CYBER HIGH USE LICENSE AND SERVICE AGREEMENT

("Agreement")

Legal Doc. No. of this Signed Agreement:_____

COVER

CLIENT	FCSS/CYBER HIGH
"Client": Calexico Unified School District Attn: Carlos R. Gonzales, Superintendent, or Authorized Designee 901 Andrade Ave, Calexico, CA 92231 Phone: (760)768-3800 Email: cgonzales@cusdk12.org	**"FCSS"** or **"Cyber High":** Fresno County Superintendent of Schools Attn: Rob Cords, Director, Cyber High Fresno County Superintendent of Schools 2840 E. Floradora Ave., Fresno, CA 93703 Phone: (559) 265-4067 FAX: (559) 264-8326 Email: rcords@fcoe.org

CONTRACT TERM (see § 3.1)

"Effective Date": July 1, 2019 **"Termination Date"**: June 30, 2020

CYBER HIGH PRODUCTS. FCSS shall provide to Client each **"Cyber High Product"** that is marked below, collectively **"Cyber High Products"** ***(mark each applicable)***:

X **District or COE Level Agreement** _ **School Site Level Agreement** _ **Other:**_____

All High School Students Enrolled at the Following Sites/Programs are to be Included Under this Agreement:

Aurora High, Calexico High

X **"Cyber High Courses"**: Access by Client Users to all courses, curriculum, tools, and resources available on-line on Cyber High. Cyber High Courses do not include Supplementary Materials (see Section 1.2.7, General Terms and Conditions).

X **"Professional Development Training"**: Upon request by Client, FCSS will provide professional development training for Client Users at a maximum rate of one training per Contract term at Client's District Office or another mutually agreeable location. Training services for Clients within California, who exceed a one hundred mile radius of 1111 Van Ness Avenue, Fresno, CA 93721, or those that justify an overnight stay due to the timing of the training, will be separately invoiced for $500. Any training taking place outside of California will be separately invoiced for $1500.

X **"Grade Report"**: After a Client User student has completed a five unit course, FCSS will mail a Grade Report to the student's school of record within a reasonable time (typically 48 hours). It is incumbent upon each Client User to ensure that Cyber High courses have been added to the approved course list of each contracting school so that proper credit may be awarded to Client User student upon course completion.

X **"Client User Support":** FCSS will provide support to Client Users via telephone and email Monday through Friday, except for holidays and periods of closure, during FCSS' normal business hours.

_ **"Other Products"*(specify)***:

CONTRACT AMOUNT. Client shall pay each **"Plan Payment"** that is marked below (collectively **"Contract Amount"*)*** to FCSS ***(mark and complete as applicable, and attach exhibit if required)***:	PAYMENT SCHEDULE. Client shall pay the Contract Amount to FCSS according to the following **"Payment Schedule"** ***(mark and complete as applicable)***:
X PLAN PAYMENT YEAR 1 – UNLIMITED USE PLAN: $23,424.00	X SCHEDULE 1/PLAN PAYMENT YEAR 1: Entire amount of Plan Payment Year 1 due within 30 days of the "Effective Date" of this contract.

In consideration of the covenants, conditions, and promises in and for good and valuable consideration and the mutual benefits to be derived from this Agreement, Client and FCSS, separately referred to as a **"Party"** and collectively as the **"Parties,"** have reviewed and understand and hereby enter into this Agreement. Unless the context requires otherwise, any reference to a Party in this Agreement shall mean the Party and its governing body, officers, employees, and agents and, in the case of Client includes the Client Users. Each person executing this Agreement on behalf of a Party represents that he/she is authorized to execute on behalf of and to bind the Party to this Agreement.

CLIENT	FCSS
By: _____	By: _____
Carlos R. Gonzales, Superintendent or Authorized Designee	Jim Yovino, Superintendent or Authorized Designee

GENERAL TERMS AND CONDITIONS

These General Terms and Conditions contain the following Articles:

Article 1 Scope of Use License and Obligations
Article 2 Payment
Article 3 Term and Termination of Agreement; Suspension or Termination of Access to Client Users
Article 4 Indemnity
Article 5 Dispute Resolution
Article 6 General Provisions

Terms with initial capital letter shall have the respective meanings set forth in this Agreement.

ARTICLE 1 SCOPE OF USE LICENSE AND OBLIGATIONS.

SECTION 1.1 RECITALS AND REPRESENTATIONS.

1.1.1 Cyber High is an on-line comprehensive electronic high school curriculum owned and maintained by FCSS (collectively **"Cyber High"**).

1.1.2 FCSS maintains Cyber High and the Cyber High Products to serve schools and their teachers, administrators, staff, and students. Cyber High offers an additional education opportunity for students who wish to accelerate their education, including high-risk students, credit recovery, students in continuation schools, alternative education, home schooling, adult students, mobile student populations, and children of military personnel.

1.1.3 Cyber High is available to schools and other entities that purchased or for whom a purchase has been made of one or more Cyber High Products. All Cyber High Products are provided at reasonable fees intended to provide for the cost of developing and maintaining the Cyber High Products and related administration and support services.

1.1.4 Each Party represents and warrants to the other Party that: (A) it has the power and authority to enter into this Agreement and is permitted by applicable laws to enter into this Agreement; and (B) it has and will comply with all applicable laws in the access and use of the Cyber High Products and performance of its obligations under this Agreement, and in particular applicable federal and California laws and regulations, including the Family Educational Rights and Privacy Act, regarding student records, student privacy, and the use and disclosure of student records and information.

1.1.5 By this Agreement, the Parties desire to set forth the terms and conditions upon which FCSS shall provide to Client, and Client shall compensate FCSS for, one or more of the Cyber High Products as marked on the Cover, and to set forth the Parties' rights and obligations relating to the Cyber High Products and this Agreement

SECTION 1.2 SCOPE OF LICENSE TO AND OBLIGATION OF CLIENT.

1.2.1 CLIENT USERS. Each student, teacher, administrator, or staff of Client who has registered for access to and use of Cyber High, and to whom FCSS has issued a user login and password (individually **"Client User"** and collectively **"Client Users")** shall have access to the Cyber High Courses and other Cyber High Products as marked on the Cover.

1.2.2 USE LICENSE. FCSS owns all rights and interests in and relating to Cyber High and the Cyber High Products, including any copyright, right, and interest therein or thereto (collectively **"FCSS Product"**) and such FCSS Product shall remain FCSS' property and FCSS shall have all rights thereto, including the right to allow other third parties to access and use the Cyber High Courses and other Cyber High Products at the same or different time as Client and Client Users. FCSS grants to Client and Client Users a limited license to use the FCSS Product in accordance with the terms and conditions of this Agreement.

1.2.3 TERMS OF USE/LICENSING AGREEMENT. Client and all Client Users who access and use the Cyber High Courses must comply with the Terms of Use/Licensing Agreement that is in effect and posted

on Cyber High at the time of such access and use. Client shall notify FCSS, through FCSS' contact person listed on the Cover, of any activity by its Client Users in violation of the Terms of Use/Licensing Agreement. If there is a conflict between any provision in this Agreement and any provision in the Terms of Use/Licensing Agreement, the provision in the Terms of Use/Licensing Agreement shall govern as between the Parties.

1.2.4 NO RESALE RIGHTS OR COMMERCIAL USE. Client shall not resell to any third party the right to access or use any Cyber High Products, or provide any third party who is not its Client User with access to, or the ability to use, any Cyber High Products. The right to use Cyber High and Cyber High Products are entered into in order to encourage and support the education youth, and is not intended to create a commercial license or enterprise. As such, any commercial use or application of Cyber High or Cyber High Products outside that specified in this Agreement is prohibited.

1.2.5 WARRANTY DISCLAIMER. Cyber High and the Cyber High Products are subject to ongoing development by FCSS and are being provided by FCSS AS IS to Client and Client Users. EXCEPT AS SET FORTH IN THIS AGREEMENT, FCSS DISCLAIMS ANY AND ALL WARRANTIES, CONDITIONS, AND DUTIES OF ANY KIND (IF ANY), EXPRESS OR IMPLIED, WITH RESPECT TO CYBER HIGH AND THE CYBER HIGH PRODUCTS, INCLUDING WITHOUT LIMITATION, ANY WARRANTY OF MERCHANTABILITY OR FITNESS FOR ANY PARTICULAR PURPOSE.

1.2.6 HARDWARE/SOFTWARE. The Cyber High Courses are made available to Client Users over the Internet through a web-browser interface. To access the Cyber High Courses, Client Users must have a suitable Internet connection, access to an appropriately configured computer, and appropriately configured computer network, of which FCSS has no responsibility to provide to any Client User.

1.2.7 SUPPLEMENTARY MATERIALS. Client is solely responsible for providing or arranging for the provision of Supplementary Materials for Client Users. **"Supplementary Materials"** include but are not limited to, supplemental texts, textbooks, novels, atlases, calculators, graphing papers, protractors, rulers, compasses, and laboratory equipment.

1.2.8 PARENTAL CONSENT. Client will obtain any necessary parental consent for each Client User student to access and use the Cyber High Courses or other Cyber High Products.

1.2.9 CONTROLLING ACCESS. It is the responsibility of the Client to immediately deactivate access to Cyber High for Client staff who should no longer have access to Cyber High student records/data.

SECTION 1.3 OBLIGATIONS AND RIGHTS OF FCSS/CYBER HIGH.

1.3.1 CYBER HIGH PRODUCTS. FCSS shall provide to Client each Cyber High Product that is marked on the Cover.

1.3.1.1 PLAN PAYMENT 1 – If Plan Payment 1 – Unlimited Use is marked on the Cover, Client and Client Users shall have access to and use of the Cyber High Products during the contract term.

1.3.2 TERMS OF USE/LICENSING AGREEMENT. FCSS reserves and shall have the right to add or modify the Terms of Use/Licensing Agreement at any time.

1.3.3 MODIFICATIONS TO CYBER HIGH. FCSS reserves and shall have the right to make any modifications to the software and course work as may be necessary. Cyber High and Cyber High Products, and any modifications thereto remain FCSS' property and FCSS retain any and all rights and interests therein and thereto.

SECTION 1.4 CONFIDENTIAL RECORDS AND INFORMATION. If any document and/or information (e.g., employee or student records) that are subject to nondisclosure or protection under federal and/or California laws (collectively **"Confidential Materials"**) are provided to or created by a Party or any Client User for or pursuant to this Agreement, each Party shall: (A) not release, disseminate, publish, or disclose the Confidential Materials except as required by law or a court order, as this Agreement may permit, or as the other Party or Client User may authorize in writing; (B) not use the Confidential Materials for any purpose not related to the performance of this Agreement unless such use is specifically authorized by applicable laws;

and (C) protect and secure the Confidential Materials, including those that are saved or stored in an electronic form, to ensure that they are safe from theft, loss, destruction, erasure, alteration, and unauthorized viewing, duplication, and use. The provisions of this Section shall survive the termination of this Agreement.

SECTION 1.5 COMPLIANCE WITH APPLICABLE LAWS. Each Party shall comply with all federal and California laws applicable to itself and its performance of this Agreement, and access to and use of Cyber High and the Cyber High Products. Each provision of law required to be inserted in or that applies to this Agreement is deemed inserted herein; however, if any conflict or inconsistency exists between a provision in this Agreement and a provision in an applicable law, the provision in this Agreement shall govern except where the provision in this Agreement is specifically prohibited or void by the applicable law(s) in which case the provision in the applicable law shall govern.

SECTION 1.6 STUDENT RECORDS. Student records include any information directly related to a student that is maintained by Client or acquired directly from the student through the use of Cyber High. Student records provided to FCSS under this Agreement are the property of and are under the control of Client. Students may retain possession and control of their own student-generated content by requesting such content in writing, and within the period of student accessibility. The parents or legal guardians of a student, or a student who is 18 years or older, may review personally identifiable information in the student's records and correct erroneous information as follows: by contacting, in writing or email, Cyber High staff and requesting to review and/or modify erroneous information. FCSS shall take actions to ensure the security and confidentiality of student records, including but not limited to designating and training responsible individuals on ensuring the security and confidentiality of student records as follows: requiring all staff members to sign confidentiality forms and limit those staff members given access to confidential student records. In the event of an unauthorized disclosure of a student's records, FCSS shall report such disclosure to the affected parent, legal guardian, or student as follows: immediately and in writing. FCSS shall not use any information in a student record for any purpose other than those required or specifically permitted by this Agreement. FCSS certifies that student records shall not be retained by or available to FCSS upon completion of the terms of this Agreement and that such certification will be enforced as follows: Upon permanent cessation of all contractual relationships, and upon written request by Client prior to cessation of contractual relationship, FCSS will provide digital reports to client and will remove all student work and data from the Cyber High system. Client agrees to work with FCSS to ensure compliance with the federal Family Educational Rights and Privacy Act, 20 U.S.C. Sec. 1232g ("FERPA") and the Parties will ensure compliance with FERPA as follows: by mandating compliance with all laws and regulations pertaining to student's rights of confidentiality. To the extent FCSS will have access to "education records" for Client's students as defined under FERPA, FCSS acknowledges that for the purposes of this Agreement it will be designated as a "school official" with "legitimate educational interests" in the education records, as those terms have been defined under FERPA and its implementing regulations, and FCSS agrees to abide by the FERPA limitations and requirements imposed on school officials.

ARTICLE 2 PAYMENT.

SECTION 2.1 GENERAL. As full consideration and compensation for FCSS' provision of the Cyber High Products to Client and Client Users, Client shall pay FCSS the Contract Amount in accordance with the Payment Schedule, both of which are marked as applicable on the Cover.

SECTION 2.2 TAXES. Amounts paid pursuant to Section 2.1 do not include any applicable sales, use, gross income, occupational, or similar taxes; import or export fees; duties, imports, or tariffs; or any other taxes, duties, charges, or fees of any kind that may be levied in connection with the transactions covered under this Agreement. Any such taxes (if any are due) are Client's responsibility and Client shall pay such taxes, and indemnify and hold FCSS from any liability with respect to such taxes.

ARTICLE 3 TERM AND TERMINATION OF AGREEMENT; SUSPENSION OR TERMINATION OF ACCESS TO CLIENT USERS.

SECTION 3.1 CONTRACT TERM. This Agreement is effective on the Effective Date and continues in full force and effect thereafter until and including the Termination Date and any extension thereto **("Contract Term")** and, unless terminated during the Contract Term in accordance with Section 3.2 below, shall

terminate at 12:00 midnight on the last day of the Contract Term without any notice or action by either Party. Any extension of the Contract Term shall be set forth in an amendment executed by the Parties.

SECTION 3.2 TERMINATION OF A WRITTEN AGREEMENT DURING CONTRACT TERM.

3.2.1 TERMINATION FOR CAUSE. During the Contract Term and unless specifically permitted otherwise in this Section, a Party may terminate this Agreement only upon the other Party's material breach of one or more provisions of this Agreement and after the non-breaching Party has given the breaching Party written notice at least 30 days before the effective date of termination and an opportunity within the 30 days to cure the material breach and to notify the other Party in writing when such cure has been completed. If the material breach has not been cured upon expiration of the 30 days or any extension thereof agreed upon by the Parties, this Agreement shall terminate effective 12:00 midnight on the 30th day or the last day of the extension (if any) without any further notice or action by either Party.

3.2.2 RIGHTS AND OBLIGATIONS UPON TERMINATION. Upon termination of this Agreement, the following shall apply and survive the termination of this Agreement:

3.2.2.1 MATERIAL BREACH BY CLIENT. If Client materially breaches any provision of this Agreement, FCSS shall have the right to keep any portion of the Contract Amount that Client has paid to FCSS and Client shall pay any remaining portion of the Contract Amount to FCSS within 30 days of the effective date of termination of this Agreement. Upon termination of this Agreement due to Client's material breach, all access to and use of all Cyber High Products shall terminate, and Client and Client Users shall have no right to access or use any Cyber High Products.

3.2.2.2 MATERIAL BREACH BY FCSS. If FCSS materially breaches any provision of this Agreement, FCSS shall have the right to keep and to have Client pay, if Client has not already paid, the Contract Amount, prorated based on the number of days that have passed during the Contract Term compared to the number of days that remain in the Contract Term. Upon termination of this Agreement due to FCSS' material breach, Client User students may complete Cyber High Courses that they were taking as of the effective date of termination of this Agreement.

SECTION 3.3 SUSPENSION OR TERMINATION OF ACCESS TO CLIENT USERS. Without terminating this Agreement, FCSS may suspend or terminate one, several, or all Client Users from accessing and using Cyber High Courses at any time if Client or any Client Users violate the Terms of Use/Licensing Agreement or any provisions of this Agreement.

SECTION 3.4 FORCE MAJEURE. A Party is not liable for failing or delaying performance of its obligations under this Agreement due to events that are beyond the Party's reasonable control and occurring without its fault or negligence, for example, acts of God such as tornadoes, lightning, earthquakes, hurricanes, floods, or other natural disasters (collectively **"Force Majeure"**) provided that the Party has promptly notified the other Party in writing of the occurrence of the Force Majeure, except that a Force Majeure shall not excuse Client's payment to FCSS of any portion of the Contract Amount that is due to FCSS.

ARTICLE 4 INDEMNITY.

Except as specifically stated otherwise in this Agreement in which case such provision shall apply to the extent provided therein, each Party's indemnity, defense, and hold harmless obligations to the other Party under this Agreement shall be as follows: (A) a Party **("Indemnitor")** shall indemnify and hold harmless the other Party **("Indemnitee")** to the full extent permitted by California laws for any Loss sustained by Indemnitee or a Third Party only in proportion to Indemnitor's liability based on a Final Determination; and (B) each Party shall defend and pay for all of its attorney's fees and litigation costs related to any Claim or Loss without any right against or from the other Party for indemnity and/or hold harmless of such costs and fees, or any right for defense. A Party who intends to seek or seeks indemnity and/or hold harmless for any Loss from the other Party: (1) shall notify the other Party in writing and within a reasonable time after the Party knows or becomes aware of any Claim that may or will result in a Loss, describing, if known or determinable, the pertinent circumstances, all entities and persons involved, and the amount being claimed; and (2) shall not settle or otherwise resolve the Claim until it has notified the other Party of the Claim in accordance with

the preceding provision (1) and given the other Party written notice and an opportunity to participate in and to consent to the settlement or resolution of the Claim, which consent the other Party shall not unreasonably withhold. A Party's obligations under this Article are not limited to or by any insurance that it maintains or the lack of insurance but apply to the full extent permitted by California laws, and shall survive the termination of this Agreement. **"Claim"** means any claim, demand, lawsuit, cause of action, action, cross-complaint, cross-action, and/or proceeding arising out of, resulting from, or relating to this Agreement where there has been no Final Determination. **"Loss"** means any bodily injury, property damage, personal injury, advertising injury, liability, loss, damage, judgment, expense and/or cost (excluding attorney's fees and litigation costs that Indemnitee or a Third Party incurred or paid related to a Loss or Claim) arising out of, resulting from, or relating to this Agreement and for which there has been a Final Determination that a Party is or both Parties are liable. **"Third Party"** means a person who or an entity that is not a Party to this Agreement and is not employed by, contracted with (whether directly or through a subcontract of any level), or otherwise retained by a Party to act for or on the Party's behalf. **"Final Determination"** means any judgment, order, or decision by a court of competent jurisdiction or a governmental entity with jurisdiction to render such judgment, order, or decision where the judgment, order, or decision is not subject to appeal or the period for an appeal has expired.

ARTICLE 5 DISPUTE RESOLUTION.

The Parties shall meet and confer in good faith to resolve any disputes between them arising out of, resulting from, or relating to this Agreement, including any Claim or Loss for which a Party seeks indemnity pursuant to Article 4 and any dispute relating to this Agreement that arises or occurs after the termination of this Agreement. During a dispute regarding payment under this Agreement, Client shall pay FCSS the portion of the Contract Amount that is undisputed and due to FCSS; if a disputed portion of the Contract Amount is determined in a Final Determination to be due to FCSS, Client shall pay such amount to FCSS within 30 days of the date of the Final Determination, unless a different date is stated in the Final Determination or in an agreement executed by the Parties, in which case, Client shall pay FCSS in accordance therewith. Except for an action to preserve the status quo and/or prevent irreparable harm, a Party shall not commence any cause of action, action, lawsuit, or proceeding arising out of, resulting from, or relating to this Agreement until after the Party has complied with the provisions of this Article. The provisions of this Article shall survive the termination of this Agreement.

ARTICLE 6 GENERAL PROVISIONS.

SECTION 6.1 ENTIRE AGREEMENT, CONFLICTS, EXECUTION, AMENDMENT, AND WAIVER. This Agreement is a complete and exclusive statement of the Parties' agreement under Code of Civil Procedure section 1856. This Agreement consists of and, unless specifically stated elsewhere in this Agreement or an amendment, any conflict or inconsistency in this Agreement shall be resolved by giving precedence as follows: the Cover, these General Terms and Conditions, any exhibit or attachment that is stated as being a part of this Agreement, and the Required Documents. The Parties may execute this Agreement and any amendment hereto in counterparts such that each Party's signature is on a separate page. A copy or an original of this Agreement or an amendment thereof with the Parties' signatures, whether original or transmitted by electronic means, shall be deemed a fully executed contract. The Parties may amend or waive any provision of this Agreement only by a writing executed by them.

SECTION 6.2 INTERPRETATION; APPLICABLE LAWS AND TIME ZONE; VENUE; SEVERABILITY; AND SURVIVAL OF TERMINATION. The Parties agree that in cases of uncertainty of any language in this Agreement, the provisions of Civil Code section 1654 shall not apply to interpret the uncertainty. The language of this Agreement shall be interpreted according to its fair meaning and not strictly for or against any Party and under California laws without giving effect to California's choice of law provisions that may result in the application of the laws of another jurisdiction. All dates and times stated in this Agreement shall be according to Pacific Time. All causes of action, actions, lawsuits, and proceedings arising out of, resulting from, or relating to this Agreement shall be adjudicated in state or federal court in Fresno County, California, provided that FCSS does not hereby waive any immunity to suit. If a court of competent jurisdiction holds any provision of this Agreement void, illegal, or unenforceable, this Agreement shall remain in full force and effect and shall be interpreted as though such invalidated provision is not a part of this Agreement and the remaining provisions shall be construed to preserve the Parties' intent in this Agreement. Any provision in this Agreement that by its nature applies after, or is specifically stated to survive, the termination of this Agreement shall survive the termination of this Agreement.

SECTION 6.3 INDEPENDENT CONTRACTOR; ASSIGNMENT AND TRANSFER. Each Party is an independent contractor, and it and its officers, employees, and agents are not, and shall not represent themselves as, officers, employees, or agents of the other Party. This Agreement does not and shall not be construed to create an employment or agency relationship, partnership, or joint venture between the Parties. Each Party shall not assign or transfer any or all of its obligations and/or rights under this Agreement, including by operation of law or change of control or merger, without the other Party's prior written consent; however, this provision shall not prohibit FCSS from subcontracting with one or more third parties to perform any portion of the Services.

SECTION 6.4 NOTICES. Except as may be stated otherwise in this Agreement in which case such provision shall govern to the extent provided therein, each Party shall give any notices, demands, and all other communications required or permitted under this Agreement in writing and by one of the following methods to the other Party at the address, FAX number, and/or email stated on the Cover, delivery to be effective upon receipt thereof by the other Party: (A) hand delivery; (B) sent by a reputable overnight courier service that tracks the delivery; (C) sent by certified mail, return receipt requested, first class postage prepaid; or (D) sent by regular mail *and* transmitted by facsimile or e-mail; and, ***if to FCSS, a copy of any notice and demand by facsimile to***: General Counsel at (559) 265-3054. A Party may change its contact person and/or contact information stated on the Cover by notifying the other Party of the particular change and the effective date thereof in accordance with this Section. The provisions of this Section shall survive the termination of this Agreement.

SECTION 6.5 ISSUANCE OF CREDITS. Client must adopt all Cyber High courses as part of Client's approved course list. Upon Client User course completion, FCSS will issue and mail the official course and/or unit completion grade report to the registrar of the Client User's permanent school of record. It is incumbent upon the Client to record the grade(s) and issue credit in accordance to Client's school and/or prevailing district policy.

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