

PROFESSIONAL SERVICES AGREEMENT

THIS PROFESSIONAL SERVICES AGREEMENT (the “**Agreement**”) is made and entered into as of the 23rd day of November (the “**Effective Date**”) by and between **HORSEHEADS CENTRAL SCHOOL DISTRICT** (hereinafter referred to as the “**District**”) and **EDUCATE ONLINE LEARNING, LLC**, a Delaware corporation (hereinafter referred to as “**Educate Online**”).

WHEREAS, the District desires to obtain instructional services that fulfill the requirements of Section 1116, subsection (e) of the No Child Left Behind Act of 2001, entitled “Supplemental Educational Services;” and

WHEREAS, Educate Online provides instructional services that meet the requirements of Section 1116, subsection (e) of the No Child Left Behind Act of 2001, entitled “Supplemental Educational Services;”

NOW THEREFORE, in consideration of the mutual covenants and conditions set forth in this Agreement, the parties agree as follows:

1 TERM

The term of this Agreement (the “**Term**”) shall commence on the Effective Date and terminate on **August 31, 2011** unless earlier terminated in accordance with Section 7 hereof.

2 SCOPE OF WORK and EDUCATE ONLINE RESPONSIBILITIES

The Program

- 2.1 Upon the terms and conditions set forth herein, Educate Online shall provide an instructional program (the “**Program**”) in Reading or Math as determined by students’ needs and program availability. The Program shall be provided during the Term of this Agreement by qualified staff utilizing Educate Online’s proprietary systems, teaching techniques, diagnostic tests, academic courses and materials. The Program will be delivered to students performing at grade levels three (3) through nine (9) in reading or math via Educate Online’s proprietary online learning platform. The Program schedule will be determined by Educate Online based on students’ needs and Educate Online’s capacity. Participating students shall have the opportunity to attend at least two 1-hour sessions per week for the duration of the Program.
- 2.2 Pursuant to the Americans With Disabilities Act (“**ADA**”), Educate Online shall make reasonable modifications to its policies, practices, and procedures to ensure nondiscrimination on the basis of disability, including providing auxiliary aids and services, unless to do so would fundamentally alter the nature of the Program or would result in an undue burden. In such a case, Educate Online will work with the District to accommodate disabled students, provided the student or District provides Educate Online with special resources or the District provides additional funds to compensate Educate Online for the provision of such resources.
- 2.3 Each student shall take a self-administered assessment prior to placement in the Educate Online instructional program. The results of the initial assessment will be used to inform the Summary of Diagnostic Assessment and the initial Progress Update, which will contain a list of specific achievement goals.
- 2.4 Students shall receive direct instruction at a student to teacher ratio not to exceed three to

one (3:1).

- 2.5 An Educate Online teacher (the “**Program Teacher**”) shall be prepared to provide all instructional services as described herein.
- 2.6 References to “**Parent**” throughout this Agreement shall mean the natural or adoptive parent, legal guardian, or responsible party as identified by the District or Educate Online. The parent shall be available to help a student access the program and will access to student records for review of student progress.
- 2.7 Generally, students will be scheduled to attend the Program two (2) to four (4) hours per week, but parents may choose to accelerate that schedule. A student schedule will be jointly developed by an Educate Online Manager and the Parent. This plan will provide the necessary structure to ensure that students have the opportunity to attend the Program on a fixed schedule to receive a total of 35 hours of instruction and assessment.

Personnel

- 2.8 Educate Online will engage only qualified individuals to perform as Program Teachers. In addition, every Program Teacher engaged in direct instruction must satisfy the requirements for criminal background checks and FBI fingerprint clearances prior to working with students in the Program.

Reporting

- 2.9 The Summary of Diagnostic Assessment will be available online to Parent(s) at the beginning of the Program as a baseline assessment of skills. The Progress Update will be made available online throughout the Program as an ongoing measurement of student progress.
- 2.10 Educate Online will report skill mastery data for students who participate in the instructional Program. Skill mastery results are reported, on an ongoing basis, to students and Parents online.
- 2.11 An End of Program report, summarizing student performance data, will be provided to the District as the final Program service.

General Responsibilities

- 2.12 Educate Online shall order, configure, ship and confirm delivery of all necessary hardware components to the parent/guardian of each participating student. Educate Online shall not be required to send more than one package of hardware components to the same residence during any two-year period. If multiple students residing at the same address participate in the Program within a two-year period, the students will share one set of hardware components. All hardware, including but not limited to computers remains the property of Educate Online until the student completes the Program. As such, Educate Online retains the right to repossess said hardware from students who do not complete the Program.
- 2.13 Educate Online shall provide each student who does not already have Internet access with services from an Internet Service Provider (ISP) throughout the duration of the program.
- 2.14 Educate Online shall establish hardware delivery and internet connectivity timeframes to

enable timely Program operations at each site.

- 2.15 Educate Online shall provide participating parent/guardians with a Toll-Free Customer Service line to provide technical and installation support.
- 2.16 Educate Online shall apply, to an extent practicable and to the extent that it does not interfere with transmission of the course material, content filtering and access controls which will provide a safe computing environment for all users throughout the duration of the program.
- 2.17 Educate Online shall commence providing services on or before a date six (6) weeks from the Effective Date of this Agreement or six (6) weeks from being given a student list from the District, including all of the information listed in Section 3.2 and Section 3.6, whichever is later.
- 2.18 Educate Online reserves the right to refuse service to students who do not return the Student and Family Agreement and Initial Student Plan or students whose home does not have electricity or phone service.
- 2.19 Educate Online will appoint a Program Manager to function as a point of contact for the District regarding the management of the Program.

3 DISTRICT RESPONSIBILITIES

Project Management

- 3.1 The District shall provide a project manager to work with Educate Online to coordinate program implementation, facilitate relations with schools and function as a general point of contact for all matters regarding the Program.
- 3.2 The District and the Schools shall provide Educate Online with a list of students to be enrolled in the Program at least six (6) weeks prior to commencement of services. In addition to the name of each student, the list shall include, birth date, grade, school, official student identification number or code, grade, and parent/guardian's contact information including name, address and phone number. To the extent possible, the District shall provide the identified data in electronic format.
- 3.3 In order to facilitate clear and effective evaluations of the Program the District shall authorize the release of all relevant individual student data, including standardized test results, to Educate Online.
- 3.4 The District shall provide Educate Online with background information on standardized test data referenced in Section 3.3, including but not limited to, technical manuals, teacher guidebooks, test objectives and item alignments.

Parental Notification and Student Enrollment

- 3.5 In order for Educate Online to adequately plan for service delivery, the District shall, in the period following dissemination of parental notice and prior to commencement of service delivery, report to Educate Online, on a weekly basis, the number of students that have selected Educate Online's services.

- 3.6 District shall make available to Educate Online all contact information for parents of students enrolled in Educate Online's program. This includes full name of parent(s)/guardian(s), street address, city, zip code, phone number. This information shall remain confidential in accordance with Section 6.3 and will be used by Educate Online solely for delivering materials, hardware, information to parents regarding service delivery, maximization of student participation, and notification of parents regarding student progress.
- 3.7 A student is considered approved by the district for participation in Educate Online's program when Educate Online is notified by the district or school in writing of the student's eligibility for Supplemental Educational Services. A student is considered enrolled in Educate Online's program when the student has been approved by the district and Educate Online has been able to confirm parent selection by phone.
- 3.8 Educate Online may register eligible students in cooperation with the District for its program in addition to those that register directly with the District. Educate Online understands that final determination of student eligibility will be the responsibility of the District.
- 3.9 District and Educate Online may continue to enroll new students into Educate Online's program throughout the course of the school year, as long as Educate Online determines that there is capacity to serve additional students. Lack of capacity includes, but is not limited to, lack of teacher availability to serve additional students and lack of time remaining in the school year to accommodate the required program hours.
- 3.10 Notwithstanding the District's obligations to notify and enroll students in the Program, Educate Online reserves the right to engage in community outreach activities designed to increase the number of participants in the Program.

4 FUNDING, FEES, BILLING AND PAYMENT

- 4.1 Educate Online shall deliver the Program, as described herein, to the District and in return, The District shall pay Educate Online a fee not to exceed \$ One Thousand Two Hundred Seventy-Eight Dollars (\$1278) per student (the "Fee"). The Fee shall consist of:
 - 4.1.1 The Program Charge of Fifty-Three Dollars (\$53.00) per hour.
- 4.2 Educate Online shall invoice the District monthly based on the number of sessions delivered to Enrolled Students and the number of instructional sessions attended by students during the previous month. All invoiced amounts are due and payable by the District within thirty-days (30 days) of receipt of an invoice from Educate Online.

Educate may assess late payment charges equal to one and one-half percent (1.5%) per month or portion thereof that any amount payable by the District hereunder remains outstanding after payment thereof is due.

5 CONFIDENTIAL AND PROPRIETARY INFORMATION

- 5.1 The District acknowledges that Educate's programs, courses, diagnostic tests and techniques for preparation of individualized courses of instruction are proprietary in nature and the confidential and exclusive property of Educate and that the District has no right, by virtue of this Agreement or otherwise to have access to or to disclose said property except

- 5.2 In the event that any proprietary or confidential information is disclosed intentionally or otherwise to the District, its employees, agents or assigns, the District agrees to hold same in strictest confidence and not to disclose same to any other person for any reasons nor utilize same within the District without prior written approval by Educate.
- 5.3 The District further agrees to use all efforts at its disposal to assure that its employees, agents or assigns are aware of the confidential and proprietary nature of the subject matter, and do not disclose same to any other person for any reasons nor utilize same without prior written approval by Educate. The District acknowledges that unauthorized disclosure of Educate's proprietary and confidential information may cause Educate irreparable harm and may entitle Educate to injunctive relief in a court of competent jurisdiction.

6 STUDENT RECORDS and CONFIDENTIALITY

- 6.1 Student Records "Educate Student Records" for the purpose of this Agreement shall constitute all Educate tests, attendance records and student diagnostic summaries. Educate shall maintain the confidentiality of all students' records in compliance with applicable federal and state laws.
- 6.2 Educate's records shall be used as proof that services have been delivered, if such proof is requested by the District.
- 6.3 Educate shall not disclose to the public any of the following, without the written permission of the parents of such student:
 - 6.3.1 The identity of any student eligible for, or receiving services; or
 - 6.3.2 The instructional needs or progress of any student eligible for, or receiving services.

7 BREACH AND TERMINATION

- 7.1 This Agreement may be terminated by either party if the other party is in breach of any material provision of this Agreement, but only after written notice of default and an opportunity to cure has been given to the breaching party. The notice of default must give the breaching party an opportunity to cure of at least sixty (60) days in the case of a non-monetary default and at least ten (10) days in the case of a monetary default. If the breaching party has not cured the breach before the cure date stated in the notice of default, the party giving notice may terminate this Agreement by giving the breaching party written notice of termination stating the date on which the termination is to be effective. Notwithstanding the delivery of a notice of default or notice of termination under this Section, the parties shall continue to observe and perform their respective obligations under this Agreement until the effective date of termination.
- 7.2 In the event either party elects to terminate this Agreement pursuant to Section 7.1, Educate shall be entitled to an equitable adjustment hereunder. Said equitable adjustment shall include all fees for services rendered up to the date of termination and costs reasonably incurred by Educate in connection with such termination. If adequate notice is not provided in accordance with Section 7.1, Educate shall also be entitled to payment of any

8 INDEMNIFICATION

- 8.1 The District shall defend, indemnify and hold harmless Educate against and from all costs, expenses, damages, injury or loss to which Educate may be subject by reason of any wrongdoing, misconduct, want of care, skill, negligence or default by the District, its agents, employees or assigns in the execution or performance of this Agreement.
- 8.2 Educate shall defend, indemnify and hold harmless the District against and from all costs, expenses, damages, injury or loss to which the District may be subjected by reason of any wrongdoing, misconduct, want of care, skill, negligence or default by Educate, its agents, employees or assigns in the execution or performance of this Agreement.
- 8.3 If a claim for indemnification (a "Claim") is to be made by a party entitled to indemnification hereunder against the indemnifying party, the party claiming such indemnification shall give written notice (a "Claim Notice") to the indemnifying party as soon as practicable after the party entitled to indemnification becomes aware of any fact, condition or event which may give rise to damages for which indemnification may be sought under this Section. Such Claim Notice shall specify the nature and amount of the Claim asserted if actually known to the party entitled to indemnification hereunder. If any lawsuit or enforcement action is filed against any party entitled to the benefit of indemnity hereunder, written notice thereof shall be given to the indemnifying party as promptly as practicable (and in any event within fifteen (15) days after the service of the citation or summons). Subject to the limitations of this Section the failure of any indemnified party to give timely notice hereunder shall not affect rights to indemnification hereunder, except to the extent that the indemnifying party demonstrates actual damage caused by such failure. After such notice, if the indemnifying party shall acknowledge in writing to the indemnified party that the indemnifying party shall be obligated under the terms of its indemnity hereunder in connection with such lawsuit or action, then the indemnifying party shall be entitled, if it so elects at its own cost and expense, (A) to take control of the defense and investigation of such lawsuit or action, (B) to employ and engage attorneys of its own choice, who shall be reasonably satisfactory to the indemnified party, to handle and defend the same unless the named parties to such action or proceeding include both the indemnifying party and the indemnified party and the indemnified party has been advised in writing by counsel that there may be one or more legal defenses available to such indemnified party that are different from or additional to those available to the indemnifying party, in which event the indemnified party shall be entitled, at the indemnifying party's cost and expense, to separate counsel of its own choosing, and (C) to compromise or settle such claim, which compromise or settlement shall be made only with the written consent of the indemnified party, such consent not to be unreasonably withheld or delayed; provided, however, that any such compromise or settlement shall give each indemnified party a full, complete and unconditional release of any and all liability by all relevant parties relating thereto. If the indemnifying party fails to assume the defense of such claim within thirty (30) calendar days after receipt of the Claim Notice, the indemnified party against which such claim has been asserted shall (upon delivering notice to such effect to the indemnifying party) have the right to undertake, at the indemnifying party's cost and expense, the defense, compromise or settlement of such claim on behalf of and for the account and risk of the indemnifying party; provided, however, that such Claim shall not be compromised or settled without the written consent of the indemnifying party, which consent shall not be unreasonably withheld or delayed. In the event the indemnified

party assumes the defense of the claim, the indemnified party will keep the indemnifying party reasonably informed of the progress of any such defense, compromise or settlement. The indemnifying party shall be liable for any settlement of any action effected pursuant to and in accordance with and subject to the limitations of this Section and for any final judgment (subject to any right of appeal).

In the event that any action, suit, proceeding or investigation relating hereto or to the transactions contemplated by this Agreement is commenced, the parties hereto agree to immediately notify each other in writing of the pending action, suit, proceeding or investigation and to cooperate to the extent possible to defend against and respond thereto and make available to each other such personnel, witnesses, books, records, documents or other information within its control that are reasonably necessary or appropriate for such defense.

9 INSURANCE

- 9.1 Educate maintains and keeps in force such insurance as Compensation, Liability, and Property Damage as will protect it from claims under Workman's Compensation Acts and also such insurance as will protect it and the District from any other claims for damages for personal injury, including death and claims for damages to any property of the District or of the public, which may arise from operations under this Agreement, whether such operations be by Educate or by any subcontractor or anyone directly or indirectly employed by any of them.
- 9.2 Educate shall maintain and keep in force liability insurance which shall under no circumstances be less than One Million Dollars (\$1,000,000.00) for injuries sustained by any one person and Two Million Dollars (\$2,000,000.00) for injuries sustained by two or more persons in any one accident. The amount of property damage insurance shall not be less than One Million Dollars (\$1,000,000.00).
- 9.3 The District will maintain and keep in force such insurance as Compensation, Liability and Property Damage as will protect it from claims under Workman's Compensation Acts and also such insurance as will protect it and Educate from any other claims for damages for personal injury, including death and claims for damages to any property of Educate, which may arise from operations under this agreement, whether such operations be by the District or by any subcontractor or anyone directly or indirectly employed by any of them.

10 STATUS CHANGE

- 10.1 Educate shall inform the District of any and all circumstances which may impede the progress of the work or inhibit the performance of this Agreement including but not limited to bankruptcy, dissolution or liquidation, merger, sale of business, assignment, etc.
- 10.2 In addition, the District shall inform Educate of any and all circumstances which may directly or indirectly affect the performance of this Agreement including but not limited to change in District or school administration, decrease in original funding source, etc.

11 NOTICES

- 11.1 All notices required or permitted to be given under this Agreement shall be in writing and shall be deemed to have been given to the party to whom intended if (i) delivered (with an acknowledgment) by hand, (ii) sent by facsimile machine or (iii) sent by certified or

registered mail postage pre-paid, return receipt requested. Any notice so delivered or sent shall be deemed to have been duly given on the date of receipt.

- 11.2 Until changed by notice in the manner specified above the addresses and telephone numbers of the parties to this Agreement for purposes of this Paragraph shall be:

FOR THE DISTRICT:

Telephone:

FOR EDUCATE:

David Blair, VP Ops
Educate Online, LLC
1001 Fleet Street
Baltimore, MD 21202
Telephone: (410) 843-2672

12 MISCELLANEOUS

- 12.1 Force Majeure. Neither party will be liable to the other party hereunder or in default under this Agreement for failures of performance resulting from acts or events beyond the reasonable control of such party, including, by way of example and not limitation, acts of God, civil disturbances, war, and strikes.
- 12.2 No Agency. Nothing in this Agreement shall be deemed to create or give rise to a partnership or joint venture between the parties. Neither party shall have the authority to or shall attempt to bind or commit the other party for any purpose except as expressly provided herein.
- 12.3 Applicable Law. In providing all services under this Agreement, Educate shall abide by all applicable federal, state and local statutes, ordinances, rules, regulations and standards as well as the standards and requirements imposed upon the District by federal and/or state agencies providing funding to the District for the purchase of Educate services.
- 12.4 Governing Law. This Agreement shall be governed by and construed in accordance with the laws of the State of Massachusetts.
- 12.5 Arbitration. Except with respect to proprietary rights and obligations with respect to confidentiality including the right of a party to apply to a court of competent jurisdiction for a temporary restraining order, preliminary injunction or other equitable relief to preserve the status quo or prevent irreparable harm and for the right to bring suit for money due under the Agreement, all claims, disputes, controversies and other matters in question between the parties to this Agreement arising out of or relating to this Agreement or the breach thereof which cannot be resolved by the parties through face-to-face negotiations, shall be settled by binding arbitration in accordance with the rules of the American Arbitration Association then in effect. Judgment upon the award rendered by the arbitrator(s) may be entered in any court having jurisdiction thereof. The arbitrator(s) shall each be a neutral person who has never been employed (either as an employee or as an independent consultant) by either of the parties, any parent, subsidiary or affiliate thereof or any third party that supplied goods or services to either party hereto. All arbitration proceedings shall be held in _____, _____. The cost of the arbitration shall be borne equally by the parties, unless the arbitrator(s) shall otherwise provide in their award.

Either party to arbitration hereunder may bring an action for injunctive relief against the

other party if necessary to preserve the arbitrators' jurisdiction or to maintain the status quo pending the arbitrators' decision.

- 12.6 Non-discrimination. Educate is an equal opportunity employer. It conducts all business activities including hiring, without regard to age, race, color, sex, disability, marital status, national origin, citizenship status or other legally protected category.
- 12.7 No Waiver. No failure on the part of either party to exercise, no delay in exercising and no course of dealing with respect to any right, power or privilege under this Agreement shall operate as a waiver thereof, nor shall any single or partial exercise of any such right, power or privilege preclude any other or further exercise thereof or the exercise of any other right, power or privilege.
- 12.8 Entire Agreement. This Agreement constitutes the entire agreement between the parties with respect to the subject matter hereof and all previous agreements or discussions between the parties relating to the subject matter hereof written or oral are hereby terminated and/or superseded by this Agreement. This Agreement may be amended or modified only by a written instrument signed by both parties. If any provision of this Agreement is held invalid, the validity of the remainder of this Agreement shall not be affected. This Agreement may be executed simultaneously in two or more counterparts, each of which shall be deemed an original but all of which together shall constitute one and the same instrument.
- 12.9 Publicity. Each party may disclose the existence, subject matter, size, and/or value of this Agreement in press releases and public announcements and in such connection may refer by name to the other party, subject to the other party's consent which consent shall not be unreasonably withheld.
- 12.10 Number and Gender. Whenever the singular number is used in this Agreement and when required by the context, the same shall include the plural and the masculine gender shall include the feminine and neutral genders.
- 12.11 Binding Effect. This Agreement will be binding upon the parties hereto and their respective successors and assigns.

IN WITNESS WHEREOF, the parties hereto have entered into this Agreement as of the Effective Date first above written.

_____ **District**
"DISTRICT"

By: _____

Title: _____

Date: _____

**EDUCATE ONLINE LEARNING, LLC
"EDUCATE ONLINE"**

By: _____
David Blair, Vice President of Operations,
Educate Online Learning, LLC

Date: _____

By: _____
President, Board of Education
Brian Lynch
Horseheads Central School District
One Raider Lane, Horseheads, NY 14845
607-739-5601

Date: _____