

EXHIBIT D

DATA SHARING AND CONFIDENTIALITY AGREEMENT

INCLUDING
PARENTS BILL OF RIGHTS FOR DATA SECURITY AND PRIVACY
AND
SUPPLEMENTAL INFORMATION ABOUT THE MLSA

1. **Purpose**

- (a) This Exhibit supplements the Master License and Service Agreement ("MLSA") to which it is attached, to ensure that the MLSA conforms to the requirements of New York State Education Law Section 2-d and any implementing Regulations of the Commissioner of Education (collectively referred to as "Section 2-d"). This Exhibit consists of the terms of this Data Sharing and Confidentiality Agreement, a copy of Erie 1 BOCES' Parents Bill of Rights for Data Security and Privacy signed by the Vendor, and the Supplemental Information about the MLSA that is required to be posted on Erie 1 BOCES' website.
- (b) To the extent that any terms contained within the MLSA, or any terms contained within any other Exhibits attached to and made a part of the MLSA, conflict with the terms of this Exhibit, the terms of this Exhibit will apply and be given effect. In the event that Vendor has online or written Terms of Service ("TOS") that would otherwise be applicable to its customers or users of its Product that is the subject of the MLSA, to the extent that any term of the TOS conflicts with the terms of this Exhibit, the terms of this Exhibit will apply and be given effect.

2. **Definitions**

Any capitalized term used within this Exhibit that is also found in the MLSA will have the same definition as contained within the MLSA.

In addition, as used in this Exhibit:

- (a) "Student Data" means personally identifiable information, as defined in Section 2-d, from student records that Vendor receives from a Participating Educational Agency pursuant to the MLSA.
- (b) "Teacher or Principal Data" means personally identifiable information relating to the annual professional performance reviews of classroom teachers or principals that is confidential and not subject to release under the provisions of New York Education Law Sections 3012-c or 3012-d, that Vendor receives from a Participating Educational Agency pursuant to the MLSA.
- (c) "Protected Data" means Student Data and/or Teacher or Principal Data to the extent applicable to Vendor's Product.

- (d) "Participating Educational Agency" means a school district within New York State that purchases certain shared instructional technology services and software through a Cooperative Educational Services Agreement with a BOCES, and as a result is licensed to use Vendor's Product pursuant to the terms of the MLSA. For purposes of this Exhibit, the term also includes Erie 1 BOCES or another BOCES that is licensed to use Vendor's Product pursuant to the MLSA to support its own educational programs or operations.

3. **Confidentiality of Protected Data**

- (a) Vendor acknowledges that the Protected Data it receives pursuant to the MLSA may originate from several Participating Educational Agencies located across New York State, and that this Protected Data belongs to and is owned by the Participating Educational Agency from which it originates.
- (b) Vendor will maintain the confidentiality of the Protected Data it receives in accordance with federal and state law (including but not limited to Section 2-d) and Erie 1 BOCES's policy on data security and privacy. Vendor acknowledges that Erie 1 BOCES is obligated under Section 2-d to adopt a policy on data security and privacy.. Erie 1 BOCES will provide Vendor with a copy of its policy. Vendor and Erie 1 BOCES agree to engage in good faith negotiations to modify this Data Sharing Agreement to the extent necessary to ensure Vendor's continued compliance with Section 2-d.

4. **Data Security and Privacy Plan**

Vendor agrees that it will protect the confidentiality, privacy and security of the Protected Data received from Participating Educational Agencies in accordance with Erie 1 BOCES' Parents Bill of Rights for Data Privacy and Security, a copy of which has been signed by the Vendor and is set forth below.

Additional elements of Vendor's Data Security and Privacy Plan are as follows:

- (a) In order to implement all state, federal, and local data security and privacy requirements, including those contained within this Data Sharing and Confidentiality Agreement, consistent with Erie 1 BOCES' data security and privacy policy, Vendor will: Review its data security and privacy policy and practices to ensure that they are in conformance with all applicable federal, state, and local laws and the terms of this Data Sharing and Confidentiality Agreement. In the event Vendor's policy and practices are not in conformance, the Vendor will implement commercially reasonable efforts to ensure such compliance.
- (b) In order to protect the security, confidentiality and integrity of the Protected Data that it receives under the MLSA, Vendor will have the following reasonable administrative, technical, operational and physical safeguards and practices in place throughout the term of the MLSA: [See Exhibit B

(c) **Exhibit A**

(d) **Mr. Elmer Service Level Terms and Conditions**

(e)

These Service Level Terms and Conditions are incorporated into the attached Agreement between Mr. Elmer, LLC ("ELMER") and the party described as the Local Education Agency ("LEA"), and apply to access, availability, support, and security of Mr. Elmer, LLC software-as-a-service (SaaS) products. These terms and conditions only apply only to products offered by Mr. Elmer, LLC (Hall Monitor, Behavior Manager, ABA, Employability), and do not apply to existing student information software, office productivity software, web browsers, operating systems, computing devices, or network infrastructure or internet connectivity.

- (f)
- (g) **A. Access.** Software provided by ELMER will be accessed by LEA users over the internet via a web browser. The system will be hosted by ELMER external to LEA's local area network (LAN). While ELMER software is accessible by many browsers, it is explicitly supported in Chrome 32+, Firefox 25+, Safari 7+, and IE 11+. All data exchange will be through the HTTPS encrypted protocol.
- (h)
- (i) **B. Availability.** Hosted software by ELMER will be accessible at a 99.95% uptime, during school hours, including one hour before the starting time of the first class and one hour after the ending time of last, subject to the exceptions described in the Agreement. Accessibility is measured in rolling monthly periods for this time frame. Downtime is defined as a lack of accessibility within this period. In the event ELMER does not meet this availability commitment, the LEA is given service credits equivalent to 25% of the annual bill, prorated to the monthly period. Service credits may be used to offset costs of any future services. At the discretion of ELMER, service credits may be issued in the form of a refund. Maintenance periods may occur outside of the above time frame and may not be announced. This may result in a lack of availability and is not covered or factored into the calculations of the uptime. ELMER will announce, via email, expected outages of longer than 30 minutes for maintenance windows. Detected events of downtime will be notified to the primary account contact. Local LEA network outages while ELMER software is still available will not count as downtime.
- (j)
- (k) **C. Support.** For the duration of the Service, LEA personnel may contact support@mrelmer.com for ELMER software support needs. An acknowledgement of receipt and reading by staff will be sent within a 12 hour period. Issues will be resolved within a 24 hour period unless otherwise explicitly noted and escalated. Issues requiring more than the 24 hour period for completion will be documented and sent to the primary account holder for receipt. Only the primary account holder for the LEA can request support via phone. The number will be given at time of deployment. In the event call center staff are unavailable, messages will be responded to within 2 hours, during normal business hours of 9am to 5pm US Central Time.
- (l)
- (m) **D. Security.** All data exchanged outside of the secure ELMER environment will be done through authenticated, encrypted SSL web connections. Users will be required to authenticate to access the system. User authentication is done through a login requiring a username and secret user password. This password is unknown to staff of ELMER and may only be reset in the event the user forgets. A unique, expiring link is sent only to the email address registered by and for the user in question. A user is required to change their password if anyone other than that user is made aware of the password, including staff of ELMER. Please see the Privacy and Compliance document for data privacy concerns as they relate to Security.

(n)

(o) **Exhibit B**

(p) **Mr. Elmer, LLC Privacy and Compliance Statement**

(q)

This Privacy and Compliance Statement applies to the Service provided by Mr. Elmer, LLC (ELMER) and is incorporated into the attached Agreement between Mr. Elmer, LLC ("ELMER") and the party described in the Agreement as the Local Education Agency ("LEA").

(r)

(s) **A. Minors and Child Online Privacy Protection Act (COPPA).** The Service shall comply with the Minors and Child Online Privacy Protection Act ("COPPA"). Any COPPA concerns should be provided to privacy@mrelmer.com.

(t)

(u) **B. Family Educational Rights and Privacy Act (FERPA).** Service Data collection, retention and distribution shall comply with the Family Educational Rights and Privacy Act ("FERPA"). ELMER is considered a "school official" with respect to FERPA compliance. Collected information is available upon request by parents or eligible students within 45 days of collection. Data such as teacher names, student names, class names, and class locations may be used in Service notifications. Any requests for clarification, deletion or access should contact privacy@mrelmer.com.

(v)

(w) **C. Information Collection.** All information collected is supplied by LEA or derived from supplied information. It is the responsibility of LEA to ensure that proper consent is obtained from parents or guardians of minors using (or represented in) the Service. ELMER will not obtain consents and will rely on LEA to obtain all required consents. Data supplied by LEA is considered to be an extension of the school's data infrastructure and usage agreements, including parental consents. Data retention, access and deletion policies for the Service are described in the Agreement. Data supplied which is not required for the Service will be deleted. LEA may request an archive copy or deletion of retained Data. Requests may be made to data@mrelmer.com. Deleted Data cannot be retrieved. Statistical records without personally identifiable information are not considered to be LEA Data. The Service uses information such as names, emails, addresses, phone numbers, genders, ages, and schedules. Lack of information or invalid information will limit the effectiveness of the Service. Activities such as hall pass issuance and student behavior may be tracked and recorded by users but are not automatically recorded. LEA information submitted, collected, and processed will be available through the website via user login. ELMER will not provide Data to any third party or use Data for marketing or sales purposes without LEA consent. ELMER may use Data for system testing and improvement without consent. LEA data will be retained and available for 45 days after expiration or termination of the Term, and thereafter may be deleted without notice.

(x)

(y) **D. Security.** ELMER uses security technology to establish an encrypted link to access the Service. Access to the Service will require a username and password. Initial passwords are randomly generated by the System and provided to an email address registered with the system. Forgotten passwords are replaced in the same manner. ELMER will not ask for a user's password. ELMER may only access a user account for troubleshooting problems. A user's browser may retain data (a "cookie") which tracks a user and user preferences. A cookie may allow for automatic user log without entry of credentials. It is the obligation of LEA to ensure that users on shared computes delete all cookies when leaving the Service.

(z)

- (aa) **E. Access.** Teachers may only see behavior information relating to those students which they directly interact with on a daily basis. This includes students whom they have at least once in a class and those students the teacher has been explicitly allowed to access. These teachers may view all behavior data submitted by all teachers and staff for these students. Other staff may have access as permitted by the LEA and LEA may restrict support staff access to prevent access any information about the behaviors of the students. All staff may access all hallway information for all students.
- (bb)]
- (cc) Vendor will comply with all obligations set forth in Erie 1 BOCES' "Supplemental Information about the MLSA" below.
- (dd) For any of its officers or employees (or officers or employees of any of its subcontractors or assignees) who have access to Protected Data, Vendor has provided or will provide training on the federal and state laws governing confidentiality of such data prior to their receiving access, as follows: Annually, Vendor will require that all of its employees (or officers or employees of any of its subcontractors or assignees) undergo data security and privacy training to ensure that these individuals are aware of and familiar with all applicable data security and privacy laws.
- (ee) Vendor [check one] _____ will X will not utilize sub-contractors for the purpose of fulfilling one or more of its obligations under the MLSA. In the event that Vendor engages any subcontractors, assignees, or other authorized agents to perform its obligations under the MLSA, it will require such subcontractors, assignees, or other authorized agents to execute written agreements as more fully described in Erie 1 BOCES' "Supplemental Information about the MLSA," below.
- (ff) Vendor will manage data security and privacy incidents that implicate Protected Data, including identifying breaches and unauthorized disclosures, and Vendor will provide prompt notification of any breaches or unauthorized disclosures of Protected Data in accordance with Section 6 of this Data Sharing and Confidentiality Agreement.
- (gg) Vendor will implement procedures for the return, transition, deletion and/or destruction of Protected Data at such time that the MLSA is terminated or expires, as more fully described in Erie 1 BOCES' "Supplemental Information about the MLSA," below.

5. **Additional Statutory and Regulatory Obligations**

Vendor acknowledges that it has the following additional obligations with respect to any Protected Data received from Participating Educational Agencies, and that any failure to fulfill one or more of these statutory or regulatory obligations shall be a breach of the MLSA and the terms of this Data Sharing and Confidentiality Agreement:

- (a) Limit internal access to education records to those individuals that are determined to have legitimate educational interests within the meaning of Section 2-d and the Family Educational Rights and Privacy Act (FERPA).

- (b) Limit internal access to Protected Data to only those employees or subcontractors that need access in order to assist Vendor in fulfilling one or more of its obligations under the MLSA.
- (c) Not use education records for any purposes other than those explicitly authorized in this Data Sharing and Confidentiality Agreement.
- (d) Not disclose any personally identifiable information to any other party, except for authorized representatives of Vendor using the information to carry out Vendor's obligations under the MLSA, unless:
 - (i) the parent or eligible student has provided prior written consent; or
 - (ii) the disclosure is required by statute or court order and notice of the disclosure is provided to Participating Educational Agency no later than the time of disclosure, unless such notice is expressly prohibited by the statute or court order.
- (e) Maintain reasonable administrative, technical, and physical safeguards to protect the security, confidentiality, and integrity of personally identifiable student information in its custody;
- (f) Use encryption technology that complies with Section 2-d, as more fully set forth in Erie 1 BOCES' "Supplemental Information about the MLSA," below.
- (g) Provide notification to Erie 1 BOCES (and Participating Educational Agencies, to the extent required by, and in accordance with, Section 6 of this Data Sharing and Confidentiality Agreement) of any breach of security resulting in an unauthorized release of Protected Data by Vendor or its assignees or subcontractors in violation of state or federal law or other obligations relating to data privacy and security contained herein.
- (h) Promptly reimburse Erie 1 BOCES, another BOCES, or a Participating School District for the full cost of notification, in the event they are required under Section 2-d to notify affected parents, students, teachers or principals of a breach or unauthorized release of Protected Data attributed to Vendor or its subcontractors or assignees.

6. **Notification of Breach and Unauthorized Release**

- (a) Vendor shall promptly notify Erie 1 BOCES of any breach or unauthorized release of Protected Data in the most expedient way possible and without unreasonable delay, but no more than seven (7) calendar days after Vendor has discovered or been informed of the breach or unauthorized release.
- (b) Vendor will provide such notification to Erie 1 BOCES by contacting Michelle Okal-Frink directly by email at mokal@e1b.org, or by calling (716) 821-7200 (office) or (716) 374-5460 (cell).
- (c) Vendor will cooperate with Erie 1 BOCES and provide as much information as possible directly to Michelle Okal-Frink or her designee about the incident, including but not limited to: a description of the incident, the date of the incident, the date Vendor

discovered or was informed of the incident, a description of the types of personally identifiable information involved, an estimate of the number of records affected, the Participating Educational Agencies affected, what the Vendor has done or plans to do to investigate the incident, stop the breach and mitigate any further unauthorized access or release of Protected Data, and contact information for Vendor representatives who can assist affected individuals that may have additional questions.

- (d) Vendor acknowledges that upon initial notification from Vendor, Erie 1 BOCES, as the educational agency with which Vendor contracts, has an obligation under Section 2-d to in turn notify the Chief Privacy Officer in the New York State Education Department ("CPO"). Vendor shall not provide this notification to the CPO directly. In the event the CPO contacts Vendor directly or requests more information from Vendor regarding the incident after having been initially informed of the incident by Erie 1 BOCES, Vendor will promptly inform Michelle Okal-Frink or her designees.
- (e) Vendor will consult directly with Michelle Okal-Frink or her designees prior to providing any further notice of the incident (written or otherwise) directly to any other BOCES or Regional Information Center, or any affected Participating Educational Agency.

EXHIBIT D (CONTINUED)

PARENTS BILL OF RIGHTS FOR DATA PRIVACY AND SECURITY

Erie 1 BOCES is committed to protecting the privacy and security of student, teacher, and principal data. In accordance with New York Education Law § 2-d, the BOCES wishes to inform the community of the following:

- (1) A student's personally identifiable information cannot be sold or released for any commercial purposes.
- (2) Parents have the right to inspect and review the complete contents of their child's education record.
- (3) State and federal laws protect the confidentiality of personally identifiable information, and safeguards associated with industry standards and best practices, including but not limited to, encryption, firewalls, and password protection, must be in place when data is stored or transferred.
- (4) A complete list of all student data elements collected by the State is available for public review at <http://www.nysed.gov/data-privacy-security/student-data-inventory>, or by writing to the Office of Information & Reporting Services, New York State Education Department, Room 863 EBA, 89 Washington Avenue, Albany, New York 12234.
- (5) Parents have the right to have complaints about possible breaches of student data addressed. Complaints should be directed in writing to the Chief Privacy Officer, New York State Education Department, 89 Washington Avenue, Albany, New York 12234. Complaints may also be submitted using the form available at the following website <http://www.nysed.gov/data-privacy-security/report-improper-disclosure>.

BY THE VENDOR:


Signature

John Daniel
Printed Name

President
Title

April 14, 2022
Date

EXHIBIT D (CONTINUED)

SUPPLEMENTAL INFORMATION

**ABOUT THE MASTER LICENSE AND SERVICE AGREEMENT
BETWEEN
ERIE 1 BOCES AND [MR. ELMER, LLC]**

Erie 1 BOCES has entered into a Master License and Service Agreement ("MLSA") with [Mr. Elmer, LLC] which governs the availability to Participating Educational Agencies of the following Product(s):

[Intervention Compass]

Pursuant to the MLSA, Participating Educational Agencies may provide to Vendor, and Vendor will receive, personally identifiable information about students, or teachers and principals, that is protected by Section 2-d of the New York State Education Law ("Protected Data").

Exclusive Purpose for which Protected Data will be Used: The exclusive purpose for which Vendor is being provided access to Protected Data is to provide Participating Educational Agencies with the functionality of the Product(s) listed above. Vendor agrees that it will not use the Protected Data for any other purposes not explicitly authorized in the MLSA. Protected Data received by Vendor, or any of Vendor's subcontractors, assignees, or other authorized agents, will not be sold, or released or used for any commercial or marketing purposes.

Oversight of Subcontractors: In the event that Vendor engages subcontractors, assignees, or other authorized agents to perform one or more of its obligations under the MLSA (including any hosting service provider), it will require those to whom it discloses Protected Data to execute legally binding agreements acknowledging the obligation under Section 2-d of the New York State Education Law to comply with the same data security and privacy standards required of Vendor under the MLSA and applicable state and federal law. Vendor will ensure that such subcontractors, assignees, or other authorized agents abide by the provisions of these agreements by: *[Describe steps the Vendor will take]*

All employees, agents and subcontractors of Mr. Elmer who create, receive, maintain or transmit Protected Data on behalf of Vendor for Participating Educational Agencies shall enter into a written agreement with such third parties that contains the same restrictions and conditions on the use and disclosure of Protected Data as contained in this Agreement; Vendor shall ensure that such third parties receive additional Protected Data training at least annually; and Vendor shall review Vendor policies and procedures at least annually to ensure compliance.

Duration of MLSA and Protected Data Upon Expiration:

- The MLSA commences on [May 1, 2022 and expires on [June 30, 2025].
- Upon expiration of the MLSA without renewal, or upon termination of the MLSA prior to expiration, Vendor will securely delete or otherwise destroy any and all Protected Data

remaining in the possession of Vendor or its assignees or subcontractors or other authorized persons or entities to whom it has disclosed Protected Data. If requested by Erie 1 BOCES and/or any Participating Educational Agency, Vendor will assist a Participating Educational Agency in exporting all Protected Data previously received back to the Participating Educational Agency for its own use, prior to deletion, in such formats as may be requested by the Participating Educational Agency.

- In the event the Master Agreement is assigned to a successor Vendor (to the extent authorized by the Master Agreement), the Vendor will cooperate with Erie 1 BOCES as necessary to transition Protected Data to the successor Vendor prior to deletion.
- Neither Vendor nor any of its subcontractors or other authorized persons or entities to whom it has disclosed Protected Data will retain any Protected Data, copies, summaries or extracts of the Protected Data, or any de-identified Protected Data, on any storage medium whatsoever. Upon request, Vendor and/or its subcontractors or other authorized persons or entities to whom it has disclosed Protected Data, as applicable, will provide Erie 1 BOCES with a certification from an appropriate officer that these requirements have been satisfied in full.

Challenging Accuracy of Protected Data: Parents or eligible students can challenge the accuracy of any Protected Data provided by a Participating Educational Agency to Vendor, by contacting the student's district of residence regarding procedures for requesting amendment of education records under the Family Educational Rights and Privacy Act (FERPA). Teachers or principals may be able to challenge the accuracy of APPR data provided to Vendor by following the appeal process in their employing school district's applicable APPR Plan.

Data Storage and Security Protections: Any Protected Data Vendor receives will be stored on systems maintained by Vendor, or by a subcontractor under the direct control of Vendor, in a secure data center facility located within the United States. The measures that Vendor will take to protect Protected Data include adoption of technologies, safeguards and practices that align with the NIST Cybersecurity Framework and industry best practices including, but not necessarily limited to, disk encryption, file encryption, firewalls, and password protection.

Encryption of Protected Data: Vendor (or, if applicable, its subcontractors) will protect Protected Data in its custody from unauthorized disclosure while in motion or at rest, using a technology or methodology specified by the secretary of the U.S. Department of HHS in guidance issued under Section 13402(H)(2) of P.L. 111-5.