



TERMS OF USE AGREEMENT

THE TERMS OF USE AGREEMENT ("Agreement") is entered into between Denver Public Schools ("the District") and Naviance, Inc. ("Partner Organization"). Hereafter, each may be referred to in the singular as, the "Party" or collectively, as the "Parties" in this Agreement.

WHEREAS, Partner Organization acknowledges and understands that the District is required to safeguard the privacy of its students' educational records in a manner consistent with the mandates of the Family Educational Rights and Privacy Act ("FERPA"), 20 U.S.C. § 1232g and the applicable regulations promulgated thereunder.

WHEREAS, the Family Educational Rights and Privacy Act ("FERPA") (20 U.S.C. § 1232g; 34 CFR Part 99) (as amended and revised from time to time, including any regulations or successor statute) prohibits the unauthorized disclosure of personally identifiable information (PII) contained in students' education records to anyone without the express written consent of the student or the student's representative.

WHEREAS, FERPA has regulatory exceptions to the general rule of confidentiality and non-disclosure of individually-identifiable data and information to allow its disclosure and use by organizations acting as school officials under certain circumstances. 20 U.S.C. § 1232g(b)(1)(F) and 34 C.F.R. § 99.31(a)(1)(i)(B).

WHEREAS, should Partner Organization be identified as satisfying the criteria associated with one or more recognized FERPA exceptions, the District, may disclose the requested data to Partner Organization, provided the purpose, scope and duration are clearly set forth in writing and satisfy the terms and conditions of this Agreement.

WHEREAS, Partner Organization will provide to the District, and/or its participating schools on behalf of the District, specified services the District could otherwise use its employees to perform, Partner Organization acknowledges that for the purposes of this Agreement it will be designated as a "school official" with "legitimate educational interests" as those terms have been interpreted and defined under FERPA and similar privacy laws and regulations, and Partner Organization agrees to abide by FERPA and those laws while performing its service for the District.

WHEREAS, the services Partner Organization will provide to the District access to Naviance, which acts as system of records for the District and provides functionality intended to support student college and career readiness through various applications and services.

WHEREAS, Partner Organization represents it has the knowledge, skill and the resources necessary to provide and maintain a data management system that is sufficiently secure and encrypted to protect, maintain and keep the provided data and information confidential.

NOW, THEREFORE, the Parties enter into these Terms of Use governing the disclosure of personally identifiable student information and provision of services described herein.

SECTION I

DEFINITIONS

- A. "Aggregate data" means data collected and reported at the group, cohort, or institutional level that is aggregated using protocols that are effective for preserving the anonymity of each individual included in the data.
- B. "Deidentified Data" means records and information from which all personally identifiable information has been removed in a manner that meets the requirements of FERPA 99.31 (b)(1), such that a reasonable determination has been made that a student's identity is not personally identifiable, whether through single or multiple releases, and taking into account other reasonably available information.
- C. "Confidential Information" is all non-public data, however documented, containing or based, in whole or in part, on reference materials, sketches, drawings, memoranda, disks, documentation and records belonging to either party (and any derivative works thereof or modifications thereto) is and will remain the exclusive property of that party. Neither party shall possess or assert any lien or other right against or to Confidential Information of the other party. **Without prior written permission, no Confidential Information of either party, or any part thereof, may be disclosed, sold, assigned, leased, shared or otherwise distributed to third parties by the other party or commercially exploited by or on behalf of the other party, or its employees or agents.**
- D. "Disclosure" means to permit access to or the release, transfer, or other communication of information contained in a record by any means, including oral, written, or electronic, to any party except the party identified as the party that provided or created the record.
- E. "District Information" means any record and all information, in any form, recorded in any way, including, but not limited to, hand writing, print, computer media, video or audio tape, film, microfilm, and microfiche and includes paper and electronic student education record information, or employee record information, furnished or made available directly or indirectly by the District or otherwise obtained from the District in connection with the Partner Organization's services and/or any agreement, including all information of the District, or any District affiliate to which it has had or will have access to, whether it is in oral, written, graphic or machine-readable form.
- F. "Educational agency or institution" means any public or private agency or institution to which funds have been made available by grant, cooperative agreement, contract, sub-grant, or subcontract or are provided to, and may be paid by those students for educational purposes, and any program if it provides educational services or instruction, or both, or is authorized to direct and control public elementary or secondary, or postsecondary educational institutions.
- G. "Education program" means any program that is principally engaged in the provision of education, including, but not limited to, childhood, elementary, secondary education, postsecondary education, special education, job training, career and technical education, and adult education, and any program that is administered by an educational agency or institution.
- H. "Personally Identifiable Information" includes but is not limited to (a) student's name; (b) name of the student's parent or other family members; (c) address of the student or student's family; (d) a personal identifier, such as the student's social security number, student number, or biometric record; and (e) other indirect personal identifiers, such as the student's date of birth, place of birth, and mother's maiden name; (f) Other information that, alone or in combination, is linked or linkable to a specific student that would allow a reasonable person in the school community, who does not have personal knowledge of the relevant circumstances, to identify the student with reasonable certainty; or (g) "medical information" as may be defined in state law; "protected health information" as that term is defined in the Health Insurance Portability and Accountability Act, 45 CFR Part 160.103; (h) nonpublic personal information as that term is defined in the Gramm-Leach-Bliley Financial Modernization Act of 1999, 15 USC 6809; (i) credit and debit card numbers and/or access codes and other cardholder data and sensitive authentication data as those terms are defined in the Payment Card Industry Data Security Standards; (j) other financial account

numbers, access codes, driver's license numbers; (k) and state- or federal-identification numbers such as passport, visa or state identity card numbers.

I. "Record" means any information recorded in any way, including, but not limited to, hand writing, print, computer media, video or audio tape, film, microfilm, and microfiche.

J. "Services" means any goods or services acquired by the District, including computer software, mobile applications (apps), and web-based tools accessed by students and/or their parents via the Internet and used as part of a school activity.

K. "Student," except as otherwise specifically provided in this part, means any individual who is or has been in attendance at an educational agency or institution and regarding whom the agency or institution maintains education records.

L. "User" means the individuals authorized to access and use the Services provided under this Agreement.

SECTION II

STUDENT DATA, INFORMATION & RECORDS

A. **Purpose.** Partner Organization, by providing certain institutional services and functions on behalf of the District, may require access to a student's educational records to effectively deliver its services. Partner Organization further agrees to be under the direct control of the District with respect to the maintenance of student educational records relating to the governance, use and re-disclosure of personally identifiable information, which will be in accordance with, and contingent upon compliance with the Family Educational Rights and Privacy Act ("FERPA") and its implementing regulations. (34 C.F.R. § 99.30, et seq.).

B. **Requested Data.** In order to perform the service(s) described herein, the Partner Organization will collect and/or utilize the following information: Student ID, Student's Last Name, Student's Class Year plus any other information the District chooses to upload onto the Naviance platform.

C. **Qualified FERPA Exception.** Partner Organization understands and agrees that the purpose and contemplated use of the data and information disclosed by the District is solely to provide the educational services for, or on behalf of the District described herein. The Partner Organization shall be designated a "school official" according to FERPA and DPS Policy JRA/JRC, as an organization to which the District has outsourced institutional services or functions for which the District would otherwise utilize its own employees. The Partner Organization acknowledges that it is under the direct control of the District for the purposes of use and maintenance of education records disclosed pursuant to this Agreement, and that the Partner Organization agrees to comply with the applicable provisions of FERPA in order to safeguard the confidentiality of student information. 20 U.S.C. § 1232g(b)(1)(F) and 34 C.F.R. § 99.31(a)(1)(i)(B)

D. **Ownership of Data and Information.** The disclosure of personally identifiable information from education records to Partner Organization is not an assignment of ownership of the personally identifiable information or records to Partner Organization. The District retains ownership of all such records. Personally identifiable information from education records may only be re-disclosed by Partner Organization to a third-party with the prior written approval of the District, in accordance with this Agreement or in compliance with FERPA and its regulations.

E. **Coordination with Partner Organization Authorized Representative(s).** During the term of this Agreement, Partner Organization will fully coordinate all of its services provided hereunder with the District through its designated authorized representative.

1. The authorized representative signatory below has authority to bind Partner Organization to the terms and conditions of this Agreement.

2. The authorized representative signatory shall also be responsible for requiring Partner Organization personnel and other authorized representatives of Partner Organization accessing information from District records to execute affidavits of nondisclosure or other documentation indicating that each person will be held accountable for the proper management, use and protection of all information and records provided to him or her.

F. Limited Disclosure, Access and Use. Partner Organization will abide by any and all conditions imposed by the District on the disclosure of information derived from and provided by the District, and agrees to manage and maintain it in accordance with the applicable federal and state privacy laws.

1. Partner Organization and its officers, employees, and agents receiving education record information from the District agrees to hold information in strict confidence and use the information **only** for the limited purpose for which the disclosure was made.

2. Partner Organization affirms that its services will be conducted in a manner that does not disclose the information to anyone who is not an authorized representative of Partner Organization. Provided, however, that Partner Organization may disclose information, including Confidential Information, District Information and Personally Identifiable Information with its third party partners for the sole and limited purpose of providing services to District on behalf of Partner Organization.

3. Partner Organization agrees not to use the information for any purpose other than the purposes for which the disclosure was sought from the District and made to Partner Organization.

4. The approval to use the information from education records for one purpose does not confer approval to use the data for another or different purpose.

5. Upon termination, cancellation, expiration or other conclusion of this Agreement, Partner Organization shall return all personally identifiable student information to the District or, if return is not feasible, destroy any and all such information. Partner may destroy the information when it is no longer needed for purposes for which it was disclosed or as authorized in this Agreement but prior to termination, cancellation, expiration or other conclusion of this Agreement. Partner Organization shall confirm the date that any information was returned or destroyed by delivering to the District the certificate attached hereto provided, however (i) the Partner Organization shall not, in connection with the foregoing obligations, be required to return or destroy such information held electronically in archive or back-up systems in accordance with its general systems archiving or backup policies ("District Archived Information") and disclaims any ownership, intellectual, or other property rights of any kind whatsoever to District Archived Information. Thereafter, if Partner Organization or its any successor neglect to keep and maintain District Archived Information safe from unauthorized disclosure, Partner Organization shall be solely responsible for any claims, damages, costs and expenses, including reasonable attorneys' fees, incurred as a result of the Partner Organization's breach of this provision pertaining to District Archived Information, which shall survive termination of the Agreement.

G. Reporting of Unauthorized Disclosures of Data and Information.

1. Partner Organization shall, within five business days of discovery, report to the District any use or disclosure of information not authorized by this Agreement or in writing by the District (a "Breach"). Partner Organization's written report shall identify (i) the nature of the breach, (ii) what information was used or disclosed, (iii) who or what was the cause of the breach, (iv) what Partner Organization has done or shall do to mitigate any deleterious effect of the breach, and (v) what corrective action Partner Organization has taken or shall take to prevent future similar unauthorized use or disclosure. Partner Organization shall provide such other information, including a written report, as reasonably requested by the District.

2. If the District reasonably determines that Partner Organization has breached a material condition of this Agreement, the District may request Partner Organization to submit within five business (5) days from the discovery a written report shall identify (i) the nature of the breach, (ii) what information was used or disclosed, (iii) who or what was the cause of the breach, (iv) what Partner Organization has done or shall do to mitigate any deleterious effect of the breach, and (v) what corrective action Organization has taken or shall take to prevent future similar unauthorized use or disclosure. Partner Organization shall provide such other information, including a written report, as reasonably requested by the District.

3. Alternatively, the District may immediately terminate this Agreement with Partner Organization, if, in its sole discretion, determines it is not possible to repair or correct the discovered breach. Under either option described in paragraphs 1 or 2, above, the District agrees to provide written notice Partner Organization.

H. Remedies, Penalties. The failure to comply with the requirements of FERPA could subject Partner Organization and any third party to all allowable penalties assessable against Partner Organization under state and federal law. Partner Organization acknowledges and agrees that due to the unique nature of the Information, there may be no adequate remedy at law for any breach of its obligations hereunder, that any such breach will result in irreparable harm to the District, and therefore, that upon any such breach or threatened breach, the District shall be entitled to seek appropriate equitable relief including specific performance and any additional remedies the law may allow, including injunctive relief. In the event the Family Policy Compliance Office of the U.S. Department of Education determines that Partner Organization improperly disclosed personally identifiable information obtained from the District's education records, the District may not allow Partner Organization access to the District's education records for at least five years.

I. Other Use of Information. Partner Organization may use aggregated, deidentified data to improve and demonstrate the effectiveness of its products, including in its marketing, develop educational products and services and for customized and adaptive learning purposes. Partner Organization represents and warrants that it will make no attempt to reidentify any such data.

SECTION III

CONFIDENTIALITY

A. Partner Organization agrees to maintain the confidentiality of business, employment, operational and other information provided by District to Partner Organization hereunder, provided such information is marked or otherwise identified by District as confidential or proprietary or is of a nature that Partner Organization knows or should know is confidential or proprietary (also referred to herein as "Proprietary Information"), and will only use it in carrying out its rights and obligations under this Agreement.

B. Both parties agree to restrict access to the Proprietary Information of the other only to authorized representatives who (i) require access in the course of their assigned duties and responsibilities in connection with this Agreement, and (ii) have been informed of the provisions set forth in this Section.

The confidentiality obligations of the parties regarding the Proprietary Information of the other shall not apply to any material or information that (i) is or becomes a part of the public domain through no act or omission by the receiving party, (ii) is independently developed by employees of the receiving party without use or reference to the Proprietary Information of the other party, (iii) is disclosed to the receiving party by a third party that, to the receiving party's knowledge, was not bound by a confidentiality obligation to the other party, (iv) is demanded by a lawful order from any court or anybody empowered to issue such an order, or (v), is requested by operation of law.

C. This Agreement may include services that require Partner Organization to collect and analyze student, classroom, school-level, and employment related data. These services include, but are not limited to: Evaluation Services, Distance Consulting, Baseline Analysis, and Summative Analysis (collectively, "Evaluation Services"). In order for Partner Organization to provide these services the District must agree to make reasonable effort to collect and submit all requested data in a timely manner.

D. Notwithstanding anything herein to the contrary and only to the extent consistent with the Confidentiality Laws, District hereby grants to Partner Organization a non-exclusive, royalty-free, nontransferable, revocable, limited license during the Term or any Renewal Term of this Agreement to collect, access and use District Information provided Partner Organization: (1) collects, accesses and uses District Information only as necessary and solely for meeting Partner Organization's performance obligations under this Agreement; (2) collects, accesses and uses District Information in a manner that does not permit personal identification of "parents" or "students" or "employees" by individuals other than Partner Organization's employees and contractors who have necessary and legitimate interests in the District Information for meeting Partner Organization's performance obligations under this Agreement; (3) keeps records of any Partner Organization disclosures of District Information, including the names of the parties to which Partner Organization may have disclosed District Information and the legitimate interests under this Agreement or the Confidentiality Laws which such parties requested or obtained the District Information from Partner Organization and; (4) otherwise complies with Section II(F)(5), above.

E. Partner Organization will indemnify, defend and hold harmless District and District's affiliates, officers, directors, and employees from and against any third-party claims, demands, causes of action, judgments, damages, liabilities, costs and expenses (including reasonable attorney's fees) arising from or relating to Partner Organization's or any of Partner Organization's employees, agents, contractors, or representatives unauthorized use, misuse, or illegal use of District Information or de-identified information or any breach of this Agreement by Partner Organization. The District and any indemnified party shall cooperate and comply with the reasonable requests of Partner Organization in connection with the defense of any such claim. The receipt or providing such assistance is not a waiver of any alleged breach nor does the acceptance of such assistance constitute a waiver of any such breach by the District. Partner Organization shall control the defense and settlement of any such claim.

SECTION IV

GENERAL TERMS AND CONDITIONS

A. Examination of Records.

1. Partner Organization will keep true and complete records of any and all data received, exchanged and shared between and amongst its employees, agents, subcontractors and volunteers pursuant to this Agreement.

2. Partner Organization will establish and maintain a system of record keeping satisfactory to Partner Organization and the District and the District's authorized representative and, upon reasonable request, provide access to such records either during regular business, at any reasonable mutually agreed upon time.

3. Partner Organization agrees that it will keep and preserve all business records and reports created during the course of this Agreement for at least three (3) years from the date of receipt under this Agreement, except that personally identifiable student information shall be returned or destroyed in accordance with the provisions of Section II.G.5 of this Agreement.

B. **Dispute Resolution.** If either District or Partner Organization believes in good faith that the other party has failed to perform, provide requested information, or has failed to satisfactorily meet any objective set forth by this Agreement or has otherwise not fulfilled commitments made under this Agreement ("Breach"), then within thirty (30) days from the date the breach occurred, the aggrieved party

shall send written notification to the party who has allegedly breached its obligations identifying the allegations and/or reasons the aggrieved party believes the non-performing party has breached this Agreement. Upon receipt of written notice, the alleged non-performing party shall have ten (10) business days, or such additional time as may be agreed to in writing between the parties, to correct or cure the alleged breach or to notify the aggrieved party that the alleged breach of this Agreement has not occurred. Upon finding that the breaching party failed to cure or respond in writing within the agreed upon timeframe, the non-breaching, aggrieved party shall be entitled to terminate this Agreement and pursue any and all remedies available at law or in equity.

C. Modification. This Agreement shall only be modified in writing signed by duly authorized representatives of both Partner Organization and the District. All requests for modifications should be directed to the authorized representative of the District and Partner Organization.

D. Notice. Any notice this Agreement requires must be in writing and will be effective only if sent by certified U.S. mail, return receipt requested, or via electronic mail, to an authorized representative at Partner Organization's address provided in this Agreement, which is as follows:

[Insert Parties' Notice Information below]:

Partner Organization: Naviance Inc.,
3033 Wilson Boulevard
Suite 500
Arlington, VA 22201
703-859-7319 (fax)
legal@naviance.com

District: ~~Kirk Anderson~~ *Kim POAST, ED*
Office of Collective & Career Readiness
DENVER PUBLIC SCHOOLS

With Copies to: Office of the General Counsel
Denver Public Schools
1860 Lincoln Street, Suite 1230
Denver, CO 80203

E. Term. The effective date begins on the next business day that follows after each authorized representatives of Partner Organization and the District executes this Agreement and it shall expires at the time Partner Organization no longer provides its services or is terminated in accordance with this, and its Program Agreement; provided, however, a lapse or stoppage of services by Partner Organization as a result of the District's school year ending that timely resumes with the commencement of the next District school year, shall not be construed or interpreted as the termination of this Agreement; furthermore, at the beginning of each school year, upon re-execution by each authorized representative of the District and Partner Organization, the parties mutually agree this Agreement is revived according to the same, or any amended terms and conditions contained herein.

F. Termination. A party may terminate this Agreement upon sending a thirty (30) day written notification with brief description of the reason for the termination to the other party. Termination shall be effective upon the date it is received.

G. Compliance with Federal and State Confidentiality, and Privacy Laws. Partner Organization and the District agree and understand this Agreement must be in compliance with, which for the purposes of illustration, includes but is not limited to: the Colorado Open Records Act ("Act"), C.R.S. 24-72-101 *et. seq.* and all applicable federal privacy and confidentiality laws; the Family Educational Rights and Privacy Act (FERPA) (20 U.S.C. § 1232g; 34 CFR Part 99); Protection of Pupil Rights Amendment ("PPRA") (20 U.S.C. § 1232h; 34 CFR Part 98), all of them which may be in effect or amended from time to time, including any successor statute and its implementing regulations and rules. In the event of a conflict

between this Agreement and the Confidentiality Laws, the Confidentiality Laws shall control. In the event of a conflict between FERPA and all other Confidentiality Laws, FERPA will control absent clear statutory authority on controlling law. In the event of conflict or uncertainty interpreting controlling law regarding the collection, access, use, or disclosure of District Information, a party will resolve the uncertainty or conflict in favor of prohibiting the collection, access, use, or disclosure of District Information.

H. Compliance with DPS Policies. Partner Organization agrees to comply with the applicable written District Board of Education policies, which hereafter by this reference are incorporated into and enforceable under this Agreement.

I. Liability.

1. **If Partner Organization is a “public entity”** then any provision of this Agreement, whether or not incorporated herein by reference, shall be controlled, limited and otherwise modified so as to limit any liability of Partner Organization under the Colorado Governmental Immunity Act, C.R.S. 24-10-101 *et seq* (“Act”). It is specifically understood and agreed that nothing contained in this paragraph or elsewhere in this Agreement shall be construed as an express or implied waiver of its governmental immunity or as an express or implied acceptance of liabilities arising as a result of actions which lie in tort or could lie in tort in excess of the liabilities allowable under the Act, as a pledge of the full faith and credit, or as the assumption of a debt, contract or liability in violation of Article XI, Section 1 of the Constitution of the State of Colorado.

2. **If Partner Organization is not a “public entity”** then it will be responsible for the negligent acts and omissions of its officers, agents, employees and representatives with respect to its obligations under this Agreement.

J. Governing Law and Jurisdiction. In the event that any disputes arise from this Agreement, the parties agree to submit such disputes to the state or federal courts located within the City and County of Denver, Colorado, and such court shall have exclusive jurisdiction over the disputes. The parties agree that Colorado law will govern such disputes that arise from this Agreement, without regard to rules regarding conflicts of law.

K. Survival of Certain Provisions. The terms and conditions of this Agreement and any exhibits and attachments that by reasonable implication contemplate continued performance, rights, or compliance beyond expiration or termination of the Agreement survive the Agreement and will continue to be enforceable.

L. No Agency Created. Partner Organization agrees and understands that no authority exists through this Agreement permitting Partner Organization to enter into any third party contract, assume any obligation, or makes any representation to third parties on behalf of, or which may bind the District.

M. No Construction Against Drafting Party. The parties and their respective counsel have had the opportunity to review the Agreement, and the Agreement will not be construed against any party merely because the Agreement or any provisions thereof were prepared by a particular party.

N. Authorized Representative. Partner Organization certifies that the individual signing below on its behalf is fully authorized to do so, is fully authorized to bind and commit Partner Organization to the obligations set forth herein, and that no other consents or authorizations are needed to bind Partner Organization to the terms of this Agreement.

O. Contract Documents. This Agreement consists of the following attachments which are incorporated herein and made a part hereof by reference which are found after the signature page.

[remainder of page intentionally left black]

Partner Organization hereby signifies its acceptance of the terms and conditions of this Agreement.

Signed: 

[District Signatory]

EXECUTIVE DIRECTOR, OFFICE of COLLEGE &
[Title of District Signatory] *ADULT READINESS*

8/3/16

Date

DocuSigned by:
Monica Morrell

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Signed:

Monica Morrell

[Partner Organization Representative]


VP Account Mgmt & Services

[Position]

8/2/2016

Date

APPROVED AS TO FORM:

By: 
Office of the General Counsel



**Attachment 1
Certification of Destruction\Return of District Information**

I/We, NAVANCE, as the authorized representative(s) of the Partner Organization [name] do hereby acknowledge and certify under penalty of perjury that [check one]:
_____ (a) the private and confidential student information provided by the District as part of the Data Sharing and Confidentiality Agreement in accordance with federal and state law was destroyed
_____ (b) the private and confidential student information provided by the District as part of the Data Sharing and Confidentiality Agreement in accordance with federal and state law has been returned.

Print Name: Monica Morrell Date: 8/2/2016
Title: VP Account Mgmt & Services
Partner Organization /Agency: MLM
Signature: DocuSigned by: Monica Morrell
0F3AD39C9594408...