

# SOFTWARE TERMS AND CONDITIONS

Updated 5/3/19

These Software Terms and Conditions (“Agreement”) set forth the terms and conditions under which DataKeeper Technologies, LLC (“DataKeeper”) will provide access to the user (“Customer”) of DataKeeper’s VisitTrackerWeb (“Software”) for use as described here. Customer cannot use the Software until Customer has carefully read and agreed to this Agreement. If Customer disagrees with the terms and conditions of this Agreement, Customer cannot use the Software. By paying for, accessing, loading, or otherwise using the Software, which may include related materials and documentation, or any portion thereof, Customer agrees to be bound by all of the terms of this Agreement. The Agreement sets forth the terms and conditions under which Customer may Use (as defined herein).

## 1. RIGHT OF USE

- 1.1. **Use.** Subject to all limitations and restrictions contained herein, DataKeeper grants Customer a subscription, software as a service (SaaS), nonexclusive and nontransferable right to use the Software as hosted by DataKeeper (“Use”).
- 1.2. **Use.** Customer shall not allow any website to frame, syndicate, distribute, replicate, or copy any portion of Customer’s web site. In addition, Customer may not provide access to the Software to any third party.
- 1.3. **Design of Software.** The Software is a custom designed record keeping software created by DataKeeper. The forms generated and rules adhered to by this Software may not be exactly like those suggested for use from Customer’s State Agency or any National Center, Program or Curriculum; however, DataKeeper makes reasonable efforts to do so. Limited testing of each new version is conducted by DataKeeper; however, DataKeeper may not find all errors. Please report any problems immediately to the support team. DataKeeper is in no way liable for lost, damaged, miscalculated, or incomplete data. It is Customer’s and the user’s responsibility to check all calculations for accuracy.
- 1.4. **Additional Restrictions.** In no event shall Customer disassemble, decompile, or reverse engineer the Software, database or Confidential Information (as defined herein) or permit others to do so. Disassembling, decompiling, and reverse engineering include, without limitation: (i) converting the Software or database from a machine-readable form into a human-readable form; (ii) disassembling or decompiling the Software or database by using any means or methods to translate machine-dependent or machine-independent object code into the original human-readable source code or any approximation thereof; (iii) examining the machine-readable object code that controls the Software’s or database’s operation and creating the original source code or any approximation thereof by, for example, studying the Software’s or database’s behavior in response to a variety of inputs; or (iv) performing any other activity related to the Software or database that could be construed to be reverse engineering, disassembling, or decompiling. To the extent any such activity may be permitted pursuant to written agreement, the results thereof shall be deemed Confidential Information subject to the requirements of this Agreement. Customer may use DataKeeper’s Confidential Information solely in connection with the Software or database and pursuant to the terms of this Agreement.
- 1.5. **National Curriculum Program Data.** National Curriculum and State Agency (ie: Parents as Teachers, HIPPIY, Healthy Families America) Customers and each Software account holder acknowledge that non-personally identifiable information may be used by DataKeeper to create aggregate/summary reports for the corresponding National Curriculums or State Agencies and their state and national leaders using the data stored in the Software (including without limitation, records of data and activities with regard to families participating in a National Curriculum Program). Notwithstanding the foregoing, no person will be authorized to access personally identifiable information

regarding families participating in a National Curriculum Program (i.e. names, phone numbers, email addresses), unless (i) that person is a direct supervisor/employer of the Customer; (ii) upon request by the Customer for purposes of support assistance; or (iii) a signed copy of a Data Sharing Agreement is on file with DataKeeper.

## 2. PAYMENT

- 2.1. **Fees.** Customer shall pay DataKeeper the then-current annual fees for the Software. All fees shall be paid to DataKeeper within fifteen (15) days of the date of invoice. The initial payment for the Software must be made on the acceptance of this Agreement. Any late payment shall subject the account to suspension or termination.
- 2.2. **Taxes.** The service fees and other amounts required to be paid hereunder do not include any amount for taxes or levy (including interest and penalties). Customer shall reimburse DataKeeper and hold DataKeeper harmless for all sales, use, VAT, excise, property or other taxes or levies which DataKeeper is required to collect or remit to applicable tax authorities. This provision does not apply to DataKeeper’s income or franchise taxes, or any taxes for which Customer is exempt, provided Customer has furnished DataKeeper with a valid tax exemption certificate.

## 3. MAINTENANCE AND SUPPORT SERVICES

- 3.1. **Fees.** The subscription fees include fees for Maintenance and Support Services and hosting of the Software. In addition, DataKeeper shall provide standard support service for resolving login issues, basic usage questions and defect/service outage reporting caused by DataKeeper. DataKeeper customer support service will reasonably assist Customer should Customer encounter problems with the Software or have reasonable questions about its usage. Customer acknowledges that standard support is to facilitate normal operational usage of the Software and not value-added services that will require a trained professional to accomplish. Any additional integration or Customer-side configuration is not included in the subscription fee. At the request of Customer, DataKeeper can facilitate integration and custom development efforts that are above and beyond the scope of the services described in this Section, subject to mutual written agreement.
- 3.2. **Maintenance.** DataKeeper shall use commercially reasonable efforts to provide corrections to reported problems that (i) prevent the Software from conforming in material respects to its specifications, and (ii) are replicated and diagnosed by DataKeeper as defects in the Software (“Maintenance and Support Services”). DataKeeper shall use commercially reasonable efforts to begin working on a resolution to Customer’s written notice of reported problems within fourteen (14) days, provided corrections shall be prioritized in DataKeeper reasonable discretion. A response is not a guaranty of a solution to the reported problem; however DataKeeper will keep Customer apprised of the resolution closure. Additional features and functions are not included as part of the maintenance and support services.
- 3.3. **Service Availability.** DataKeeper’s goal is to provide Software Availability twenty-four hours per day, seven (7) days per week (referred to as “24x7 Availability”) EXCEPT during times of scheduled updates. However, the parties recognize that 24x7 Availability is only a GOAL, and DataKeeper cannot represent or guarantee that such goal can be achieved. These response time goals apply only to public production servers (i.e. web servers, application servers, and database servers). DataKeeper shall use reasonable efforts to achieve 99% Software Availability in North America. The Software Availability goal excludes any time Customer requests the site be taken down for scheduled updates. DataKeeper does not and cannot control the flow of data to or from DataKeeper’s network and other

portions of the Internet. Such flow depends in large part on the performance of Internet services provided or controlled by third parties. At times, actions or inactions of such third parties can impair or disrupt Customer's connections to the Internet (or portions thereof). Although DataKeeper will use reasonable efforts to take actions it deems appropriate to remedy and avoid such events, DataKeeper cannot guarantee that such events will not occur. Accordingly, DataKeeper disclaims any and all liability resulting from or related to such events.

3.4. **Exclusions.** DataKeeper shall not be obligated to provide Maintenance and Support Services for any software other than the generally available Software delivered to Customer pursuant to this Agreement (collectively the "Unsupported Code"). Any DataKeeper support services related to Unsupported Code shall be subject to execution of a mutually agreed upon assignment order issued under a professional services agreement.

3.5. **Third Parties.** DataKeeper shall have the right to use third parties, including employees of DataKeeper's affiliates and subsidiaries ("Subcontractors") in performance of its obligations and services hereunder and, for purposes of this Section, all references to DataKeeper or its employees shall be deemed to include such Subcontractors.

#### 4. OWNERSHIP

4.1. **Reservation of Rights.** Customer irrevocably acknowledges that, subject to the rights granted herein, Customer has no ownership interest in the Software, or DataKeeper materials provided to Customer. DataKeeper shall own all right, title, and interest in such Software and DataKeeper materials, subject to any limitations associated with intellectual property rights of third parties. DataKeeper reserves all rights not specifically granted herein.

4.2. **Customer Data.** Customer shall own all right, title, and interest in the data provided by Customer for use by the Software ("Customer Data"). Customer may download or export Customer Data from within the Software using standard available exports and reports built into the Software. To the extent Customer requests exports or reports that are not part of the standard Software, such exports or reports may be provided for an additional fee and subject to mutual written agreement of the parties. Customer may not provide access to the Customer Data through the Software to any third party; however, nothing herein restricts Customer from downloading Customer Data in order to transfer such Customer Data to such third party.

#### 5. CONFIDENTIALITY

5.1. **Definition.** "Confidential Information" includes all information marked pursuant to this Section and disclosed by either party, before or after the date of acceptance of this Agreement, and generally not publicly known, whether tangible or intangible and in whatever form or medium provided, as well as any information generated by a party that contains, reflects, or is derived from such information.

5.2. **Confidentiality of Software.** All Confidential Information in tangible form shall be marked as "Confidential" or the like or, if intangible (e.g. orally disclosed), shall be designated as being confidential at the time of disclosure and shall be confirmed as such in writing within thirty (30) days of the initial disclosure. Notwithstanding the foregoing, the following is deemed DataKeeper Confidential Information with or without such marking or written confirmation: (i) the Software, database and other related materials furnished by DataKeeper; (ii) the oral and visual information relating to the Software; and the terms and conditions of this Agreement.

5.3. **Exceptions.** Without granting any right or license, the obligations of the parties hereunder shall not apply to any material or information that: (i) is or becomes a part of the public domain through no act or omission by the receiving party; (ii) is independently developed by the other party without use of the disclosing party's Confidential Information; (iii) is rightfully obtained from a third party without any obligation of confidentiality; or (iv) is already known by the receiving party without any obligation of confidentiality prior to obtaining the Confidential Information from the disclosing party. In addition,

neither party shall be liable for disclosure of Confidential Information if made in response to a valid order of a court or authorized agency of government, provided that notice is promptly given to the disclosing party so that the disclosing party may seek a protective order and engage in other efforts to minimize the required disclosure. The parties shall cooperate fully in seeking such protective order and in engaging in such other efforts.

5.4. **Ownership of Confidential Information.** Nothing in this Agreement shall be construed to convey any title or ownership rights to the Software, Database or other Confidential Information to Customer or to any patent, copyright, trademark, or trade secret embodied therein, or to grant any other right, title, or ownership interest to the DataKeeper Confidential Information. Neither party shall, in whole or in part, sell, lease, license, assign, transfer, or disclose the Confidential Information to any third party and shall not copy, reproduce or distribute the Confidential Information except as expressly permitted in this Agreement. Each party shall take every reasonable precaution, but no less than those precautions used to protect its own Confidential Information, to prevent the theft, disclosure, and the unauthorized copying, reproduction or distribution of the Confidential Information.

5.5. **Non-Disclosure.** Each party agrees at all times to keep strictly confidential all Confidential Information belonging to the other party. Each party agrees to restrict access to the other party's Confidential Information only to those employees or Subcontractors who (i) require access in the course of their assigned duties and responsibilities; and (ii) have agreed in writing to be bound by provisions no less restrictive than those set forth in this Section.

5.6. **Injunctive Relief.** Each party acknowledges that any unauthorized disclosure or use of the Confidential Information would cause the other party imminent irreparable injury and that such party shall be entitled to, in addition to any other remedies available at law or in equity, temporary, preliminary, and permanent injunctive relief in the event the other party does not fulfill its obligations under this Section.

5.7. **Suggestions/Improvements to Software.** Notwithstanding this Section, unless otherwise expressly agreed in writing, all suggestions, solutions, improvements, corrections, and other contributions provided by Customer regarding the Software or other DataKeeper materials provided to Customer shall be owned by DataKeeper, and Customer hereby agrees to assign any such rights to DataKeeper. Nothing in this Agreement shall preclude DataKeeper from using in any manner or for any purpose it deems necessary, the know-how, techniques, or procedures acquired or used by DataKeeper in the performance of services hereunder.

#### 6. WARRANTY

6.1. **Authorized Representative.** Customer and DataKeeper warrant that each has the right to enter into this Agreement and that the Agreement shall be executed by an authorized representative of each entity.

6.2. **Disclaimer of Warranties.** Customer acknowledges and agrees that it is not relying on any statement or warranty not expressly provided herein with respect to the Software or maintenance, or other services provided hereunder. EXCEPT AS OTHERWISE STATED IN THIS AGREEMENT, THE SOFTWARE IS PROVIDED "AS IS" AND DATAKEEPER MAKES NO WARRANTIES, EXPRESS OR IMPLIED, INCLUDING EXPRESS OR IMPLIED WARRANTIES OF MERCHANTABILITY, FITNESS FOR A PARTICULAR PURPOSE, AND NON-INFRINGEMENT.

6.3. **No Modifications.** Notwithstanding anything to the contrary in this Section, any and all warranties under this Agreement are VOID if Customer has made changes to the Software or has permitted any changes to be made other than by or with the express, written approval of DataKeeper.

#### 7. LIMITATION OF LIABILITY

7.1. **Liability Cap.** IN NO EVENT SHALL DATAKEEPER BE LIABLE UNDER ANY THEORY OF LIABILITY,

WHETHER IN AN EQUITABLE, LEGAL, OR COMMON LAW ACTION ARISING HEREUNDER FOR CONTRACT, STRICT LIABILITY, INDEMNITY, TORT (INCLUDING NEGLIGENCE), OR OTHERWISE, FOR DAMAGES WHICH, IN THE AGGREGATE, EXCEED THE AMOUNT OF THE FEES PAID BY CUSTOMER FOR THE SOFTWARE WHICH GAVE RISE TO SUCH DAMAGES IN THE SIX (6) MONTH PERIOD PRIOR TO THE CLAIM AND NOTWITHSTANDING THE FAILURE OF ESSENTIAL PURPOSE OF ANY REMEDY.

7.2. **Disclaimer of Damages.** IN NO EVENT SHALL DATAKEEPER BE LIABLE FOR ANY SPECIAL, INCIDENTAL, INDIRECT, EXEMPLARY, PUNITIVE, OR CONSEQUENTIAL DAMAGES OF ANY KIND AND HOWEVER CAUSED INCLUDING, BUT NOT LIMITED TO, BUSINESS INTERRUPTION OR LOSS OF PROFITS, BUSINESS OPPORTUNITIES, OR GOODWILL EVEN IF NOTIFIED OF THE POSSIBILITY OF SUCH DAMAGE, AND NOTWITHSTANDING THE FAILURE OF ESSENTIAL PURPOSE OF ANY REMEDY.

## 8. TERM AND TERMINATION

8.1. **Term.** The initial term of use of the Software shall be one (1) year beginning on the date Customer "Accepts" this Agreement ("Initial Term"). At the conclusion of the Initial Term, this Agreement shall automatically renew for additional periods equal to the Initial Term unless either party provides written notice of termination at least thirty (30) days prior to the conclusion of the applicable period.

8.2. **Termination by DataKeeper.** This Agreement and any right of use created hereunder may be terminated by DataKeeper (i) if Customer fails to make any payments due hereunder within fifteen (15) days of the due date; (ii) on thirty (30) days written notice to Customer if Customer fails to perform any other material obligation required of it hereunder, and such failure is not cured within such thirty (30) day period; or (iii) Customer files a petition for bankruptcy or insolvency, has an involuntary petition filed against it, commences an action providing for relief under bankruptcy laws, files for the appointment of a receiver, or is adjudicated a bankrupt concern.

8.3. **Termination by Customer.** This Agreement may be terminated by Customer on thirty (30) days written notice to DataKeeper if DataKeeper fails to perform any material obligation required of it hereunder, and such failure is not cured within thirty (30) days from DataKeeper's receipt of Customer's notice or a longer period if DataKeeper is working diligently towards a cure.

8.4. **Termination.** Upon termination of this Agreement, Customer shall no longer access the Software and Customer shall not circumvent any security mechanisms contained therein. There shall be no refunds upon termination of this Agreement.

8.5. **Other Remedies.** Termination of this Agreement shall not limit either party from pursuing other remedies available to it, including injunctive relief, nor shall such termination relieve Customer's obligation to pay all fees that have accrued or are otherwise owed by Customer under this Agreement.

## 9. CUSTOMER OBLIGATIONS

9.1. **Ancillary Agreements.** Customer agrees that no employees of DataKeeper shall be required to individually sign any agreement in order to perform any services hereunder including, but not limited to, access agreements, security agreements, facilities agreements or individual confidentiality agreements.

## 10. MISCELLANEOUS

10.1. **Compliance With Laws.** Customer agrees to comply with all applicable laws, regulations, and ordinances relating to its performance under this Agreement. The parties agree that the Agreement shall not be governed by the United Nations Convention on the International Sale of Goods or by UCITA, the application of which is expressly excluded.

10.2. **Assignment.** Customer may not assign this Agreement or otherwise transfer any right of use created hereunder whether by operation of law, change of control, or in any other manner,

without the prior written consent of DataKeeper. Any assignment or transfer in violation of this Section shall be null and void.

10.3. **Survival.** The provisions set forth in Sections 2, 4, 6.3, 7, 8.4, and 10 of this Agreement shall survive termination or expiration of this Agreement.

10.4. **Notices.** Any notice required under this Agreement shall be given in writing and shall be deemed effective upon delivery to the party to whom addressed. All notices shall be sent to the applicable address specified on the face page hereof or to such other address as the parties may designate in writing. Unless otherwise specified, all notices to DataKeeper shall be sent to the attention of the CEO. Any notice of material breach shall clearly define the breach including the specific contractual obligation that has been breached.

10.5. **Force Majeure.** DataKeeper shall not be liable to Customer for any delay or failure of DataKeeper to perform its obligations hereunder if such delay or failure arises from any cause or causes beyond the reasonable control of DataKeeper. Such causes shall include, but are not limited to, acts of God, floods, fires, loss of electricity or other utilities, or delays by Customer in providing required resources or support or performing any other requirements hereunder.

10.6. **Restricted Rights.** Use of the Software by or for the United States Government is conditioned upon the Government agreeing that the Software is subject to Restricted Rights as provided under the provisions set forth in FAR 52.227-19. Customer shall be responsible for assuring that this provision is included in all agreements with the United States Government and that the Software, when delivered to the Government, is correctly marked as required by applicable Government regulations governing such Restricted Rights as of such delivery.

10.7. **Entire Agreement.** This Agreement constitutes the entire agreement between the parties regarding the subject matter hereof and supersedes all proposals and prior discussions and writings between the parties with respect thereto. Any signed copy of this Agreement made by reliable means (e.g., photocopy or facsimile) shall be considered an original.

10.8. **Modifications.** The parties agree that this Agreement cannot be altered, amended or modified, except by a writing signed by an authorized representative of each party.

10.9. **Nonsolicitation.** During the term of this Agreement and for a period of two (2) years thereafter, Customer agrees not to hire, solicit, nor attempt to solicit, the services of any employee or Subcontractor of DataKeeper without the prior written consent of DataKeeper. Customer further agrees not to hire, solicit, nor attempt to solicit, the services of any former employee or Subcontractor of DataKeeper for a period of one (1) year from such former employee's or Subcontractor's last date of service with DataKeeper. Violation of this provision shall entitle DataKeeper to liquidated damages against Customer equal to two hundred percent (200%) of the solicited person's gross annual compensation.

10.10. **Publicity.** Customer agrees to cooperate with DataKeeper (i) in preparation of at least one (1) press release, where the aforementioned materials can be used in/on DataKeeper's Web site, marketing materials, trade shows, public advertisements, and other associated marketing uses ("DataKeeper Marketing Materials"); and (ii) in preparation of an DataKeeper-sponsored testimonial advertisement to be run in newspapers, magazines, and other publications and for use in DataKeeper Marketing Materials. The parties further agree that DataKeeper may include Customer's logo on publicly displayed customer lists (including DataKeeper's Internet Web site and public advertisements). There shall be a "Powered by DataKeeper" logo, to be provided by DataKeeper, in the bottom portion of any of Customer's Web pages that utilize the Software, which logo shall link directly to the then-current DataKeeper Web site home page.

- 10.11. **No Waiver.** No failure or delay in enforcing any right or exercising any remedy will be deemed a waiver of any right or remedy.
- 10.12. **Severability and Reformation.** Each provision of this Agreement is a separately enforceable provision. If any provision of this Agreement is determined to be or becomes unenforceable or illegal, such provision shall be reformed to the minimum extent necessary in order for this Agreement to

remain in effect in accordance with its terms as modified by such reformation.

- 10.13. **Choice of Law.** THIS AGREEMENT SHALL BE GOVERNED AND INTERPRETED BY THE LAWS OF THE STATE OF TEXAS WITHOUT REGARD TO THE CONFLICTS OF LAW PROVISIONS OF ANY STATE OR JURISDICTION.