Montgomery County Schools

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TO: Board of Education

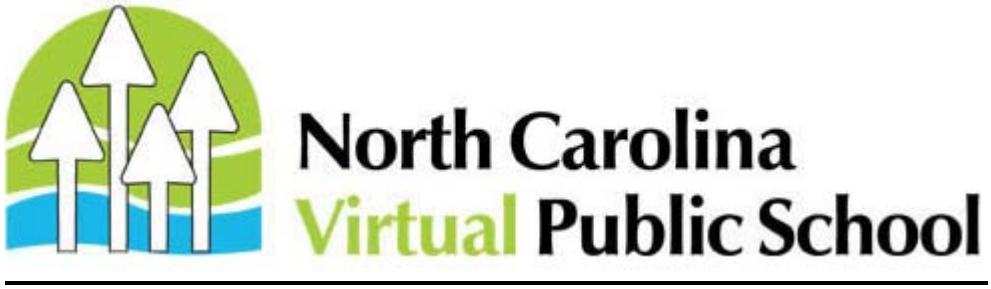
FROM: Phillip Brown

DATE: June 3, 2013

SUBJ: North Carolina Virtual Public Schools (NC VPS) - Consent Agenda Item

Enclosed is a copy of the 2013-2014 Content Exchange Agreement with North Carolina Virtual Public Schools for your review.

I will be available to answer questions as needed.



CONTENT EXCHANGE AGREEMENT

1. PARTIES. This Content Exchange Agreement ("**Agreement**") is entered into as of May 17, 2013 (the "**Effective Date**") by and between the North Carolina Virtual Public School ("**NCVPS**"), and Montgomery County, and NCVPS and Montgomery County agree as follows:

2. PURPOSE OF AGREEMENT. The primary purpose of this Agreement between NCVPS and Montgomery County is to provide and exchange digital learning content for the teachers and students of North Carolina.

3. ONE TO ONE EXCHANGE AGREEMENT NCVPS will provide 4 single semester course(s) and in return will receive the same revised single semester courses, should any modifications be made, from Montgomery County. As part of this exchange agreement, neither party shall owe or receive any monetary compensation in addition to or in lieu of the one to one course exchange.

4. PRODUCTS.

4.1 NCVPS. NCVPS will provide the following online courses to Montgomery County (the "**NCVPS Courses**"):

English 3

English 4

American History 1

American History 2

4.2 Montgomery County. Montgomery County will provide the following revised NCPVS online courses should any modification be made to the course to NCVPS (the "**Montgomery County Courses**"):

English 3

English 4

American History 1

American History 2

5. DELIVERY OF COURSES. NCVPS and Montgomery County shall work together, in a reasonable way, to facilitate and ensure the successful transfer of (i) the NCVPS Courses from NCVPS to Montgomery County prior to June 7, 2013 and (ii) the Montgomery County Courses from Montgomery County to NCVPS within [twenty one (21) calendar days after written request from NCVPS. All Courses will be transferred in their current form and state, as available on the Effective Date, and neither party shall be responsible to update or revise the Courses prior to their respective transfer or to provide

continued Course updates after the Effective Date. All written requests for exchange shall be made within one hundred eighty (180) days from the execution of this agreement.

6. USE OF COURSES

6.1 Montgomery County. Montgomery County may modify the NCVPS Courses to comply with and correspond to the Montgomery County's educational requirements. Montgomery County shall limit access, use, and **enrollment** of the NCVPS Courses to end-users (students and teachers) located within Montgomery County and may not sell, lend, rent, lease, or otherwise dispose of the NCVPS Courses, in their current form or any modified form, to any other third party.

6.2 NC Virtual Public School. NCVPS may modify the Montgomery County Courses to comply with and correspond to the State of North Carolina's educational requirements. NCVPS shall limit access and use of the Montgomery County Courses to end-users (students and teachers) located within North Carolina and may not sell, lend, rent, lease, or otherwise dispose of the Montgomery County Courses, in their current form or any modified form, to any other third party.

7. THIRD PARTY LICENSED CONTENT. The NCVPS Courses and Montgomery County Courses may contain "third-party" licensed content. After the Effective Date, each party assumes responsibility for any copyright issues or content licensing requirements within the respective Courses they have received as part of this Agreement and each party is required to pay and keep current any respective third party licenses, fees, or costs relating to the respective NCVPS Courses or Montgomery County Courses. In the event a party is in default of payment to a third party licensor, the party shall be required to (i) immediately cease and desist all use of the respective Course, (ii) return the Course (including all revisions and versions of the same) to the other party with five (5) days of notice by the non-breaching party, and (iii) immediately remit payment to the third-party licensor.

8. NO AUTHORITY TO BIND OTHER PARTY. The parties are independent businesses and do not have and will not have the power, right, or authority, express or implied, and will not represent to have any power, right or authority, to bind the other party or to assume or to create any obligation or responsibility, express or implied, on behalf of the other party. Nothing stated in this Agreement shall be construed as constituting the relationships of employer and employee, franchiser and franchisee, master and servant, principal and agent, partnership, or joint venture between the parties.

The terms and conditions set forth in this Agreement are intended for the sole use and benefit of NCVPS and Montgomery County. No third party or other entity may rely on these terms and conditions. Any failure of NCVPS or Montgomery County to follow any or all of these terms and conditions, or any future amendment or modification of these procedures, shall not establish any liability of NCVPS or Montgomery County to any third party or other entity.

9. TERM AND TERMINATION.

9.1 Term. The "Term" of this Agreement shall commence on the Effective Date and shall terminate upon the provision of the Courses described in Section 4.

9.2 Termination without Cause. Either party may terminate this Agreement at any time, with or without cause, upon thirty (30) calendar days' written notice to the other party specifying the date of termination. Upon termination, the parties shall: (i) promptly discontinue all work, unless the termination notice directs otherwise; (ii) promptly return to the other party any property provided by the other party pursuant to the Agreement; and, (iii) make available to the other party all data, reports, estimates, summaries and such other information and materials as may have been accumulated in performing the Agreement, whether completed or in process. Notwithstanding termination, the parties shall remain obligated as otherwise set forth in this Agreement to the extent of costs or obligations to third parties incurred pursuant to the Agreement prior to the termination.

9.3 Termination upon Breach. Abandonment or breach of this agreement by either party may be grounds for immediate termination of this Agreement at the sole discretion of the other

party. Waiver of any breach by either party shall not be deemed a waiver of the requirements of the entire contract. If at any time during the performance of this Agreement, in the opinion of either party, the work is not progressing satisfactorily or within the terms of the Agreement, then at the discretion of the either party and after written notice, either party may terminate this Agreement or any parts thereof.

10. INTELLECTUAL PROPERTY PROTECTION.

10.1 **NCVPS**. NCVPS has all rights in and to all patents, copyrights, trademarks, trade secrets or other proprietary rights associated with the NCVPS Courses. The NCVPS Courses do not infringe upon or violate any patent, copyright, trade secret, trade name, trademark or any other proprietary right of any third party. If any written claim of infringement is made by any third party against Montgomery County, Montgomery County shall promptly notify NCVPS, and NCVPS shall defend against the claim. Should a NCVPS Course become, or in NCVPS's opinion is likely to become the subject of any claim of infringement, NCVPS shall (i) procure the right for Montgomery County to continue to use and distribute the NCPVS Course to end-users located in Montgomery County, (ii) replace or modify the North Carolina Course to make it non-infringing, or (iii) return the payment made by Montgomery County to NCVPS with respect to the NCVPS Courses.

10.2 **Montgomery County**. Montgomery County has all rights in and to all patents, copyrights, trademarks, trade secrets or other proprietary rights associated with the Montgomery County Courses. The Montgomery County Courses do not infringe upon or violate any patent, copyright, trade secret, trade name, trademark or any other proprietary right of any third party. If any written claim of infringement is made by any third party against NCVPS, NCVPS shall promptly notify Montgomery County, and Montgomery County shall defend against the claim. Should a Montgomery County Course become, or in Montgomery County's opinion is likely to become the subject of any claim of infringement, Montgomery County shall (i) procure the right for NCVPS to continue to use and distribute the Montgomery County Course to end-users located in North Carolina or (ii) replace or modify the Montgomery County Course to make it non-infringing.

11. **CONFIDENTIALITY**. Except for any disclosure required by law, each party agrees to retain all confidential information received from the other party in confidence, not to disclose any such information to any other person, and not to use any such information for its own benefit, to the other party's detriment or for any purpose other than in furtherance of this Agreement. All information which either party and any of its agents receives at any time from the other party or any of its agents shall be deemed confidential and subject to the provisions of this Section 12, whether the information shall be received orally, in writing, visually, by inspection of documents, products or processes, by electronic transmission, or in any other form or manner, excepting only information which the recipient establishes was generally available to the public at the time of disclosure or subsequently became generally available to the public other than as a result, directly or indirectly, of disclosure by the recipient or its agents. Information shall be confidential and shall be subject to this Section 12 whether or not it is marked or designated "confidential" at the time of disclosure. Notwithstanding the provisions above, the recipient may disclose confidential information to its agents only to the limited extent necessary to carry out this Agreement and maintain the business relationship. The recipient shall be fully responsible for any use or disclosure of confidential information by any of its agents in violation of this Section 12.

12. **LIMITED WARRANTY**.

12.1 The (i) courses provided under this agreement are provided "as is and where as with all defects " and (ii) NCVPS and Montgomery County, with respect to the courses, each disclaim any and all warranties of any kind, either express or implied, including without limitation, implied warranties of merchantability and fitness for a particular purpose, title, non-infringement, course of dealing, or course of trade.

12.2 NCVPS and Montgomery County, respectively, do not warrant that the NCVPS courses or Montgomery County courses, respectively, provided under this agreement will operate error free, or in an uninterrupted fashion, or that any defects or errors in the NCVPS courses or Montgomery

County courses will be corrected, or that the NCVPS courses or Montgomery County courses are compatible with any particular operating system**.**

12.3 There are no warranties that extend beyond the description on the face of this limited warranty.

13. Limitation of liability

13.1 For any breach or default by either party of any of the provisions of this agreement, or respect to any claim arising wherefrom or related hereto, each parties' entire liability, regardless of the form of action, whether based on contact or tort, including negligence, shall in no event exceed with respect to all claims under or related to this agreement, the amount paid under this agreement**.**

13.2 In no event will either party be liable for special, incidental, indirect, or consequential loss or damage, lost business revenue, loss of profits, loss of data, failure to realize expected profits or savings or any claim by another person**.** The provisions of this section 14 shall survive expiration or termination of this agreement.

14. INDEMNIFICATION.

14.1 NCVPS's Indemnification. NCVPS agrees to defend, indemnify, and hold harmless Montgomery County from and against any and all damages, expenses, costs, claims, judgments and liabilities including, without limitation, reasonable attorney's fees, incurred by Montgomery County (unless caused by the negligence or wrongful acts or omissions of Montgomery County) arising from or in connection with any negligent or wrongful act or omission by NCVPS with respect to the provision of the NCVPS Courses.

14.2 Montgomery County's Indemnification. Montgomery County agrees to defend, indemnify, and hold harmless NCVPS from and against any and all damages, expenses, costs, claims, judgments and liabilities including, without limitation, reasonable attorney's fees, incurred by NCVPS (unless caused by the negligence or wrongful acts or omissions of Montgomery County) arising from or in connection with any negligent or wrongful act or omission by NCVPS with respect to the provision of the Montgomery County Courses.

15. DISCRIMINATION. The Parties hereby agree that no person shall, on the basis of race, color, creed, national origin or gender, be excluded from or denied participation in or otherwise subjected to discrimination in relation to any activity associated with this Agreement.

16. SUFFICIENT FUNDING. The parties understand and agree that NCVPS is a governmental entity and this Agreement shall in no way or manner be construed so as to bind or obligate the State of North Carolina beyond the term of any particular appropriation of funds by the State Legislature as may exist from time to time. NCVPS reserves the right to terminate this Agreement, in whole or in part, if in NCVPS's sole judgment, the Legislature of the State of North Carolina fails, neglects, or refuses to appropriate sufficient funds as may be required under this Agreement. Any such termination shall take effect on ten (10) days notice to Montgomery County by NCVPS and be otherwise effective as provided in this Agreement.

17. INTERPRETATIONS.

17.1 Agreement Residency. It is agreed between the parties hereto that the place of this agreement, its situs and forum, will be Wake County, North Carolina, and in said county and state will all matters, whether sounding in contract or tort relating to the validity, construction, interpretation and enforcement of this agreement, be determined. North Carolina law will govern the interpretation and construction of this agreement.

17.2 Attorneys' Fees. Should any party employ an attorney for the purpose of enforcing this Agreement, the prevailing party shall receive its reasonable attorneys' fees and costs.

17.3 Assignment. The parties respective obligations and duties as set forth herein are to be performed by the parties and may not be assigned or subcontracted by either party without the written consent of the other party.

17.4 Failure or Omissions. No delay or failure by either party to exercise any right under this Agreement, and no partial or single exercise of that right, shall constitute a waiver of that or any other right, unless otherwise expressly provided in this Agreement.

17.5 Severability. If any part of this Agreement shall be determined to be invalid, illegal or unenforceable, or declared null and void by any court of competent jurisdiction, then such part shall be reformed, if possible, to conform to the law and, in any event, the remaining parts of this Agreement shall be fully effective and operative insofar as reasonably possible.

17.6 Compliance with Laws and Regulations. Each party shall be and shall remain in compliance with all applicable federal, state and local laws and mandatory regulations in performance of its obligations pursuant to this Agreement.

17.7 Dispute. If a dispute arises between the parties regarding their rights or obligations under this Agreement, the parties shall first attempt to settle the dispute by direct discussions. If the dispute cannot be settled by the parties by direct discussions, then the parties agree to endeavor to settle the dispute in an amicable manner by mediation administered by the American Arbitration Association under its Commercial Mediation Rules. Thereafter, any unresolved dispute arising from or relating to this Agreement or a breach of this Agreement shall be resolved as provided by this Agreement and by law.

17.8 Resolution of Certain Claims—Injunctive Relief. Section 18.7 shall have no application to claims by either party asserting a violation of Section 7 or Section 8 or seeking to enforce, by injunction or otherwise, the terms of Section 7 or Section 8. Such claims may be maintained by either party in a lawsuit subject to the terms of this Section 18.8. Each party acknowledges that it would be difficult to fully compensate the other party for damages resulting from any breach by the party of Section 7 or Section 8 of this Agreement. Accordingly, the breaching party agrees that, in addition to, but not to the exclusion of any other available remedy, the non-breaching party shall have the right to enforce the provisions of Section 7 or Section 8 by applying for and obtaining temporary and permanent restraining orders or injunctions from a court of competent jurisdiction without the necessity of filing a bond therefore and without the necessity of proving actual damages, and the non-breaching party shall be entitled to recover from the breaching party its reasonable attorneys' fees and costs in enforcing the provisions of Section 7 or Section 8.

17.9 Force Majeure. The obligations of either party to perform under this Agreement will be excused during each period of delay caused by acts of God, or by shortages of power or materials, or government orders which are beyond the reasonable control of the party obligated to perform ("**Force Majeure Event**"). In the event that either party ceases to perform its obligations under this Agreement due to the occurrence of a Force Majeure Event, such party shall: (i) immediately notify the other party in writing of such Force Majeure Event and its expected duration, and (ii) take all reasonable steps to recommence performance of its obligations under this Agreement as soon as possible. In the event that any Force Majeure Event delays a party's performance for more than ninety (90) days following notice by such party pursuant to this Agreement, the other party may terminate this Agreement immediately upon written notice to such party.

17.10 Notice. All notices and other communications ("**Notices**") shall be in writing and may be delivered (i) in person, with the date of notice being the date of personal delivery, (ii) by United States Mail, with the date of notice being the date of the postmark on the return receipt, (iii) by fax, with confirmation of the transmittal of the fax and a copy of the fax deposited on the same day in the United States Mail, with the date of notice being the date of the fax, (iv) by e-mail, with confirmation of sending of the e-mail and a copy of the e-mail deposited on the same day in the United States Mail, with the date of notice being the date of the e-mail, (v) by nationally recognized delivery service such as Federal Express, with the date of notice being the date of delivery as shown on the confirmation provided by the delivery

service. Notices shall be addressed to the following addresses, or such other address as one party shall provide the other parties:

If to Montgomery County:	Montgomery County <insert address> <insert City, State, Zip>
If to NCVPS:	NC Virtual Public School 1017 Main Campus Drive Partners I Building, Suite 3900 Raleigh, North Carolina 27606

17.11 Entire Agreement. This Agreement constitutes the entire agreement between the parties, and supersede all prior oral and written agreements and understandings between the parties.

18. SIGNATURES.

NC Virtual Public School

_____

Executive Director Date

Montgomery County

_____

Authorized Montgomery County Signature Date