Amended and Restated Agreement of Wichita Public Schools, USD 259 and TOP Early Learning Centers

This Agreement is made and entered into on this 14 day of ~~March~~ May, 2021, by and between TOP School–North Charitable Foundation, dba TOP Early Learning Centers, by Barry L. Downing as Trustee (the "Foundation"), and Unified School District No. 259, Sedgwick County, Kansas, a school district organized and existing under the laws of the State of Kansas (the "District").

Recitals

The Foundation operates at two separate locations a project known as The Opportunity Project (the "Project") that provides a structured environment for pre-kindergarten children. District pre-kindergarten children have attended the Project at both locations in the past. The District desires to continue to have some of its pre-kindergarten children attend the Project. The Foundation and the District have previously entered into an Agreement dated August 23, 2005 (the "Original Agreement"), and Addenda Nos. 1, 2, 3, 4, 5 and 6 to the Original Agreement. This Amended and Restated Agreement ("Agreement") supersedes and replaces the Original Agreement and its addenda, setting forth the current terms and conditions under which District pre-kindergarten children will attend the Project.

The Foundation and the District agree as follows:

1. **Students and Enrollment.**

1.1. **Students.** Subject to the terms and conditions set forth in the Agreement, the Foundation shall provide services as described in the Agreement to 120 pre-kindergarten four-year-olds who reside within District boundaries.

1.2. **Enrollment.** Prior to the start of school, the District shall exercise its discretion to provide the Foundation with a list of eligible students. The Foundation, from the list of eligible students, shall exercise its discretion to select, recruit and enroll as many as 120 students to attend and participate in the Foundation's pre-kindergarten four-year-olds program. As many as sixty (60) students shall be selected to attend at each of the two locations. On each September 20, the Foundation shall provide the District with the following information for each District student who is present at both of the Foundation locations on September 20:

- Name
- Address
- Telephone number
- Parent(s)/Guardian(s) name(s)
- Address of Foundation school where student is enrolled
- Number of hours enrolled

This same information shall be provided for District students who were not present on September 20 who are enrolled to attend a Foundation Project school. In the event that the total number of

students enrolled to receive services from the Foundation under this section is less than 120, then the Foundation may elect to terminate this Agreement as provided herein.

2. **Term.** This Agreement shall start on August 1, 2021 and shall end on July 31, 2023, subject to earlier termination in accordance with the terms of this Agreement.

3. **Performance and Delivery of Services.**

3.1. **Performance Criteria.** The Foundation shall be responsible for and accountable to the Superintendent of the District (the "Superintendent"), the District and the Board of Education of the District (the "Board") for performance of the duties and obligations of the Project in accordance with terms and conditions contained in this Agreement, including, but not limited to, the following:

3.1.a. using fiscal control and fund accounting procedures to ensure the proper disbursement; compliance with state and federal laws, rules, and regulations, with District policies and rules, and with applicable grant requirements as to use of funds the Foundation receives from the District on behalf of each child served by the Foundation under this Agreement;

3.1.b. the submitting of reports as required by the State of Kansas, the District or others that assure that the District will be in compliance with federal and state laws, rules, and regulations and with grant or program funding requirements that pertain to the Project, and the Foundation further agrees to provide such information and afford access to the District and others in relation to compliance with federal and state laws, policies, regulations and grant requirements;

3.1.c. providing a physical setting that is safe and developmentally appropriate and meets federal, state and local requirements for providing services to enrollees;

3.1.d. all staff directly and primarily involved in the Project shall be qualified and shall hold appropriate certifications and licenses including, but not limited to, early childhood certification required for care or instruction of children under the Kansas Department of Health & Environment regulations, under appropriate Kansas State Board of Education regulations, and under any other applicable federal or state rules, regulations and laws;

3.1.e. maintaining the adult/child ratios that, based on current research findings and professional recommendations, are considered to be appropriate for providing services to the District's children who will participate in the Project; and,

3.1.f. the District and the Foundation acknowledge that the Foundation's facilities are not designated or staffed to meet the needs of all children, and thus, the District shall not assign, and the Foundation shall not be obligated to accept, children with needs which the Foundation's facilities and operations are not designated or staffed to serve. It is understood, however, that the Foundation's right to not accept children to participate in the Project does not include the right to exclude children in a way that causes the District to be in violation of the Individuals with Disabilities Education Act ("IDEA"), Section 504, the Americans with Disabilities Act ("ADA") or any other federal or state laws, rules or regulations.

3.2. **Obligation to Delivery of Services.** The Foundation shall, at the Foundation's sole expense and cost, pay for all expenses and costs of managing, operating, providing maintenance for the facilities and administering the Project. It is the intent of the parties that the District's only expense will be the per student consideration it pays under this Agreement. The payment of such costs and expenses by the Foundation shall include, but not be limited to, the following:

3.2.a. personnel functions and salaries and wages of employees of the Foundation;

3.2.b. maintenance and operations functions connected to the facilities and connected to providing all services to be provided under this Agreement;

3.2.c. business administration functions related to operating the Project and related to the Foundation;

3.2.d. janitorial services;

3.2.e. extracurricular activities and projects;

3.2.f. professional development for administrators and instructional personnel including, but not limited to, instruction and training related to qualifying administrators and instruction personnel to administer DIAL-4 assessments, work sampling and to teach a reading curriculum that has been approved by the District for its four-year-olds that shall be used as a method of instruction to District students who participate in the Project; and,

3.2.g. instructional materials, equipment, supplies, etc., used in providing services to be provided under this Agreement to District students.

3.3. **Additional Reports.** The Foundation shall cooperate with and prepare reports, etc., that the District is required to provide to federal, state, local or other entities pursuant to federal and state laws, rules, regulations and policies or grant requirements that are connected to services being provided to District children under this Agreement by the Foundation. Subject to all applicable legal requirements and as approved with written parental consents, the District shall exert best efforts to provide to Foundation K-12 educational outcomes data for TOP graduates attending schools in the District.

4. **Facilities.**

4.1. **Facilities.** The Foundation shall operate both of its facilities (the "Facilities," each a "Facility") appropriate with terms and conditions contained in this Agreement in order that District students who participate hereunder will, from a Facility standpoint, receive appropriate services.

4.2. **Regulations.** The Facilities shall comply with all policies, procedures, rules, regulations and laws of all federal, state and local agencies regarding the construction and operation of the Facilities, including, but not limited to (as applicable), ADA, Section 504, building

codes, zoning codes, fire codes, State of Kansas Department of Children & Families rules and regulations and any other group with authority and/or obligations to inspect and/or regulate private preschools in the State of Kansas.

5. **Financial Arrangements.**

5.1. **Project Cost.** The Foundation, in addition to all other obligations and duties assumed hereunder, shall, at no cost to the District, be responsible for payment of all costs incurred by the Foundation as a result of the operation of the Project, including, but not limited to, acquisition and construction of the Facility, compensation for all staff, employees, administrators, contractors, subcontractors, and/or all other personnel required for the operation of the Project, benefits for employees, curriculum materials, textbooks, attorney fees, library books, computers and other equipment, software supplies, federal, state and local taxes of any kind that are assessed or imposed, utilities (including City of Wichita storm water utility fees), janitorial services, food services, repairs to the Facility, maintenance of the Facility, and all other expenses and costs incurred by the Foundation in connection with the operation of the Project and the providing of services required to be provided in this Agreement.

5.2. **Fees.** Subject to Section 5.4, the District shall pay the Foundation as follows ("Fees"), subject to adjustment as provided in Section 5.3:

5.2.a. For services rendered for the 2021-22 school year, $4,706 per pre-kindergarten four-year-old student who receives five hours of instruction per day, not to exceed 40 students, not to exceed in total $188,240; and $2,353 per pre-kindergarten four-year-old student who receives not less than 2.5 hours of instruction per day, not to exceed 80 students, not to exceed in total $188,240.

5.2.b. For services rendered for the 2022-23 school year, $4,846 per pre-kindergarten four-year-old student who receives five hours of instruction per day, not to exceed 40 students, not to exceed in total $193,840; and $2,423 per pre-kindergarten four-year-old student who receives not less than 2.5 hours of instruction per day, not to exceed 80 students, not to exceed in total $193,840

5.3. **Adjustments.** The per-pupil compensation provided by Section 5.2 and/or the maximum number of students who the Foundation serves may be adjusted annually by the District, starting with the 2021-2022 budget year, should the Kansas Legislature pass laws changing the weighting in the school finance formula that affect the availability of funding sources used to pay the Foundation pursuant to this Agreement. The District will use its best efforts to notify the Foundation of any adjustment under this Section 5.3 not later than June 1. The Foundation acknowledges that meeting the June 1 deadline will not be possible if the State of Kansas does not complete the process of setting a school finance budget for an upcoming school year before June 1. If the District adjusts compensation pursuant to this Section 5.3, the Foundation may elect to terminate this Agreement as provided herein by providing notice of its decision to terminate to the District within fifteen (15) days after receipt of the District's notice of adjustment. Annual adjustments will become effective at the start of each upcoming school year.

5.4. **Payment.** The District shall pay the Foundation for services rendered on a monthly basis starting in October and ending in June of each year. Each monthly payment shall equal 1/9 of the annual amount due. Each monthly invoice from the Foundation shall contain a list of the names of enrolled students, the location of the Foundation Facility where the student is enrolled to attend, attendance report for the month for each enrolled student, and the date of enrollment if the student started attending a Foundation Facility during the month. Each monthly invoice shall be for services rendered in the previous month, e.g., the October invoice will be for services provided in September. The District shall pay the Foundation not later than 20 days after receiving a monthly invoice.

5.5. **Reimbursement for Audit Exceptions.** The Foundation shall cooperate with the District regarding providing information, records, etc., that relate to services provided by and payments made to the Foundation under this Agreement that the District receives from the Kansas State Department of Education or under any grant. Notwithstanding the above, the District shall be responsible for audit exceptions that arise from enrollment of students by the District.

6. **Additional Foundation Responsibilities.** Instruction shall be provided by the Foundation on a five day per week, Monday through Friday basis. In providing services to District students, the Foundation services shall be provided for a minimum of 173 days per year, commencing within 3 days before or after the date District students start attending District schools. At its sole discretion and subject to the Foundation obtaining funds from other sources, the Foundation may offer to District students who participate in the Project additional hours or weeks of instruction. Upon the mutual agreement of the District and the Foundation, the Project may make additional spaces available to District pre-kindergarten students.

7. **Personnel and Training.**

7.1 **Personnel.** The Foundation shall have the responsibility and the authority to determine staffing levels and to select, evaluate, assign, discipline and transfer personnel, subject to such staffing levels, etc., complying with all federal and state laws, rules, policies and regulations and to any grant requirements that apply. The Foundation shall provide training in its methods, curriculum project and technology to all personnel as may be needed on a regular and continuous basis to assure compliance with requirements in this Agreement, the grant requirements that fund the District's costs under this Agreement and with all federal and state laws, rules, policies and regulations. The Foundation shall provide training to its personnel in its method curriculum, project and technology to all personnel as may be needed to assure compliance with this Agreement, grant requirements, and with federal and state laws, rules, policies and regulations on a regular and continuous basis.

7.2. **Employee Salaries.** The Foundation shall pay the salaries, fringe benefits, FICA taxes and all withholding taxes for employees of the Foundation, and the Foundation shall otherwise be wholly and solely responsible for payment of any and all compensation benefits its employees are entitled to receive.

8. **Compliance with Federal Educational Rights and Privacy Act (FERPA).** The Foundation acknowledges that it has been advised that the District is subject to and must comply

with the Federal Educational Rights and Privacy Act ("FERPA"). The Foundation acknowledges and understands that in the course of providing services to the District under this Agreement individual student educational records will be disclosed to the Foundation and its employees. The Foundation agrees that it and its employees will comply with FERPA with regard to such educational records. Accordingly, the Foundation agrees that it and its employees will maintain strict confidentiality of information contained in student educational records, and will not disclose any such information to third parties unless specifically authorized by the District or the student's parent or legal guardian in writing.

9. **Warranties and Representations.**

9.1. **Representations of the District.** The District represents that it has the authority under state law to deliver and perform this Agreement and to incur the obligations provided for under this Agreement.

9.2 **Certification as to Pending Claims.** The District certifies as of the date of this Agreement that there are no pending (or, to the knowledge of the District, threatened or reasonably anticipated) actions, claims or suits against or affecting the District which, if adversely determined, would have a material adverse effect on the ability of the District to perform its obligations under this Agreement.

9.3. **Representations of the Foundation.** The Foundation represents and warrants that it has authority to enter into this Agreement and warrants that this Agreement constitutes a legal, valid and binding obligation of the Foundation in accordance with its terms and conditions.

9.4. **The Organization and Authority of the Foundation.** The Foundation represents and warrants that it has a trust duly organized and existing under the laws of the State of Kansas, and is duly authorized and qualified to do business in the state of Kansas with lawful power and authority to enter into this Agreement acting by and through its trustees.

9.5. **Maintenance of Existence.** The Foundation shall maintain and preserve its existence and organization as a trust and its authority to do business in the state of Kansas in the performance of its obligations and duties under this Agreement.

10. **Insurance and Indemnification.**

10.1. **Indemnification.** The Foundation agrees to indemnify, protect, defend and save the District harmless from and against any and all claims, demands, liabilities and costs, including attorney fees, arising from damage or injury, actual or claimed, of whatsoever kind or nature, to property or persons, occurring or allegedly occurring during the providing of services under this Agreement. Upon timely written notice from the District, the Foundation shall defend the District, its officers and employees in any action or proceeding brought thereon; provided, however, that nothing contained in this paragraph shall be construed as requiring the Foundation to indemnify the District, its officers and employees for any claim resulting from negligence or

willful misconduct of the District, its officers and employees. The right of indemnity provided by this paragraph shall survive the termination of this Agreement.

10.2. **Insurance.** The Foundation agrees to maintain liability insurance for bodily and personal injury, property damage, and errors, acts and omissions of the Foundation and its employees in an amount not less than the maximum liability of a governmental entity for claims arising out of a single occurrence, as provided by the Kansas Tort Claims Act (currently $500,000 per occurrence). This liability insurance coverage shall include coverage for transportation provided to students, as well as premises liability coverage. The Foundation further agrees to provide a certificate of insurance coverage naming the District as an additional insured on or before the effective date of this Agreement. The providing to the District of a certificate of insurance evidencing such insurance coverage shall be a condition precedent to the effectiveness of this Agreement.

10.3. **Workers' Compensation Insurance.** The Foundation shall secure and maintain at its own expense workers' compensation insurance that covers the Foundation employees and personnel while the employees and personnel are working on the Project. A certificate of insurance shall be provided to the District evidencing such workers' compensation insurance. The providing of such certificate of insurance coverage shall be a condition precedent to the effectiveness of this Agreement.

11. **Termination.**

11.1. **Cash Basis Law.** The right of the Foundation and the District to enter into this Agreement is subject to the provisions of the Cash Basis Law (K.S.A. 10-1112 and 10-1113) and the Budget Law (K.S.A. 79-2935) and other laws of the State of Kansas. The Agreement shall be construed and interpreted to ensure the Foundation and the District shall at all times be in conformity with such laws. It is a condition of the Agreement that the Foundation and the District reserve the right to unilaterally sever, modify, or terminate the Agreement at any time if, in the opinion of the District's legal counsel, the Agreement may be deemed to violate the terms of such laws. As of the Effective Date, the District does not intend to terminate as provided for under this Section 11.1.

11.2. **District Termination.**

11.2.a. In addition to any other termination rights expressly set forth elsewhere herein, the District may terminate this Agreement prior to the end of the term specified in Section 2 in the event that the Foundation fails to initiate corrective action of a material breach of this Agreement within 30 days after written notice from the District is sent to the Foundation that gives notice of a material breach, or, if such corrective action is initiated, but the material breach is not reasonably and satisfactorily corrected within a total of 60 days from the date written notice was first served on the Foundation. Absent extraordinary circumstances, the termination will not become effective until the end of the then-current school year (approximately May 31 annually). In the event of termination of this Agreement by reason of a breach, at the election of the District, the Foundation shall provide reasonable assistance to the District in transitioning Foundation students to District schools. The District shall compensate the Foundation in accordance with

Section 5 on an FTE per student basis for students that remain at a Foundation Facility, until May 31st of the year this Agreement is terminated for a material breach or through the last day a student attends a Foundation Facility, whichever date comes first.

11.3. **Foundation Termination.** In addition to any other terminations expressly set forth elsewhere herein, the Foundation may terminate this Agreement prior to the end of the term specified in Section 2 in the event that the District fails to initiate corrective action of a material breach of this Agreement within 30 days after written notice from the Foundation is sent to the District that gives notice of such material breach and if such corrective action is initiated the material breach is not reasonably and satisfactorily corrected within 90 days. Absent extraordinary circumstances, the termination will not become effective until the end of the then-current school year (approximately May 31 annually). The sole remedy of the Foundation for any breach of this Agreement by the District shall be the collection of all sums due or to become due as a result of work performed before termination.

11.4. **Termination by Either Party.** Either party to this Agreement may for elect to terminate the Agreement prior to the 2022-2023 school year by providing the other party notice of its intention to terminate no later than April 2, 2022. In such a case, the Agreement will terminate on June 1, 2022.

12. **Independent Contractor Status.** The parties to this Agreement intend that the Foundation's relationship with the District created by this Agreement is that of an independent contractor, and not as an employee. No officer, official, agent, employee, contractor, subcontractor or servant of the Foundation shall be deemed to be an officer, official, agent, employee, contractor, subcontractor or servant of the District. The District is interested only in the results obtained under this Agreement. The manner and means of conducting the work is under the sole discretion and control of the Foundation. The Foundation will be solely and entirely responsible for its acts and for the acts of the Foundation's agents, officers, employees, servants, officials, contractors and subcontractors during the term of this Agreement.

13. **Amendments.** This Agreement shall constitute the full and complete agreement between the parties hereto and may be altered, amended, changed or modified only by agreement in writing executed by the Foundation and approved by the Board and executed by the President of the Board.

14. **Invalidity of Provisions of this Agreement.** If, for any reasons, any provision hereof shall be determined to be invalid or unenforceable, the validity and effect of the other provisions hereof shall not be affected thereby.

15. **Section Headings and Recitals.** The section headings and recitals section of this Agreement shall not be treated as part of this Agreement or affect the meaning of the provisions hereof. The reference to section headings shall be deemed to refer to the numbers preceding each section.

16. **Assignment.** This Agreement shall not be assigned by either party without the prior written consent of the other party.

17. **No Waiver.** No waiver of any provision of this Agreement shall be deemed or shall constitute a waiver of any other provision, nor shall such waiver constitute a continuing waiver unless otherwise expressly stated.

18. **Survival.** All representations, warranties and indemnities made in this Agreement shall survive termination of this Agreement.

19. **Notices.** Any notice required by this Agreement shall be sent to the District addressed as follows:

Unified School District No. 259
ATTN: Mike Willome, Clerk of the Board
201 North Water
Wichita, Kansas 67202-1292

Any notice required by this Agreement shall be sent to the Foundation addressed as follows:

TOP School North, LC
Dba TOP Early Learning Centers
1625 N. Waterfront Parkway, Suite 100
Wichita, Kansas 67206

Notices under this Agreement shall not be effective unless the notice is in writing and has been sent postage prepaid by United States registered or certified mail, return receipt requested, directed to the other party at the above address. The address where notice shall be sent may be amended by written notice given from time to time in accordance herewith.

22. **Replacement.** This Agreement replaces the prior Agreement entered into on September 26, 2016, and the 2020 Addendum to Agreement entered into on November 11, 2020.

IN WITNESS WHEREOF, the parties hereto have entered into this Agreement as of the day and year first above written.

TOP SCHOOL NORTH, LC

By: Barry L Downing
Barry L. Downing, Trustee
Date signed: 5-3-21

ATTEST:

Cornelia Stevens, Executive Director
Date signed: 5/3/21

UNIFIED SCHOOL DISTRICT NO. 259
SEDGWICK COUNTY, KANSAS

By _____
Stan Reeser, President of the Board of Education
Date signed: _____

ATTEST:

By _____
Mike Willome, Clerk of the Board of Education
Date signed: _____