

TECHNICAL SERVICES AGREEMENT

THIS TECHNICAL SERVICES AGREEMENT is entered into as of this ____ day of _____, 2005 (the "Effective Date"), by and between the School Board of Palm Beach County, Florida, a political subdivision of the State of Florida, with a principal office at 3318 Forest Hill Boulevard, West Palm Beach, Florida 33408-5813 (the "SBPBC"), and First Associates, Inc., Tax Identification number 65-0660458, a Corporation, organized under the laws of the State of Florida, with a principal place of business at 12222 Old Country Road, West Palm Beach, FL 33414, ("Contractor") (the SBPBC and Contractor each a "Party," and collectively, the "Parties").

WHEREAS, SBPBC wishes to retain the services of a technical services provider for various technical services;

WHEREAS, SBPBC has selected First Associates, Inc. for staff augmentation, and First Associates, Inc. has agreed to provide the technical services, in accordance with the terms of this agreement and the Scope of Services as more fully set forth herein, for such services and tasks and together with such other services and tasks as may be required and directed from time to time by SBPBC, in connection with Information Technology;

Therefore, in consideration of the mutual covenants and provisions contained herein, the parties hereto agree as follows:

AGREEMENT

In consideration of the mutual promises and covenants contained herein and for other good and valuable consideration, the receipt, sufficiency, and adequacy of which are hereby acknowledged, the Parties hereby agree as follows:

1. **Definitions**

The following capitalized terms shall have the specified meanings when used herein:

- 1.1. Affiliate.** "Affiliate" means, as to Contractor, any entity directly or indirectly controlled by, controlling, or under common control with Contractor; and, as to the SBPBC, any entity for which the SBPBC provides information technology services, including, but not limited to, any school.
- 1.2. Agreement.** "Agreement" means this Technical Services Agreement and all Schedules, Exhibits, or other documents attached hereto, or incorporated or referenced herein (the terms of each of which are incorporated herein by this reference), including, but not limited to, any written amendments to any of the foregoing that have been signed by a duly authorized representative of each Party.
- 1.3. SBPBC Indemnitees.** "SBPBC Indemnitees" means the SBPBC and its Affiliates, and any officers, elected officials, directors, attorneys, employees, agents, students, and parents of students, including any successors and assigns of any of the foregoing.
- 1.4. Company Information.** "Company Information" means, collectively, the Confidential Information and the Trade Secrets of a Party.
- 1.5. Confidential Information.** "Confidential Information" means all information related to the business or services of a Party and its Affiliates that (a) is confidential or proprietary in nature, (b) is not in the public domain, and (c) does not constitute a Trade Secret. With respect to the SBPBC, Confidential Information includes, but is not limited to, all information related to the students, parents of students, faculty, administration, and staff of the SBPBC and its Affiliates (such as grades, transcripts, test scores, disciplinary reports, attendance records, faculty recommendations, personnel reviews, etc.).
- 1.6. Contractor Property.** "Contractor Property" means any tangible or intangible property or materials that Contractor uses in performing the Services or that Contractor provides to the SBPBC in connection with performing the Services.
- 1.7. Hardware.** "Hardware" means the computer hardware and operating system software described in Schedule 1.7 hereto.
- 1.8. Software.** "Software" means the computer software described in Schedule 1.8 hereto.
- 1.9. Trade Secret.** "Trade Secret" means all confidential or proprietary information related to the business or services of a Party and its Affiliates that (a) derives economic value, actual or potential, from not being generally known to or readily ascertainable by other persons who can obtain economic value from its disclosure or use, (b) is the subject of efforts to maintain its secrecy that are reasonable under the circumstances, and (c) includes, but is not limited to, technical and non-technical data related to designs, software programs and tools, methodologies, documentation, enhancements, modifications, business methods, business plans and models,

inventions, finances, actual or potential customers and suppliers, research, development, marketing, existing and future products, and employees of such Party and its Affiliates.

2. Technical Services

Contractor shall perform the Technical Services with respect to the Software set forth in Schedule 1.8 attached hereto, in accordance with the terms, conditions, and scope set forth therein (the "Services").

2.1. Key Personnel. The services to be performed under this Agreement shall be performed by the First Associates, Inc. staff. SBPBC reserves the right of prior approval of any changes or additions of Key Personnel.

3. Price and Payment

3.1. Price. In consideration of Contractor's agreement to perform the Services, the SBPBC agrees to pay Contractor for the performance of Services in accordance with the terms and conditions set forth herein. The SBPBC shall pay to the Consultant the maximum sum of \$226,000, for a maximum of 3,200 hours. Hourly rate: \$70.00. Travel is allowable for this contract. Estimated travel expense is not to exceed \$2,000. Contractor shall be responsible for any expenses incurred in connection with this Agreement, unless Contractor shall have obtained the SBPBC's written approval for reimbursement thereof prior to incurring such expenses. The Consultant further agrees that reimbursement for travel must be submitted on travel reimbursement forms with the rates determined by F.S. 112.061 and School SBPBC Policy # 6.01 and must be authorized by the appropriate administrator(s).

3.2. Terms of Payment. Within sixty (60) days after the SBPBC's receipt of an acceptable and validly issued invoice in accordance with the pricing set forth in Section 3.1, with adequate supporting documentation attached, the SBPBC shall pay Contractor all undisputed amounts set forth therein.

3.3. Taxes. Fees set forth herein do not include sales and use taxes. If Contractor is required to pay sales or use taxes based on the Services provided hereunder or the license granted herein, or on the SBPBC's use of such Services or license, then such taxes shall be paid by Contractor; provided, however, that the SBPBC shall reasonably cooperate with Contractor to lawfully minimize the imposition thereof and to the extent the SBPBC or the transactions contemplated by this Agreement may be exempt from such taxes, and the SBPBC shall provide Contractor with a tax certificate of exemption; and Contractor will not be required to pay taxes on behalf of the SBPBC. Contractor shall be solely responsible for reporting, withholding, and paying all employment-related taxes and related deductions and payments, including, but not limited to, federal, state, and local income taxes, social security, Medicare, unemployment and disability deductions, withholdings, and/or payments.

4. Term and Termination

4.1. Term. This Agreement shall commence and become effective August 18, 2005 through June 30, 2006.

4.2. Termination. The SBPBC may terminate this Agreement for convenience and without cause by providing written notice thereof to Contractor at least ten (10) days prior to the effective date of such termination. Either Party may immediately terminate this Agreement in the event that the other Party breaches a material term of this Agreement and such other Party fails to cure such breach within thirty (30) days after receiving written notice from the non-breaching Party reasonably describing such breach. Notwithstanding the foregoing, Contractor may terminate this Agreement for nonpayment of fees by the SBPBC only in the event that the SBPBC fails to pay any valid and undisputed invoice within sixty (60) days after receipt thereof and then only after Contractor provides the SBPBC with written notice of such overdue invoice followed by an additional thirty (30) day period in which the SBPBC fails to cure such nonpayment (any such termination as described in this or the preceding sentence, a "Termination for Cause"). In no event shall Contractor discontinue or suspend performance under this Agreement, until the same shall have been terminated in accordance with this Agreement, unless requested otherwise in writing by the SBPBC. In the event that this Agreement is terminated prior to the end of the then-current Term, then Contractor shall refund to the SBPBC any pre-paid portion of the Technical and Support Fee allocable to the remainder of the then-current Term. A Party terminating this Agreement pursuant to a Termination for Cause shall be entitled to pursue any and all available legal and equitable remedies.

4.3. Termination Assistance. Contractor shall reasonably cooperate with the SBPBC after any such termination and timely provide such assistance as reasonably requested by the SBPBC on a time-and-materials basis at Contractor's then-prevailing rates for services similar to the Services. Such requested assistance may include, but shall not be limited to, the orderly transition to another service provider.

5. Contractor Obligations

5.1. Status Reports. Contractor shall deliver to the SBPBC on a quarterly basis a detailed written report of the status and progress of, and any ongoing problems with, the Services.

5.2. Third Parties. Contractor shall not use any equipment, facilities, materials, supplies, or other tangible or intangible property of any third party that could give rise to any claims by any such third party of ownership of or rights to any Contractor Property unless Contractor shall have expressly obtained the SBPBC's prior written approval therefor.

5.3. Non-Solicitation. The SBPBC invests substantial resources to hire, train and develop the knowledge of its employees and the third-party technology Contractors engaged by the SBPBC. Therefore, during the Term and for one (1) year thereafter, except with the prior written consent of the SBPBC (which consent shall be in the reasonable discretion of the SBPBC), Contractor shall not, directly or indirectly, select, recruit, or hire to work for Contractor, as a Contractor, an employee, or in any other capacity: (a) any employee of the SBPBC employed directly in the performance of work of the SBPBC in connection with this Agreement or (b) any former employee of the SBPBC employed directly in the performance of work for the SBPBC in connection with this Agreement, unless such employment has been terminated for at least six (6) months at the time of such solicitation by Contractor or (c) any third-party technology Contractors engaged by the SBPBC directly in the performance of work under this Agreement if such hiring would have a material, adverse impact on the SBPBC (in the SBPBC's reasonable business judgment). The prohibition set forth in the foregoing sentence shall not apply to the hiring by Contractor of any present or former employee of the SBPBC to fill any position that is (i) based, or for which the principal office is located, outside of a one-hundred (100) mile radius of West Palm Beach, Florida and (ii) the process of such hiring is initiated by such present or former employee responding to a general solicitation for employment in or through a newspaper, trade publication, job listing service, third party placement agency or the like without the knowledge of Contractor's personnel performing Services hereunder. Contractor shall pay the SBPBC liquidated damages equal to fifty percent (50%) of the annual compensation that Contractor offers or pays, as applicable, to each such employee or former employee (or such technology Contractor) of the SBPBC or its Affiliates, in each event of a breach of this Section 5.3 by Contractor.

5.4. Assistance. The SBPBC's personnel may from time to time give technical assistance or advice to, or effect an exchange of information with, Contractor's personnel concerning this Agreement or any activities contemplated thereby. Such assistance, advice or exchange shall not affect, or in any way modify, any of the SBPBC's rights or Contractor's obligations, express or implied, pursuant to this Agreement.

5.5. Compliance. In all respects and in all performance hereunder, Contractor shall comply with all policies, procedures and requirements of the SBPBC and its Affiliates (including, but not limited to, those regarding computer security and access, professional and ethical standards, drug-, alcohol- and tobacco-free workplaces, hazardous materials, safety, and performance of work and conduct on, or security of, any premises under the SBPBC's or its Affiliates' control).

5.6. Non-Interference. Contractor shall in no event interfere with the business or school operations of the SBPBC or its Affiliates in performing under this Agreement.

5.7. Risk of Loss. Contractor shall bear all risk of loss for all work in process or completed until such work is actually accepted by the SBPBC.

5.8. Financial Information. Upon the written request of the SBPBC, Contractor shall promptly provide the SBPBC with such relevant financial information about Contractor's business operations and enterprises to enable the SBPBC to fairly evaluate Contractor's ability to perform, or continue to perform, its obligations pursuant to this Agreement, or for any other valid and reasonable business purpose in connection herewith.

5.9. Records. Contractor shall maintain books and records according to generally accepted accounting principles and in such reasonably sufficient nature and detail as to support and permit verification of invoices submitted by Contractor to the SBPBC for a period of at least three (3) years after the date the related work is completed. Upon the SBPBC's request, Contractor shall provide the SBPBC with access to or copies of such relevant records, including, but not limited to, proof of required licenses and permits. The SBPBC may, at the SBPBC's expense, audit Contractor's compliance with the terms and conditions of this Agreement on Contractor's premises during normal business hours and following reasonable notice. If such audit reveals such substantial noncompliance by Contractor as to be unacceptable to the SBPBC, in its reasonable discretion, then any subsequent audit to verify the effectiveness of Contractor's remediation efforts shall be at Contractor's expense. In the event that an audit conducted hereunder reveals that any single invoice submitted by Contractor contains an overcharge of the total amount that should have been billed on such invoice, then Contractor shall promptly: (a) refund any such overcharge paid to Contractor by the SBPBC, (b) correct and resubmit such invoice, if not yet paid by the SBPBC, and (c) if the overcharge is in excess of five percent (5%), reimburse the SBPBC for the costs and expenses associated with such audit. The SBPBC may employ an independent auditor of its choice to conduct any audit permitted hereunder.

5.10. Refunds. If the Services or Contractor Property fail to meet the specifications and criteria provided therefor (including, but not limited to, acceptance criteria), and Contractor does not cure such deficiencies at no additional charge to the SBPBC within thirty (30) days after receipt of the SBPBC's written notice thereof, then, without limiting any other rights or remedies that the SBPBC may have, Contractor shall promptly refund all amounts that the SBPBC has paid, or cancel all such amounts as remain payable, to Contractor regarding such deficient Services or Contractor Property, and the SBPBC shall have no further obligation for payment of such amounts.

6. Proprietary Materials

6.1. Contractor Property. With respect to the Contractor Property, Contractor hereby grants to the SBPBC a perpetual, fully-paid, non-assessable, royalty-free, worldwide, non-exclusive license to use, reproduce, redistribute and modify all Contractor Property that is

for, and as necessary to achieve, any legitimate business or school purpose consistent with this Agreement. Such license shall include, but shall not be limited to, the right to (a) authorize the SBPBC's Affiliates, and its designated agents and intended users, to fully access and utilize such Contractor Property, (b) make a reasonable number of copies, including, but not limited to, backup and archival copies, of the Contractor Property as the SBPBC reasonably deems necessary for such use, (c) modify the Contractor Property for any internal SBPBC business or school use, in accordance with the provisions of this Agreement, through the services of the SBPBC's own employees or independent contractors, and make, have made, use and sell or sublicense any inventions or derivative works resulting from such modification; and (d) merge the Contractor Property with, and use in conjunction with, other software, programs, routines, and subroutines developed or acquired by the SBPBC and make, have made, use, have used, import, offer and sell, lease, otherwise transfer or sublicense any inventions or derivative works resulting from such merging or recombination. Such license shall not include the right to use the Contractor Property in a resale capacity or as a service bureau. The license granted herein shall become effective upon delivery of each individual item of Contractor Property to the SBPBC.

6.2. Data Ownership. The SBPBC shall be, for all purposes hereof and as between Contractor and the SBPBC, the sole and exclusive owner of any information or data created, provided, or used in connection with Contractor's performance hereunder, including, but not limited to, all proprietary data, information and records, all internal financial information and projections, and all billing, pricing, personnel, salary, student, faculty, staff, administrative and insurance information, of or relating to the SBPBC and its Affiliates (collectively, "the SBPBC Data"). Except as expressly provided herein and as necessary to performance hereunder, Contractor and its employees, agents and subcontractors shall not have any rights in or to the SBPBC Data in any form or any information derived from or in connection with the SBPBC Data.

7. Confidentiality

7.1. Obligations. Each Party shall use the same care to prevent the disclosure of the other Party's Company Information to third parties as it uses to avoid disclosure of its own Company Information of a similar nature, but in no event less than a reasonable standard of care. Notwithstanding the foregoing, each Party may disclose Company Information of the other Party to those of its officers, directors, employees, or agents who have a need to know such information to perform their obligations hereunder, provided that the obligations of confidentiality set forth herein are made known to and legally imposed upon each such person to whom such Company Information of the other Party is disclosed. Neither Party shall: (a) make any use of the Company Information of the other Party other than as strictly necessary to perform its obligations hereunder; or (b) acquire any right in or assert any lien against the other Party's Company Information. Each Party shall notify the other Party immediately upon learning of any disclosure, loss or use of such other Party's Company Information in violation of this Agreement.

7.2. Exclusions. Notwithstanding Section 7.1 or any other provision of this Agreement, and except with regard to information concerning or about individual students of the SBPBC and its Affiliates (such as grades, transcripts, test scores, disciplinary reports, attendance records, faculty recommendations, etc.), none of the Trade Secrets, Confidential Information or Company Information of a Party shall include any information that the other Party can demonstrate: (a) was in the public domain at the time of disclosure to such other Party, (b) was published or otherwise became part of the public domain after disclosure to such other Party through no fault of such other Party, (c) was previously disclosed to such other Party without a breach of duty owed to the disclosing Party by a third party who had a lawful right to such information, (d) was independently developed by such other Party without reference to Company Information of the disclosing Party, or (e) is subject to disclosure under Chapter 119 of the Florida Statutes. Further, either Party may disclose the other Party's Company Information to the extent required by law or order of a court or governmental agency, provided that a Party that becomes subject to any such duty, request, or order must give the other Party prompt notice as soon as reasonably practicable, in order to allow such other Party to obtain a protective order or to otherwise protect the confidentiality of such Company Information.

7.3. Return. Upon termination of this Agreement, or upon request of the other Party at any prior time, each Party shall destroy or return to such other Party all of such other Party's Company Information and all copies thereof, unless retention thereof is expressly authorized by such other Party or otherwise required by law or governmental regulations.

7.4. Duration. The obligations of confidentiality set forth herein shall: (a) take effect as of the Effective Date and continue in full force and effect throughout the Term and (b) continue beyond the Term for, (i) with respect to Trade Secrets, so long as Trade Secret status is maintained under applicable law, and (ii) with respect to Confidential Information, for a period equal to four (4) years after termination of this Agreement.

7.5. Remedies. Each Party would each suffer immediate and irreparable injury in the event the other Party breaches any duties or obligations of this Article 7. Each Party acknowledges that such duties and obligations are reasonably necessary to protect the interests of the Parties and, that in addition to all of the remedies provided at law or in equity, each Party shall be entitled to seek and obtain any available equitable relief to prevent any actual or threatened breach of any such covenants, duties or obligations. A Party against whom any such equitable relief is sought shall in no way contest the right of the other Party to seek or obtain such relief.

8. Representations and Warranties

Contractor represents, warrants, and covenants that:

8.1. Due Authority. Contractor has full right, title, and authority to execute and deliver this Agreement, to consummate the transactions contemplated hereby, and complete all performance hereunder. Contractor's performance of its obligations hereunder shall not violate or create a conflict of interest with regard to any other agreement to which Contractor is or shall become a party, and shall not violate any law, court order, or decree to which Contractor is, or shall become, subject.

8.2. No Claims. There is no action, suit, proceeding, claim, or investigation, pending or threatened, against Contractor in any court, or by or before any Federal, state, municipal, or other governmental department, commission, SBPBC, bureau, agency, or instrumentality, of any State or the United States or any other country, or before any arbitrator of any kind, that if adversely determined, might adversely affect the Services or the Contractor Property, or otherwise restrict Contractor's ability to consummate the transactions contemplated hereby or to perform its obligations hereunder. Further, Contractor knows of no basis for any such action, suit, claim, investigation, or proceeding.

8.3. Non-Infringement. The Services and all Contractor Property do not violate or in any way infringe upon any rights of third parties including, but not limited to, any property, contractual, employment, proprietary information, non-disclosure, copyrights, patents, trademarks, trade secrets, or any other proprietary or intellectual property rights. Contractor has not and shall not misappropriate or improperly copy from a third party any Contractor Property provided (or any portion thereof) or any intellectual property used hereunder. Contractor has not infringed or otherwise violated, and neither Contractor's performance hereunder nor the SBPBC's exercise of its rights hereunder, shall infringe or otherwise violate any rights of any third party in or to any intellectual property or proprietary rights therein including, but not limited to, copyrights, patents, trade secrets, and trademarks. No third party has asserted, is asserting, or to Contractor's knowledge, has or will have any reasonable basis to assert a claim of any of the foregoing.

8.4. Services. The Services shall be performed, on a prompt and timely basis, in a professional manner and in accordance with the recognized professional standards and practices in the industry. The personnel employed or engaged by Contractor in connection with this Agreement shall have the requisite ability, expertise, knowledge and skill, as appropriate to the duties assigned, to perform the Services on such a basis, in such a manner, and in accordance with such professional standards, industry practices, and applicable deadlines.

8.5. Material Defects. All Contractor Property, and all portions and components thereof, shall be free of material or frequent defects and shall operate in all material respects in conformance with the applicable specifications therefor.

8.6. Response Time. To the extent that any Contractor Property includes or constitutes application computer software, such software shall operate within the response times in accordance with the applicable specifications or if none are so specified, in the reasonable discretion of the SBPBC, such software shall provide (a) a response time acceptable to the SBPBC, and (b) a level of availability at least equal to that reasonably contemplated by the Parties and, in any event, equal to or greater than the prevalent commercial standards of the industry.

8.7. Documentation. All documentation, whether of the Services or Contractor Property, shall be complete and shall accurately describe such Services or Contractor Property so as to enable a reasonable professional with skills and experience customary in the industry to utilize such Services and Contractor Property for all purposes hereunder and for which they were intended and produced. Contractor Property shall not contain any undocumented material features of any kind whatsoever.

8.8. Viruses. The Contractor Property shall not knowingly contain, and Contractor's performance of the Services shall not knowingly result in the creation or insertion of, any virus, timer, clock, counter, or other limiting design, instruction or routine that would erase data or programming or cause any of the Contractor Property, or any portion thereof, or any other programs, equipment or data to become inoperable or otherwise become incapable of being used in the full manner for which designed, intended and created. Contractor shall promptly repair or replace any item of Contractor Property, or any portion thereof, that fails to satisfy the foregoing warranty, and promptly correct in a manner satisfactory to the SBPBC any damage caused by such failure, and all such cures shall be at no additional charge to the SBPBC.

8.9. Loss of Data. Contractor's performance of the Services shall not result in, the direct or indirect loss, destruction, deletion, or alteration of any of the SBPBC's or its Affiliates' data. Contractor shall promptly restore any of the SBPBC's or its Affiliates' data the loss of which shall have been caused by or resulted from the Services or any use of either of the foregoing. Alternatively, in the SBPBC's sole discretion, the SBPBC may perform such restoration or have such restoration performed for it by a third party, and Contractor shall promptly reimburse the SBPBC for the reasonable cost thereof.

8.10. Compliance with Laws. Contractor shall perform the Services in compliance with all applicable laws, regulations, and policies, including, but not limited to, all applicable immigration and labor laws and regulations; all laws, regulations, and policies related to fair employment, employment of the handicapped, minorities and women, and the treatment of all employees without regard to discrimination by reason of race, color, religion, sex, national origin or physical handicap; and all applicable data protection and privacy laws of any relevant jurisdiction, and all applicable policies of the SBPBC or its Affiliates.

8.11. Third-Party Products. Contractor hereby assigns to the SBPBC all warranties and other commitments that Contractor has obtained or shall obtain from the vendors and manufacturers of, and that are applicable to, any third-party software or hardware that is included in any Contractor Property. Contractor shall exercise commercially reasonable efforts to work with and coordinate the efforts of such vendors and manufacturers to ensure that the SBPBC obtains any required warranty service. Contractor hereby agrees that Contractor Property shall not contain any open-source code software unless Contractor has obtained the SBPBC's prior written consent.

8.12. Disclaimer. THE FOREGOING WARRANTIES BY CONTRACTOR ARE IN LIEU OF ALL OTHER WARRANTIES, EXPRESS OR IMPLIED, INCLUDING ANY IMPLIED WARRANTIES OF MERCHANTABILITY AND FITNESS FOR A PARTICULAR PURPOSE.

9. Indemnification

9.1. General. Contractor shall indemnify, defend, and hold all of the SBPBC Indemnitees harmless from and against any claims brought by any third party: (a) that allege any death, bodily injury, or damage or destruction of tangible property, or any other damage or loss arising out of any act, omission, error, or negligence of Contractor or its subcontractors; (b) that relate to Contractor's performance of the Services; (c) that relate to any claimed violation of law, statute, ordinance, governmental administration order, rule, or regulation by Contractor or its subcontractors; or (d) that relate to any liens, claims, or actions filed, brought, or made by any of the employees, agents, or creditors of Contractor or its subcontractors. Contractor shall pay all liabilities, losses, costs, damages, penalties and expenses (including, but not limited to, reasonable attorneys' fees) incurred by any of the SBPBC Indemnitees in connection with any of the foregoing third-party claims.

9.2. Intellectual Property. Contractor shall indemnify, defend, and hold all of the SBPBC Indemnitees harmless from and against any claims brought by any third party against any of the SBPBC Indemnitees that allege that any Contractor Property or the Services infringe upon any patent, trademark, copyright, or other intellectual property or proprietary right (including, but not limited to, misappropriation of trade secrets), and Contractor shall pay all liabilities, losses (including, but not limited to, loss of use), costs, damages and expenses (including reasonable attorneys' fees) incurred in connection with any such claims or actions.

9.3. Recovery. Notwithstanding anything to the contrary, none of the obligations of indemnification set forth in any of the provisions of this Article 9 shall be limited with respect to the amount or type of damages, compensation or benefits payable by or on behalf of Contractor or any of its subcontractors under any Workers' Compensation, disability benefits or other employee benefit statutes or acts, or any other statutory bar. Any costs or expenses (including, but not limited to, reasonable attorneys' fees) incurred by the SBPBC or its Affiliates to enforce such obligations of indemnification shall be borne by Contractor. Contractor recognizes the broad nature of this Article 9, voluntarily makes these covenants and expressly acknowledges the receipt of good and valuable consideration provided by the SBPBC in support of the obligations of indemnification set forth in this Article 9.

9.4. Setoff. The SBPBC may set off against and deduct from any and all amounts otherwise payable to Contractor pursuant to any of the provisions of this Agreement, any and all amounts owed by Contractor to any of the SBPBC Indemnitees under this Article 9. Upon the exercise of such right of setoff, the SBPBC shall notify Contractor in writing of the extent to which such right has been asserted.

9.5. Procedures. Contractor represents and acknowledges that it has received adequate consideration from the SBPBC for the obligations of indemnification set forth in this Article 9. If any claim covered by this Article 9 is commenced against any the SBPBC Indemnitee ("Indemnified Party"), prompt written notice thereof shall be given to Contractor. After such notice, if Contractor shall acknowledge in writing to Indemnified Party that the right of indemnification under this Agreement applies with respect to such claim, then Contractor shall be entitled, if it so elects in a written notice delivered to Indemnified Party not fewer than ten (10) days prior to the date on which a response to such claim is due, to take control of the defense and investigation of such claim and to employ and engage attorneys of its sole choice to handle and defend same, at Contractor's expense. Indemnified Party shall cooperate in all reasonable respects with Contractor and its attorneys in the investigation, trial, and defense of such claim and any appeal arising therefrom; provided, however, that Indemnified Party may, at its own expense, participate, through its attorneys or otherwise, in such investigation, trial, and defense of such claim and any appeal arising therefrom. No settlement of a claim that involves a remedy other than the payment of money by Contractor shall be entered into without the consent of Indemnified Party, which consent will not be unreasonably withheld or delayed. After notice by Contractor of its election to assume full control of the defense of any such claim, Indemnified Party shall not be liable to Contractor for any legal expenses incurred thereafter by Contractor in connection with the defense of that claim. If Contractor does not assume full control over the defense of a claim subject to such defense as provided in this Section 9.5, Contractor may participate in such defense, at its expense, and the Indemnified Party shall have the right to defend the claim in such manner as it may deem appropriate, at the expense of Contractor.

10. Insurance

Without limiting Contractor's undertaking to indemnify, defend, and hold harmless all the Board Indemnitees as provided in Article 9, Contractor, at its own cost, shall procure (from a company or companies acceptable to and approved by the Board, in its sole discretion), maintain, and keep in force and effect adequate and sufficient insurance to protect the Board from all claims (including, but

not limited to, claims brought by any of Contractor's employees) that arise out of or result from Contractor's operations, the Services, the Contractor Property or Contractor's performance under this Agreement, whether such operations, Services, Contractor Property or performance are provided by Contractor or by any of Contractor's agents, representatives, suppliers, or subcontractors or by anyone directly employed by any of them, or by anyone for whose acts any of them may be liable. In particular, at all times during the Term (as defined in Section 4.1 hereof) and for such longer period of time as specified in attached Schedule 10, Contractor shall maintain standard insurance policies for at least the minimum insurance coverages and requirements as set forth in Schedule 10. Further, Contractor shall insert into all subcontracts executed to enable it to fulfill the requirements of this Agreement, provisions that conform substantially to the language and content of the insurance coverages and requirements set forth in Schedule 10 and Contractor shall, and shall cause each of its contractors and subcontractors who are subject to professional liability insurance, procure, maintain and keep in force and effect, at all times during the Term and for two (2) years after termination or expiration thereof, professional liability insurance meeting all applicable requirements set forth on Schedule 10 (including, but not limited to, those set forth in Section 1.5 thereof).

11. Limitation of Liability

11.1. General Limitation. EXCEPT AS EXPRESSLY PROVIDED FOR IN SECTION 11.3, NEITHER CONTRACTOR NOR THE SBPBC SHALL BE LIABLE FOR ANY CONSEQUENTIAL, EXEMPLARY, INCIDENTAL, INDIRECT, OR SPECIAL DAMAGES INCLUDING, BUT NOT LIMITED TO, LOST PROFITS OR LOSS OF GOODWILL, RESULTING FROM ANY CLAIM OR CAUSE OF ACTION BASED UPON BREACH OF WARRANTY, BREACH OF CONTRACT, NEGLIGENCE, STRICT LIABILITY, PRODUCT LIABILITY, OR ANY OTHER LEGAL THEORY, EVEN IF EITHER PARTY HAS BEEN ADVISED, KNEW, OR SHOULD HAVE KNOWN OF THE POSSIBILITY THEREOF; PROVIDED HOWEVER, THAT THE FOREGOING LIMITATION SHALL IN NO EVENT LIMIT A PARTY'S ABILITY TO RECOVER ACTUAL DAMAGES FOR BREACH HEREOF, INCLUDING THE COST OF OBTAINING REPLACEMENT SERVICES COMPLYING WITH THE TERMS HEREOF.

11.2. Maximum Liability. EXCEPT AS EXPRESSLY PROVIDED FOR IN SECTION 11.3, CONTRACTOR'S MAXIMUM AND AGGREGATE HEREUNDER LIABILITY HEREUNDER SHALL BE LIMITED TO THE TOTAL FEES PAID AND PAYABLE BY THE SBPBC UNDER THIS AGREEMENT. EXCEPT AS EXPRESSLY PROVIDED FOR IN SECTION 11.3, THE SBPBC'S MAXIMUM AND AGGREGATE LIABILITY HEREUNDER SHALL BE LIMITED TO THE TOTAL OF UNPAID FEES THEN DUE AND PAYABLE BY THE SBPBC HEREUNDER.

11.3. Exceptions. Notwithstanding the limitations set forth in Sections 11.1 and 11.2, and subject to Florida Statutes Chapter 768.28 (as amended), there shall be no limit on liability for the following: (a) losses arising out of Contractor's partial or entire repudiation of its obligations, or refusal to perform its duties and obligations, under this Agreement; (b) Contractor's obligations of indemnification as set forth in Article 9; (c) losses associated with any breach of the obligations set forth in Articles 7; (d) losses arising out of the gross negligence or willful misconduct of either Party or its agents or subcontractors; and (e) claims related to death, bodily injury, or damage to real or tangible personal property.

12. Dispute Resolution

12.1. General Intent. Contractor shall seek recourse solely against the SBPBC, and shall in no event seek recourse against any of the SBPBC's Affiliates, for any claim, problem or dispute arising under this Agreement. All claims, problems and disputes between the Parties, of any nature, relating to this Agreement (or any breach thereof), or arising from the transactions contemplated herein, or Services performed hereunder, shall be resolved through the procedures of this Article 12. Notwithstanding the foregoing, neither Party shall be under any obligation to invoke the procedures of this Article 12 with respect to seeking and obtaining injunctive relief in any dispute for which it is available, and nothing herein shall restrict or limit the ability of either Party to seek or obtain such injunctive relief at any time.

12.2. Senior Executives. The Parties shall initially attempt to resolve disputes arising hereunder through good faith negotiations of the Parties' respective senior-level executives or officers.

12.3. No Termination or Suspension of Services. Notwithstanding anything to the contrary contained herein, and regardless of whether a problem or dispute arises between the Parties and whether either Party at any time avails itself of the good faith dispute negotiations set forth herein, in no event nor for any reason shall Contractor interrupt the provision of Services to the SBPBC or its Affiliates or disable any Contractor Property, or any hardware used to provide the Services, or perform any other action that prevents, slows down, or reduces in any way the provision of Services or the SBPBC's or its Affiliates' ability to conduct its business and school activities, unless: (a) authority to do so is granted by the SBPBC or conferred by a court of competent jurisdiction; or (b) the Agreement has been terminated or expired pursuant to Article 4 hereof and Contractor has completed its obligations to provide termination assistance in accordance with Section 4.3 hereof.

13. Miscellaneous

13.1. **Entire Understanding.** This Agreement constitutes the entire understanding of the Parties with respect to the subject matter hereof and supersedes all prior or contemporaneous written and oral agreements with respect to such subject matter. Except as expressly provided herein, this Agreement shall not be modified, amended, or in any way altered except by a writing signed and executed by each of the Parties.

13.2. **SBPBC Action.** Only in the event that the duly authorized, formal, and official action of the School SBPBC Members (as defined below) is required by applicable law, regulations, policies, or procedures, or sought by the District (as defined below) in its sole discretion, to effectuate the intent of any provision of this Agreement, with respect to use of the defined term "SBPBC" in such provision, shall such formal and official action of the School SBPBC Members be deemed to be required hereunder. In all other instances, with respect to use of the defined term "SBPBC" in any provision of this Agreement, the intent of such provision shall be deemed capable of being effectuated by the District. As used herein, the "District" means the appropriate, authorized directors, administrators, attorneys, employees and agents of the SBPBC, acting in their respective, appropriate and authorized capacities for and on behalf of the SBPBC. As used herein, "School SBPBC Members" means, collectively, such individuals as are serving, at the applicable and appropriate time, as the authorized, duly elected or appointed school SBPBC members of the SBPBC, in accordance with applicable laws, regulations, policies and procedures.

13.3. **Assignment of Agreement and/or Payment.** Contractor shall not directly or indirectly subcontract or delegate any of its duties or obligations hereunder or assign, sell, or otherwise dispose of, this Agreement, in whole or in part, without the prior written consent of the SBPBC, which consent shall be in the sole discretion of the SBPBC. A permitted assignee of Consultant shall be bound by the terms of this Agreement and shall have all of the rights, duties, and obligations of consultant set forth in this Agreement.

13.4. **Publicity.** Contractor shall not use the name, logos, trademarks, tradenames, service marks, or any other symbol or designation of either the SBPBC or its Affiliates in any fashion without the SBPBC's prior written approval.

13.5. **Governing Law.** This Agreement shall be interpreted, construed, and governed by the laws of the State of Florida, without regard to conflict of law principles and rules thereof, including Florida Statutes Chapter 768.28 (as amended). All actions and proceedings arising out of or related to this Agreement shall be brought in the state or federal courts sitting in Palm Beach County, Florida. Each Party hereby expressly and irrevocably consents and submits to the personal jurisdiction of such courts over such actions or proceedings, and expressly and irrevocably consents to such forums as appropriate and convenient venues for such actions and proceedings. If either Party to this Agreement commences a proceeding to enforce its rights hereunder, the prevailing Party in such proceeding shall be entitled to recover its costs and expenses, including, but not limited to, reasonable attorneys' fees and expenses, if any, reasonably incurred in connection therewith.

13.6. **Order of Precedence.** To the extent any terms of the body of this Agreement are in conflict or are inconsistent with those of any other Schedule or Exhibit attached hereto or incorporated herein, the terms of this Agreement shall be deemed to prevail.

13.7. **Set-off.** The SBPBC may set off against any and all amounts otherwise to be paid to Contractor hereunder or otherwise, against other amounts due to the SBPBC by the Contractor under any other agreement between Contractor and the SBPBC.

13.8. **Severability.** If any part of this Agreement shall be adjudged by any court of competent jurisdiction to be invalid, illegal, or unenforceable, then the validity, legality, and enforceability of the remaining provisions shall in no way be affected or impaired thereby and shall be enforced to the maximum extent permitted by applicable law.

13.9. **Force Majeure.** Neither Party shall be liable for any failure or delay in the performance of its obligations due to fire, flood, earthquake, elements of nature or acts of God, acts of war, terrorism, riots, civil disorder, rebellions, or other similar cause beyond the reasonable control of the Party affected, provided such default or delay cannot reasonably be circumvented and could not have been prevented by commercially reasonable precautions common and prevalent in the industry, and further provided that the Party whose performance is hindered or delayed: (a) immediately notifies the other Party in writing, stating the date that such delay began and reasonably describing the circumstances causing such delay (a "Notice of Delay"); and (b) again immediately notifies such other Party in writing when such circumstances causing such delay have substantially abated, ended, or ceased (a "Notice of Abatement"). Either Party may immediately terminate this Agreement, upon written notice to the other Party, if an event of force majeure, as described above in this Section, extends for a period in excess of sixty (60) days after the date that such force majeure began, as set forth in the applicable Notice of Delay, provided that such notice of termination is delivered to the other Party prior to receipt or timely delivery, as applicable, of the corresponding Notice of Abatement. No such termination for force majeure shall be deemed a Termination for Cause.

13.10. **No Waiver.** No failure to exercise, and no delay in exercising, on the part of either Party, any right, power, or privilege hereunder will operate as a waiver thereof, nor will either Party's exercise of any right, power, or privilege hereunder preclude further exercise of the same right or the exercise of any other right hereunder.

13.11. **Non-Exclusive Remedies.** Except as expressly provided, no remedy set forth in this Agreement is intended to be exclusive of any other remedy. Each remedy shall be in addition to every other remedy given hereunder, or now or hereafter existing at law, in

equity, by statute, or otherwise. No quality assurance or acceptance test, or other similar procedure, shall be deemed to obligate the SBPBC with respect to, or necessarily to constitute, legal "acceptance" of any such item Services or Contractor Property, and no such procedure shall be deemed to waive any right or remedy hereunder.

13.12. Independent Contractors. The Parties intend to be, are, and shall at all times be, independent contractors with respect to the Services, and all performance hereunder. Contractor and its employees, agents, and subcontractors shall in no event be considered as employees of the SBPBC or its Affiliates, or be entitled to participate in any of the SBPBC's or its Affiliates' employee benefit programs including, but not limited to, workers' compensation and disability insurance, group health and dental insurance, unemployment insurance, retirement plans, and any employment-related benefits or plans. Contractor shall not, and shall not be considered to, act as an agent of the SBPBC or its Affiliates, and shall in no event be entitled to enter into any agreements or incur any obligations on behalf of the SBPBC or its Affiliates. No form of joint employer, joint venture, partnership, or similar relationship between the Parties, or between a Party and any Affiliate of the other Party, is intended or hereby created. All of Contractor's activities hereunder are undertaken and performed at the sole risk of Contractor, and Contractor shall at all times be responsible for arrangements to appropriately guard against all physical, financial, and other risks.

13.13. No Construction Against Drafter. If an ambiguity or question of intent arises with respect to any provision of this Agreement, the Agreement will be construed as if drafted jointly by the Parties and no presumption or burden of proof will arise favoring or disfavoring either Party by virtue of authorship of any of the provisions of this Agreement.

13.14. No Third Party Benefit. The provisions of this Agreement are for the sole benefit of the Parties hereto. Except as expressly provided herein, this Agreement confers no rights, benefits, or claims upon any person or entity not a Party hereto.

13.15. Survival. The rights, duties and obligations of the Parties and the provisions of this Agreement which by their nature are intended to survive the Term, termination, cancellation, completion or expiration of this Agreement shall survive and continue as valid and enforceable rights, duties and obligations, including, but not limited to, the rights, duties and obligations set forth in Articles 3, 4, 5, 6, 7, 8, 9, 10, 11, 12 and 13.

13.16. Minority Status. See Schedule 3.1.

13.17. Prohibition from Discrimination. First Associates, Inc. and its subcontractors shall not discriminate against any employee or applicant for employment because of race, religion, color, gender, national origin or age. First Associates, Inc. shall take affirmative actions to ensure that applicants are employed, and that employees are treated during employment without regard to their race, religion, color, gender, national origin or age.

13.18. Conflict of Interest. No officer, director, or agent of First Associates, Inc. will be permitted to be an employee of SBPBC.

13.19. Notice. All notice required or made pursuant to this Agreement to be given by SBPBC to First Associates, Inc. shall be in writing and should be delivered by hand or by United State Postal Service, or by telefax, addressed to First Associates, Inc. as follows:

First Associates, Inc.
12222 Old Country Road
West Palm Beach, FL 33414

All notices required or made pursuant to this Agreement to be given by First Associates, Inc. to SBPBC shall be in writing and should be delivered by hand or by United State Postal Service, or by telefax, addressed to SBPBC as follows:

c/o Linda G. Mainord
Chief Technology Officer
3348 Forest Hill Blvd., Suite B-301
West Palm Beach, FL 33406-5813

All notices shall be deemed effective upon personal delivery; or on the day following receipt by telephonic facsimile; or when received if sent by certified or registered mail or by overnight delivery. Either Party may change its address or other contact information for notification purposes from time to time by giving the other Party prior written notice, in accordance with this Section, of the new address or other contact information and the date upon which such change will become effective.

[SIGNATURE PAGE FOLLOWS.]

IN WITNESS WHEREOF, the parties hereto have caused this Agreement to be executed by a duly authorized officer as of the Effective Date hereof.

**The School Board of
Palm Beach County, Florida**

By: _____
Name: Thomas E. Lynch
Title: Chairman
Date: _____



Contractor

By: Brenda Henley
Name: BRENDA HENLEY
Title: Director, FUST Associates
Date: 7/18/05

Attest:

By: _____
Name: _____
Title: Superintendent
Date: _____

**Approved as to Form and Legal
Sufficiency:**

By: [Signature]
Name: _____
Title: School Board Attorney
Date: 7/19/05

[Signature]

FINANCIAL IMPACT: \$226,000 Business Operating Systems Capital Projects Budget

FUND	FUNCTION	OBJECT	LOCATION	PROJECT	HOURS	AMT	DEPT:
3999	7410	3101	9231	8823	650	\$45,500	Customer Support
3999	7410	3101	9229	8823	1,200	\$84,000	Information Processing
3999	7410	3101	9049	8823	1,350	\$94,500	Network & Tech. Services

SCHEDULE 1.7

HARDWARE

**[ADD DESCRIPTION OF HARDWARE AND OPERATING SYSTEM SOFTWARE
BEING MAINTAINED BY CONTRACTOR]**

N/A

SCHEDULE 1.8

SOFTWARE

SCOPE OF SERVICE

The Parties agree as follows:

1. That the Consultant does agree to perform the following professional or technical services:

Provide staff augmentation in the area responsible for maintaining e-Server availability for current critical business applications delivered to departments and schools. This includes support of hardware configuration/connectivity; software installation and maintenance; storage management for District data; disaster recovery including e-Server application recovery at the Board approved hot site; system tuning; Database Administration for new initiatives such as the Data Warehouse; network server storage and intrusion reviews; technical training; and support for one-time technology projects. Technical services include but are not limited to:

Customer Support:

Technical Training

- Provide experienced technical instructors to prepare and teach additional classes offered to schools and departments for existing and new applications. These classes are offered primarily through October when new personnel are hired to support the school year as well as offered on an as needed basis.
- Provide resources to assist schools and departments in FTE preparation and with answering technical questions regarding usage of the TERMS Student Information application.

Information Processing:

Database Administration Support

- Provide augmented senior level experienced Database Administration personnel to support the District's Data Warehouse. Tasks include update of the Test Mini Mart with latest test results; assist with design and implementation of common assessment testing tables; assist with design and implementation of Palm Beach writes testing tables; Assist with adding diagnostic item level data to the test data mart; assist developers with performance improvements and efficiency with report/SQL techniques and DB2 subsystems; add/maintenance to the bucket accumulator fields in the data warehouse tables; assist with the design and implementation of ERP staff data to the data warehouse.

Network and Technical Services:

IT Infrastructure Support

- Augment current staff in support of current production IT infrastructure and future infrastructure requirements mandated by new projects including the ERP, Data Warehouse, CAFM, Online Assessment, IP Convergence and Dark Fiber projects. This will provide continuity and support for critical systems while staff is realigned during the IT reorganization and while staff vacancies are filled. Provide storage management services for all central e-server storage media including the tape silo and disk storage systems which house the District's mission critical business and student data.

e-Server Disaster Recovery

- Once a year, execute a complete e-Server disaster recovery test on-site; audit backup procedures throughout the year to ensure the production systems are adequately backed up to recover from a declared disaster; At District's request, commute to hot site location and execute the Disaster Recovery plan and prepare a summary report of the test.

Central and Distributed System Software Support

- Assist staff in Operating System upgrades for all production platforms as required. Provide backup coverage and technical expertise for the Data Center, Systems, Applications and Network staff including resolution of production issues, tuning, storage administration and installation of software.

New Technology Initiatives

- Provide technical expertise for specific one-time projects and targeted initiatives when resources are needed to meet District requirements.

All:

Knowledge Transfer

- Provide specific project knowledge transfer to IT staff.

SCHEDULE 3.1

Minority Status

The School District strongly encourages active minority/women business enterprise participation with all professional services. In accordance with Palm Beach County School Board Policy #6.146, I certify that:

This business is minority owned and operated (minimum 51%) X Yes No
If a consultant nor representing a firm, I am a minority Yes No

If either statement above was checked (x) yes, please indicate minority group.

Black or African American	<u> </u> Male	<u> </u> Female
American Indian or Alaskan Native	<u> </u> Male	<u> </u> Female
Asian	<u> </u> Male	<u> </u> Female
Disabled	<u> </u> Male	<u> </u> Female
Native Hawaiian or Other Pacifica Islander	<u> </u> Male	<u> </u> Female
White		<u> X </u> Female
Hispanic or Latino	<u> </u> Male	<u> </u> Female
Other _____		

SCHEDULE 10

INSURANCE

1. Coverage

The insurance required to be maintained hereunder shall not be for less than the minimum limits of coverage specified herein (unless the law in any jurisdiction with authority over Contractor's operations, services, or performance requires a greater amount, in which event, Contractor shall maintain limits of coverage not less than the legally required amounts). Contractor shall maintain insurance policies with at least the following types of coverage and in at least the specified minimum amounts, with reasonable deductible amounts (all of which deductible amounts are and shall be the responsibility of Contractor) and which, in all cases (except with regard to the coverage specified in Sections 1.1, 1.2, 1.4 and 1.6 below), shall name the Board as an additional insured:

- 1.1. Worker's Compensation Insurance offering statutory coverage as required by the laws of Florida (Florida Statutes Chapter 440) and any other jurisdiction(s) in which the Services shall be performed.
- 1.2. Employer's Liability Insurance with limits of not less than One Million Dollars (\$1,000,000.00) for each accident or disease.
- 1.3. Commercial General Liability Insurance with limits of not less than One Million Dollars (\$1,000,000.00) per occurrence for personal or bodily injury (including, but not limited to, wrongful death), and broad-form property damage liability inclusive of blanket contractual liability for this insured Agreement and product/completed operations coverage maintained for not less than five (5) years following termination of this Agreement.
- 1.4. Professional Liability Insurance covering errors and omissions in the performance of professional services under this Agreement, with limits of not less than One Million Dollars (\$1,000,000.00) per occurrence. A policy meeting the requirements of this SCHEDULE 10 shall be maintained and kept in force and effect at all times during the Term of this Agreement and for two (2) years after termination or expiration of the Term.
- 1.5. Automobile Liability Insurance, of comprehensive form, with a limit of not less than One Million Dollars (\$300,000.00) per occurrence for any vehicle used by Contractor while performing under this Agreement.
- 1.6. Fidelity Bond coverage with limits of not less than One Million Dollars (\$1,000,000.00) per occurrence.

2. General Insurance Requirements

- 2.1. Contractor shall provide insurance coverage by insurance companies or surplus lines insurers licensed or authorized to do business in the State of Florida and having policy holder ratings no lower than "A" and financial ratings not lower than "XII" in the latest edition of Best's Insurance Guide, in effect as of the Effective Date of this Agreement.
- 2.2. Contractor shall verify and ensure that Contractor's Project Manager and all of Contractor's Project Personnel and other employees, agents, representatives, contractors and subcontractors involved with the performance of Contractor's obligations pursuant to this Agreement are adequately insured against claims arising out of or relating to their performance under this Agreement, in accordance with each of the requirements set forth in this SCHEDULE 10.
- 2.3. The insurance policies listed herein shall not be restricted by the country or state in which any Services are being performed. In the case of Services performed outside the United States and as required by law, the insurance must be placed with the Board admitted to do business in that country.
- 2.4. The foregoing insurance coverage shall be primary and non-contributing with respect to any other insurance or self-insurance that may be maintained by the Board and its Affiliates and shall contain a cross-liability or severability-of-interest clause. The fact that Contractor has obtained the insurance required in this SCHEDULE 10 shall in no manner or event lessen or affect Contractor's other duties, obligations or liabilities set forth in this Agreement. Upon or prior to the Effective Date, and not less than thirty (30) days before each subsequent or renewal term applicable to such insurance policies commences, Contractor shall supply certificates of insurance to the Board demonstrating that all of the insurance required herein is or will be in force at all times during the Term. Not less than thirty (30) days' written notice will be given (via certified mail) by Contractor to the Board prior to any cancellation or restrictive modification of the policies.