

Washington Learning Source
Access Subscription Agreement

District Name:	Odessa School District	ESD:	NEWESD101
Address:	PO Box 248	District Contact Name:	Suellen White
City:	Odessa	Phone:	(509) 982-2668
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This Washington Learning Source Access Subscription Agreement (the “**Agreement**”) is an intergovernmental cooperative purchasing agreement, which is entered into by and between Puget Sound Educational Service District No. 121 through the center of excellence known as the Washington Learning Source (the “**WLS**”), as the lead agency, and Odessa School District (“**Subscriber**”), as the participating agency. This Agreement will be effective beginning on the date when WLS executes it below (the “**Effective Date**”).

Recitals

WLS and Subscriber are both duly constituted public agencies organized and existing under and by virtue of the laws of the State of Washington. As public agencies, the parties must make certain purchases by a formal advertisement and bid process, and thereby incur certain expenses, and it is in the public interest for the parties to cooperate in purchasing activities to obtain the most favorable pricing for each party and to reduce redundant activities. The Interlocal Cooperation Act, Chapter 39.34 RCW, provides for intergovernmental cooperation between public agencies. The parties find that this Agreement will permit them to make the most efficient use of their powers by enabling them to cooperate with each other on a basis of mutual advantage, and that it is in their respective best interests to cooperate and join in certain purchasing activities. Such cooperative purchasing activities will support the education of preschool through twelfth grade students in the public schools and support the effective, efficient, and/or safe management and operation of Subscriber’s school district and of districts served by WLS.

Therefore, BE IT RESOLVED by Subscriber’s Board of Directors or other governing authority, and pursuant to appropriate resolution or other action by the governing authority for WLS, for and in consideration of the promises and covenants contained in this Agreement and the mutual benefits to be derived from it, that the parties agree as follows:

Terms

1. Definitions.

“**Product**” means any product or service that is both: (a) available to be sold, licensed, or otherwise provided to Subscriber pursuant to a Vendor Agreement; and (b) selected by WLS, in its sole discretion, to be covered under this Agreement.

“**Subscriber Information Form**” means a form provided by WLS that allows Subscriber to provide certain information about itself.

“**Vendor Agreement**” means any agreement that is both: (a) entered into by WLS and a third party vendor or reseller of goods and/or services, pursuant to which that third party agrees to sell, license, or otherwise provide certain goods and/or services to WLS, other public agencies, on terms described

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in that agreement; and (b) selected by WLS, in its sole discretion, to be covered under this Agreement.

“**Vendor**” means a third party vendor or reseller of goods and/or services that has entered into a Vendor Agreement with WLS.

“**WLS Policies**” means WLS’ policies and procedures for ordering, shipment, substitutions, risk of loss/passage of title, returns, incidental charges, and other procedures and terms required by WLS concerning orders for Products.

2. Access to Vendor Agreements.

2.1 General. WLS is the public entity that initiates the procurement process to purchase Products and executes the resulting Vendor Agreements. This Agreement allows Subscriber, as the follow-on entity, to use those Vendor Agreements to purchase or acquire access to the Products, to the extent permitted by law and as permitted under those Vendor Agreements (the “**Program**”), all subject to this Agreement’s terms and conditions. Subscriber acknowledges and agrees that prices and availability of Products may change at any time with or without notice, and that prices paid for Products may include administrative fees that will be paid to WLS and its affiliates.

2.2 Information Exchange. From time to time: (a) WLS will disseminate information about the Program to Subscriber, including copies of Vendor Agreements. (Portions of those copies may be redacted as required by their terms, but Subscriber will not be bound under this Agreement to comply with those redacted portions.); and (b) Subscriber will provide WLS with suggestions about products and services that it would like to see available under the Program and the estimated demand for those products and services.

2.3 WLS Policies. Subscriber will comply with the WLS Policies. WLS will make the WLS Policies available to Subscriber by reasonable means, which may include posting them on WLS’ web site. WLS may change the WLS Policies from time to time, and it may post a notice of those changes on WLS’ web site. Subscriber agrees to periodically review WLS’ web site and the WLS Policies in order to keep itself aware of those changes. Subscriber’s continued use of the Program constitutes its acceptance of those changes.

2.4 Purchase for Own Use Only. Except where WLS expressly permits otherwise, Subscriber will make all of its purchases from Vendors through the Program only for Subscriber’s direct use and will not submit any orders or otherwise make any purchases through the Program on any third party’s behalf or for resale. Subscriber will not distribute or transfer any Products acquired through the Program without WLS’ written consent.

2.5 Payment. Subscriber will provide payments for Products directly to the respective Vendor or to WLS, pursuant to the WLS Policies or as directed by WLS. Subscriber will provide its payments to Vendors consistent with the payment terms required under the respective Vendor Agreements, and will provide its payments to WLS consistent with Section 4.2.

2.6 Contact Person. The “Contact Person” identified in the Subscriber Information Form will be WLS’ main point of contact with Subscriber, including with respect to receipt of Products, management of internal distribution of Products purchased by Subscriber, and acquisition of information about Vendor Agreements and about WLS activities, resources and services supporting education.

2.7 Product Suitability. Subscriber acknowledges and agrees that Subscriber, and not WLS, is responsible for examining or evaluating the suitability of any Vendor or Product and the content of any Vendor web site. In obtaining the Products, Subscriber is relying on Vendors’ specifications only and is not relying on any statements, specifications, photographs or other illustrations representing the Products that may be provided by WLS.

2.8 Passwords. Subscriber may be required to use passwords to place orders for Products (and for Direct Purchases, as defined below). Subscriber will comply with the WLS Policies relating to the

issuance, protection, and administration of such passwords. As between Subscriber and WLS, Subscriber is solely responsible for any activity by any person that is committed through the use of any password distributed with respect to this Agreement.

2.9 User Information. Subscriber acknowledges and agrees that contact information and other information about Subscriber's use of the Program, including information about the purchase of Products, will be received, collected, generated, and/or stored by WLS and Vendors through or as a result of participation in the Program, and that such information may be personally identifiable.

2.10 No Unauthorized Representations by Subscriber. Subscriber acknowledges that it is not authorized to make any representations or warranties to any third party on behalf of WLS or any Vendor regarding the Program or any Product. However, this Section 2.10 does not bar Subscriber from: (a) repeating statements made on then-current, commercially available packaging and marketing materials provided by the respective Vendor; or (b) making statements that are expressly authorized in writing by a WLS or any Vendor, as the case may be.

2.11 Subscriber Policies. Subscriber will have or establish policies to ensure that its employees and independent contractors who obtain or use Products through the Program comply with this Agreement, the WLS Policies, and the applicable Vendor Agreements.

3. Legal Relationship with Vendors.

3.1 Vendor Responsible for Products. Subscriber acknowledges and agrees that Vendors (and not WLS) will provide the Products, and that each Vendor (and not WLS) is responsible for the delivery or non-delivery, quality, nature, and performance of its respective Products. Any license to a Vendor's intellectual property rights will be granted by that Vendor (and not by WLS), and may be subject to additional terms and conditions. **WLS does not assume any responsibility or liability for any Vendor's or other third party's actions or omissions, Products, or information (including web site content).** Subscriber should carefully review Vendors' privacy statements and other terms and conditions before making any purchase under the Program.

3.2 Subscriber Compliance With Vendor Agreements. Subscriber will comply with the terms of each Vendor Agreement with respect to Products it orders under that Vendor Agreement. Subscriber agrees that it (and not WLS) is liable to each respective Vendor concerning Subscriber's compliance with those terms. Subscriber acknowledges and agrees that a Vendor or other third party fulfilling a Product order submitted by Subscriber may, as provided in the respective Vendor Agreement, be entitled to seek all legal and equitable remedies against Subscriber if Subscriber fails to comply with the applicable terms of that Vendor Agreement (e.g., by failing to pay the agreed upon purchase price to the Vendor). However, WLS is responsible for conveying to the applicable Vendor any payment Subscriber delivers to WLS pursuant to the first sentence of Section 2.5.

4. Direct Purchases. This Section 4 applies only to those specific products and services selected by WLS (in its sole discretion) for direct sale by WLS ("**Direct Purchases**").

4.1 Acceptance; Shipping. Subscriber's orders for Direct Purchases are not binding upon WLS until they have been accepted by WLS. Direct Purchases will be shipped by a third party, and that 3d party is responsible for such delivery. (This does not apply to product keys that WLS may agree to distribute directly to Subscriber.) Subscriber will be responsible for all shipping and related charges.

4.2 Payment; Taxes. Subscriber will pay WLS for each Direct Purchase within 30 days of the respective invoice date. The amounts charged for Direct Purchases do not include applicable sales, use, gross income, occupational, or similar taxes; import or export fees; duties, imports, or tariffs; or any other taxes, duties, charges, or fees of any kind which may be levied in connection with the transactions covered under this Agreement. Any taxes that are (a) statutorily imposed upon Subscriber as a result of entering into this Agreement and the payment of the fees hereunder, (b) required to be collected from Subscriber by WLS under applicable law, and (c) based solely upon the amounts payable under this Agreement, will be remitted by

Subscriber to WLS. Notwithstanding the foregoing portions of this Section 4.2, Subscriber may provide WLS with a valid exemption or reseller certificate in a form acceptable to the relevant taxing authority, in which case WLS will not collect the taxes covered by such certificate.

4.3 Title; Risk of Loss. If Subscriber provides WLS with Subscriber's carrier account number or selects a carrier other than a carrier that regularly ships for WLS, title to products and risk of loss or damage during shipment passes from WLS to Subscriber upon shipment from the shipper's facility (F.O.B. Origin, freight collect). For all other shipments, title to products and risk of loss or damage during shipment passes from WLS to Subscriber upon receipt by Subscriber (F.O.B. Destination, freight prepaid and added). Notwithstanding the foregoing, title to software will remain with the applicable Vendor. WLS retains a security interest in Direct Purchases until payment in full is received.

5. WLS Services. Subscriber and WLS may separately agree, in writing, that WLS will provide certain services to Subscriber. Except as so agreed, WLS is not obligated to provide any services (including support, maintenance, updates, and other assistance) to Subscriber or anyone else concerning any Products.

6. Reservation of Rights. WLS (for itself and each Vendor) reserves all rights, title and interest in the Products that are not expressly granted under the respective Vendor Agreements to Subscriber. Neither WLS nor any Vendor, directly or by implication, by estoppel or otherwise, grants any other rights or license to Subscriber under this Agreement.

7. Representations and Warranties.

7.1 Mutual Warranties. Each party represents and warrants to the other party that: (a) it has the power and authority to enter into this Agreement and is permitted by applicable law and regulations to enter into this Agreement, (b) it will comply with all applicable laws with respect to this Agreement, including any federal and state rules regarding student records, privacy, and the commercial use of student information, (e.g., the Family Educational Rights and Privacy Act (20 U.S.C. § 1232g) and its associated implementing regulations (collectively "FERPA")); and (iii) it is not subject to any other agreement that would conflict with its ability to perform its obligations under this Agreement.

7.2 WLS Warranties. WLS represents and warrants that: (a) it has complied with its statutory requirements under Washington law regarding notice for bids or proposals for the Products; (b) it either posted the bid or solicitation notice on a web site established and maintained by a public agency, purchasing cooperative, or similar service provider, for purposes of posting public notice of bid or proposal solicitations, or has provided an access link to the notice on the State of Washington's web portal; and (c) the bid documents specified that the bid would be posted on WLS' web site, and WLS has maintained copies of the web posting and has records of the dates that it was posted on the web site. Further, WLS agrees to pass through to Subscriber any warranties that WLS is given by any Vendor with respect to any of that Vendor's Products obtained by Subscriber pursuant to this Agreement, but that pass-through will be effective: (x) only upon payment by Subscriber for the respective Product; and (y) only to the extent it is permitted by applicable law and by the respective Vendor Agreement.

7.3 Subscriber Warranties. Subscriber represents and warrants that: (a) the information in the Subscriber Information Form it submits to WLS is accurate; and (b) it is responsible for compliance with any additional or varying laws and regulations governing purchase by Subscriber or on its behalf.

7.4 WARRANTY DISCLAIMERS. EXCEPT AS SET FORTH IN SECTIONS 7.1-7.2, WITH RESPECT TO SUBSCRIBER AND ALL OTHER PERSONS OF EVERY NATURE WHATSOEVER, WLS DISCLAIMS ALL WARRANTIES, EXPRESS, IMPLIED, AND STATUTORY, INCLUDING ANY IMPLIED WARRANTIES OR CONDITIONS OF MERCHANTABILITY, FITNESS FOR A PARTICULAR PURPOSE, OF REASONABLE CARE OR WORKMANLIKE EFFORT, RESULTS, LACK OF NEGLIGENCE, LACK OF VIRUSES, OR ACCURACY OR COMPLETENESS OF RESPONSES. THERE IS NO WARRANTY OF TITLE, QUIET ENJOYMENT, QUIET POSSESSION, CORRESPONDENCE TO DESCRIPTION, AUTHORITY, OR NONINFRINGEMENT WITH RESPECT TO THE PRODUCTS, ANY SERVICES PROVIDED BY WLS, ANY DIRECT PURCHASES, OR ANY

OTHER INFORMATION OR MATERIALS EXCHANGED BETWEEN THE PARTIES. WLS MAKES THIS DISCLAIMER ON BEHALF OF ITSELF AND ITS SUPPLIERS (INCLUDING VENDORS). HOWEVER, THIS SECTION 7.4 DOES NOT MODIFY ANY WARRANTY PROVIDED BY ANY VENDOR UNDER A VENDOR AGREEMENT.

SUBSCRIBER ACKNOWLEDGES AND AGREES THAT WLS IS NOT THE PROVIDER OF THE PRODUCTS, AND THAT VENDORS ARE THE ONLY PARTIES RESPONSIBLE FOR PROVIDING PRODUCTS TO SUBSCRIBER. IN CONNECTION WITH PRODUCTS, NO VENDOR IS AN AGENT OF WLS, AND WLS HAS NO OBLIGATION OR LIABILITY ARISING FROM ANY PRODUCTS PROVIDED BY OR ANY WARRANTY, IF ANY, MADE BY, SUCH VENDORS. SUBSCRIBER WILL LOOK SOLELY TO VENDORS FOR ANY LOSS, CLAIMS OR DAMAGES ARISING FROM OR RELATING TO THE PURCHASE OR PROVISION OF PRODUCTS.

WLS MAKES NO REPRESENTATION OR WARRANTY THAT THIS AGREEMENT COMPLIES WITH THE REQUIREMENTS OF THE STATUTES, REGULATIONS, POLICIES, OR RULES APPLICABLE TO SUBSCRIBER.

8. Indemnity. Subscriber will indemnify, hold harmless, and defend WLS and its successors, affiliates, and assigns, and all of their respective officers, directors, members, shareholders, agents, and employees from any and all Claims, except for those arising out of the sole negligence of the WLS. “**Claim**” means any action, cause of action, suit, proceeding, claim, or demand of any third party (and all resulting judgments, bona fide settlements, penalties, damages, losses, liabilities, costs, and expenses (including reasonable attorneys’ fees and costs)), which arises out of: (a) Subscriber’s breach of this Agreement, including Sections 3.2 and 7.3; (b) Subscriber’s infringement of any third party’s intellectual property rights, where such infringement is caused by Subscriber’s directly or indirectly exceeding the scope of any license granted with respect to any Product; and (c) personal injury or death or property damage caused by Subscriber’s use of the Products. WLS may, at its expense, employ separate counsel to monitor and participate in the defense of any Claim. WLS will provide Subscriber with reasonably prompt notice in writing of any Claim.

9. LIMITATION OF LIABILITY. NEITHER PARTY WILL BE LIABLE HEREUNDER FOR ANY INDIRECT, SPECIAL, INCIDENTAL OR CONSEQUENTIAL DAMAGES (INCLUDING LOST PROFITS) ARISING OUT OF OR IN CONNECTION WITH THIS AGREEMENT. NOTWITHSTANDING ANY OTHER PROVISION CONTAINED IN THIS AGREEMENT, WLS’ MAXIMUM AGGREGATE LIABILITY TO SUBSCRIBER FOR ANY AND ALL CLAIMS ARISING OUT OF OR IN CONNECTION WITH THIS AGREEMENT OR ITS TERMINATION, OR ANY SALE OR USE OF, OR SUPPLY OR FAILURE TO SUPPLY, ANY PRODUCTS, WHETHER SUCH LIABILITY ARISES FROM ANY CLAIM BASED UPON CONTRACT, WARRANTY, TORT, FAILURE OF ESSENTIAL PURPOSE, TRADE USAGE, OR OTHERWISE, WILL IN NO CASE EXCEED THE AGGREGATE AMOUNT ACTUALLY RECEIVED BY WLS AS A RESULT OF SUBSCRIBER’S PURCHASES UNDER THE PROGRAM AS OF THE DATE OF SUCH CLAIM. THE LIMITATIONS OF THIS SECTION 9 ARE APPLICABLE NOTWITHSTANDING ANY FAILURE OF ESSENTIAL PURPOSE, REGARDLESS OF THE FORM OR CAUSE OF ACTION OR THE ALLEGED BASIS OF THE CLAIM, AND EVEN IF WLS HAD BEEN ADVISED OF THE POSSIBILITY OF SUCH DAMAGES.

10. Term and Termination.

10.1 Term. This Agreement becomes effective as of the Effective Date and will continue in effect until one year after the Effective Date, (“**Initial Term**”). This Agreement will automatically extend for successive additional periods of one year thereafter (each, a “**Renewal Term**”), unless (a) either party provides the other with written notice of non-renewal at least 30 days before the end of the then-current Initial Term or Renewal Term (as applicable); or (b) the Agreement is earlier terminated as provided herein.

10.2 Termination. Either party may terminate this Agreement for convenience upon 30 days’ prior written notice. In addition, either party may terminate this Agreement immediately upon written notice

at any time if the other party is dissolved, or if the other party is in material breach of any material term of this Agreement and has failed to cure that breach within 30 days after written notice, or experiences any of the following events: (a) that other party, and/or its parent company or guarantor, becomes insolvent or is unable to pay its debts as they mature, or makes an assignment for the benefit of creditors; (b) a petition under any foreign, state or United States federal bankruptcy act, receivership statute, or the like, as they now exist, or as they may be amended, is filed by that other party; or (c) such a petition is filed by any third party with regard to that other party, or an involuntary petition is not resolved favorably to such other party within 90 days after the petition is filed.

10.3 Effect of Termination; Survival. Upon termination of this Agreement, Subscriber will pay all amounts incurred before the effective termination date. Sections 1, 2.7, 2.8 (last sentence), 6, 7.4, 8, 9, 10.3, and 11 will survive any termination of this Agreement, and with respect to orders made and amounts incurred before that termination date Sections 2.5, 3, 4, and 7.1-7.3 will survive any termination of this Agreement.

11. Miscellaneous.

11.1 Filing. Following its execution of this Agreement below, WLS will file a copy of this Agreement with the County Auditor's Office in the respective counties of each of the parties, or list this Agreement by subject on its web site or other electronically retrievable public source.

11.2 Notices. All notices under this Agreement will be: (a) personally delivered, or (b) sent by registered or certified mail, return receipt requested. Notices under this Section 11.2 will be effective when they are received, and will be sent to Subscriber at the address listed in the Subscriber Information Form, or to WLS at its mailing address listed on WLS' web site.

11.3 Governing Law; Disputes. This Agreement will be governed by and construed in accordance with the laws of the State of Washington. Any dispute arising under, in connection with, or incident to this Agreement will be resolved exclusively in the state or federal courts located in King County, Washington. In any action to enforce any right or remedy under this Agreement or to interpret any provision of this Agreement, the prevailing party will be entitled to recover its costs, including attorneys' fees.

11.4 Independent Parties; No New Entity; No Third Party Beneficiaries. Each party reserves the right to contract with others for the purchase or disposal of any particular class of goods or services, with or without notice being given to the other party. WLS and Subscriber are independent contractors under this Agreement, and nothing in this Agreement creates a partnership, joint venture, franchise, employment, or agency or fiduciary relationship between WLS and Subscriber. Nothing in this Agreement creates any new or separate legal entity for the performance of this Agreement. Instead, the boards or other governing body of both parties will jointly administer this Agreement. Each party disclaims any intent that any obligations under this Agreement benefit or can be relied upon in whole or in part by any third party.

11.5 Assignment; Waiver. Neither party may assign this Agreement, in whole or in part, without the other party's prior written consent. No waiver of any breach of any provision of this Agreement will constitute a waiver of any other breach of the same or any other provision, and no waiver will be effective unless made in writing and signed by an authorized representative of the waiving party.

11.6 Manner of Acquiring, Holding, and Disposing of Property. Subscriber will be solely responsible for acquiring the Products, and all such Products will be held in Subscriber's name. Subscriber will purchase Products under this Agreement by submitting its purchase orders to the respective Vendors, directing each such Vendor to furnish the particular Products specified by Subscriber. Subscriber will also have primary responsibility for disposing of such property for the duration of this Agreement and upon termination of this Agreement.

11.7 Manner of Financing; Budget. The manner of financing the Products purchased under this Agreement will be through budgeted funds or other available funds of Subscriber purchasing the Products.

Subscriber will be responsible for all budget and accounting procedures related to its purchases under this Agreement.

11.8 Intellectual Property Protection. WLS respects the intellectual property rights of others, and it asks that Subscriber do the same. Anyone who believes that their work has been included in WLS' web site in a way that constitutes copyright infringement may notify WLS' copyright agent by providing the following information:

- Identification of the copyrighted work that that person claims has been infringed;
- Identification of the material that that person claims is infringing and needs to be removed, including a description of where it is located in the Music Archive;
- That person's address, telephone number, and, if available, e-mail address, so that WLS can contact that person about the complaint; and
- A signed statement that the above information is accurate; that that person has a good faith belief that the identified use of the material is not authorized by the copyright owner, its agent, or the law; and, under penalty of perjury, that that person is the copyright owner or is authorized to act on the copyright owner's behalf in this situation.

This is the address for sending notices of copyright infringement to WLS:

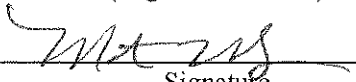
Washington Learning Source
Puget Sound Educational Service District No. 121
800 Oakesdale Ave SW
Renton, WA 98057

11.9 Construction. If a court of competent jurisdiction finds any provision of this Agreement to be illegal, invalid, or unenforceable in whole or in part, that provision will be enforced to the maximum extent permissible so as to effect the parties' intent, and the remainder of this Agreement will continue in full force. This Agreement will be interpreted in accordance with its terms, without any strict construction in favor of or against either party. Any list of examples following terms such as "including" or "e.g." is illustrative and not exhaustive, unless expressly qualified by terms such as "only" or "solely." All captions in this Agreement are intended solely for the convenience of the parties, and none will affect the meaning or construction of any provision.

11.10 Entire Agreement. This Agreement and any attachments constitute the entire agreement between WLS and Subscriber with respect to the Program and the Products, and it supersedes all prior and contemporaneous communications and proposals between WLS and Subscriber with respect to that subject matter. In the event of conflicting terms, the WLS terms will prevail. Additional or different terms and conditions contained in any Subscriber purchase order will be null and void. **This Agreement has been approved by the governing bodies of the parties by resolution, motion, or other action necessary to approve this Agreement.** This Agreement may be amended or modified by mutual agreement of the parties. Any amendment or modification will be in writing, signed, and duly approved by the boards or other governing body or authority of both parties. This Agreement may be executed in counterparts and will be binding on both parties as if all signatures were affixed to a single Agreement. An electronic facsimile of this Agreement bearing the authorized signature of any party will have the same force and effect as a copy bearing an original signature.

IN WITNESS WHEREOF, the parties have executed Agreement as of the dates shown below:

Washington Learning Source
(Puget Sound ESD)



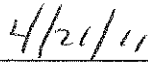
Signature



Printed Name



Title



Date

Subscriber School District



Signature

Suellen White

Printed Name

Superintendent

Title

April 14, 2011

Date

Send the **original** signed form to:

Angela Bolam
Washington Learning Source
Puget Sound ESD
800 Oakesdale Ave. SW
Renton, WA 98057