EXHIBIT D

STATE OF SOUTH DAKOTA

CONFIDENTIALITY EXHIBIT

1. The State agrees not to permit unauthorized access to, and to take reasonable steps to protect, the confidentiality of the Consultant’s information, marked “confidential,” “proprietary,” or with a similar legend indicating its sensitive nature. The State agrees to treat as confidential information all Consultant techniques, processes, methods, and know-how observed at the State’s facilities. Except as otherwise provided in this Agreement, the State acknowledges that all processes and materials used or furnished by Consultant pursuant to this Agreement have been developed at great expense to Consultant, contain trade secrets of Consultant, are the sole property of Consultant and shall be kept confidential. These obligations of the State shall not apply to any portion of the confidential information: (i) which was rightfully known or becomes rightfully known to the State without confidential restrictions from a source other than the Consultant; (ii) which was or becomes publicly available or a matter of public knowledge generally, through no fault of the State; (iii) which is approved by the Consultant, in writing, for disclosure without restrictions; (iv) which is independently developed by the State; (v) which is generalized know-how or skills; (vi) which is a public record as defined by South Dakota Codified Law Chapter 1-27; or (vii) which the State is otherwise legally compelled to disclose, provided that the State has given the Consultant reasonable notice and opportunity to contest such compulsive disclosure, and the Consultant requests that the information be treated as confidential. Consultant acknowledges that the State and its agencies are public entities and thus are bound by South Dakota open meetings and open records laws. It is not a breach of this Agreement for the State to take any action that the State reasonably believes is necessary to comply with open records or open meetings laws. Consultant acknowledges that this Agreement, including all exhibits, is an open record under South Dakota law. SDCL §§ 1-27-1.5, 1-27-1.6, and 5-18D-20.
2. For purposes of this Agreement, “State Proprietary Information” shall include all information disclosed to Consultant by the State or its End Users. “End User(s)” shall include employees, faculty, staff, schools, libraries, students, and parents affiliated with the State and thereby authorized to use the service as herein provided. Consultant acknowledges that it shall have a duty to not disclose any State Proprietary Information to any third person for any reason without the express written permission of a State officer or employee with authority to authorize the disclosure. Consultant shall not: (i) disclose any State Proprietary Information to any third person unless otherwise specifically allowed under this Agreement; (ii) make any use of State Proprietary Information except to exercise rights and perform obligations under this contract; (iii) make State Proprietary Information available to any of its employees, officers, agents, or subcontractors except those who have agreed to obligations of confidentiality at least as strict as those set out in this Agreement and who have a need to know such information. Consultant is held to the same standard of care in guarding State Proprietary Information as it applies to its own confidential or proprietary information and materials of a similar nature, and no less than holding State Proprietary Information in the strictest confidence. Consultant shall protect confidentiality of the State’s information from the time of receipt to the time that such information is either returned to the State or destroyed to the extent that it cannot be recalled or reproduced. Consultant agrees to return or destroy all information received from the State to State’s custody upon the end of the term of this Agreement or when no longer needed to perform its duties under this Agreement, whichever is first. Consultant will provide the State with affidavits to this effect upon request of the State.

State Proprietary Information shall not include information that: (i) was in the public domain at the time it was disclosed to Consultant; (ii) was known to Consultant without restriction at the time of disclosure from the State; (iii) that is disclosed by Consultant with the prior written approval of State’s officers or employees having authority to disclose such information; (iv) was independently developed by Consultant without the benefit or influence of the State’s information; or (v) becomes known to Consultant without restriction from a source not connected to the State or its End Users.

State’s Proprietary Information shall include but not be limited to: (i) names, social security numbers, employer numbers, addresses, and all other data about applicants, employers or other clients to whom the State provides services of any kind; and (ii) personally identifiable student information as defined in 34 C.F.R. § 99.3. Consultant understands that this information is confidential and protected under state and federal law and agrees to immediately notify the State if the information is disclosed, either intentionally or inadvertently. If work assignments performed in the course of this Agreement require additional security requirements or clearance, the Consultant will be required to undergo investigation.

1. For purposes of the Family Educational Rights and Privacy Act (“FERPA”), State designates Consultant an “authorized representative” pursuant to 20 U.S.C. 1232g(b)(1)(C) and 34 C.F.R. 99.31(a)(3). Consultant shall also be considered a “school official” with legitimate educational interests pursuant to 20 U.S.C. 1232g(b)(1)(A) and 34 C.F.R. 99.31(a)(1)(i)(B). Consultant and the State shall comply with the provisions of FERPA in all respects. Nothing in this Agreement may be construed to allow either party to maintain, use, disclose or share personally identifiable student information in a manner not allowed by state or federal law or regulation.

The types of personally identifiable information which may be necessary to disclose to Consultant under this Agreement may include: Student Benchmark Data, Student Progress Monitoring Data, Statewide English Language Arts Assessment Data, Student Attendance Data. No other personally identifiable information will be disclosed to Consultant under this Agreement.

1. Any State Proprietary Information disclosed to Consultant will further the legitimate educational interests of the State as described elsewhere in the Agreement. State Proprietary Information will be used only as necessary to: (a) further these legitimate educational interests; (b) carry out an audit or evaluation of Federal- or State-supported education programs; or (c) enforce or comply with legal requirements that relate to those programs. By disclosing this information to Consultant, the State is in no way assigning ownership of this information to Consultant.

1. For purposes of this Agreement, "disclose" or "disclosure" means to permit access to or the release, transfer, or other communication of State Proprietary Information contained in education records by any means, including oral, written, or electronic means, to any party except the party identified as the party that provided or created the record. Consultant may only use State Proprietary Information for purposes of fulfilling its duties under this Agreement. Consultant will abide by the security standards of this Agreement to protect this information in such a manner that it will be disclosed only to Consultant staff whose duties under this Agreement specifically require them to have access to this information. Under no circumstances shall Consultant disclose State Proprietary Information to any other person. Under no circumstances shall Consultant disclose any other information to any other person which would allow individual students to be directly or indirectly identified.
2. All Consultant employees, officers, and agents with access to the State Proprietary Information must acknowledge that they are aware of and will abide by the provisions of this Confidentiality Exhibit. Consultant agrees to remove any person from performing work who has, or is suspected to have, violated the terms of this Confidentiality Exhibit. All persons receiving State Proprietary Information must acknowledge in writing that they have received and will abide by the provisions of this Confidentiality Exhibit by signing the certification below.

1. The parties will enforce the terms of this Confidentiality Exhibit to its fullest extent. The parties agree to remove any person from performing work under this Agreement that has or is suspected to have violated the terms of this Confidentiality Exhibit.
2. Violation of this Confidentiality Exhibit is cause for immediate termination of this Agreement and could subject any violator to criminal prosecution in accordance with state law. No remedy conferred by any of the specific provisions of this Confidentiality Exhibit is intended to be exclusive of any other remedy, and each and every remedy may be cumulative and may be in addition to every other remedy given under this Agreement, now and hereafter existing at law or in equity or by statue or otherwise. The election of any one or more remedies by either party shall not constitute a waiver of the right to pursue other available remedies.
3. Neither this Confidentiality Exhibit, nor any part thereof, shall establish any privacy rights to, for or on the part of, any employee of the Consultant, the State or its End Users, or any third party, or waive any remedies against any such person for illegal, improper, or unauthorized use of confidential information.
4. CERTIFICATION: I, \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_, have read this Confidentiality Exhibit and agree to abide by its terms.

\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

Recipient Signature (Date)

Certification of additional parties’ agreement to abide by this Confidentiality Exhibit between Consultant and the South Dakota Department of Education.

As a Consultant employee, I have read and understood this Confidentiality Exhibit and will abide by its terms and conditions.

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| Employee | Signature | Date |
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