

Course InSite® Application Service Provider License Agreement

This Application Service Provider License Agreement ("Agreement") applies to the Course InSite® software and derivative works supplied by Avatar Technology, a Division of Alchemy Training Systems LP ("Avatar") whose principal place of business is 8015 Shoal Creek Blvd., Austin, TX. This Agreement is between Avatar and Gadsden Independent School District (NM) ("Client"), located at 4950 McNutt Rd. Sundland Park, NM 88063. Course InSite software and derivative works includes, without limitation, the creation, development or delivery of any code, algorithms, logic, design, procedures, internal databases, structure, or organization of any and all software and all prior versions of the software and all related user documentation and manuals (collectively, the "Avatar Software").

Up to 1000 Number of Users

Yes Module 1: Managing Workshops, Seminars, and other Learning Events

Yes Module 2: Managing Learning Plans, Portfolios, and Transcripts

No Module 3: Design, Delivery, & Management of web-based courses, modules, assessments, & certification.

\$7500 Annual License Fee based on number of users (software hosted on Avatar web servers)

1. Proprietary Rights

1.1 **Ownership of Intellectual Property.** All copies and partial copies of any part of the Avatar Software shall be the sole and exclusive property of Avatar and shall not be owned by Client. Client further acknowledges that all title and ownership rights in the Avatar Software and all prior versions thereof remain exclusively with Avatar, and no title or ownership rights are conveyed to Client in this Agreement or otherwise. Avatar reserves all rights with respect to the Avatar Software under all applicable laws for the protection thereof, including but not limited to laws relating to trade secrets, copyrights and patents. Client agrees to use its best efforts and take all reasonable steps to protect the Avatar Software from unauthorized use, reproduction or distribution.

1.2 **Modifications; Reverse Engineering.** Except as may be expressly authorized in writing by Avatar, Client will not modify any of the Avatar Software or attempt to reverse engineer, disassemble, or decompile any of the Avatar Software, translate, localize or create any derivative works, compilations, or collective works related thereto, or apply any process, technique or procedure to ascertain or derive the source code to the Avatar Software. If Avatar, in its sole discretion, elects to modify the Avatar Software, or permit Client to modify the Avatar Software, Client agrees that all modifications, alterations, and enhancements of the Avatar Software shall become the sole and exclusive property of Avatar, and Client shall have no right, title, or interest in or to the modifications.

1.3 **Transfers.** Under no circumstances shall Client sell, assign, license, sublicense, publish, display, distribute, or otherwise transfer to a third party the Avatar Software, or permit any third party to use or have access to the Avatar Software, or any copy thereof, in whole or in part, without Avatar's prior written consent.

1.4 **Trademarks.** Client acknowledges that it will acquire no rights in any trademarks, service marks, trade names or logos of the other party pursuant to this Agreement, as such marks are and shall remain the exclusive property Avatar. Except as otherwise provided in this Section 1, nothing contained in this Agreement shall be construed as conferring any right to use in advertising, publicity or other promotional activities any name, trade name, trademark, or other designation (including any contraction, abbreviation, or simulation of any of the foregoing) of Avatar without the express written approval of Avatar.

1.5 **Notification of Avatar.** If Client becomes aware of any act or threatened act by any of its officers, directors, employees, agents or representatives which is or would be in violation of any of the terms of this Agreement, including but not limited to, the use, disclosure, or copying of the Avatar Software or any portion thereof, Client shall notify Avatar immediately and, in cooperation with Avatar, shall take all steps necessary to remedy any actual or threatened noncompliance to the reasonable satisfaction of Avatar. This provision shall not in

remedy any actual or threatened noncompliance to the reasonable satisfaction of Avatar. This provision shall not in any way limit any of the remedies otherwise available to Avatar for breach of this Agreement, or limit Client's liability for failing to comply with the provisions of this Agreement.

1.6 **Survival.** The provisions of this Section 1 shall apply to the Avatar Software as delivered by Avatar or as modified or otherwise enhanced by either party and shall survive the termination or expiration of this Agreement.

2. Confidentiality

2.1 **Confidential Information.** Client agrees and acknowledges that it will be exposed to the Avatar Software and that the Avatar Software contains valuable trade secrets of Avatar embodying substantial creative efforts and confidential information, ideas and expressions ("Confidential Information"). Confidential Information does not include (a) any information generally known to the public, (b) information disclosed to the public by a third party who has no duty to keep such information confidential, (c) information known to Client prior to its entering into this Agreement or (d) information required to be disclosed by valid judicial process, provided that the Client promptly notifies Avatar of the requirement for such disclosure and cooperates, at Avatar's expense, with Avatar in seeking to prevent such disclosure.

2.2 **Non-Disclosure of Confidential Information.** Client agrees to hold the Confidential Information in strictest confidence and to take all reasonable precautions necessary to safeguard the confidentiality of such information. Without limiting the generality of the foregoing, Client agrees:

(a) Not to disclose or permit any other person or entity access to the Confidential Information, except that such disclosure or access shall be permitted to an employee, agent, representative or independent contractor of either party or that of an affiliate requiring access to the same in the course of his or her employment or services provided that such employee, agent, representative or independent contractor has previously entered into a written confidentiality Agreement including terms as least as restrictive as those contained herein;

(b) To ensure that its employees, agents, representatives and independent contractors are advised of the confidential nature of the Confidential Information, and are precluded from taking any action prohibited under this Section; and

(c) Not to alter or remove any identification, copyright or proprietary rights notice which indicates the ownership of any part of the Confidential Information.

Client agrees to notify all persons who will have access to any part of the Confidential Information of the restrictions on use, disclosure, and copying set forth in this Agreement. Client agrees to take appropriate action by instruction, agreement, or otherwise with all of its employees who will have access to any part of the Confidential Information to satisfy its obligations under this Agreement with respect to the security of the Confidential Information and the information contained therein, and the restrictions on the use, disclosure, and copying of the Confidential Information. Client shall not assert, directly or by implication, to any person, that it has any ownership interest whatsoever in the Confidential Information. Client acknowledges that any violation of this Section 2, including without limitation any unauthorized use of the Avatar Software by any person or entity who receives the Avatar Software in contravention of the terms of this Agreement, shall cause irreparable damage to Avatar, for which there would be no adequate remedy at law. In addition, Client acknowledges that damages resulting from such breach would be impossible to ascertain. Client therefore agrees that Avatar shall be entitled to obtain injunctive relief, without bond, if the provisions of this Section 2 are violated. The provisions of this Section 2 shall survive any cancellation or termination of this Agreement.

3. Term and Termination

3.1 **Term.** This Agreement will serve as a valid contractual document outlining the agreement between both Parties. The Agreement is valid for one (1) year from the date signed. The Agreement will

automatically renew on an annual basis unless otherwise specified by either party with at least a thirty (30) day written notice prior to the end of term.

3.2 Termination for Material Failure. In addition to the termination rights granted under Section 4.2, this Agreement and any license created hereunder may be terminated by either party by notice in writing, provided the basis for such termination is a material failure by the other party to perform its obligations under this Agreement and such material failure is not corrected within 30 days from the date such notice is received.

3.3 Termination by Avatar. Avatar reserves the right to terminate this Agreement immediately by written notice to Client (a) if Client (i) fails to timely make all payments due under this Agreement, (ii) breaches any of the restrictions on use or disclosure of the Confidential Information, (iii) is insolvent or unable to pay its debts as they become due, or (b) if voluntary or involuntary bankruptcy proceedings are instituted by or against Client, or a receiver or assignee for the benefit of creditors is appointed for Client.

3.4 Effect of Termination. The termination of this Agreement shall not prejudice the right of Avatar to recover any fees or other sums otherwise due it at the time of termination or cancellation.

3.5 Obligations Upon Termination. Upon termination of this Agreement or any license hereunder, Client shall promptly discontinue use of the affected Avatar Software and destroy or return all copies of the Avatar Software and all related documentation and materials in its possession or control to Avatar.

4. Warranty and Limitations of Liability

4.1 Limited Warranty. For a period of 1 year ("Warranty Period") after purchase, Avatar warrants that the Avatar Software will conform substantially to the specified functions provided that: (a) the Avatar Software is not modified by anyone other than Avatar, unless authorized by Avatar in writing; (b) the nonconformity is not caused by a third party or by the Client (c) Client provides such assistance as reasonably required by Avatar to enable Avatar to diagnose and replicate the nonconformance. Under these conditions Avatar will use commercially reasonable efforts to correct the nonconformance in a reasonable timeframe.

4.2 Remedy. If the Avatar Software fails to conform to the above warranty, Client's remedy and Avatar's liability shall be to replace the Avatar Software with a conforming copy without charge, or terminate the license and refund to client all license fees paid for such Avatar Software.

4.3 Disclaimer of Warranty. THE WARRANTY SET FORTH IN THIS SECTION 4 IS A LIMITED WARRANTY AND IT IS THE ONLY WARRANTY MADE BY AVATAR. AVATAR DISCLAIMS ANY AND ALL PROMISES, REPRESENTATIONS, AND GUARANTEES EXCEPT AS EXPRESSLY SET FORTH IN THIS AGREEMENT. AVATAR MAKES NO OTHER WARRANTIES OF ANY KIND, EITHER EXPRESS OR IMPLIED, INCLUDING WITHOUT LIMITATION ANY IMPLIED WARRANTIES OF MERCHANTABILITY OR FITNESS FOR A PARTICULAR PURPOSE, WITH RESPECT TO THE SOFTWARE, TECHNICAL INFORMATION, AND TECHNICAL ASSISTANCE PROVIDED BY AVATAR PURSUANT TO THIS AGREEMENT. CLIENT ACCEPTS THE SOFTWARE, "AS IS" AND "WITH ALL FAULTS." EXCEPT AS NOTED IN SECTION 4.1, AVATAR DOES NOT WARRANT THAT THE AVATAR SOFTWARE OR THE PRODUCT WILL MEET AVATAR'S REQUIREMENTS OR THAT THE OPERATION OF THE AVATAR SOFTWARE OR THE PRODUCT WILL BE UNINTERRUPTED OR ERROR-FREE, OR THAT ERRORS IN THE AVATAR SOFTWARE OR THE PRODUCT WILL BE CORRECTED. AVATAR'S LIMITED WARRANTY IS IN LIEU OF ALL LIABILITIES OR OBLIGATIONS OF AVATAR FOR DAMAGES ARISING OUT OF OR IN CONNECTION WITH THE INSTALLATION, USE OR PERFORMANCE OF THE AVATAR SOFTWARE AND THE PRODUCT. THE PARTIES AGREE THAT THE FAILURE OF THE AVATAR SOFTWARE OR THE PRODUCT TO PERFORM IN ACCORDANCE WITH THE SPECIFICATIONS SHALL NOT BE CONSIDERED A FAILURE OF THE ESSENTIAL PURPOSE OF THE REMEDIES CONTAINED HEREIN. EXCEPT FOR THE ABOVE LIMITED WARRANTY, THE ENTIRE RISK OF THE QUALITY AND PERFORMANCE OF THE SOFTWARE AND THE PRODUCT IS WITH THE CLIENT.

4.4 Limitation of Liability. AVATAR SHALL HAVE NO LIABILITY UNDER THIS AGREEMENT OR OTHERWISE FOR CONSEQUENTIAL, EXEMPLARY, SPECIAL, INCIDENTAL OR

PUNITIVE DAMAGES EVEN IF IT HAS BEEN ADVISED OF THE POSSIBILITY OF SUCH DAMAGES. IN ANY EVENT, THE LIABILITY OF AVATAR TO AVATAR FOR ANY REASON AND UPON ANY CAUSE OF ACTION SHALL BE LIMITED TO THE AMOUNT SET FORTH IN SECTION 4.2. THIS LIMITATION APPLIES TO ALL CAUSES OF ACTION IN THE AGGREGATE, INCLUDING WITHOUT LIMITATION, TO BREACH OF CONTRACT, BREACH OF WARRANTY, NEGLIGENCE, STRICT LIABILITY, MISREPRESENTATIONS, AND OTHER TORTS. BOTH PARTIES UNDERSTAND AND AGREE THAT THE REMEDIES AND LIMITATIONS HEREIN ALLOCATE THE RISKS OF PRODUCT AND SERVICE NONCONFORMITY BETWEEN THE PARTIES AS AUTHORIZED BY THE UNIFORM COMMERCIAL CODE AND OF OTHER APPLICABLE LAWS.

4.5 **Risk of Use; Indemnification.** The entire risk of use and consequences of the use, both direct and indirect, of the Avatar Software shall be on the party using it. Avatar shall not be liable in any respect for any claims for loss or injury alleged to have resulted from any use of or reliance on the Avatar Software or any part thereof, by Client or by any other person. Client hereby agrees to indemnify, and does hereby indemnify, Avatar against any and all claims, which may arise directly or indirectly out of Client's breach of any provision of this Agreement or the use or operation of the Avatar Software by Client.

5. Assignment

5.1 **Non-Assignability by Client.** This Agreement shall be binding upon the parties and their respective permitted successors and assigns and shall continue to be binding upon such parties notwithstanding any assignments or transfers hereunder. Client shall not assign, grant a security interest in, or transfer this Agreement or the Avatar Software, or any modifications to the Avatar Software without the express prior written consent of Avatar in each instance. ANY ATTEMPT BY CLIENT TO ASSIGN, GRANT A SECURITY INTEREST IN, OR TRANSFER THIS AGREEMENT, INCLUDING ANY OF CLIENT'S RIGHTS, DUTIES, OR OBLIGATIONS HEREUNDER, IS NULL AND VOID *AB INITIO* AND SHALL RESULT IN THE IMMEDIATE TERMINATION OF THIS AGREEMENT.

5.2 **Avatar's Right to Assign.** Notwithstanding anything contained herein to the contrary, Avatar may assign this Agreement without the Client's consent to any corporation which controls, is controlled by, or is under the common control with Avatar, or to any corporation resulting from merger or consolidation with Avatar, or to any person or entity which acquires substantially all the assets of Avatar as a going concern, provided that such assignee assumes, in full, the obligations of Avatar under this Agreement.

5.3 **Client's Obligations.** Notwithstanding any permitted assignment, succession, dissolution, bankruptcy, merger, or acquisition of or by Client, Client's obligations (a) to make full payment in accordance with the provisions of this Agreement; (b) to maintain confidentiality in accordance with Section 2, and (c) to preserve Avatar's ownership rights to the Confidential Information shall survive any such occurrence, and Client shall remain the primary obligor thereon.

6. General Provisions

6.1 **Governing Law.** This Agreement has been negotiated, executed and delivered at and shall be deemed to have been made in Texas. This Agreement shall be governed by and construed in accordance with the domestic laws of the State of Texas without giving effect to any choice or conflict of law provision or rule (whether of the State of Texas or any other jurisdiction) that would cause the application of the laws of any jurisdiction other than the State of Texas.

6.2 **Consent to Jurisdiction and Forum.** The parties hereto hereby consent and agree that the District Court of Travis County, Texas or, at the Avatar's option, the United States District Court for the Western District of Texas, shall have exclusive jurisdiction to hear and determine any claims or disputes between the parties hereto pertaining to this Agreement or to any matter arising out of or related to this Agreement. The parties hereto expressly submit and consent in advance to such jurisdiction in any action or suit commenced in any such court, and hereby waive any objection which it may have based upon lack of personal jurisdiction, improper venue or forum non conveniens and hereby consent to the granting of such legal or equitable relief as is deemed appropriate by such court. Each party hereto irrevocably consents to the service of process by registered or certified mail, postage

prepaid, to it at its address given pursuant to this Agreement. Nothing in this Agreement shall be deemed or operate to affect the right of either party to serve legal process in any other manner permitted by law, or to preclude the enforcement by either party of any judgment or order obtained in such forum or the taking of any action under this Agreement to enforce same in any other appropriate forum or jurisdiction.

6.3 Construction. The parties have participated jointly in the negotiation and drafting of this Agreement. In the event an ambiguity or question of intent or interpretation arises, this Agreement shall be construed as if drafted jointly by the parties and no presumption or burden of proof shall arise favoring or disfavoring any party by virtue of the authorship of any of the provisions of this Agreement. Whenever the context of this Agreement requires, the gender of all words herein shall include the masculine, feminine, and neuter, and the number of all words herein shall include the singular and plural. All references to section numbers in this Agreement shall be references to sections in this Agreement, unless otherwise specifically indicated. The captions used herein are for convenience only and are not to be considered in the construction of this Agreement.

6.4 Amendments; Waiver. This Agreement may be amended from time to time only by written agreement of the parties. No term or provisions of this Agreement may be waived or modified unless such waiver or modification is in writing and signed by the party against whom such waiver or modification is sought to be enforced. No failure on the part of any party to exercise and no delay in exercising, any right, power, or remedy under this Agreement shall operate as a waiver thereof, nor shall any single or partial exercise of any right under this Agreement preclude any other or further exercise thereof or the exercise of any other right. The remedies provided in this Agreement are cumulative and not exclusive of any remedies provided by law.

6.5 Force Majeure. The parties shall be excused from delays in performing or from their failure to perform hereunder to the extent that such delays or failures result from causes beyond the reasonable control of the party (including, but not limited to, power loss, telecommunications failure, fire, flood, other natural disasters, strikes, labor trouble, riots, civil disobedience, or natural disasters).

6.6 Entire Agreement. This Agreement constitutes the entire agreement between the parties with respect to the subject matter of this Agreement, and supersedes all prior agreements between them, whether oral or written, of any nature whatsoever with respect to the subject matter hereof. No amendment, alteration, or modification of this Agreement shall be valid unless in each instance such amendment, alteration, or modification is expressed in a written instrument duly executed by the parties hereto.

6.7 Severability. If any provision of this Agreement is held by final judgment of a court of competent jurisdiction to be invalid, illegal or unenforceable, such invalid, illegal or unenforceable provision shall be severed from the remainder of this Agreement, and the remainder of this Agreement shall be enforced. In addition, the invalid, illegal or unenforceable provision shall be deemed to be automatically modified, and, as so modified, to be included in this Agreement, such modification being made to the minimum extent necessary to render the provision valid, legal and enforceable. Notwithstanding the foregoing, however, if the severed or modified provision concerns all or a portion of the essential consideration to be delivered under this Agreement by one party to the other, the remaining provisions of this Agreement shall also be modified to the extent necessary to equitably adjust the parties' respective rights and obligations hereunder.

6.8 Notices. All notices, requests, demands and other communications hereunder shall be in writing and shall be deemed to have been duly given, if delivered in person or by courier, by facsimile transmission, by first class U.S. mail, postage prepaid, or by e-mail to the addresses first set forth above. If notice is mailed by first class U.S. mail, such notice shall be deemed to be delivered three business days after such notice was deposited with the U.S. Postal Service.

6.9 **Authority to Sign.** The parties represent and warrant that each person signing this Agreement in a representative capacity has the authority to sign on behalf of all of the entities and persons for whom s/he is signing and that s/he and the represented entities and persons are empowered to enter into and to perform this Agreement.

6.10 **Counterparts.** This Agreement may be executed in any number of counterparts and any party hereto may execute any such counterpart, each of which when executed and delivered shall be deemed to be an original and all of which counterparts taken together shall constitute but one and the same instrument. This Agreement shall become binding when all counterparts taken together shall have been executed and delivered by the parties. A telecopied facsimile of an executed counterpart of this Agreement shall be sufficient to evidence the binding agreement of each party to the terms hereof. However, each party agrees to return to the other parties an original, duly executed counterpart of this Agreement promptly after delivery of a telecopied facsimile thereof.

AVATAR

CLIENT

Avatar Technology,
A Division of Alchemy Training Systems

(Client Name)

By: _____

By: _____

Name: _____

Name: _____

Title: _____

Title: _____

Date: _____

Date: _____