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DATED 29 OCTOBER 2013

(1) THE KENT COUNTY COUNCIL

- and -

(2) THE SECRETARY OF STATE FOR EDUCATION

- and -

(3) BROOK LEARNING TRUST

**DFE PRINCIPAL AGREEMENT**

relating to

**EBBSFLEET ACADEMY**

V37

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THIS PRINCIPAL AGREEMENT is made on 29 OCTOBER

2013

**BETWEEN:**

- (1) **THE KENT COUNTY COUNCIL** whose principal premises are Sessions House, County Hall, Maidstone, Kent ME14 IXQ (the "**Authority**");
- (2) **THE SECRETARY OF STATE FOR EDUCATION** whose registered office is at Sanctuary Buildings, Great Smith Street, London SW1P 3BT (the "**DFE**"); and
- (3) **BROOK LEARNING TRUST** (company number 7368292) whose registered office is at The Hayesbrook School, Brook Street, Tonbridge TN9 2PH (the "**Academy**").

**WHEREAS**

- A The Authority is a children's services authority with duties and powers to provide primary and secondary education under the Education Acts 1996-2005 and the School Standards and Framework Act 1998 and the Education and Inspections Act 2006.
- B The Authority has entered into the Project Agreement with the Contractor pursuant to its powers contained in section 2 of the Local Government Act 2000, section 14 of the Education Act 1996, section 22 of the School Standards and Framework Act 1998 and section 111 of the Local Government Act 1972 in order to enable investment in certain educational services and facilities for which it is responsible, including Swan Valley Community School.
- C The governing body and the parties have agreed that Swan Valley Community School shall close and henceforth the Academy shall deliver educational services at the School as the Ebbsfleet Academy.
- D The Authority and the Academy intend to enter into a School Agreement on or around the date of this Agreement. The Academy and the DFE have entered into a supplemental funding agreement dated on or around the date of this Agreement.
- E The parties agree to the terms and conditions of this Agreement.

**1. DEFINITIONS AND INTERPRETATION**

**1.1 Definitions**

In this Agreement, unless the context otherwise requires, the following expressions shall have the following meanings:

**"Academy Affordability Gap"** means the portion of the Affordability Gap which is reasonably attributable to the Academy in respect of the School;

**"Academy Contribution"** means the sum payable by the Academy to the Authority, by way of contribution to the Unitary Charge pursuant to, and calculated in accordance with (and defined as the Relevant Contribution in) the School Agreement;

**"Academy Related Party"** means:

- (a) an officer, agent or employee of the Academy acting in the course of his office or employment, including without limitation any director of the Academy or any member of the local governing body of the School acting in the course of his office;

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- (b) during the School Day any student of the School, or any person visiting the School at the invitation (whether express or implied) of the Academy, including but not limited to the Fitness Suite Operator and the Fitness Suite Users;
- (c) in relation to the School during any period of Ad Hoc Use or Additional Use, any person using the School for that purpose at the invitation, whether express or implied of the Academy; and
- (d) any contractors and their officers, employees and agents involved in the operation and/or maintenance of works or services at the Site procured by the Academy,

but excluding in each case the Authority, the DfE, the Contractor and any of their respective Related Parties, and statutory undertakers as defined in the Town and Country Planning Act 1990 and utilities as defined in the Utilities Contracts Regulations 2006;

**"Affordability Gap"** means the sum of money being the shortfall between: (i) the annual Unitary Charge (net of any deductions from the Monthly Unitary Charge and any amounts payable by the Contractor, in each case pursuant to the payment mechanism set out in Schedule 5 of the Project Agreement) in a relevant Financial Year; and (ii) the aggregate of the amounts received by the Authority in a relevant Financial Year pursuant to:

- (a) the Promissory Note;
- (b) the School Agreement (but excluding any amounts which the Authority receives under clauses 12.1B (*Affordability Gap*) and 12.1C (*Management Fee*) of the School Agreement);
- (c) the Project Agreement (but excluding deductions from the Monthly Unitary Charge and any amounts payable by the Contractor, in each case pursuant to the payment mechanism set out in Schedule 5 of the Project Agreement); and
- (d) any agreements between the Authority and the PFI School relating to the Project (insofar as the amounts receives are contributions towards the Unitary Charge);

as may be amended from time to time;

**"Agreement"** means this agreement, its schedules and any annexures hereto, as may be amended from time to time;

**"Approved Suitable Substitute"** has the meaning given to it in clause 15.2;

**"Area"** means the area within which the Authority is statutorily responsible for the provision of educational services;

**"Articles"** means the articles of association of the Academy (as may be amended from time to time);

**"Authority Change"** has the meaning given to it in the Project Agreement;

**"Authority Equipment"** has the meaning given to it in the Project Agreement;

**"Authority Related Party"** means:

- (a) the Authority and its employees, officers, consultants and agents lawfully entitled or otherwise permitted whether expressly or impliedly to be on the Site;
- (b) the Authority's licensees, tenants, contractors and sub-contractors (of any tier) lawfully entitled or otherwise permitted whether expressly or impliedly to be on the Site whilst actually on the Site;
- (c) any person, including visitors on the Site, whilst lawfully entitled or otherwise permitted whether expressly or impliedly to be on the Site whilst actually on the Site (including but not limited to users of the youth centre, the public library and the car parking spaces shown coloured green on the site plans set out in schedule 4 of the School Agreement),

but excluding in each case the Academy, the Contractor, the DFE, and any of their respective Related Parties, and statutory undertakers as defined in the Town and Country Planning Act 1990 and utilities as defined in the Utilities Contracts Regulations 2006 save to the extent that the Authority comprises a statutory undertaker or a utility for the purpose of those Regulations;

**"Business Day"** means a day (other than a Saturday or Sunday) on which banks are open for domestic business in the City of London;

**"Contractor"** means NewSchools (Swanscombe) Limited, a limited company registered in England and Wales (company number 4167465) and which is the counterparty of the Authority to the Project Agreement;

**"Contractor Change"** has the meaning given to it in the Project Agreement;

**"Contractor Related Party"** has the meaning given to the term "Contractor Party" in the Project Agreement;

**"Contractor Termination Notice"** means a Termination Notice (as that term is defined in the Project Agreement) served by the Contractor pursuant to the Project Agreement;

**"De Minimus Amount"** means £10,000 (ten thousand pounds) per event or in the aggregate in any rolling twelve (12) month period;

**"DFE Related Party"** means an officer, employee, agent, representative, contractor or subcontractor (of any tier) of the DFE acting in the course of his office or employment or appointment (as appropriate) but excluding, in each case, the Authority, the Contractor, the Academy and any of their respective Related Parties;

**"Dedicated Schools Grant" or "DSG"** means the grant of that name paid to the Authority by the Department for Education under section 14 of the Education Act 2002 and shall include a reference to any successor grant(s) and/or similar funding arrangements, as may be adjusted in accordance with clause 9 and schedule 2;

**"Direct Losses"** means all damages, losses, liabilities, claims, actions, costs, expenses (including the cost of legal or professional services, legal costs being on an indemnity basis), to the extent that the Authority is obliged to pay such amounts to the Contractor under the Project Agreement;

**"Earmarked Annual Grant" or "EAG"** has the meaning given to it in the Funding Agreement and shall include a reference to any successor grant(s);

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**"Educational Services"** means the provision of teaching and pastoral support for school age children, the provision of careers advice, liaison with parents and guardians of Pupils and the carrying on of extra-curricular activities for Pupils and the use of school accommodation by the local community;

**"Excusing Cause"** means (i) the items defined as Adverse Circumstances and (ii) the items listed in paragraph 4.4 of Part 2 of schedule 5 to the Project Agreement;

**"Financial Year"** means the financial year of the Authority being each year commencing on 1 April (or as otherwise notified by the Authority);

**"Fitness Centre"** has the meaning given to it in the Project Agreement;

**"Fitness Centre Operator"** has the meaning given to it in the Project Agreement;

**"FM Services"** means the facilities management services to be provided by the Contractor at the Site;

**"Funders Direct Agreement"** means the financiers' direct agreement dated 24 May 2001 made between (1) the Authority (2) the Contractor (3) the Royal Bank of Scotland plc;

**"Funding Agreement"** means together the Master Funding Agreement and the Supplemental Funding Agreement;

**"General Annual Grant" or "GAG"** has the meaning given in the Funding Agreement and shall include a reference to any successor grant(s);

**"Guidance"** means any applicable guidance or directions with which the parties are bound to comply;

**"Information Protocol"** means the information sharing protocol set out in schedule 1;

**"Intervention Rights"** means any rights of intervention which the DfE enjoys under the Articles and/or Funding Agreement;

**"Lease"** means the lease granted by the Authority to the Academy pursuant to the provisions of the Academies Act 2010;

**"Legislation"** means any one or more of the following:

- (a) any Act of Parliament;
- (b) any subordinate legislation within the meaning of section 21(1) of the Interpretation Act 1978;
- (c) any exercise of the Royal Prerogative; and
- (d) any enforceable community right within the meaning of Section 2 of the European Communities Act 1972;

in each case in the United Kingdom;

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**"Local Authority"** means a principal council (as defined in Section 270 of the Local Government Act 1972) or any body of government in England established as a successor to principal councils in relation to Educational Services;

**"Master Funding Agreement"** means the funding agreement between the DfE and the Academy dated 30 September 2013, as varied by the deed of variation to the Master Funding Agreement and as may be subsequently amended from time to time;

**"Monthly Unitary Charge"** has the meaning given to it in the Project Agreement;

**"Normal Payment Matters"** means:

- (a) any failure of the Academy to pay the Academy Contribution when this is due and payable in accordance with the School Agreement;
- (b) whilst the recoupment model applies, any failure of the Academy to pay the amount which the Authority has invoiced in respect of the Academy Affordability Gap (calculated in accordance with this Agreement), when this is due and payable in accordance with the School Agreement and/or this Agreement;
- (c) any failure of the Academy to make payments due to the Authority of amounts due and payable under this Agreement or the School Agreement to the extent that these payments comprise:
  - (i) any amounts which the DfE agrees are to be paid by the Academy under clause 6A (Qualifying Changes in Law) of this Agreement;
  - (ii) any amounts due under clause 27.3.1(a) or 27.3.2(a) of the School Agreement in connection with which the Academy is to contribute towards all or part of any lump sum payment (with the agreement of the Academy, where required pursuant to the terms of the School Agreement) provided always that the Authority has complied with clause 8 of this Agreement;
  - (iii) any other amounts to the extent that the DfE has provided funding to the Academy expressly in respect of such payments to the Authority;and in each of cases (i), (ii) and (iii) to the extent that such amounts relate to payments due to the Contractor under the Project Agreement;
- (d) not used; and
- (e) any other liability of the Academy due and payable under this Agreement or the School Agreement to the extent that these relate to payments due to the Contractor under the Project Agreement and which the DfE reasonably determines should be payable by the Academy to the Authority,

(but, for the avoidance of doubt, limbs (a) to (e) above do not include any payments, costs, expenses or liabilities incurred in relation to clause 12.1C (Management Fee) in the School Agreement) and **"Normal Payment Matter"** shall be construed appropriately;

**"PFI School"** means the Primary School (as defined in the Project Agreement);

**"Prescribed Rate"** has the meaning given in the Project Agreement;

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**"Project"** means the provision of serviced accommodation to the Authority in relation to the School by the Contractor as contemplated by the Project Agreement;

**"Project Agreement"** means the PFI principal agreement dated 24 May 2001 and entered into by (1) the Authority and (2) the Contractor (as may be amended from time to time);

**"Project Agreement Termination Notice"** has the meaning given to the term Termination Notice in the Project Agreement;

**"Project Documents"** means the Project Agreement and the Funders Direct Agreement;

**"Promissory Note"** means the promissory note issued to the Authority by the Department for Education (or its predecessor department) relating to the Project Agreement;

**"Pupil"** means a pupil on the roll of the Academy who attends the School;

**"Qualifying Change in Law"** has the meaning given in the Project Agreement;

**"Related Party"** means any Academy Related Party, Authority Related Party, DFE Related Party or Contractor Related Party (as the case may be);

**"Relevant Assets"** means:

- (a) assets at any time transferred to the Academy by the Contractor and/or the Authority for nil consideration;
- (b) assets, the acquisition of which by the Academy was wholly or mainly financed through grant payments made by the DFE to the Academy under the Supplemental Funding Agreement; and
- (c) assets not falling within paragraphs (a) and (b) above and which the DFE and the Academy have agreed prior to the date of termination of the Supplemental Funding Agreement (in accordance with its terms), will be purchased by the DFE from the Academy on the terms set out in the Supplemental Funding Agreement;

provided that such assets are transferable as at the date of termination of the Supplemental Funding Agreement;

**"Relevant Notice"** means any notice issued under a Project Document which relates to the School (save any issued in accordance with the payment mechanism set out in Schedule 5 of the Project Agreement, other than those expressly referred to in limb (b) below) relating to:

- (a) a breach of that Project Document;
- (b) the occurrence of a Compensation Event, Relief Event or Force Majeure Event (each as defined in the Project Agreement) or an Excusing Cause; and/or
- (c) the termination of that Project Document; or
- (d) any other notice which (assessed reasonably) may relate to circumstances which are expected to have a material adverse effect on the Project;

**"Representative"** means the duly authorised representative of each party (as the case may be) appointed in accordance with clause 12;



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**"School"** means the educational establishment, buildings and facilities located at the Site;

**"School Agreement"** means the school agreement entered into on or about the date hereof between (1) the Authority and (2) the Academy relating to the provision of facilities and services to the Academy;

**"Senior Lender"** has the meaning given to it in the Project Agreement;

**"Site"** means the area shown edged red on the site plans set out in schedule 4 of the School Agreement;

**"Sub-Contractors"** has the meaning given to it in the Project Agreement;

**"Suitable Substitute"** means a charitable company incorporated in England and Wales limited by guarantee whose objects include power to maintain an academy pursuant to section 1 of the Academies Act 2010, the governing body of a maintained school, or some other legal person not comprising an Unsuitable Third Party and proposed by the DFE as having legal capacity, power, authority, competence and resources (including financial and educational resources) to become a party to and perform the obligations of the Academy under this Agreement, the School Agreement and the Lease;

**"Supplemental Funding Agreement"** means the supplemental funding agreement relating to the School to be entered into by the DFE and the Academy on or around the date hereof and as may be subsequently amended from time to time;

**"Term"** means any term in each academic year for the School;

**"Third Party"** means any person other than (i) Pupils and (ii) any person falling within limb (a) of the definition of Academy Related Party;

**"Transfer Agreement"** means an agreement entered into on or about the date hereof between (1) the Authority and (2) the Academy and (3) the governing body of the school known as Swan Valley Community School in relation to the transfer of assets and staff from the Authority to the Academy;

**"Unitary Charge"** means the unitary charge payable by the Authority to the Contractor in accordance with the Project Agreement; and

**"Unsuitable Third Party"** means any of:

- (a) any person who has a material interest in the production, distribution or sale of tobacco products, alcoholic drinks and/or pornography;
- (b) any person whose activities are, in the reasonable opinion of the Authority, incompatible with the provision of Educational Services in the Area; or
- (c) any person whose activities, in the reasonable opinion of the Authority, pose or could pose a threat to national security.

## 1.2 Interpretation

In this Agreement, except where the context otherwise requires:

- 1.2.1 capitalised terms used in this Agreement and defined in the Project Agreement shall (unless otherwise defined in this Agreement) have the same meanings in this Agreement;
- 1.2.2 the masculine includes the feminine and vice-versa;
- 1.2.3 the singular includes the plural and vice-versa;
- 1.2.4 a reference to any clause, subclause, paragraph, schedule, recital or annex is, except where expressly stated to the contrary, a reference to such clause, subclause, paragraph, schedule, recital or annex of and to this Agreement;
- 1.2.5 save where otherwise provided in this Agreement, any reference to this Agreement or to any other contract, agreement or document shall be to such contract, agreement or document as amended, varied, supplemented, novated or assigned;
- 1.2.6 any reference to any enactment, order, regulation or other similar instrument shall be construed as a reference to the enactment, order, regulation or instrument as amended, replaced, consolidated or re-enacted;
- 1.2.7 a reference to a person includes firms, partnerships and corporations and their successors and permitted assignees or transferees;
- 1.2.8 headings are for convenience of reference only;
- 1.2.9 words preceding "include", "includes", "including and "included" shall be construed without limitation by the words which follow those words;
- 1.2.10 any obligation on a party to do any act, matter or thing includes, unless expressly stated otherwise, an obligation to procure that it is done;
- 1.2.11 subject to any express provisions of this Agreement to the contrary, the obligations of any party are to be performed at that party's own cost and expense.

### 1.3 **Precedence**

In the event of any conflict between the provisions of this Agreement and the School Agreement, the provisions of this Agreement shall prevail.

### 1.4 **Schedules**

The schedules to this Agreement form part of this Agreement. In the event of any inconsistency between the provisions of the main body of this Agreement and the schedules, the main body shall take precedence.

## 2. **ACKNOWLEDGEMENTS**

- 2.1.1 Subject to clause 2.1.2, the parties acknowledge that neither the Authority nor the PFI School should suffer, in connection with the Project Agreement, any adverse consequences arising out of the School's status as an academy rather than a school maintained by the Authority and that the aim of this Agreement is to avoid or, if that is not practicable, to mitigate any such effects. The parties agree that, in relation to schools other than the PFI School, clause 2.3 shall apply.

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2.1.2 Nothing in clause 2.1.1 shall have the effect of overriding any express provisions of this Agreement or the School Agreement or of imposing any additional obligations on the parties to this Agreement or the School Agreement.

2.2 In particular, the parties acknowledge:

2.2.1 the statutory responsibility of the Authority to provide Educational Services;

2.2.2 that the Academy is obliged to pay the Academy Contribution to the Authority pursuant to the School Agreement;

2.2.3 that the Academy shall be granted the Lease in respect of the Site to enable it to run the School in accordance with the terms of the School Agreement; and

2.2.4 that the acts of Academy Related Parties shall become the responsibility of the Academy with effect from the date of the School Agreement.

2.3 Further, the DFE:

2.3.1 confirms that it shall maintain full revenue support to the Authority for the term of the Project Agreement in accordance with the terms of the Promissory Note; and

2.3.2 intends that schools, other than the PFI School, maintained by the Authority should not be adversely affected financially by the School's status as an academy rather than a school maintained by the Authority whether initially, on an on-going basis, or in the event of any future closure of the School.

**3. COMMENCEMENT, DURATION AND EXPIRY**

**3.1 The term of the Agreement**

This Agreement will commence on the date hereof, and will terminate or expire in accordance with clause 13.

**3.2 Provisions surviving expiry:**

3.2.1 Notwithstanding the expiry or termination of this Agreement, such expiry or termination shall be without prejudice to any accrued rights and obligations under this Agreement as at the date of expiry or termination.

3.2.2 Without limitation to clause 3.2.1, the expiry or termination of this Agreement shall not affect the continuing rights and obligations of the parties under the clauses in the table below and/or under any other provision of this Agreement which is expressed to survive expiry or termination or which is required to give effect to such expiry or termination or the consequences of such expiry or termination:

| Clause/Schedule Reference | Description                    |
|---------------------------|--------------------------------|
| 1                         | Definitions and interpretation |
| 2                         | Acknowledgements               |

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|     |                                     |
|-----|-------------------------------------|
| 3.2 | Provisions surviving expiry         |
| 4   | Normal Payment Matters              |
| 6   | Authority obligations               |
| 7   | Information protocol                |
| 11  | General Assistance and Co-operation |
| 14  | DFE Comfort                         |
| 15  | Failure of the Academy              |
| 16  | Assignment                          |
| 17  | Dispute Resolution                  |
| 18  | Miscellaneous                       |

**4. NORMAL PAYMENT MATTERS**

- 4.1 The Academy shall, subject to clauses 4.3, 4.4, 4.5 and 4.9 to 4.12 (inclusive), be responsible for and shall release and indemnify the Authority from and against all liability for Direct Losses that arise out of or in connection with any Normal Payment Matters. No claim shall be made under this clause 4.1 unless the Authority has provided to the Academy a valid VAT invoice.
- 4.2 NOT USED
- 4.3 The Authority shall promptly upon becoming aware of any claims under clause 4.1 which it intends to pursue serve written notice on the Academy (with a copy provided to the DFE) of such claims (the "Academy Notification") and the Academy shall discharge any liability in full within five (5) Business Days of such notification or, if it disputes the Academy Notification, subject to clause 4.4, within five (5) Business Days following determination of such dispute.
- 4.4 If the Academy fails to pay any amount detailed in the Academy Notification within (five) 5 Business Days of the Academy Notification (regardless of whether or not the Academy has disputed the claim) the Authority shall promptly notify the DFE in writing (the "DFE Notification") and the DFE shall, subject to clauses 4.5, 4.6, 4.8 to 4.14 (inclusive) and clause 8.4, pay any such claim to the Authority in full within twenty (20) Business Days of the DFE Notification unless such claim has previously been satisfied by the Academy. In the event that it is later agreed or determined that the Authority was not entitled to either the whole or any part of the amounts claimed (an "Illegitimate Claim"), DFE may set off any Illegitimate Claims from the DSG or from any other monies due to the Authority whether under this Agreement or otherwise.
- 4.5 Neither the Academy nor the DFE shall be responsible or be obliged to indemnify the Authority pursuant to this clause 4 to the extent that any Normal Payment Matters liabilities are caused by (i) the negligence or wilful misconduct of the Authority, the Contractor, or any of their Related Parties or (ii) a breach by the Authority or any Authority Related Party of this

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Agreement, the School Agreement, the Project Documents, and/or the Lease or (iii) any breach of the Project Agreement by the Contractor or a Contractor Related Party.

- 4.6 The DFE shall not be responsible or be obliged to indemnify the Authority pursuant to clause 4.4 to the extent that the Authority is in breach of its obligations under clause 6 to provide information that is relevant to such claim.
- 4.7 The DFE shall promptly give the Academy written notice of any steps taken by the Authority to enforce its rights pursuant to clause 4.4 including details of amounts which the DFE is proposing to pay to the Authority under clause 4.4.
- 4.8 The Authority and the Academy shall not settle or compromise any claim which may be fully or partially funded by the DFE pursuant to the terms of this Agreement without the prior written consent of the DFE (such consent not to be unreasonably withheld or delayed).
- 4.9 For the avoidance of doubt, the indemnities in clauses 4.1 and 4.4 shall not extend to any Direct Losses incurred by the Authority to the extent caused by any Authority Change or Contractor Change where the consent of the DFE is required pursuant to this Agreement and such consent has not been obtained.
- 4.10 Where any party ("**Indemnified Party**") wishes to make a claim under this Agreement against the other ("**Indemnifying Party**") whether in relation to a claim made against it by a third party ("**Third Party Claim**") or otherwise, then:
- 4.10.1 any and all claims by the Indemnified Party shall be made in accordance with clause 4; and
- 4.10.2 the Indemnified Party shall give notice of the relevant claim as soon as reasonably practicable setting out full particulars of the claim; and
- 4.10.3 the Indemnifying Party shall, if it wishes to have conduct of any Third Party Claim, give reasonable security to the Indemnified Party for any cost or liability arising out of the conduct of the Third Party Claim by the Indemnifying Party.
- 4.11 Any liability under a claim made pursuant to any indemnity contained in this Agreement shall be reduced to the extent that the Indemnified Party recovers any sums under the terms of any insurance policy for the time being in place.
- 4.12 If the Academy or DFE shall have paid to the Authority any amount in respect of a claim under any indemnity contained in this Agreement and the Authority subsequently receives or recovers from a third party (including an insurer) a sum which is referable to such claim, the Authority shall forthwith repay to the Academy or, as the case may be, DFE the amount so received or recovered less the reasonable costs and expenses incurred in connection with such recovery up to the amount which has been paid by the Academy or DFE in respect of such claim.
- 4.13 Nothing in this clause 4 or elsewhere in this Agreement shall make the DFE liable or responsible to the Authority in respect of any failure by the Academy to make a payment due to the Authority under the School Agreement where and to the extent that such payment is not for the purpose of defraying the cost to the Authority of a sum paid or payable by the Authority to the Contractor under and in accordance with the terms of the Project Agreement (for the avoidance of doubt, any administration or other fee which may be imposed by the Authority on the Academy in relation to the relevant cost to the Authority under the Project

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Agreement shall not be counted as part of that cost under the Project Agreement when applying the provisions of this clause 4.13).

4.14 For the avoidance of doubt, the protections under the terms of this Agreement which are provided by the DFE to the Authority in relation to the performance by the Academy of certain obligations under this Agreement and/or the School Agreement do not apply in respect of any agreement (including, without limitation, any management or services agreement) between the Authority and the Academy which is separate to and not contained within this Agreement and the document which is:

4.14.1 titled "School Agreement";

4.14.2 entered into as a contract by the Authority and the Academy on or about the date of this Agreement; and

4.14.3 in the form approved by or on behalf of the DFE,

as such document may be amended, varied, changed, novated or assigned with the prior written consent of the DFE in accordance with the terms of this Agreement.

4.15 Save as provided under clauses 14.3 to 14.5 (inclusive) and without prejudice to any accrued liabilities of the DFE pursuant to this Agreement, the DFE shall have no responsibility for any compensation payable by the Authority to the Contractor on termination of the Project Agreement, howsoever arising. This clause shall take precedence over all other provisions of this Agreement.

**5. NOT USED**

**6. AUTHORITY OBLIGATIONS**

The Authority shall:

6.1 NOT USED;

6.2 provide the DFE with such information as it may reasonably require on a quarterly basis on the operation of the Project Agreement to the extent that it relates to the School;

6.3 inform the DFE promptly (providing such details as the DFE may reasonably require) on becoming aware of any breach or non-compliance by the Academy with its obligations under the School Agreement or this Agreement or where it is reasonably foreseeable to the Authority that any breach of or non-compliance with the School Agreement or this Agreement by the Academy shall occur;

6.4 forthwith inform the DFE whenever any Relevant Notice is served under any Project Document;

6.5 promptly inform the DFE of any proposed changes to the Project Documents or the School Agreement or any other relevant contract which may (assessed objectively) lead to additional potential liabilities for the Academy and/or the DFE under the terms of this Agreement which have a value equal to or greater than the De Minimus Amount taking into consideration all other changes which have not previously been notified to DFE under this clause 6.5;

6.6 promptly inform the DFE whenever it exercises any rights or remedies under the Project Documents in connection with a breach thereof by any of the counterparties and/or relating to

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poor performance of obligations under the Project Agreement by the Contractor (but not including the making of payment mechanism deductions) where these relate to the School or are relevant to the School Agreement and which have a value equal to or greater than the De Minimus Amount taking into consideration all other events which have not previously been notified to DFE under this clause 6.6

- 6.7 exercise such rights or remedies that the Authority has available to it under the Project Documents in accordance with those Project Documents at the reasonable request of the DFE in circumstances where the DFE considers (acting reasonably) that the exercise of the relevant right or remedy shall assist the DFE in mitigating its potential or actual exposure under this Agreement (other than where the Authority is not and does not intend to seek to recover any liability from the Academy and/or the DFE pursuant to clauses 4 and/or 14 of this Agreement);
- 6.8 promptly pay to the Academy any sums or monies recovered from the Contractor and which are properly due to the Academy under the School Agreement.
- 6.9 immediately notify the DFE and the Academy on receipt of a Project Agreement Termination Notice and any Contractor Termination Notice and provide all relevant information (including a copy of the relevant notice);
- 6.10 immediately notify the DFE and the Academy following confirmation from the Contractor that the breach giving rise to the Contractor Termination Notice has been remedied;
- 6.11 following receipt of a Contractor Termination Notice, where DFE notifies the Authority that it intends to exercise its Intervention Rights, the Authority shall immediately advise the DFE whether or not the breach has been remedied; and
- 6.12 promptly notify the DFE and the Academy of any breach of the Project Agreement which, if it was repeated or continued, could give rise to the right for the Contractor to serve a Contractor Termination Notice under the Project Agreement.

**6A QUALIFYING CHANGES IN LAW**

- 6A.1 The Authority shall promptly notify the Academy and the DFE where it becomes aware of any Qualifying Change in Law which may affect the School or any part of it and provide all relevant details, to the extent available.
- 6A.2 The Authority shall promptly provide to the Academy any information which it receives in relation to the Qualifying Change in Law.
- 6A.3 The Authority shall consult with the Academy in respect of the Qualifying Change in Law and have regard to any representations made by the Academy.
- 6A.4 Where the Qualifying Change in Law has a potential financial impact for the Academy (by means of an increased Academy Contribution or otherwise), following notification under clause 6A.1, the Parties shall convene a meeting to discuss the appropriate course of action. In considering the appropriate course of action, all Parties shall act reasonably having regard to the nature of the Qualifying Change in Law, terms of the Project Agreement in relation to how such risk shall be managed and the Parties shall have regard to sources of funding available to them in respect of any expenditure arising from the Qualifying Change in Law.
- 6A.5 In the event that the Parties agree under clause 6A.4 that a proportion of the costs arising from the Qualifying Change in Law which are actually incurred and paid by the Authority under

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the Project Agreement should be reimbursed by the Academy, then the Academy shall pay the agreed proportion through:

6A.5.1 a contribution towards the payment of a lump sum payable by the Authority to the Contractor in relation to the Qualifying Change in Law, such contribution to be paid by the Academy to the Authority within 20 Business Days after the date on which the Authority paid that lump sum to the Contractor; and/or

6A.5.2 payment (in monthly instalments) of an annual contribution towards the upwards adjustment to the Unitary Charge by way of an adjustment to the Academy Contribution, such adjustment to be made from the date on which the increase to the Unitary Charge by the Contractor takes effect.

6A.6 In the event that the Parties agree under clause 6A.4 that there should be a cost saving to the Academy where there is a decrease in payments from the Authority to the Contractor arising from the implementation of the Qualifying Change in Law, an adjustment to the Academy Contribution to reflect such decrease shall apply from the date of the decrease in the amount of the Unitary Charge (or other payment from the Authority to the Contractor) takes effect.

## 7. INFORMATION PROTOCOL

Each of the parties shall comply with the relevant obligations set out in the Information Protocol.

## 8. PROJECT DOCUMENTS AND SCHOOL AGREEMENT

8.1 Save as provided for in clause 8.3, but subject always to clauses 8.4 and 8.5, the Authority shall not agree to any amendment, variation, change, novation or assignment of any Project Document, or give any consent or approval under any Project Document, where the effect of such action shall on the balance of probabilities potentially expose the DFE to greater liabilities by operation of either clause 4.4 or clause 14.5 without the prior written consent of the DFE (not to be unreasonably withheld or delayed). In the event that such action be contemplated by the Authority, the Authority shall take into account the DFE's reasonable comments on any proposals or relevant documentation.

8.2 The Authority and the Academy shall not agree to any amendment, variation, change, novation or assignment of the School Agreement without the prior written consent of the DFE (not to be unreasonably withheld or delayed). In the event that such action be contemplated by the Authority and/or the Academy, such parties shall take into account the DFE's reasonable comments on any proposals or relevant documentation.

8.3 The Authority shall not be obliged to obtain the consent of the DFE pursuant to clause 8.1 where the effect of such proposed action will cause an increase in the Academy's liabilities under the School Agreement of less than the De Minimus Amount taking into consideration all other actions where the prior written consent of DFE has not previously been obtained under clause 8.1.

8.4 The Authority shall ensure that, prior to agreeing to proceed with any change or variation to the Project Documents (including, but not limited to, those changes referred to in clause 27 (Exercise of Authority Change and Change mechanism) of the School Agreement) in connection with which the Academy is to contribute towards all or part of any lump sum payment (with the agreement of the Academy, where required pursuant to the terms of the School Agreement), it has received written confirmation from the Academy that the Academy has obtained adequate funding which relates to the relevant change or variation.



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8.5 The Parties agree that the intent of clause 8.3 is to set out a de minimus amount, below which the Authority is not obliged to seek DfE's consent and that nothing in clauses 8.1 and/or 8.3 shall prejudice the Academy's rights as against the Authority under clause 6.2 of the School Agreement.

## 9. FINANCIAL MATTERS

9.1 The DfE shall pay on an annual basis to the Authority the Dedicated Schools Grant adjusted as appropriate in accordance with schedule 2 and in accordance with the DfE's usual policies and procedures.

9.2 Where schedule 2 makes provision for the payment of the Academy Affordability Gap, the DfE shall pay to the Authority or the Academy (as the case may be) a sum equal to the Academy Affordability Gap.

9.3 Save as provided for in clause 9.4, the Authority and the Academy shall not agree to any amendment to the basis for calculation of the Academy Contribution without the prior written consent of the DfE (not to be unreasonably withheld or delayed).

9.4 The Authority and the Academy shall not be obliged to obtain the consent of the DfE pursuant to clause 9.3 where the effect of the amendment to the basis for calculation of the Academy Contribution does not increase or decrease the Academy Contribution by £10,000 (ten thousand pounds) or more whether by way of a single amendment or when calculated in aggregation in any rolling twelve (12) month period with all such other amendments where the prior written consent of the DfE has not previously been obtained.

## 10. INSURANCE ARRANGEMENTS

10.1 The Authority shall use best endeavours and the DfE and the Academy shall use their reasonable endeavours to ensure that, from the date hereof the Academy is a named co-insured for its rights and interests on those insurances that the Contractor shall have taken out pursuant to schedule 6, part 2 of the Project Agreement (other than business interruption cover) (containing a clause waiving the insurer's rights of subrogation against the Academy and providing for non-vitiation protection in respect of any claim made by the Academy as co-insured).

10.2 The Academy shall not take any action or fail to take any reasonable action or (insofar as it is reasonably within its power) permit any Academy Related Party to take any action or fail to take any action in relation to it, which would entitle any insurer to refuse to pay any claim under any policy taken out pursuant to the Project Documents, to which it is an insured, a co-insured or an additional insured person, or noted on the policy.

10.3 The Academy shall take out and maintain (or procure that the Fitness Centre Operator takes out and maintains) insurances which:

10.3.1 cover the risk of physical loss and/or damage to the contents of the School (but, without prejudice to clauses 10.3.2 and 10.3.3, this shall in no way extend to the taking out and maintenance of any insurance in respect of any risk covered by any insurance required to be taken out and maintained under the Project Documents);

10.3.2 cover the risk of material damage to Authority Equipment located on the Site, with the Contractor, Sub-Contractors and Senior Lender named as coinsured so as to discharge the Authority's obligations to the Contractor in relation to Authority

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Equipment located at the Site pursuant to Clause 36.15.2 of the Project Agreement;

- 10.3.3 cover the risk of loss or damage to equipment in the Fitness Centre owned or leased by the Fitness Centre Operator and/or the Academy;
- 10.3.4 cover the risk of third party liability (including products liability) in relation to the operation of the Fitness Centre by the Fitness Centre Operator;

and ensure that the Contractor's interest (as PFI contractor, senior leaseholder and facilities manager of the building in which the Fitness Centre is located) is noted on the policies referred to in clauses 10.3.3 and 10.3.4.

## **11. GENERAL ASSISTANCE AND COOPERATION**

11.1 Subject to clause 11.2, each party undertakes to co-operate in good faith with the other parties to facilitate the proper performance of this Agreement and in particular each party shall:

- 11.1.1 use all reasonable endeavours to avoid unnecessary disputes and claims against the other parties;
- 11.1.2 not unnecessarily interfere with the rights of the other parties and their Related Parties, agents, representatives or subcontractors in performing their obligations under this Agreement or the School Agreement nor in any other way hinder or prevent such other party from performing those obligations; and
- 11.1.3 assist the other parties and their Related Parties in performing their obligations so far as is reasonably practicable.

11.2 Nothing in clause 11.1 shall:

- 11.2.1 interfere with the right of any party to lawfully arrange its affairs in whatever manner it considers fit in order to perform its obligations under this Agreement in the manner in which it considers to be the most effective and efficient;
- 11.2.2 oblige any party to incur any material additional cost or expense in excess of that required by its proper performance of its obligations under this Agreement;
- 11.2.3 relieve a party from any obligation under any indemnity contained in this Agreement or the School Agreement or from any obligation to pay any debt due or payable under this Agreement or the School Agreement; or
- 11.2.4 fetter the discretion of the parties in fulfilling their statutory functions.

## **12. REPRESENTATIVES**

- 12.1 Each party shall from time to time appoint a Representative who shall be authorised to exercise the rights, functions and powers of the relevant appointing party under this Agreement and the identity of such Representative shall be notified to the other parties in writing.
- 12.2 Each Representative shall be entitled at any time by written notice to the other parties to appoint an alternate who shall for the purposes of this clause be regarded as the relevant Representative.

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12.3 Each party shall be entitled to treat any act of a Representative as being expressly authorised by the relevant appointing party and shall not be required to determine whether any express authority has in fact been given.

**13. TERMINATION**

13.1 This Agreement shall terminate on the earlier of:

13.2 expiry or early termination of the Project Agreement; and

13.3 termination of the School Agreement.

**14. DFE COMFORT**

14.1 The Authority acknowledges that the DFE benefits from the Intervention Rights which it may exercise in respect of the Academy.

14.2 The DFE shall promptly notify the Authority upon exercising any of its Intervention Rights, providing details as may reasonably be required by the Authority. The DFE shall promptly notify the Authority when the exercise of any Intervention Rights ceases.

14.3 In the event that the Academy is in material breach of the School Agreement with the consequence that such breach has placed the Authority in breach of the Project Documents and such breach has a material consequence for the Authority (provided that any breach of the School Agreement which places the Authority in breach of the Project Documents with material consequences shall be deemed to be a material breach for the purpose of this clause), the Authority may request that the DFE :

14.3.1 exercise its Intervention Rights; and/or

14.3.2 take any other reasonable action to the extent that the DFE is permitted to do so (such action to be agreed between the DFE and the Authority, both parties acting reasonably); and/or

14.3.3 compensate the Authority for Direct Losses which the Authority has incurred as a result of such breach.

14.4 Following a request made by the Authority under clause 14.3, the DFE shall consult with the Authority in relation to the course of action which DFE proposes to take. The DFE shall act reasonably when considering any request made by the Authority. The DFE shall retain discretion whether to take the action requested by the Authority or whether to take another course of action, provided always that the DFE acts reasonably when exercising its discretion.

14.5 In the event that the DFE decides to compensate the Authority pursuant to clause 14.3.3, the DFE shall have the right to specify such conditions in relation to such compensation as it sees fit.

**15. FAILURE OF THE ACADEMY**

15.1 The DFE may, in circumstances where a final notice has been served on relevant parties terminating the Supplemental Funding Agreement (in accordance with the terms of the Supplemental Funding Agreement), propose to the Authority a Suitable Substitute to undertake the obligations and rights of the Academy under this Agreement, the School

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Agreement and the Lease and, if proposed, the DFE shall provide the Authority with all information relating to such proposed Suitable Substitute as the Authority may reasonably require to determine whether the Suitable Substitute is able to comply with the obligations it is proposed to undertake.

- 15.2 The Authority shall within a reasonable period from receipt of all information provided in accordance with clause 15.1, notify the DFE whether it approves of such proposed Suitable Substitute (such approval not to be unreasonably withheld or delayed) (hereafter referred to as the "Approved Suitable Substitute"). If the Authority does not approve the proposed Suitable Substitute, either the Authority's decision shall be referred to the dispute resolution procedure under clause 17 or the DFE may propose an alternative Suitable Substitute and clauses 15.1 and 15.2 shall apply in respect of such alternative Suitable Substitute.
- 15.3 Where the Authority notifies the DFE of the Approved Suitable Substitute pursuant to clause 15.2, the parties shall undertake all necessary steps to cooperate to:
- 15.3.1 terminate the Supplemental Funding Agreement, and ensure that the Approved Suitable Substitute is offered funding on reasonably acceptable terms from the DFE for the operation of an academy at the Site (save that nothing in this Agreement shall have the effect of requiring the Academy to undertake any action, give any commitment or execute any document in connection with ensuring that the Approved Suitable Substitute is offered funding on reasonably acceptable terms from the DFE for the operation of an academy at the Site except to provide promptly to the DFE such information as the DFE may reasonably request in connection with the Academy's operation of an academy at the Site);
  - 15.3.2 novate this Agreement and the School Agreement to the Approved Suitable Substitute;
  - 15.3.3 assign the Lease to the Approved Suitable Substitute as tenant pursuant to the terms of such Lease;
  - 15.3.4 not unreasonably prevent or frustrate the novation or assignment of any rights and/or liabilities to the Approved Suitable Substitute as envisaged by this clause 15.
- 15.4 Any transfer, novation and/or assignment pursuant to clause 15.3 shall become effective by a novation of this Agreement, the School Agreement and assignment of the Lease to the Approved Suitable Substitute whereupon the Academy shall be released from any obligations or liabilities under or in connection with this Agreement, the School Agreement and the Lease from that date and the Approved Suitable Substitute shall become liable for such obligations or liabilities. The DFE shall use all reasonable endeavours to ensure that the release of the Academy from all obligations and liabilities under or in connection with this Agreement, the School Agreement and the Lease shall take effect on or prior to the date on which the Supplemental Funding Agreement is terminated.
- 15.5 Where:
- 15.5.1 the DFE notifies the Authority that, in circumstances which would permit the DFE to propose a Suitable Substitute, the DFE has chosen not to propose a Suitable Substitute to the Authority pursuant to clause 15.1, and the DFE has provided to the Authority all relevant details of such circumstances and reasons for it not proposing a Suitable Substitute; or

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- 15.5.2 an Approved Suitable Substitute has not been appointed or agreed;
- then, the DFE may serve written notice on the Authority that the Supplemental Funding Agreement shall terminate on a date which is not less than the later of:
- 15.5.3 one month after the date of receipt of such notice; and
- 15.5.4 the effective date of termination of the Supplemental Funding Agreement as set out in a notice issued pursuant to the terms of the Supplemental Funding Agreement.
- 15.6 The DFE shall procure that from the date the Authority receives notice under clause 15.5 until the date of termination of the Supplemental Funding Agreement, the Authority shall continue to receive the DSG and the Academy Contribution in accordance with the terms of this Agreement and the School Agreement.
- 15.7 Following the issue of a notice by the DFE that the Supplemental Funding Agreement will terminate, the parties shall co-operate fully to ensure the transfer of the responsibility for delivery of Educational Services to the Authority.
- 15.8 For the purpose of clause 15.3 and clause 15.7 above, the meaning of the term "**co-operate**" shall include the Academy:
- 15.8.1 liaising with the DFE, the Authority and/or any Approved Suitable Substitute, and providing such information as the DFE, the Authority and/or any Approved Suitable Substitute may reasonably require relating to the operation of an academy at the Site (including, but not limited to, information relating to claims, disputes and/or alleged breaches of the Project Documents, School Agreement, Lease and this Agreement);
- 15.8.2 allowing any Approved Suitable Substitute access (at reasonable times and on reasonable notice) to the School, but not so as to interfere with or impede the provision of the FM Services, and/or Educational Services at the School; and/or
- 15.8.3 transferring its rights, title and interest in and to any Relevant Assets to the Authority promptly upon termination, or (where relevant) to the Approved Suitable Substitute with effect on and from the date the DFE and the Approved Suitable Substitute enter into a funding agreement in relation to the operation of an academy at the Site. The DFE shall procure that the Secretary of State for Education shall not exercise any of his rights under clause 6.5 of the Supplemental Funding Agreement in such a way so as to prevent or frustrate the performance by the Academy of its obligations under this clause 15.8.3.
- 15.9 Where the responsibility for the provision of the Educational Services at the School reverts to the Authority pursuant to clause 15.7, this Agreement and the School Agreement and the Lease shall terminate (subject to any provisions which are expressed to survive termination). The Authority shall at any time after receipt of notice of termination of the Supplemental Funding Agreement be permitted to apply to the DFE for revenue grant in respect of pupils at the School. The DFE shall (acting reasonably) consider the Authority's application for such funding and any such decision of the DFE shall not be unreasonably withheld or delayed.

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**16. ASSIGNMENT**

**16.1 Assignment by DFE**

- 16.1.1 Subject to clause 16.1.2, the rights and obligations of DFE under this Agreement shall not be assigned, novated or otherwise transferred other than to any person (being a single entity) having the legal capacity, power and authority to become a party to and perform the obligations of DFE under this Agreement being a Minister of the Crown pursuant to an order under the Ministers of the Crown Act 1975.
- 16.1.2 Any assignment pursuant to clause 16.1.1 may only be to an assignee which has substantially the same responsibilities for education services.

**16.2 Assignment by the Authority**

- 16.2.1 Without prejudice to clause 8, and subject to clauses 16.2.2 and 16.2.3, the rights and obligations of the Authority under this Agreement, the School Agreement and the Lease shall not be assigned, novated or otherwise transferred (whether by virtue of any legislation or any scheme pursuant to any Legislation or otherwise) to any person other than to any public body (being a single entity) having the legal capacity, power and authority to become a party to and to perform the obligations of the Authority under this Agreement, the School Agreement and the Lease being:
  - 16.2.1.1 a Minister of the Crown pursuant to an order under the Ministers of the Crown Act 1975; or
  - 16.2.1.2 any Local Authority which has sufficient financial standing or financial resources to perform the obligations of the Authority under this Agreement, the School Agreement and the Lease.
- 16.2.2 Any assignment pursuant to clause 16.2.1 may only be to an assignee which has substantially the same responsibilities in the Area for Educational Services.
- 16.2.3 The Authority shall assign, novate or otherwise transfer its rights and/or obligations under this Agreement to any person to which the Authority assigns, novates or otherwise transfers its rights and/or obligations under the Project Agreement in accordance with clause 66A.1 of the Project Agreement.

**16.3 Assignment by the Academy**

The rights and obligations of the Academy under this Agreement, the School Agreement and the Lease may be novated or assigned in accordance with the terms of this Agreement and the School Agreement but not otherwise.

**17. DISPUTE RESOLUTION**

**17.1 Disputes**

Any dispute arising in relation to any aspect of this Agreement shall be resolved in accordance with this clause 17.

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**17.2 Consultation**

If a dispute arises in relation to any aspect of this Agreement, the relevant parties to the dispute shall first consult in good faith in an attempt to come to an agreement in relation to the disputed matter.

17.3 Any dispute not capable of resolution by the parties to the dispute in accordance with the terms of clause 17.2 shall be escalated so that the matter is considered by senior representatives of the relevant parties.

17.4 If the dispute remains not capable of resolution following escalation pursuant to clause 17.3, it shall be settled as far as possible by mediation in accordance with the Centre for Effective Dispute Resolution ("CEDR") model mediation procedure.

17.5 No party to the dispute may commence any court proceedings/adjudication in relation to any dispute arising out of this Agreement until they have attempted to settle it by mediation, but any such mediation may be terminated by any party to the dispute at any time of such party wishing to commence court proceedings/adjudication.

17.6 The parties to the dispute will co-operate with any person appointed as mediator providing him with such information and other assistance as he shall require and such parties will pay his costs, as he shall determine.

**17.7 Adjudication**

If the relevant parties to the dispute fail to resolve the dispute through such consultation or mediation, any party to the dispute may refer the matter to an adjudicator selected in accordance with clause 17.8 (Identity of Adjudicator) ("Adjudicator").

**17.8 Identity of Adjudicator**

The Adjudicator nominated to consider a dispute referred to him shall be wholly independent of the relevant parties to the dispute and shall be selected in accordance with the following:

17.8.1 the nominee shall be an expert on matters of schools funding, being a qualified lawyer or accountant with not less than ten (10) years' experience in the field; and

17.8.2 if the relevant parties to the dispute are unable to agree on the identity of the Adjudicator, the President for the time being of the Chartered Institute of Arbitrators shall appoint such Adjudicator within twenty (20) Business Days of any application for such appointment by the relevant party.

**17.9 Submission of arguments**

Within five (5) Business Days of nomination in relation to a particular dispute, the Adjudicator shall require the parties in dispute to submit in writing their respective arguments. The Adjudicator shall, in his absolute discretion, consider whether a hearing is necessary in order to resolve the dispute.

**17.10 Adjudicator's decision**

In any event, the Adjudicator shall provide to all parties in dispute his written decision on the dispute, within twenty (20) Business Days of the Adjudicator's nomination to consider the relevant dispute (or such other period as the parties may agree after the reference) or thirty

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(30) Business Days from the date of reference if the party which referred the dispute agrees. The Adjudicator's decision shall not state any reasons for his decision. Unless and until revised, cancelled or varied by the English courts, the Adjudicator's decision shall be binding on all parties to the dispute who shall forthwith give effect to the decision.

**17.11 Adjudicator's costs**

The Adjudicator's costs of any reference shall be borne as the Adjudicator shall specify or, in default, equally by the parties to the dispute. Each party to the dispute shall bear its own costs arising out of the reference, including legal costs and the costs and expenses of any witnesses.

**17.12 Adjudicator as expert**

The Adjudicator shall be deemed not to be an arbitrator but shall render his decision as an expert, and the provisions of the Arbitration Act 1996 and the law relating to arbitration shall not apply to the Adjudicator or his determination or the procedure by which he reached his determination.

**17.13 Adjudicator's powers**

The Adjudicator shall act impartially and may take the initiative in ascertaining the facts and the law. The Adjudicator shall have the power to open up, review and revise any opinion, certificate, instruction, determination or decision of whatever nature given or made by him under this Agreement.

**17.14 Confidentiality**

All information, data or documentation disclosed or delivered by a party to the Adjudicator in consequence of or in connection with his appointment as Adjudicator shall be treated as confidential. The Adjudicator shall not, save as permitted by clause 18.2 (Confidentiality) or clause 18.3 (Freedom of Information), disclose to any person or company any such information, data or documentation and all such information, data or documentation shall remain the property of the party disclosing or delivering the same and all copies shall be returned to such party on completion of the Adjudicator's work.

**17.15 Liability of Adjudicator**

The Adjudicator is not liable for anything done or omitted in the discharge or purported discharge of his functions as Adjudicator unless the act or omission is in bad faith. Any employee or agent of the Adjudicator is similarly protected from liability.

**17.16 Reference to the courts**

If:

17.16.1 any party to the dispute is dissatisfied with or otherwise wishes to challenge the Adjudicator's decision made in accordance with clause 17.10 (Adjudicator's decision); or

17.16.2 all relevant parties agree,

then any party to the dispute may (within twenty (20) Business Days of receipt of the Adjudicator's decision), notify the other parties to the dispute of its intention to refer the dispute to the courts.



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**17.17 Parties' obligations**

The parties shall continue to comply with, observe and perform all their obligations hereunder regardless of the nature of the dispute and notwithstanding the referral of the dispute for resolution under this clause 17 and shall give effect forthwith to every decision of the Adjudicator and the courts delivered under this clause 17.

**18. MISCELLANEOUS**

**18.1 The Authority's statutory authority**

Nothing in this Agreement shall be construed as a fetter or restriction on the exercise of the Authority's planning or highways functions nor, without prejudice to the rights and remedies of the DFE and the Academy under this Agreement, the exercise of any other statutory function by or on behalf of the Authority.

**18.2 Confidentiality**

18.2.1 No party to this Agreement shall publish or cause to be published or communicate to any third party any matter relating to this Agreement except with the prior written consent of the other parties (such consent not to be unreasonably withheld or delayed).

18.2.2 Each party shall comply with their duties and responsibilities under the Data Protection Act 1998 in the performance of this Agreement and shall not unlawfully process or disclose information subject to that Act.

**18.3 Freedom of Information**

The parties agree that they will each cooperate with one another to the extent they are legally entitled to do so to enable any party receiving a request for information under the Freedom of Information Act 2000 and/or the Environmental Information Regulations 2004 to respond to that request promptly and within the statutory timescales. This cooperation shall include but not be limited to finding, retrieving and supplying information held, directing requests to other parties as appropriate and responding to any requests by the party receiving a request for comments or other assistance.

**18.4 Notices**

18.4.1 All notices under this Agreement shall be in writing and all certificates, notices or written instructions to be given under the terms of this Agreement shall be served by sending the same by first class post, facsimile or by hand, leaving the same at:

If to DFE:

Director of Academies;  
Academies Group  
Department for Education  
Sanctuary Buildings  
Great Smith Street  
London  
SW1P 3BT

Fax No. 020 7925 7352

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If to the Authority:

The Kent County Council,  
Sessions House,  
Maidstone,  
Kent  
ME14 1RF  
marked for the attention of: Rebecca  
Spore, Director of Property &  
Infrastructure Support

Fax No: 01622 694 117

If to the Academy:

The Hayesbrook School,  
Brook Street,  
Tonbridge,  
Kent  
TN9 2PH,  
marked for the attention of: The  
Chief Executive Officer of Brook  
Learning Trust

Fax No: 01732 500 556

18.4.2 Any party to this Agreement may change its nominated address or facsimile number by prior notice to the other parties.

18.4.3 Notices given by post shall be effective upon the earlier of (i) actual receipt, and (ii) five (5) Business Days after mailing. Notices delivered by hand shall be effective upon delivery. Notices given by facsimile shall be deemed to have been received where there is confirmation of uninterrupted transmission by a transmission report and where there has been no telephonic communication by the recipient to the senders (to be confirmed in writing) that the facsimile has not been received in legible form:

18.4.3.1 within two (2) hours after sending, if sent on a Business Day between the hours of 9.00am and 4.00pm; or

18.4.3.2 by 11.00am on the next following Business Day, if sent after 4.00pm, on a Business Day but before 9.00am on that next following Business Day.

## 18.5 Amendments

This Agreement may not be varied except by an agreement in writing signed by duly authorised representatives of all the parties to this Agreement.

## 18.6 Waiver

Any relaxation, forbearance, indulgence or delay (together "**Indulgence**") of any party in exercising any right shall not be construed as a waiver of the right and shall not affect the ability of that party subsequently to exercise that right or to pursue any remedy, nor shall any

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Indulgence constitute a waiver of any other right (whether against that party or any other person).

**18.7 No agency**

Nothing in this Agreement shall be construed as creating a partnership or as a contract of employment between any of the parties. Save as expressly provided otherwise in this Agreement, no party shall be, or be deemed to be, an agent of another party and shall not hold itself out as having authority or power to bind another party in any way.

**18.8 Entire agreement**

18.8.1 Except where expressly provided otherwise in this Agreement, this Agreement constitutes the entire agreement between the parties in connection with its subject matter and supersedes all prior representations, communications, negotiations and understandings concerning the subject matter of this Agreement.

18.8.2 Each of the parties acknowledges that it does not enter into this Agreement on the basis of and does not rely, and has not relied, upon any statement or representation (whether negligent or innocent) or warranty or other provision (in any case whether oral, written, express or implied) made or agreed to by any person (whether a party to this Agreement or not) except those expressly repeated or referred to in this Agreement and the only remedy or remedies available in respect of any misrepresentation or untrue statement made to it shall be any remedy available under this Agreement.

**18.9 Severability**

If any provision of this Agreement shall be declared invalid, unenforceable or illegal by the courts of any jurisdiction to which it is subject, such provision may be severed and such invalidity, unenforceability or illegality shall not prejudice or affect the validity, enforceability or legality of the remaining provisions of this Agreement.

**18.10 Counterparts**

This Agreement may be executed in one or more counterparts. Any single counterpart or a set of counterparts executed, in either case, by all the parties shall constitute a full original of this Agreement for all purposes.

**18.11 Costs and expenses**

Each party shall be responsible for paying its own costs and expenses incurred in connection with the negotiation, preparation and execution of this Agreement.

**18.12 No privity**

It is agreed for the purposes of the Contracts (Rights of Third Parties) Act 1999 that this Agreement is not intended to, and does not, give to any person who is not a party to this Agreement any rights to enforce any provisions contained in this Agreement except for any person to whom the benefit of this Agreement is assigned or transferred in accordance with the terms of this Agreement.

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**18.13 Interest on late payment**

Save where otherwise specifically provided, where any payment or sum of money due from one party to another under any provision of this Agreement is not paid on or before the due date, it shall bear interest thereon at the Prescribed Rate from the due date (whether before or after any judgement) until actual payment.

**18.14 Mitigation**

The parties shall at all times take all reasonable steps to minimise and mitigate any loss for which they are entitled to bring a claim (including but not limited to any indemnity) pursuant to this Agreement and to take all reasonable steps to minimise and mitigate any effects or circumstances and/or events adversely affecting the performance of their obligations under this Agreement which would otherwise entitle that party to relief and/or to claim compensation hereunder.

**18.15 No double recovery**

Notwithstanding any other provisions of this Agreement, no party shall be entitled to recover compensation or to make a claim under this Agreement in respect of any loss that it has incurred to the extent that it has already been compensated in respect of that loss pursuant to this Agreement, the School Agreement, the Project Documents or otherwise.

**18.16 Further assurance**

All parties shall do all things and execute all further documents necessary to give full effect to this Agreement.

**18.17 Governing law and jurisdiction**

18.17.1 This Agreement and any non-contractual obligation arising out of or in connection with it is subject to the laws of England and Wales.

18.17.2 Subject to the provisions of clause 17 (Dispute Resolution), the parties agree that the courts of England and Wales shall have exclusive jurisdiction to hear and settle any action, suit, proceeding or dispute in connection with this Agreement and irrevocably submit to the jurisdiction of those courts.

**IN WITNESS** whereof the parties have executed this Agreement the day and year first above written

✓✓

The common seal of THE KENT COUNTY COUNCIL was hereunto affixed in the presence of:



*[Handwritten signature]*

Authorised Signatory

1144

THE CORPORATE SEAL of the SECRETARY OF STATE FOR EDUCATION hereunto affixed was authenticated by:



*[Handwritten signature: D Churchill]*

Authorised by the Secretary of State for Education

DAVID CHURCHILL

SIGNED as a deed by and on behalf of BROOK LEARNING TRUST acting by:

*[Handwritten signature: KMElves]*

Director

*[Handwritten signature: VFBgeal]*

Director / secretary

KZJ

## SCHEDULE 1: INFORMATION PROTOCOL

1. The parties recognise the benefit of cooperation and sharing of information as part of a prudent risk management strategy. Each Party shall notify the others of relevant timescales (contractual and non-contractual) to which it is bound or committed, and shall use reasonable endeavours to facilitate exchange of information in good time to meet such timescales.
2. The Authority shall provide to the DFE and the Academy (in each case solely in respect of matters affecting the Site and/or the School):
  - 2.1 promptly upon becoming aware of the same, details of any actual or potential claim made or potentially to be made against the Authority under the Project Documents relating to a liability which the Authority may seek to recover from the Academy or the DFE;
  - 2.2 on reasonable request, details of claims that the Authority is progressing under the Project Documents (irrespective of whether the claims are being made at the request of the Academy or the DFE) and which total an amount equal to or greater than the De Minimus Amount taking into consideration all other claims which have not previously been notified to DFE;
  - 2.3 a copy of any Relevant Notice;
  - 2.4 details of any matter exceeding the De Minimus Amount (taking into consideration all other matters which have not previously been notified to DFE) which may lead to an increase in the Academy Contribution including indexation, any benchmarking/market testing and any change in law; and
  - 2.5 such other information as the DFE or Academy may reasonably require.
3. The Authority shall provide to the Academy (in each case solely in respect of matters affecting the Site or the School):
  - 3.1 copies of insurance certificates obtained from the Contractor and copies of insurance reports provided by the Contractor as part of the insurance premia sharing mechanism under the Project Agreement;
  - 3.2 not used
  - 3.3 copies of performance reports received from the Contractor pursuant to the relevant payment mechanisms;
  - 3.4 not used;
  - 3.5 copies of any survey reports obtained by the Authority having exercised its rights to require surveys pursuant to the Project Documents;
  - 3.6 copies of planned maintenance programmes provided to the Authority by the Contractor pursuant to the Project Documents;
  - 3.7 notice of any intention on the part of the Authority to exercise its step in rights pursuant to the Project Documents;

- 3.8 details of any information given to the Authority by the Contractor under the Project Agreement concerning any litigation, arbitration, administrative or adjudication or mediation proceedings before or of any court, arbitrator or relevant authority which would adversely affect, to an extent which is material to the Academy, the Contractor's ability to perform its obligations under the Project Agreement;
  - 3.9 details of any matter which may lead to an increase in the Academy Contribution including indexation, any benchmarking/market testing and any change in law; and
  - 3.10 on reasonable request, details of claims that the Authority is progressing under the Project Documents (irrespective of whether the claims are being made at the request of the Academy).
4. The Academy shall provide to the Authority and to the DFE, promptly upon becoming aware of the same, details of any actual or potential claim made or potentially to be made against the Authority under the Project Documents.
  5. The Academy shall provide to the Authority:
    - 5.1 details of any breaches of the Project Documents by the Contractor not addressed by the relevant payment mechanism of which it is aware;
    - 5.2 details of any grounds to exercise rights or remedies in favour of the Authority under the Project Documents of which it is aware;
    - 5.3 details of any instances of damage to the Site, the School of which it is aware, together with details of any contact with the Contractor it has in respect of the same.
  6. A party providing information pursuant to this schedule may require payment of its reasonable costs in providing such information where, acting reasonably, it believes it is appropriate to do so given the nature or volume of the information or requests for information, or any other relevant factors.

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## SCHEDULE 2: AFFORDABILITY GAP AND ADJUSTMENTS RELATING THERETO

### Introduction

1. Any payments of sums equal to the Academy Affordability Gap payable by the DFE pursuant to clause 9 shall be calculated in accordance with this schedule 2.

### Where the DSG *includes* pupils attending the School - recoupment model applies

2. Where the pupil number baseline of the Authority's allocation of DSG *includes* pupils attending the School (the "recoupment model"), the DSG will be calculated in accordance with the methodology that applies to all local authorities allocated DSG (but with recoupment applying), as determined by the Secretary of State, for the relevant Financial Year.
3. Where the Authority "delegates" the Academy Affordability Gap and such sum is accounted for within the relevant School budget share (and is therefore subject to recoupment), the DFE shall, subject to paragraph 8, pay to the Academy a sum equal to the Academy Affordability Gap as part of the General Annual Grant or Earmarked Annual Grant. The parties agree that the Academy shall promptly pay such sum to the Authority pursuant to the terms of the School Agreement.
4. The parties agree that the recoupment model for calculating DSG shall apply until such time as this practice ends or is amended.

### Where the DSG *excludes* pupils attending the School - no recoupment model applies

5. Where the pupil number baseline of the Authority's allocation of DSG *excludes* pupils attending the School (the "no recoupment model"), the DSG will be calculated in accordance with the methodology that applies to all local authorities allocated DSG, as determined by the Secretary of State, for the relevant Financial Year, plus the Academy Affordability Gap as calculated by the Authority (in accordance with paragraph 8) for the Financial Year in question.

### General

6. In any Financial Year where the School operated by the Academy is open for less than 12 months the value of the Academy Affordability Gap will be reduced commensurately.
7. The amounts payable under this schedule shall only be payable from the date of this Agreement.
8. The Authority shall act reasonably when undertaking calculations of the Affordability Gap and the Academy Affordability Gap, and shall on request provide in good faith all relevant information in its possession to the DFE necessary to calculate the DSG for the relevant Financial Year which, for the avoidance of doubt, shall include:
  - 8.1 the projected Unitary Charge;
  - 8.2 details of the Affordability Gap and how it is proposed to be apportioned to the School, if applicable;
  - 8.3 the details of any sums received pursuant to the Promissory Note; and



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- 8.4 the projected allocation of the DSG for each school which is the subject of the Project Agreement.
9. DFE shall provide at least one (1) months written notice to the Authority of the proposed date of grant of the DSG and shall provide to the Authority any information reasonably required by the Authority in connection with the DSG.
10. In this schedule, "Financial Year" means a period of 12 months commencing on 1 April provided that the first Financial Year shall be the period commencing on the date of opening of the School operated by the Academy and ending on the immediately following 31 March.