIFORNIA EDUCATION CODE SECTION 49073.1 AMENDMENT TO *Flocabulary, Inc.* BETWEEN
CHINO VALLEY UNIFIED SCHOOL DISTRICT AND
Flocabulary Inc ("AMENDMENT")**

This Amendment is made part of and modifies the *Flocabulary, Inc.* dated 2/12/2019, and any subsequent amendments thereto (hereinafter referred to as the "Agreement") between the Chino Valley Unified School District ("District") and *Flocabulary Inc* ("Vendor"). Terms not defined otherwise herein shall have the meaning ascribed to them in the Agreement. To the extent of any conflict or inconsistency between this Amendment and the terms and conditions of the Agreement, this Amendment will prevail.

RECITALS

WHEREAS, through the Agreement Vendor provides digital education software that is authorized to access, store and use Pupil Records and/or provides services, including cloud-based services, for the digital storage, management and/or retrieval of Pupil Records;

WHEREAS, as a California school district, District is subject to certain provisions of the California Education Code;

WHEREAS, District is a "local educational agency" under California Education Code section 49073.1(d)(3), which defines "local educational agency" as including "school districts, county offices of education, and charter schools;"

WHEREAS, Vendor is a "third party" under California Education Code section 49073.1(d)(6), which defines "third party" as a provider of digital educational software or services, including cloud-based services, for the digital storage, management, and retrieval of Pupil Records;

WHEREAS, California Education Code section 49073.1 requires that any contract for the provision of services entered into between District and Vendor contain provisions specified in sections (b)(1) through (b)(9) of California Education Code section 49073.1;

WHEREAS, District and Vendor desire to amend the terms of the Agreement to satisfy the requirements of California Education Code section 49073.1.

NOW THEREFORE, DISTRICT AND VENDOR AGREE TO THE TERMS IN COMPLIANCE WITH CALIFORNIA EDUCATION CODE SECTION 49073.1:

1. **Definitions:** As used in herein the following terms are defined as follows:
 - a. "Amendment" means this California Education Code Section 49073.1 Amendment To *Flocabulary, Inc.* between District and Vendor.

- b. “Adult Pupil” means a Pupil who has reached 18 years of age.
- c. “Agreement” means the *Purchase orders & privacy agreement*.
- d. “District Data” means documents, information and data, including Pupil Records, submitted to Vendor by District for processing through Vendor’s services and/or documents, information and data input or maintained by District through Vendor’s services.
- e. “Deidentified Information” means information that cannot be used to identify an individual Pupil.
- f. “Parent” means a natural parent, an adopted parent or legal guardian of a Pupil.
- g. “Pupil” means a student of District.
- h. “Personally Identifiable Information” includes: 1) the Pupil’s name, 2) the name of the Pupil’s parent or other family members, 3) the address of the Pupil or Pupil’s family, 4) a personal identifier, such as a Pupil’s social security number, Pupil’s number, or biometric record, 5) other indirect identifiers, such as the Pupil’s date of birth, place of birth, and mother’s maiden name, 6) other information that, alone or in combination, is linked or linkable to a specific Pupil that would allow a reasonable person in the school community, who does not have personal knowledge of the relevant circumstances, to identify the Pupil with reasonable certainty, or 7) information requested by a person who the educational agency or institution reasonably believes knows the identity of the Pupil to whom the Pupil Record relates.
- i. “Pupil Records” means both of the following regardless of how otherwise defined or described in the Agreement: 1) any information directly related to a Pupil that is maintained by District, and 2) any information acquired directly from the Pupil through the use of instructional software or applications assigned to the Pupil by a teacher or other District employee. “Pupil Records” does not mean aggregated Deidentified Information used by Vendor for the following purposes: to improve educational products for adaptive learning purposes and for customizing Pupil learning; to demonstrate the effectiveness of the Vendor’s products in the marketing of those products; or for the development and improvement of educational sites, services, or applications.
- j. “Pupil Generated Content” means materials created by a Pupil, including but not limited to essays, research reports, portfolios, creative writing, music or other audio files, photographs; but it does not include Pupil

responses to a standardized assessment where Pupil possession and control would jeopardize the validity and reliability of that assessment.

2. Ownership and Control of District Data, Including Pupil Records. All District Data, including Pupil Records, remain the exclusive property of District and District retains exclusive rights, ownership and control thereto.
3. Ownership and Control of Generated Content. A Pupil may retain possession and control of his/her own Pupil Generated Content retained, stored or hosted by Vendor's software/information systems by accessing Pupil Generated Content through Pupil's user account/user portal with Vendor by entering the Pupil's Vendor account/portal user name and password, which allows pupil to edit, save, download and upload his/her Pupil Generated Content. A Pupil may also transfer Pupil Generated Content to a personal account by accessing his/her Pupil Generated Content through his/her user account, digitally copying, downloading and/or uploading the Pupil Generated Content and uploading the Pupil Generated Content to a Vendor or non-Vendor personal account. *[Note: This specific described procedure is not legally required and can be modified; however, it is legally required that a procedure exist.]*
4. Use of Pupil Records. Vendor shall not use Pupil Records to which it has access by way of the Agreement for any purpose other than those required or specifically permitted by the Agreement.
5. Review and Correction of Pupil Records. A Parent or Adult Pupil may review his/her Pupil Records that are retained, stored, hosted, accessed or used by Vendor by making a request in writing to District for access to his/her subject Pupil Records. Subject to District verification of identity, approval of disclosure and redaction of any Personally Identifiable Information of a Pupil, other than the Pupil of the Parent or Adult Pupil who is making the request, District will direct Vendor to provide access to any/all requested Pupil Records within five (5) business days or as otherwise required by law, by issuing the Parent or Adult Pupil a temporary user name and password to log on to the Vendor's software/information system to review the requested Pupil Records. This time frame may be extended by written consent of the Parent or Adult Pupil. District shall have exclusive authority over Vendor with respect to authorizing disclosure of Pupil Records pursuant to this Amendment.

A Parent or Adult Pupil may correct erroneous information identified upon review of Pupil Records by making a written request to District. Subject to District's verification of identity and approval of such a request to correct erroneous information, District shall notify Vendor of the approved request. Vendor shall correct the erroneous information as directed by District.

Vendor shall direct all requests to review and/or correct erroneous information to District through the following contact information:

REQUEST TO CORRECT PERSONAL INFORMATION
55 Washington St. Suite 606
Brooklyn, NY 11201

[Note: This specific described procedure is not legally required and can be modified; however, it is legally required that a procedure exist.]

6. **Security and Confidentiality of Pupil Records.** Vendor will do the following to ensure the security and confidentiality of Pupil Records:
- a. Designate an employee responsible for the training and compliance of all Vendor employees, agents, and assigns on compliance with security and confidentiality provisions detailed in this Amendment.
 - b. Vendor will protect the confidentiality of Pupil Records and take all reasonably necessary measures consistent with industry standards to protect District Data from any and all unauthorized access and disclosures.
 - c. Vendor represents and warrants that it has designated an individual responsible for training Vendor employees, agents and assigns on reasonable protection measures and the confidentiality of Pupil Records consistent with state and federal law.
 - d. Vendor shall not disclose Pupil Records, except as specified under the terms of the Agreement, this Amendment or as required by law.
 - e. Vendor shall develop, implement, maintain and use appropriate administrative, technical and physical security measures to preserve the confidentiality, integrity and availability of all stored, managed, retained, accessed or used Pupil Records received from or on behalf of District, Parents or Adult Pupils.
 - e. Vendor warrants that all confidentiality and security measures identified in the Agreement will be extended by contract to any and all subcontractors used by Vendor, if any, to execute the terms of the Agreement.
 - f. Vendor warrants that all Pupil Records will be encrypted in transmission and storage.
 - g. Vendor will use appropriate and reliable storage media, regularly backup Pupil Records and retain such backup copies for the duration of the Agreement.
 - h. Vendor warrants that all Pupil Records will be stored in the United States.
 - i. Vendor warrants that all confidentiality and security measures identified in

this Amendment will be extended by contract to any and all subcontractors used by Vendor, if any, to execute the terms of the Agreement or this Amendment.

Compliance with this requirement shall not, in itself, absolve Vendor of any liability in the event of an unauthorized disclosure of Pupil Records.

7. **Unauthorized Disclosure Notifications.** In the event of an unauthorized disclosure of Pupil Records the following process will be implemented:

- a. Immediately upon becoming aware of a compromise of Pupil Records, or of circumstances that could have resulted in an unauthorized access to or disclosure of Pupil Records, District and Vendor agree to notify the other party, fully investigate the incident and fully cooperate with District's investigation of the incident, implement remedial measures and respond in a timely manner.
 - i. Parent or Adult Pupil will be immediately notified of:
 - (1) the nature of the unauthorized use or disclosure (e.g., security breach, nonconsensual re-disclosure, etc.);
 - (2) the specific Pupil Records that were used or disclosed without authorization;
 - (3) what Vendor and District have done or will do to mitigate any effects of the unauthorized use or disclosure; and
 - (4) what corrective action Vendor and District have taken or will take to prevent future occurrences.
- b. Except as otherwise required by law, Vendor will not provide notice of the incident directly to the Parent or Adult Pupil whose Pupil Records were involved, regulatory agencies, or other entities, without prior written permission from District.

Compliance with this requirement shall not, in itself, absolve Vendor of any liability in the event of an unauthorized disclosure of Pupil Records.

8. **Retention and Destruction of Pupil Records.** Vendor warrants that upon the termination of the Agreement, Vendor will securely transmit all District Data, including Pupil Records, to District in a mutually agreed upon format, without retaining any copies of District Data. In the alternative, and subject to a written request from District, Vendor will securely destroy all District Data, including Pupil Records, upon termination of the Agreement. Vendor will then provide verification to District that the District Data not otherwise returned to District was destroyed pursuant to District's written request, the date of destruction and the

method of destruction. If Pupil chooses to establish or maintain an account with Vendor for the purpose of storing Pupil Generated Content, this provision shall not apply. Notwithstanding this provision, Vendor will comply with all litigation holds and/or court orders to preserve District Data.

9. **Compliance with Applicable Laws.** As District Data includes Pupil Records subject to the Family Educational Rights and Privacy Act (20 U.S.C. Sec. 1232g), Vendor will be considered a “School Official” (as the term is used in FERPA and its implementing regulations) for any and all software, hosting and services provided to District through the Agreement. District and Vendor agree that the services provided to District through the Agreement serve a “legitimate educational interest,” as defined and used in FERPA and its implementing regulations. District and Vendor will jointly ensure compliance with FERPA, its implementing regulations and Pupil privacy and confidentiality requirements of California law, including but not limited to California Education Code section 49060 *et seq.* The parties shall comply with the following process for compliance with FERPA and California law:

- a. Vendor and District warrant that they are familiar with the confidentiality, security and disclosure requirements of FERPA, its implementing regulations and Pupil privacy and confidentiality requirements of California law, including but not limited to California Education Code section 49060 *et seq.* and have designated an individual responsible for ensuring compliance therewith.
- b. Vendor and District shall abide by the disclosure, security, breach notification, retention/destruction and use provisions contained in this Amendment to the Agreement and as required by law.
- c. By the signature of its authorized representative or agent below, Vendor hereby acknowledges that District has provided notice under California Education Code section 49075(a) and 34 C.F.R. section 99.33(d) that Vendor is strictly prohibited from disclosing Pupil Records to any third party without the prior written consent and direction to authorize disclosure by District.

Compliance with this requirement shall not, in itself, absolve Vendor of its duty to comply other applicable privacy laws. Vendor hereby agrees to comply with all other applicable federal and state privacy laws.

10. **Targeted Advertising Prohibited.** Vendor shall not use any District Data, including Pupil Records, to engage in targeted advertising during the term of the Agreement, and this provision shall survive the termination of the Agreement.
11. **Governing Law and Venue.** The Agreement shall be governed by the laws of the State of California with venue in Riverside, California.

12. **Material Breach and Termination of Agreement.** If District reasonably determines in good faith that Vendor has materially breached any of its obligations under this Amendment, District, in its sole discretion, shall have the right to provide Vendor with written notice of a fifteen (15) day period to cure the breach. If Vendor fails to cure a breach within that period of time, District may terminate the Agreement immediately. If, in its sole discretion, District determines that cure is not possible, District may provide written notice of immediate termination of the Agreement.

13. **Insurance and Indemnity.** Vendor shall obtain and maintain for the duration of the Agreement Five Million Dollars (\$5,000,000.00) in Cyber Liability Insurance to cover Security, Privacy, Business Interruption, Cyber Extortion, and Denial of Service. Vendor shall indemnify, defend and hold District harmless from all claims, liabilities, damages or judgments involving a third party, including District's costs and attorney's fees, which arise as a result of such unauthorized disclosures or misuse District Data, including Pupil Records, or Vendor's breach of any terms of the Agreement or this Amendment, excluding those claims, liabilities, damages or judgments arising from the sole active negligence or willful misconduct of District.

As noted above, to the extent of any conflict or inconsistency between this Amendment and the terms and conditions of the Agreement, this Amendment will prevail and supersede any conflicting and/or inconsistent terms and conditions in the Agreement. Except as specifically modified herein, all other terms and conditions contained in the Agreement between District and Vendor shall remain unchanged and in full force and effect.

[Note: The Agreement and this Amendment will need to be cross-checked to confirm that there is no conflicting priority clause and to confirm that the terms used herein are consistent with the terms and definitions in the Agreement.]

Dated this 12th day of February, 2019.



Chino Valley Unified District



Brendan Hudey
CA Flocabulary Representative
Flocabulary, Inc

EXHIBIT "E"

GENERAL OFFER OF PRIVACY TERMS

1. Offer of Terms

Provider offers the same privacy protections found in this DPA between it and Flocabulary and which is dated 2/12/19 to any other LEA ("Subscribing LEA") who accepts this General Offer through its signature below. This General Offer shall extend only to privacy protections and Provider's signature shall not necessarily bind Provider to other terms, such as price, term, or schedule of services, or to any other provision not addressed in this DPA. The Provider and the other LEA may also agree to change the data provided by LEA to the Provider in Exhibit "B" to suit the unique needs of the LEA. The Provider may withdraw the General Offer in the event of: (1) a material change in the applicable privacy statutes; (2) a material change in the services and products subject listed in the Originating Service Agreement; or three (3) years after the date of Provider's signature to this Form. Provider shall notify CETPA in the event of any withdrawal so that this information may be transmitted to the Alliance's users.

Provider:

BY: [Signature]
Printed Name: Brendan Huddy

Date: 2/12/19
Title/Position: CA Flocabulary Rep

2. Subscribing LEA

A Subscribing LEA, by signing a separate Service Agreement with Provider, and by its signature below, accepts the General Offer of Privacy Terms. The Subscribing LEA and the Provider shall therefore be bound by the same terms of this DPA.

Subscribing LEA:

BY: [Signature]
Printed Name: Katie M. Hylton

Date: 4/11/19
Title/Position: Program Manager / Purchasing / Contracts / Warehouse

TO ACCEPT THE GENERAL OFFER, THE SUBSCRIBING LEA MUST DELIVER THIS SIGNED EXHIBIT TO THE PERSON AND EMAIL ADDRESS LISTED BELOW

Name: _____

Title: _____

Email Address: _____