

(ATTACHMENT 9) ACTION ON THE AWARD OF PROFESSIONAL SERVICES CONTRACTS

Contract Requisition Number: CR028896
Contract Number: C026185
Vendor Number: V0609919

MILWAUKEE BOARD OF SCHOOL DIRECTORS PROFESSIONAL SERVICES CONTRACT

This Contract is being entered into this 1st day of May 2017 by and between **NCS Pearson, Inc.** (“Contractor”) and Milwaukee Board of School Directors (“MPS”). This Contract is the result of an open competitive procurement, specifically Request for Proposal (RFP) 929.

1. SCOPE OF SERVICES

Contractor shall specifically perform the following tasks:

In accordance with Contractor’s “Terms and Conditions of Use”, attached hereto as Exhibit A and incorporated by reference, Contractor shall provide MPS with the rights to purchase WriteToLearn for up to 7,500 licenses. Licenses are purchased on a “per-student” basis as outlined in § 10 of the Terms and Conditions. Product shall perform as indicated in the response to RFP 929. The cost per license for the Initial Term and each subsequent extension shall be \$19.95. If MPS wishes to acquire more than 7,500 licenses for purchase, Contractor must receive approval from Melanie Stewart, Director of Student Performance & Improvement.

Contractor shall also provide professional development associated with the licenses. Contractor and MPS shall mutually agree upon the schedule and format of professional development. Contractor shall initially provide 12 free hours of professional development. The cost for professional development thereafter shall be \$350.00 per hour.

RFP 929 and Contractor’s Response to RFP 929 are incorporated herein by reference.

Contractor shall provide, at its own expense, all personnel required to perform the services under this Contract.

2. TERM

This Contract shall be in effect from May 1, 2017 through April 30, 2018 (“the Initial Term”), with the option to extend for two additional one year periods. MPS will base its extension options on the following criteria for renewal to be rated by MPS personnel. A score equal to or below 59 is not passing and renewal will not be granted. A score between 60 and 84 will require specific action plans to be developed and approved prior to any extension being granted. A total score of 85 or more will be considered passing; however, 85 or more points does not guarantee renewal.

Criteria for Evaluation	Points
The intervention has been successfully administered via the computer or by a teacher.	5
The intervention performs as indicated in the evidence/research, <i>i.e.</i> , when used with fidelity produces academic achievement.	5
Interventions are clearly aligned to instruction and the acquisition of skills in their designated areas.	5
The utilization and fidelity of use is tracked electronically and broken down by district, school and grade level as needed.	5
Students using the program with fidelity show progress in closing achievement gaps.	5
The interventions have universally designed activities.	5
Students receive immediate feedback on progress within the program.	5
Accommodations increase the access of students with special needs.	5
The intervention has all materials included for lessons, formative assessments and necessary consumable products and an electronic tracking system to monitor student use.	5
Intervention administration works successfully within MPS technological requirements.	5
Vendor provides prompt technical support.	5
Communication of changes, updates or other technology related issues are done well in advance of the event so planning can occur.	5
Reports are accurate or reported errors are promptly corrected.	5
At the high school level, scores are related to college readiness.	5
Score reports provide data related to the scope of the intervention.	5
Reports provide information on student closing achievement gaps	5
Reports are easily accessible in all formats provided by vendor.	5
Interfaces easily with MPS’s universal screening tools (<i>i.e.</i> , STAR).	5
Costs were as described without hidden charges emerging after purchase.	5
Cost of consumables was clearly delineated (or permission to reproduce locally).	5

Vendor provided sufficient professional development so staff is able to intervene students efficiently.	5
Vendor provided sufficient professional development so staff is able to access reports.	5
Vendor provided sufficient professional development so staff is able to set up the system throughout MPS.	5
If original professional development was deemed insufficient by MPS, vendor provided additional professional development at no cost during the implementation term.	5
A project manager is consistently available and helpful.	5
Total	100

No work shall commence before a Contractor receives a fully executed Contract and has been given approval to proceed. Any work performed by the Contractor prior to obtaining a fully-executed Contract with approval to proceed shall not be compensated pursuant to this Contract. Any continuation of the Contract beyond this term must be set forth in writing and signed by the original signatories to the Contract.

3. COMPENSATION

Total compensation under this Contract shall not exceed \$149,625 in the Initial Term.

MPS reserves the right to determine in its sole discretion whether services have been adequately and fully delivered; to withhold payment until services are fully and adequately delivered; or to disallow a pro rata share of payments for services not fully and adequately delivered.

Milwaukee Public Schools does not pay in advance for services. No payment shall be made until a properly submitted invoice is approved. Invoices shall be submitted to:

Milwaukee Public Schools
 ATTN: Melanie Stewart
 5225 W. Vliet Street
 Milwaukee, WI 53208

A properly submitted invoice must include a detailed description of the dates and times worked, and the tasks performed. As a matter of practice, MPS attempts to pay all invoices in 30 days. It is mutually agreed that State Prompt pay law does not apply to this Contract.

Unless otherwise specified, MPS shall not pay invoices submitted more than 60 days after actual work. In the case of grant funding, no payments shall be made after grant close out. Final invoices must be marked as such.

4. NON APPROPRIATION OF FUNDS

This Contract is contingent upon the appropriation of sufficient funds by appropriate MPS officials. MPS will notify Contractor of any non-appropriation as soon as reasonably possible after such determination is made. If funds are not appropriated, Contractor agrees to take back any commodities furnished under the Contract, terminate any services supplied to MPS under the Contract, and relieve MPS of any further obligations under the Contract.

5. NON-DISCRIMINATION

In the performance of work under this Contract, Contractor shall not discriminate in any way against any employee or applicant for employment on the basis of a person’s sex, race, age, religion, national origin, ancestry, creed, pregnancy, marital or parental status, sexual orientation, disability, or socio-economic status. This prohibition includes but is not limited to employment; promotions, demotions and transfers; recruitment; advertising; layoff or termination; rates of pay or other forms of compensation; and selection for training, including apprenticeships. Contractor is required to include a similar provision in all subcontracts to this Contract.

If MPS determines Contractor has violated this non-discrimination policy, MPS may terminate this Contract without liability for undelivered services or materials. MPS may also deem the Contractor ineligible to participate in future contracts with MPS.

6. INDEMNITY

Notwithstanding any references to the contrary, Contractor assumes full liability for all of its acts or omissions in the performance of this Contract, as well as the acts or omissions of its subcontractors. Contractor shall indemnify and hold harmless MPS, its agents, officers and employees against all liabilities, losses, judgments, decrees, costs, and expenses that may be claimed against MPS as a result of granting of this Contract to said Contractor, or that may result from the carelessness or neglect of said Contractor, its agents, or employees. If judgment is recovered against MPS in suits of law or equity for any reason, including by

reason of the carelessness, negligence, or acts or omissions of the Contractor, against such persons, firms or corporations carrying out the provisions of the Contract for the Contractor, the Contractor assumes full liability for such judgment, not only as to any monetary award, but also as to the costs, attorneys' fees or other expenses resulting therefrom.

In accordance with applicable laws, MPS shall be responsible for defending and paying judgments on behalf of its officers, employees and agents while acting within the scope of their employment or agency for any claims that may arise out of MPS's negligence for acts, policies, or directives that affect the activities covered by this Contract.

7. BACKGROUND CHECKS

Contractor will conduct, at Contractor's expense, a criminal information records background check, (hereinafter referred to as "background check"), through the Wisconsin Department of Justice and other appropriate states' agencies, on all current and potential administrators, board members, officers, and employees who have, or who are anticipated to have, "direct, unsupervised contact" with MPS students in the performance of this Contract.

An out of state background check should be completed in the state(s) in which the individual resided for at least six months within the last two years and was eighteen years or older at the time.

Contractor will submit to MPS's Department of Employment Relations (DER), (via mail to Milwaukee Public Schools Background Checks, Attn: Department of Employment Relations, Room 116, 5225 West Vliet Street, Milwaukee, WI 53208, or via email at 564@milwaukee.k12.wi.us), all completed background checks. Such records will be reviewed and MPS will notify Contractor of any individual(s) who, based on MPS standards, are unfit and should not have contact with MPS students. All determinations made by MPS with regards to whether an individual is fit to provide services pursuant to this Contract are made in MPS's sole discretion.

The following will each be a material failure to comply with the terms of this Contract and cause for immediate termination of this Contract by MPS: failure to perform background checks as outlined in this Section 7; failure to submit background checks to MPS as outlined in this Section 7; allowing services to be provided by an individual who has not be subjected to a background check; and allowing services to be performed by an individual who has been determined to be unfit by MPS as outlined in this Section 7.

8. INSURANCE AND PROOF OF FINANCIAL RESPONSIBILITY

Contractor understands and agrees that financial responsibility for claims or damages to any person, or to Contractor's employees and agents, shall rest with the Contractor. Contractor and its subcontractors shall effect and maintain any insurance coverage, including, but not limited to, Workers' Compensation, Employers' Liability, General Liability, Contractual Liability, Automobile Liability and Umbrella Liability to support such financial obligations. The indemnification obligation, however, shall not be reduced in any way by existence or non-existence, limitation, amount or type of damages, compensation, or benefits payable under Workers' Compensation laws or other insurance provisions.

The minimum limits of insurance required of the Contractor by MPS shall be:

Workers' Compensation	Statutory Limits
Employers' Liability	\$100,000 per occurrence
General Liability	\$1,000,000 per occurrence/\$2,000,000 aggregate
Auto Liability	\$1,000,000 per occurrence
Umbrella (excess) Liability	\$1,000,000 per occurrence

The Milwaukee Board of School Directors shall be named as an additional insured under Contractor's and subcontractors' general liability insurance and umbrella liability insurance. Evidence of all required insurances of Contractor shall be submitted electronically to MPS via its third party vendor, EXIGIS Risk Management Services. Waivers and exceptions to the above limits will be in the sole discretion of MPS and shall be recorded in the EXIGIS system, which records are incorporated into this Contract by reference.

9. SHIPPING /TAXES

If goods are provided pursuant to this Contract, please note that MPS is exempt from Federal Excise and Wisconsin Sales Taxes. All vendor quotes, bids and invoices must include delivery FOB destination to the MPS location receiving the goods and freight must be prepaid. This means any freight, shipping, processing, handling or like charges must be part of a unit price. Any separate line items for freight, shipping, processing, handling or like charges listed on an invoice will be deleted and NOT PAID.

MPS reserves the right to reject any items that do not conform to the bid, quote or Purchase Order. All return freight charges associated with the rejected materials shall be borne by the vendor.

10. IRREPARABLE HARM

The breach of this Contract on Contractor's part shall entitle MPS to both preliminary and permanent injunctive relief and money damages insofar as they can be determined under the circumstances.

11. PARAGRAPH INTENTIONALLY OMITTED

12. TERMINATION

If either party fails to fulfill its obligations under this Contract in a timely or proper manner, or violates any of its provisions, the non-breaching party shall thereupon have the right to terminate it by giving thirty days written notice before the effective date of termination of the Contract, specifying the alleged violations, and effective date of termination. The Contract shall not be terminated if, upon receipt of the notice, the breaching party promptly cures the alleged violation within thirty days. In the event of termination, MPS will only be liable for services rendered through the date of termination and not for the uncompleted portion, or for any materials or services purchased or paid for by Contractor for use in completing the Contract.

13. TERMINATION BY MPS

MPS further reserves the right to terminate this Contract at any time for any reason by giving Contractor written notice by Registered or Certified Mail of such termination. MPS will attempt to give Contractor 20 days' notice, but reserves the right to give immediate notice. In the event of said termination, Contractor shall reduce its activities hereunder, as mutually agreed to, upon receipt of said notice. Upon said termination, Contractor shall be paid for all services rendered through the date of termination, including any retainage. This section also applies should the Milwaukee Board of School Directors fail to appropriate additional monies required for the completion of the Contract.

14. INDEPENDENT CONTRACTOR

Contractor agrees and stipulates that in performing this Contract, it is acting as an Independent Contractor, and that no relationship of employer and employee, partnership or joint venture is created by this Contract. Contractor has exclusive control over work hours, location, and other details of such services, and MPS's sole interest is to ensure that said service shall be performed and rendered in a competent, safe, efficient, timely and satisfactory manner in accordance with the terms of this Contract.

Contractor has the sole obligation to provide for and pay any contribution or taxes required by federal, state or local authorities imposed on or measured by income. Contractor specifically covenant not to file any complaint, charge, or claim with any local, state or federal agency or court in which Contractor claims to be or to have been an employee of MPS during the period of time covered by this Contract and that if any such agency or court assumes jurisdiction of any complaint, charge or claim against MPS on Contractor's behalf, Contractor will request such agency or court to dismiss such matter. MPS shall not be charged any obligation or responsibility whatsoever of extending any fringe benefits which may be extended to MPS employees, including any insurance, or pension plans.

Contractor further agrees that MPS is not to be charged with the obligation or responsibility of extending any fringe benefits such as hospital, medical and life insurance, or pension plans which may be extended to employees of MPS from time-to-time and further agree to indemnify and hold harmless MPS and all its employees, officers and agents from any liability for personal injuries, including death, or for damage to or loss of personal property, which might occur as a result of the performance of the services provided for under this Contract.

15. ASSIGNMENT LIMITATION

This Contract shall be binding upon and inure to the benefit of the parties and their successors and assigns.

16. PROHIBITED PRACTICES

- A. Contractor during the period of this Contract shall not hire, retain or use for compensation any member, officer, or employee of MPS to perform services under this Contract, or any other person who, to the knowledge of Contractor, has a conflict of interest.
- B. Contractor hereby attests it is familiar with MPS's Code of Ethics, providing in pertinent part, "[a]n employee of Milwaukee Public Schools may not accept any gift or gratuity in excess of \$25.00 annually from any person, persons, group or any firm which does business with or is attempting to do business with MPS."
- C. No person may enter into this Contract for services that the MPS employee would otherwise perform as an employee.
- D. No current or former MPS employee may perform services on a professional services contract without the prior written consent of the MPS Chief Human Capital Officer or his/her designee.

17. LIVING WAGE REQUIREMENT

Contractor shall comply with, and ensure its subcontractors performing work under this Contract comply with, Milwaukee Board of School Directors' Administrative Policy 3.09(17), which requires that employees be paid a "living wage."

18. NOTICES

Notices to either party provided for in this Contract shall be sufficient if sent by Certified or Registered mail, postage prepaid, addressed to the signatories on this Contract, or to their designees.

19. WAIVER

The waiver or failure of either Party to exercise in any respect any rights provided for in this Contract shall not be deemed a waiver of any further right under this Contract.

20. INTEGRATION / SEVERABILITY

This Contract, its Exhibit A, RFP 929, and Contractor's Response to RFP 929, constitute the entire Contract among the Parties with respect to the subject matter hereof and supersede all prior proposals, negotiations, conversations, discussions and Contracts among the Parties concerning the subject matter hereof. No amendment or modification of any provision of this Contract shall be effective unless the same shall be in writing and signed by both Parties.

The District shall not be bound by any terms and conditions included in of Contractor's packaging, service catalog, brochure, technical data sheet or other document which attempts to impose any conditions at variance with or in addition to the terms and conditions contained herein.

If any term or provision of this Contract should be declared invalid by a court of competent jurisdiction or by operation of law, the remaining terms and provisions of this Contract shall be interpreted as if such invalid Contracts or covenants were not contained herein.

21. CHOICE OF LAW & FORUM

The state courts of Wisconsin shall be the sole forum for all disputes arising of this Contract. The validity, construction, enforcement and effect of this Contract shall be governed solely by the laws of the State of Wisconsin.

22. TIMING

Time is of the essence in this Contract.

23. CERTIFICATION REGARDING DEBARMENT OR SUSPENSION

Contractor certifies that neither Contractor or its principals; its subcontractors or their principals; the sub-recipients (if applicable) or their principals are suspended, debarred, proposed for debarment, voluntarily excluded from covered transactions, or otherwise disqualified by any federal department or agency from doing business with the Federal Government pursuant to Executive Orders 12549 and 12689. Contractor specifically covenants that neither the Contractor or its principals, its sub-contractors or their principals, or the sub-recipients (if applicable) or their principals are included on the Excluded Parties List System ("EPLS") maintained by the General Services Administration ("GSA").

24. FORCE MAJEURE

MPS will not be liable to pay Contractor for any work that the Contractor is unable to perform due to act of God, riot, war, civil unrest, flood, earthquake, outbreak of contagious disease or other cause beyond MPS's reasonable control (including any mechanical, electronic, or communications failure, but excluding failure caused by a party's financial condition or negligence). Likewise, in the event Contractor is unable to perform due to a force majeure event, performance may be delayed for a reasonable time.

25. STUDENT DATA

Contractor acknowledges that student data is protected by both federal and state law. *See* Wis. Stat. § 118.125; 20 U.S.C. § 1232g(b); 34 C.F.R. § 99.1 *et seq.* If MPS determines that Contractor has disclosed any student record information in violation of either federal or state law, without prejudice to any other rights or remedies the MPS may have, MPS shall be entitled to immediately terminate this and every other existing Contract without further liability. Moreover, MPS may bar Contractor from future MPS contracts for varying periods up to and including permanent debarment.

26. NON-DISCLOSURE

Absent prior written consent of the person listed in Section 3 or his/her designee, Contractor shall not: (1) disclose, publish, or disseminate any information, not a matter of public record, that is received by reason of this Contract, regardless of whether the Contractor is or is not under contract at the time of the disclosure; or (2) disclose, publish, or disseminate any information developed for MPS under this Contract. Contractor agrees to take all reasonable precautions to prevent any unauthorized use, disclosure, publication, or dissemination of the same information.

Within ten business days of the earlier of receipt of MPS' written or oral request, or final payment, Contractor will return all documents, records, and copies thereof it obtained during the development of the work product covered by this Contract.

27. MPS LOGO/PUBLICITY

No Contractor shall use the MPS Logo in its literature or issue a press release about the subject of this Contract without prior written notice to and written approval of MPS's Executive Director of Communications & Outreach.

28. ORDER OF PRIORITY

The parties have negotiated the integration of Contractor's Terms and Conditions of Use with MPS's Professional Services Contract. It is the intent of the parties that, in the event of a conflict among the documents constituting this Contract, the order of priority to resolve the conflict shall be: 1) this Contract; 2) Contractor's Terms and Conditions of Use; 3) RFP 929; and 4) Contractor's Response to RFP 929.

29. PUBLIC RECORDS

Both parties understand that the Board is bound by the Wisconsin Public Records Law, and as such, all of the terms of this Contract are subject to and conditioned on the provisions of Wis. Stat. § 19.21, *et seq.* Contractor acknowledges that it is obligated to assist the Board in retaining and producing records that are subject to Wisconsin Public Records Law, and that the failure to do so shall constitute a material breach of this Contract, and that the Contractor must defend and hold the Board harmless from liability under the law. Except as otherwise authorized, those records shall be maintained for a period of seven years after receipt of final payment under this Contract.

30. CONTRACT COMPLIANCE REQUIREMENT

The HUB requirement on this Contract is 0%. The student engagement requirement of this Contract is 0 hours. The Career Education requirement for this Contract is 20 hours. Failure to achieve these requirements may result in the application of some or all of the sanctions set forth in Administrative Policy 3.10, which is hereby incorporated by reference.

IN WITNESS WHEREOF, the parties here to have executed this Contract on the day, month and year first above written.

CONTRACTOR (Vendor #: V0609919)

MILWAUKEE BOARD OF SCHOOL DIRECTORS

By: _____
Authorized Representative

By: _____
*Kari H. Race, J.D., Acting Director
Procurement and Risk Management*

Date: _____

Date: _____

NCS Pearson, Inc.
19500 Bulverde Road, Suite 201
San Antonio, TX, 78259

By: _____
*Darrienne B. Driver Ed.D.,
Superintendent of Schools*

Date: _____

SSN / FEIN:

Budget Code: SYS-0-0-AMT-RH-ECTS

By: _____
*Mark A. Sain, President
Milwaukee Board of School Directors*

Date: _____

Reviewed by Risk Management:

By: _____

Date: _____

Exhibit A to Professional Services Contract dated May 1, 2017
Terms and Conditions of Use The authorized purchaser (the

"Subscriber") hereby agrees to this Subscriber Agreement (the "Agreement").

1. WriteToLearn™ (the "Service") is a web-based service offered by NCS Pearson, Inc. ("Pearson") providing automated assessment of summaries and essays and reporting for students and teachers through use of a writing skills and reading comprehension development tool.
2. Subscriber is granted a limited, non-exclusive, non-transferable, revocable license, for a subscription period consistent with the fees paid by Subscriber, permitting authorized individuals (the "Users"), identified by Subscriber, access to the Service.
3. Subscriber will ensure that Users meet the then-current minimum hardware and software requirements for using the Service, and is responsible for configuring its computer systems so that they interface properly with the Service. Copies of Pearson's minimum hardware and software requirements for using the Service are available upon request. Subscriber acknowledges and agrees that these minimum hardware and software requirements are subject to change over time as operating systems, browsers, and other technologies evolve. Pearson shall have no obligation to Subscriber in the event that Subscriber is unable to access the Service due to a failure to maintain an operating environment consistent with Pearson's then-current minimum hardware and software requirements.
4. Subscriber's additional responsibilities are as follows:
 - a. Issue to its Users unique access ids and passwords after WriteToLearn teacher accounts have been established.
 - b. Disseminate information to Users regarding access to and use of the Service.
5. Subscriber agrees to take all necessary precautions regarding the privacy of User information, essays, and score data. Subscriber is responsible for obtaining any parental consent that may be required under applicable laws in order to provide student identifying data to Pearson. Pearson agrees to exercise commercially reasonable efforts to maintain as confidential and use solely as necessary for purposes of performing this Agreement all Subscriber data that is disclosed to Pearson or is stored on servers hosting the Service. Such commercially reasonable efforts shall include the use of commercially available encryption technology for transmission of Subscriber data and the use of commercially available password protection technology within the Service; however, Subscriber acknowledges that user identifications and passwords to access its data will be controlled and managed by the Subscriber and not by Pearson.
6. Subscriber authorizes Pearson to use non-personally identifiable student assessment results on an aggregated basis for research and analytical purposes.
7. Pearson will provide a User manual in electronic format containing Service information.
8. The Service will generally be available to Users on a 7x24 basis; however, Subscriber acknowledges that Pearson may take the Service down from time to time to perform maintenance or upgrades. In addition, Subscriber acknowledges that from time to time the Service may be inaccessible or inoperable due to errors or causes beyond the control of Pearson or which are not reasonably foreseeable by Pearson, including, but not limited to: the interruption or failure of telecommunication or digital transmission links; hostile network attacks; network congestion; or other failures (collectively "Downtime"). Pearson will use commercially reasonable efforts to perform scheduled maintenance and/or upgrades at times when usage of the Service is generally low, and to minimize any disruption, inaccessibility and/or inoperability of the Service caused by Downtime.
9. Pearson will maintain and provide Subscriber with access to essay and score data for Subscriber's current contract period. It is Subscriber's responsibility to preserve essay and score data from previous contract periods or for archival purposes.
10. The Service is offered by Pearson under two subscription pricing models. If Subscriber is licensing the Service under Pearson's per-student subscription model, each registration of a student to use the Service will use up one of Subscriber's paid registrations. Pearson will monitor the number of registrations and notify Subscriber when remaining unused registrations reach a low point. The Service will be unavailable for additional registrations when all of the Subscriber's registrations have been used. Once assigned to a particular student, student subscriptions cannot be transferred from that student to a different student. If Subscriber is licensing the Service under Pearson's concurrent user subscription model, then the number of students using the Service at any given time will be limited to the number of concurrent user subscriptions licensed by the Subscriber.
11. WriteToLearn subscription fees must be prepaid. These fees are based on the number of subscriptions (whether per-student registrations, when using the per-student subscription model, or concurrent user subscriptions, when using the concurrent user subscription model) being purchased by Subscriber. All fees are payable within thirty (30) days of invoice date. Applicable taxes will be applied at time of invoicing. Any unused subscriptions at the end of Subscriber's period will be forfeited. For the per-student subscription model, the number of subscriptions ordered may be increased at any time during the contract period at the request of Subscriber. These increased subscriptions will be assigned to the total number of current subscriptions; however, the contract period will not be extended with the additional subscriptions on an existing contract. For the concurrent user subscription model, added subscriptions may run for different subscription periods than the original subscriptions. In all cases, additional subscriptions will be calculated at the prevailing contract rate.
12. This Agreement is effective on the date that the Service has been set up by Pearson and made available to Subscriber to use, and will remain in effect up to the last business day of the final month of the contract period. Pearson may terminate this Agreement by providing Subscriber with written notice in the event that Subscriber fails to pay the fees which are deemed payable, fails to abide by the restrictions on the use and disclosure of the Service, or breaches any other term or condition of this Agreement. Subscriber may terminate this Agreement by providing sixty (60) days written notice to Pearson. Fees paid are non-refundable. The terms of this Agreement shall continue to apply to any renewal of Subscriber's use of the Service, unless Pearson supplies updated terms to Subscriber in connection with such renewal, in which case such updated terms shall apply.
13. Subscriber is responsible for the actions of its Users. The Service may not be used for any purpose except as expressly permitted by this Agreement. Subscriber may not resell, assign, or otherwise transfer this Agreement or its rights or obligations hereunder.
14. Pearson will retain ownership of all intellectual property rights pertaining to the Service, including the WriteToLearn software, the Pearson essay topics, and all related documentation, as well as any other Pearson material, software programs and associated techniques, concepts, and methodologies (collectively known as "Intellectual Property") that may be used to provide the products and services under this Agreement.
15. **DISCLAIMER OF WARRANTIES: PEARSON WILL USE COMMERCIALY REASONABLE EFFORTS TO MAINTAIN THE PERFORMANCE OF THE SERVICE IN ACCORDANCE WITH THE TERMS AND CONDITIONS OF THIS AGREEMENT. HOWEVER, PEARSON DOES NOT MAKE, AND HEREBY DISCLAIMS, ANY EXPRESS AND IMPLIED WARRANTIES, INCLUDING BUT NOT LIMITED TO, WARRANTIES OF MERCHANTABILITY, FITNESS FOR A PARTICULAR PURPOSE, NON-INFRINGEMENT, AND ANY WARRANTIES ARISING FROM COURSE OF DEALING, USAGE OR TRADE PRACTICE. PEARSON DOES NOT WARRANT THAT THE SERVICE OR SUBSCRIBER'S USE THEREOF WILL BE UNINTERRUPTED, ERROR-FREE, OR COMPLETELY SECURE. PEARSON CANNOT CONTROL THE FLOW OF DATA TO OR FROM PEARSON'S NETWORK AND OTHER PORTIONS OF THE INTERNET. SUCH FLOW DEPENDS IN LARGE PART ON THE PERFORMANCE OF INTERNET SERVICES PROVIDED OR CONTROLLED BY THIRD PARTIES. AT TIMES, ACTIONS OR INACTIONS OF SUCH THIRD PARTIES CAN IMPAIR OR DISRUPT USERS' AND/OR PEARSON'S CONNECTIONS TO THE INTERNET.**

16. **LIMITATION OF LIABILITY: PEARSON WILL NOT BE LIABLE FOR ANY CONSEQUENTIAL, INCIDENTAL, SPECIAL, INDIRECT, OR EXEMPLARY DAMAGES ARISING OUT OF OR RELATED TO THIS AGREEMENT, EVEN IF ADVISED OF THE POSSIBILITY OF SUCH DAMAGES AND WHETHER OR NOT SUCH DAMAGES WERE FORESEEABLE. PEARSON'S LIABILITY FOR ANY LOSS OR DAMAGE WHATSOEVER ARISING OUT OF THIS CONTRACT WILL BE LIMITED TO ACTUAL, DIRECT DAMAGES ONLY, NOT TO EXCEED THE TOTAL AMOUNT OF MONEY PAID BY SUBSCRIBER TO PEARSON FOR THE SERVICE, OR OTHER ITEM OR MATERIAL ON WHICH THE CLAIM IS BASED, DURING THE TWELVE MONTH PERIOD IMMEDIATELY PRECEDING THE LOSS OR INJURY.**
17. Force Majeure: Pearson will not be liable for any failure to fulfill its obligations hereunder due to causes beyond its control. However, if Pearson's performance is delayed for a period in excess of sixty consecutive days, then Subscriber may terminate this Agreement upon written notice and receive a refund of any unused subscription fees (calculated on a prorated basis from the date of termination through the remainder of Subscriber's applicable subscription period).
18. This Agreement will be construed under the laws of the State of Wisconsin, without regard to its conflict of laws provisions.

