

## TERMS OF USE

**IMPORTANT: BY ACCESSING OR USING THE PRODUCT (AS DEFINED BELOW), YOU ARE AGREEING TO BE BOUND BY THE TERMS OF THIS AGREEMENT. IF YOU ARE NOT WILLING TO ACCEPT THESE TERMS AND CONDITIONS, YOU MAY NOT ACCESS OR USE THE PRODUCT.**

**1. DEFINITIONS.** NCS Pearson, Inc., the provider of the Product pursuant to this Agreement, is referred to herein as “Provider.” The school, educator, or other entity accessing or using the Product is referred to herein as “User.” Provider and User may each be referred to herein as a “Party” and collectively as the “Parties.” This Terms of Use Agreement is referred to herein as the “Agreement.” “Product” means the Naglieri Nonverbal Ability Test, 3rd Edition (“NNAT3”) application and any other software embedded in the application as well as any assessment item content that User will access pursuant to this Agreement, now or in the future.

### **2. ACCESS RIGHTS.**

**2.1 Basic Terms.** Subject to the terms and conditions of this Agreement, Provider grants to User a limited, non-exclusive, non-transferable, non-assignable right to access and use the Product for the purposes of administering assessments, subject to the terms and conditions of this Agreement.

**2.2 Restrictions.** The access rights granted hereunder do not grant any rights not explicitly expressed. User shall not (and shall not permit any employee, contractor or other party to (a) do anything to infringe upon, harm or take any action contrary to, or that would diminish or contest the validity of, any ownership rights in the Product; (b) remove or alter any copyright, trademark or patent notices that appear on any portion of the Product; (c) copy, rent, lease, sublicense, distribute publicly, modify, or create derivative works based on the Product or otherwise commercially exploit the Product; or (d) reverse engineer, decompile, disassemble or otherwise reproduce Product. User’s rights in Product will be limited to those expressly granted herein, and Provider reserves all rights not expressly granted in this document.

**2.3 Collection and Use of Data.** Provider may collect and use data and related information including but not limited to technical information about User’s device, system, and application software in order to make improvements to Provider products. Provider may use de-identified, aggregated student data for quality assurance, research and development purposes.

### **3. OWNERSHIP AND CONFIDENTIALITY.**

**3.1 Intellectual Property Rights.** Product is proprietary to Provider and/or third parties and is protected by copyright, trade secret, and other intellectual property rights. The placement of a copyright notice on any portion of Product does not mean that such portion has been published and will not derogate any claim of trade secret protection for the same. Title to all complete or partial copies and all applicable rights to copyrights, patents, trademarks and trade secrets in Product, are and shall remain the property of Provider or their other owners, as applicable. If User submits feedback or suggestions to Provider regarding the Product or services, User acknowledges and agrees that Provider may use such feedback and suggestions in any manner it sees fit, and User hereby grants Provider a perpetual, irrevocable, and royalty-free license to all intellectual property rights User may have in such feedback and suggestions.

**3.2 User’s Confidentiality Obligations.** User agrees to keep Product confidential and to prevent unauthorized disclosure or use of Product. User shall not transfer, assign, provide or otherwise make Product available to any other party without the prior written consent of Provider. Any attempted sublicense, assignment or transfer of any rights, duties or obligations by User in violation of this Agreement shall be void. User shall notify Provider immediately in writing of any unauthorized use or distribution of Product of which User becomes aware and shall take all steps necessary to ensure that such unauthorized use or distribution is terminated. User agrees to make all reasonable efforts to protect user identification technology and passwords and any unauthorized access to the Product.

**4. DISCLAIMER OF WARRANTIES. PRODUCT IS PROVIDED “AS IS” AND “AS AVAILABLE” WITHOUT WARRANTY OF ANY KIND, AND PROVIDER AND ITS PROVIDERS EXPRESSLY DISCLAIM ALL OTHER WARRANTIES, EXPRESS OR IMPLIED, INCLUDING, BUT NOT LIMITED TO, ANY IMPLIED WARRANTIES OF MERCHANTABILITY, FITNESS FOR A PARTICULAR PURPOSE AND NON-INFRINGEMENT. PROVIDER DOES NOT WARRANT THAT THE FUNCTIONALITY CONTAINED IN THE PRODUCT WILL MEET USER’S REQUIREMENTS, OR THAT THE OPERATION OF THE PRODUCT WILL BE UNINTERRUPTED OR ERROR-FREE, OR THAT DEFECTS IN THE PRODUCT WILL BE CORRECTED. FURTHERMORE, PROVIDER DOES NOT WARRANT OR MAKE ANY REPRESENTATIONS REGARDING THE USE OR THE RESULTS OF THE USE OF THE PRODUCT IN TERMS OF ITS CORRECTNESS, ACCURACY, RELIABILITY OR OTHERWISE. USER AGREES THAT THE USE OF PRODUCT IS AT USER’S OWN RISK. NO ORAL OR WRITTEN INFORMATION OR ADVICE GIVEN BY PROVIDER OR A PROVIDER REPRESENTATIVE SHALL CREATE A WARRANTY OR IN ANY WAY INCREASE THE SCOPE OF ANY WARRANTY. SOME JURISDICTIONS MAY NOT ALLOW THE EXCLUSION OF CERTAIN IMPLIED WARRANTIES, SO THE ABOVE EXCLUSION MAY NOT FULLY APPLY TO USER. THE SPECIFIC FEATURES AND FUNCTIONALITY OF THE PRODUCT ARE SUBJECT TO CHANGE AND DISCONTINUATION IN PROVIDER’S SOLE DISCRETION.**

**5. LIMITATION OF LIABILITY. PROVIDER SHALL NOT BE LIABLE TO USER FOR ANY SPECIAL, EXEMPLARY, INDIRECT, INCIDENTAL OR CONSEQUENTIAL DAMAGES OF ANY KIND OR NATURE WHATSOEVER, INCLUDING WITHOUT LIMITATION LOST PROFITS, LOST FUNDING, LOST SAVINGS, OR LOST OR DAMAGED DATA; OR FOR CLAIMS OF A THIRD PARTY; ARISING OUT OF OR RELATED TO THIS AGREEMENT, PRODUCT, THIRD PARTY SOFTWARE, OR THE USE OR INABILITY TO USE ANY OF THE FOREGOING, EVEN IF PROVIDER HAS BEEN ADVISED OF THE POSSIBILITY OF SUCH DAMAGES OR THEY**

**ARE FORESEEABLE. IN ANY EVENT, IN RESPECT OF ANY CLAIM, DEMAND OR ACTION ARISING OUT OF THIS AGREEMENT, USER SHALL BE LIMITED TO RECEIVING ACTUAL AND DIRECT DAMAGES IN A MAXIMUM AGGREGATE AMOUNT EQUAL TO THE CHARGES PAID BY USER TO PROVIDER HEREUNDER FOR THE APPLICABLE PRODUCT, ITEM OR SERVICE ON WHICH THE CLAIM IS BASED, OR \$50, WHICHEVER AMOUNT IS GREATER. THE LIMITATIONS SET FORTH IN THIS PARAGRAPH SHALL APPLY WHETHER SUCH LIABILITY IS ASSERTED ON THE BASIS OF CONTRACT, TORT, OR OTHERWISE, AND EVEN IF ANY OF THE LIMITED REMEDIES IN THE AGREEMENT FAILS IN THEIR ESSENTIAL PURPOSE.**

**6. INDEMNIFICATION.** User will indemnify and hold Provider and its employees and affiliates harmless against: (a) third party claims based on User's negligent use of the Product; (b) any third party claim based on a claim that User has breached its obligations and responsibilities under this Agreement. Provider shall notify User promptly upon the receipt or occurrence of any such claim. Provider will indemnify and hold User and its employees and affiliates harmless against: (a) any third party claims that the Product infringes upon intellectual property belonging to a third party; and (b) any third party claim based on a claim that Provider breached its obligations and responsibilities under this Agreement. User shall notify Provider promptly upon the receipt or occurrence of any such claim.

**7. TERMINATION.** Notwithstanding any contrary provisions contained elsewhere in this Agreement, this Agreement and the rights and obligations of both parties may be terminated: (a) by Provider immediately if Section 3 of the Agreement has been breached; (b) by either party for cause, in the event the terminating party reasonably determines that the other party has committed a material breach and failed to cure such breach within thirty (30) days after receiving notice of such breach; (c) by Provider for convenience with five (5) days notice to User. Immediately upon any termination of this Agreement, User shall immediately cease use of and access to the Product. The following provisions shall survive termination or expiration of the Agreement or any portion thereof: Ownership and Confidentiality, Disclaimer of Warranties, Limitation of Liability, Indemnification, and General.

## **8. GENERAL.**

**8.1 Governing Law.** This Agreement shall be governed by the laws of the State of Minnesota, USA, excluding its choice of law principles that would require the application of the laws of another jurisdiction, and the Parties hereby consent to exclusive jurisdiction and venue in the State of Minnesota. Each party hereby waives any claim that any legal proceeding brought in accordance with the Agreement has been brought in an inconvenient forum or that the venue of that proceeding is improper. The United Nations Convention on Contracts for the International Sale of Goods, or the Uniform Computer Information Transaction Act (in its original form or in the form as enacted by any applicable jurisdiction) shall not apply to this Agreement.

**8.2 Waiver and Severability.** If any provision of this Agreement is invalid or unenforceable under any applicable statute or rule of law, this Agreement shall be enforced to the maximum extent possible to effectuate the original express intent of the Parties. Failure to enforce any provision of this Agreement shall not operate as a waiver of such provision or any other provision.

**8.3 Notices.** In the case of notices to Provider, such notices shall be sent to: NCS Pearson, Inc., Attn.: Contracts Department, 2510 North Dodge Street, MS 120, Iowa City, IA 52245. In the case of notices to User, such notices shall be sent to Provider's address of record for User. Either Party may change its notice address by notifying the other in like manner.

**8.4 Independent Contractor.** Provider and its employees are independent contractors and not employees of the User. Nothing herein shall be deemed to establish a partnership, joint venture, association or employment relationship between the Parties.

**8.5 No Third Party Beneficiaries.** The Parties agree that there are no third party beneficiaries to this Agreement and that no third party shall be entitled to assert a claim against either of the Parties based on this Agreement.

**8.6 Entire Agreement.** This Agreement, in conjunction with the Prime Contract, constitutes the complete and entire agreement between the Parties with respect to the subject matter detailed herein. This Agreement shall not be modified or amended without the written agreement of both Parties. These terms may only be amended in writing and signed by both parties.