

Dated: *Do NOT DATE* 2017

**Rotherham Borough Council (1)**

**and**

**Wickersley Partnership Trust (2)**

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**SCHOOL AGREEMENT**  
relating to Clifton Community School

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**THIS AGREEMENT** is made on

of

2017

**BETWEEN**

- (1) Rotherham Borough Council of Riverside House, Main Street, Rotherham S60 1AE (the "**Authority**"); and
- (2) Wickersley Partnership Trust, a company limited by guarantee registered in England and Wales (company number 08833508) whose registered office is at Wickersley School and Sports College, Bawtry Road, Wickersley, Rotherham S66 1JL (the "**Company**").

**BACKGROUND**

- (A) The Company is a company incorporated in England and Wales, limited by guarantee with charitable objects.
- (B) The Existing School is in an area in respect of which the Authority is the local education authority pursuant to Section 12 of the Education Act 1996.
- (C) The Authority has entered into the Project Documents with a view, amongst other things, to procuring accommodation and related services at the Existing School and other schools.
- (D) The Authority is proposing to enter into the Academy Contracts with a view to the Company operating an academy from the sites of the Existing School.
- (E) The Company and the Authority have agreed the terms and conditions of this Agreement.
- (F) The Company agrees that it is in the interests of the Company that it should enter into this Agreement which amongst other matters commits the Company to pay to the Authority a proportion of its budget and confirms to the Authority that some matters concerning the provision of the Services under the Project Agreement at the Existing School and subsequently the Academy shall be managed by the Authority in liaison with the Company as provided for in this Agreement and the Principal Agreement.

**IT IS AGREED** as follows:

**1 DEFINITIONS AND INTERPRETATION**

**1.1 Definitions**

In this Agreement, unless the context otherwise requires, the following terms shall have the meanings given to them below:

**"1954 Act"** means the Landlord and Tenant Act 1954;

**"Academic Year"** as defined in clause 1.1 of the Project Agreement;

**"Academy"** the academy to be operated by the Company from the Commencement Date on the Sites, which expression shall include the Sites and the Facilities on the Sites;

**"Academy Contracts"** this Agreement, the Principal Agreement, the Leases, the Transfer Agreement and the Project Agreement Deed of Variation;

**"Academy 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), proceedings demands and charges whether arising under statute, contract or at common law provided always that this shall not include Indirect Losses;

**"Additional School Use"** as defined in clause 1.1 of the Project Agreement;

**"Agreement"** this Agreement and any Schedules annexed hereto;

**"Approved Purposes"** means in relation to Intellectual Property Rights procured under the Project Agreement, the purposes set out in Clause 67 of the Project Agreement;

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

**"Authority Change"** an Authority Change (as that term is defined under the Project Agreement);

**"Authority 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), proceedings demands and charges whether arising under statute, contract or at common law provided always that this shall not include Indirect Losses;

**"Authority Notice of Change"** as defined in clause 1.1 of the Project Agreement;

**"Authority Related Party"**

- (a) an officer, agent or employee of the Authority acting in the course of his office or employment and, in relation to the Academy, any licensee, tenant or contractor of any tier of the Authority at the Academy;
- (b) in relation to the Academy, any person visiting or using the Academy at the invitation (whether express or implied) of the Authority;

but excluding in each case:

- (c) the Provider, Provider Related Parties and Company and Company Related Parties; and
- (d) a DSO where it is under the control of or acting in accordance with the instructions of the Provider, any Provider Related Party, the Company or any Company Related Party or where it is performing its contractual obligations under the relevant DSO Agreement;

**"Authority's Representative"** the representative appointed by the Authority pursuant to Clause 6.1;

**"Bank Hours"** as defined in clause 1.1 of the Project Agreement;

**"Building Contractor"** as defined in clause 1.1 of the Project Agreement;

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



**"Change in Law"** as defined in clause 1.1 of the Project Agreement;

**"Collateral Warranties"** means the Collateral Warranties as defined in the Project Agreement;

**"Commencement Date"** means 1 December 2017;

**"Community Use"** means use of the relevant PFI Site by the community by or at the invitation of the Company outside the School Day;

**"Compensation Event"** as defined in clause 1.1 of the Project Agreement;

**"Company Assets"** without limitation, any items of equipment and/or chattels brought onto either Site by the Company or Company Related Parties;

**"Construction Sub-Contractor"** as defined in clause 1.1 of the Project Agreement;

**"Company Related Party"**

- (a) an officer, agent or employee of the Company acting in the course of his office or employment, including without limitation any director of the Company or any member of the local governing body of the Academy;
- (b) in relation to the Academy during the School Day any pupil or student of the Academy, or any person visiting the Academy at the invitation (whether express or implied) of the Company;
- (c) not used; and
- (d) any contractors and their officers, employees and agents involved in the operation and/or maintenance of works or services at either or both of the Sites procured by the Company;

but excluding in each case the Authority, Authority Related Parties and Provider and Provider Related Parties (including the Senior Lender);

**"Company Representative"** the representative appointed by the Company pursuant to Clause 7.2;

**"Dedicated Schools Grant"** or **"DSG"** has the meaning given to it in the Principal Agreement;

**"Deductions"** has the meaning given to Deductions and MMA Deductions in clause 1.1 of the Project Agreement;

**"Direct Agreement"** means the agreement dated on or about 13 June 2003 made between (1) the Authority (2) the Provider (3) the Agent (as that term is defined therein), as amended by the parties;

**"Dispute Resolution Procedure"** the procedure for resolution of disputes set out in Clause 23 (Dispute Resolution);

**"DFE"** the Department for Education;

**"DSO"** as defined in clause 1.1 of the Project Agreement;

**"DSO Agreement"** as defined in clause 1.1 of the Project Agreement;

**"Existing School"** Clifton Community School (which is defined as "Clifton Comprehensive School" in the Project Agreement);

**"Expiry Date"** as defined in clause 1.1 of the Project Agreement;

**"Facilities"** means the buildings on the Sites;

**"FM Contractor"** as defined in clause 1.1 of the Project Agreement;

**"Funding Agreement"** the agreement entered into by the Company and the DFE dated on or about the date of this Agreement relating to the funding of the Academy supplemental to an agreement between the Company and the Secretary of State for Education and Skills dated 28 July 2016 and any agreement in writing which supersedes, replaces or amends/varies those agreements;

**"Helpdesk"** the helpdesk provided by the Provider pursuant to the Project Agreement;

**"ICT"** information and communications technology;

**"ICT Services"** services related to the delivery, maintenance and management of ICT;

**"Indirect Losses"** loss of profits, loss of use, loss of production, loss of business, loss of business opportunity, or any claim for consequential loss or for indirect loss of any nature but excluding any of the same that relate to loss of revenue in each case arising under this Agreement or under the Project Agreement;

**"Information"** means all information, materials, documents and data relating to the Project, including:

- (i) the design or construction of the Existing School (including the Provider's Proposals and the Construction Programme), the operation and maintenance of the Existing School and/or the Academy or other matters in connection with the Existing School under the Project Agreement;
- (ii) all property matters referred to or otherwise identified in this Agreement; and
- (iii) all changes and updates of any such information, material, document and data;

**"Information Protocol"** the obligations on the parties to provide and share information contained in Schedule 5;

**"Intellectual Property Rights"** any and all patents, trade marks, service marks, copyright, database rights, moral rights, rights in a design, know-how, confidential information and all or any other intellectual or industrial property rights whether or not registered or capable of registration and whether subsisting in the United Kingdom or any other part of the world together with all or any goodwill relating or attached thereto which is created, brought into existence, acquired, used or intended to be used by the Company in relation to the Academy;

**"Termination Date"** the date of early termination of the Project Agreement in accordance with its terms or the date of early termination of this Agreement in accordance with its terms, whichever the earlier;

**"Transfer Agreement"** means the agreement of that name entered into on or about the date of this Agreement between the Authority (1) and the Company (2);

**"Unavailability"** as defined in clause 1.1 of the Project Agreement;

**"Unitary Payment"** as defined in clause 1.1 of the Project Agreement;

**"Upper Site"** means the Site of Clifton Community School adjoining Cranworth Road, Rotherham;

**"VAT"** value added tax at the rate prevailing at the time of the relevant supply charged in accordance with the provisions of the Value Added Tax Act 1994; and

**"Works"** the works delivered by the Provider to the Authority pursuant to the Project Agreement.

## 1.2 Interpretation

1.2.1 In this Agreement, unless the context otherwise requires:

- (a) capitalised terms defined in the Project Agreement, as the context requires (unless otherwise defined in this Agreement), have the same meaning in this Agreement;
- (b) headings and sub-headings are for ease of reference only and shall not be taken into account in the interpretation or construction of this Agreement;
- (c) all references to clauses and schedules are references to the clauses of and the schedules to this Agreement unless otherwise stated;
- (d) the Schedules form part of this Agreement;
- (e) all references to agreements, documents or other instruments include (subject to all relevant approvals) a reference to that agreement, document or other instrument as amended, supplemented, substituted, novated or assigned from time to time;
- (f) all references to any statutory provision shall include references to any statute or statutory provision which amends, extends, consolidates or replaces the same or which has been amended, extended, consolidated or replaced by the same and shall include any orders, regulations, codes of practice, instruments or other sub-ordinate legislation made under the relevant statute or statutory provision;
- (g) words importing the singular include the plural and vice versa;
- (h) words importing a gender include all genders;



- (i) "person" includes an individual, partnership, forum, trust, body corporate, government, governmental body, authority, agency or unincorporated body of persons or association;
- (j) the words "include" and "including" are to be construed without limitation;
- (k) references to sub-contractors shall be to sub-contractors of any tier;
- (l) a requirement not to unreasonably withhold consent includes a requirement not to unreasonably delay the giving or withholding of that consent;
- (m) in relation to the parties, references to a public organisation shall be deemed to include a reference to any successor to such public organisation or any organisation or entity which has taken over either or both the functions and responsibilities of such public organisation. References to other persons shall include their successors and assignees;
- (n) reference to "parties" means the parties to this Agreement and reference to "a party" means one of the parties to this Agreement; and
- (o) in the event that the provisions of this Agreement are inconsistent with the terms of the Principal Agreement, the terms of the Principal Agreement prevail to the extent of any inconsistency.

1.2.2 For the avoidance of doubt, the terms of this Agreement operate as between the Authority and the Company and are not intended to effect an assignment, novation or other transfer by the Authority to the Company of any of the rights and obligations of the Authority under the Project Agreement.

## **2 COMMENCEMENT AND DURATION**

- 2.1 This Agreement shall come into force on the date hereof and, subject to clause 27 (Termination) and clause 2.2, shall continue in force until the earlier to occur of the Termination Date and the Expiry Date.
- 2.2 The termination of this Agreement howsoever arising is without prejudice to the rights, duties and liabilities of relevant parties accrued prior to termination. The clauses of this Agreement which expressly or by implication have effect after termination will continue to be enforceable notwithstanding termination.

## **3 CONSENT, PROJECT DOCUMENTS AND ACADEMY CONTRACTS**

### **3.1 Entering the Project Documents**

Without prejudice to the rights and obligations of the parties under or in connection with this Agreement, the Company acknowledges that the Authority has entered into the Project Documents.

### 3.2 Compliance with Programme and Project Documents

The Company shall not take any action or fail to take any action, or (insofar as it is reasonably within its power) permit anything to occur which would cause the Authority to be in breach of its obligations under the Academy Contracts and the Project Documents.

### 3.3 Performance of Authority's Obligations

The Authority owes obligations to the Provider under the Project Documents. To the extent that these obligations relate to the Academy, the Authority undertakes to perform its obligations in a timely manner and acting reasonably and to consult with the Company and take due regard of any comments made by the Company.

### 3.4 Amendments to Project Documents

3.4.1 Save as set out in clause 3.4.2, the Authority shall notify the DFE and the Company of any proposed changes to the Project Documents that:

- (a) may materially affect the operation of the Academy; and/or
- (b) may result in additional costs for the Company ("**Proposed Material Changes**").

3.4.2 Any proposal for Authority Changes or Provider Changes under clause 57 of the Project Agreement shall be dealt with in accordance with clause 26 (Exercise of Authority Change and Change Mechanism) and shall not constitute a Proposed Material Change.

3.4.3 The Authority shall consult with the Company and shall have due regard to any representations made by the Company in respect of the Proposed Material Changes. The Authority shall act reasonably in light of the Company's representations when deciding whether or not to continue with a Proposed Material Change.

3.4.4 The Authority shall as soon as reasonably practicable following any amendment described in clause 3.4.1 and/or described in clause 3.4.2, provide to the Company copies of each amended Project Document.

### 3.5 Copies of Project Documents

The Authority has provided to the Company copies of each of the relevant Project Documents and the Company confirms that it has conducted its own analysis of the Information supplied to the Company or any of its nominees and advisers before the date of this Agreement.

### 3.6 Due Diligence

Neither the Authority nor any of its agents, servants or advisers shall be liable to the Company (whether in contract, tort or otherwise and whether or not arising out of any negligence on the part of the Authority or any of its agents, servants or advisers) in respect of any inadequacy of any kind whatsoever in the Information and except as provided in Clause 6.3 and Part 2 of Schedule 3 the Authority gives no warranty or undertaking that the Information represents all of the information in its possession or power relevant or material to the Project nor in respect of any failure to disclose or make available to the Company any information, documents or

data or to keep the Information up to date or to inform the Company of any inaccuracy, error, omission, unfitness for purpose, defects or inadequacy in the Information.

### 3.7 Information Share

The parties and their representatives shall co-operate to share Information which may be relevant concerning the operation of the Academy, without limitation:

- 3.7.1 the parties shall comply with the Information Protocol;
- 3.7.2 under the terms of the Project Documents the Authority is required to provide certain Information to the Provider which is in the possession or control of the Company. The Company will provide such Information to the Authority within such time period as the Authority may reasonably require. Without limitation to the foregoing, the Company shall notify the Authority promptly in writing when it becomes aware of any of the following events:
  - 3.7.3 plans to erect any new structures on either Site (other than pursuant to the Project Documents);
  - 3.7.4 any applications for planning consent for either Site;
  - 3.7.5 Not Used; and
  - 3.7.6 any contract for the purchase, lease or licence of any ICT (including software) or equipment or ICT Services proposed to be entered into by the Company which impacts on the Services at the Academy.

The parties agree that where and to the extent that the Authority or the Company fails to supply or make available to the other (the "**Uninformed Party**") any Information provided in accordance with this Clause 3.7 or pursuant to the Information Protocol (an "**Information Default**") and this affects the Uninformed Party's ability to comply with any obligation provided in, or discharge any liability in connection with this Agreement or gives rise to any additional or operates to increase any existing liability for the Uninformed Party under this Agreement, the Uninformed Party shall (subject to it taking all reasonable steps to mitigate the effects of such Information Default) be relieved of any such obligation and/or liability to the extent that reasonably reflects the impact of the relevant Information Default

## 4 ENFORCEMENT OF THE PROJECT AGREEMENT

- 4.1 Where, in relation to a PFI Site:
  - 4.1.1 there is a breach of the Project Agreement by the Provider;
  - 4.1.2 there is an act or omission of the Provider which entitles the Authority to make a claim under the Project Agreement;
  - 4.1.3 there is damage to the relevant PFI Site that is the liability of the Provider under the Project Agreement;



- 4.1.4 a dispute arises under Clause 23.1 of this Agreement; and/or
- 4.1.5 the Company is a co-insured party under a Project Insurance and wishes to pursue a claim against insurers under such relevant Project Insurance,

the Authority and the Company shall promptly liaise to consider whether and upon what basis the Authority should exercise any of the rights available to it under the Project Documents in respect of such breach, act or omission or whether and upon what basis the Company would intend to exercise its right to make a claim against a relevant Project Insurance (as the case may be) provided that with the exception of any claims which may prejudice the operation of Clause 62 of the Project Agreement, nothing in this Clause 4 shall be construed as preventing the Company from making a claim under a relevant Project Insurance where it is a co-insured party.

- 4.2 If the Authority and the Company cannot reach agreement on an issue raised pursuant to Clause 4.1, DFE shall adjudicate promptly on that issue, taking into account:

- 4.2.1 any time period required to take action in accordance with the Project Agreement and relevant circumstances;
- 4.2.2 the views of both parties; and
- 4.2.3 any matter reasonably deemed relevant by DFE.

- 4.3 In the event that it is agreed by the parties or determined by DFE that:

- 4.3.1 the Authority should exercise its rights and remedies in respect of the relevant breach, act or omission, the Authority shall promptly use its best endeavours to do so; or
- 4.3.2 a relevant party should pursue a claim against an insurer under a Project Insurance, the relevant party shall (subject to any existing claim arrangements) endeavour to pursue such a claim.

- 4.4

- 4.4.1 The Authority shall use all reasonable endeavours to procure compliance by the Provider with its obligations under the Project Agreement for the benefit of the Academy and the Company.
- 4.4.2 Where in this Agreement the Authority purports to limit its liability to the Company to the equivalent benefit it receives under the Project Agreement such limitation shall be subject always to the Authority complying with clause 4.4.1.
- 4.4.3 In its monitoring of the Provider, the Authority shall have regard (so far as is reasonable and practicable to do so) to any matter that the Company (acting reasonably) considers should be enforced against the Provider pursuant to the Project Agreement provided that the Company shall notify the Authority of any such matters as soon as reasonably practicable.

- 4.5 Payment of Claims Following Provider Default



- 4.5.1 Subject to Clause 4.5.2 the Authority shall promptly pay to the Company any amounts it recovers under the Project Documents following a Provider Default and/or in the circumstances envisaged in clauses 4.1 to 4.3, to the extent they relate to the Academy.
- 4.5.2 Where the losses referred to in Clause 4.5.1 are suffered by the Company and the Authority arising from the same matter and the amount recovered does not cover the total losses incurred, the Authority shall only be liable to the Company under this Clause 4.5.2 for a proportionate amount of the amounts recovered taking into account the parties' respective claims. The Authority shall not be liable to the Company under this Clause 4.5 for any amounts in excess of those recovered pursuant to the Project Documents.
- 4.6 During the subsistence of the Project Agreement, the Authority shall provide to those pupils at the Academy from time to time entitled to free meals such free meals as a maintained school is required under legislation from time to time in force to provide. It is acknowledged that the Authority has delegated the provision of such meals to the Provider under the Project Agreement.
- 4.7 The Authority will hold for the benefit of the Company and will, where permitted to do so by the Project Documents, if so required by the Company, use reasonable endeavours to enforce in accordance with the terms thereof each Collateral Warranty to the extent that the protections afforded by each such Collateral Warranty relate to the Academy. The Company will indemnify the Authority for the proportion of its costs of taking such action as relates to the proportion of the benefit of enforcement of such Collateral Warranty accruing to the Company.
- 4.8 The Company shall be entitled in any action or proceedings brought by the Authority in connection with this Agreement to rely on any right in defence of liability available to the Authority in the Project Agreement and to raise an equivalent right in defence of liability (save for set off and counterclaim) as would be available to the Authority in the Project Agreement and to raise an equivalent right in defence of liability (save for set off and counterclaim) as would be available in connection with a similar course of action by the Provider against the Authority pursuant to the Project Agreement.
- 4.9 In the event of an Emergency to which Clause 26 of the Project Agreement applies upon the request of the Company, the Authority will instruct the Provider to use its best endeavours to procure that such additional or alternative services (of a similar nature to the Services) shall be undertaken by the Provider to ensure that the Emergency is dealt with and normal operation of the Academy resumes as soon as reasonably practicable and the Company will bear and pay any costs payable by the Authority to the Provider under Clause 26 of the Project Agreement in those circumstances.

## **5 COMPENSATION EVENTS AND RELIEF EVENTS**

- 5.1 If:
- 5.1.1 either Party has reason to believe that a Compensation Event has arisen whether the same is also a breach of this Agreement or otherwise or that a Relief Event has arisen; or

- 5.1.2 the Authority is notified by the Provider that circumstances constituting a Compensation Event whether the same is also a breach of this Agreement or otherwise or that a Relief Event has or may have arisen,

in either case having or with the potential to have an impact on the Academy, then the Parties shall promptly consult regarding circumstances that give rise to the claim or potential claim and shall discuss whether there has been or may have been a Compensation Event or Relief Event and shall meet frequently thereafter to review information received from the Provider in connection with the circumstances that give rise to any claim made by the Provider with a view to considering the evidence provided.

- 5.2 In the event that a claim is made by the Provider to which clause 5.1 applies, the Authority shall take due account of all information provided by the Company where the Company may be in whole or in part responsible for the circumstances that give rise to the Compensation Event and the Authority shall use all reasonable endeavours to resist such claim and to require mitigation of the claim where it ought reasonably to do so.

## **6 COMPANY ACKNOWLEDGEMENT, UNDERTAKINGS AND WARRANTIES**

### **6.1 The Company:**

- 6.1.1 warrants and represents to the Authority that the information set out in Schedule 3 Part 1 (Corporate Warranties) is true and accurate in all respects; and
- 6.1.2 acknowledges that the Provider shall be entitled to provide the Services described in the Project Agreement at the Academy.

### **6.2 Authority Consents**

The parties agree that in relation to the Project Agreement:

- 6.2.1 the Authority shall not give any consent, approval or authorisation of matters concerning the Academy without the prior operation of the procedures set out in this Clause 6.2;
- 6.2.2 the Authority shall inform the Company of the decision it requires by when and shall provide any relevant information at its disposal to inform such a decision, following which the Company will ensure that the Company gives any consent, approval or other necessary response in accordance with the timescales within which the Authority has advised it is required to act; and
- 6.2.3 where the Company:
- (a) does not respond to the Authority in accordance with Clause 6.2.2, the Authority shall be deemed to have discharged all obligations under this Clause 6.2 in respect of the relevant consent, approval or authorisation and shall be entitled to give such consent, approval or authorisation; or
  - (b) does not give consent, the Company will provide full written details of its objections to the Authority within such time period as

the Authority has advised it is required to act to enable the Authority to comply with its obligations under the Project Documents.

6.2.4 Without prejudice to Clause 26.3.4, the Company shall not be required to give any consent or approval sought by the Authority under Clause 6 or otherwise and the Company may withhold or give such consent or approval in its absolute discretion, save where the Authority can demonstrate that the failure to give such consent or approval would have a material adverse effect in the context of all of the schools subject to the Project Agreement and provided further that where under the Project Agreement the Authority is under an obligation not to unreasonably withhold or delay its consent in respect of a matter, the Company shall be deemed also to be under such an obligation pursuant to this Agreement where its consent is being sought in relation to the same matter.

6.2.5 Subject to Clause 6.2.4, the Authority shall not give any consent or approval to which this Clause 6 applies if the Company shall, in accordance with this Clause 6 have notified the Authority that it is withholding its consent or approval.

6.3 The Authority warrants and represents that the information set out in Schedule 3 Part 2 is correct in all material respects.

6.4 Nothing in this Agreement shall be construed as a fetter or restriction on the exercise of the Authority's statutory functions and/or related rights including planning, education or highways functions.

## **7 REPRESENTATIVES**

7.1 The Authority shall, from time to time, appoint a representative to exercise the functions and powers of the Authority in relation to the performance of this Agreement notifying the Company and DFE promptly of the identity of the relevant person. The Authority shall be entitled from time to time to amend the identity of its appointed representative by notice, in writing, to the Company and to DFE.

7.2 The Company shall, from time to time, appoint a representative to exercise the functions and powers of the Company in relation to this Agreement notifying the Authority and DFE promptly of the identity of the relevant person. The Company shall be entitled from time to time to amend the identity of its appointed representative by notice, in writing, to the Authority and to DFE.

## **8 GRANT OF LEASES**

8.1 The Authority shall, subject to clause 8.2, grant and the Company shall accept a lease of each Site pursuant to the terms set out in Schedule 4 (Leases) of this Agreement as and from the Commencement Date.

8.2 Clause 8.1 shall not apply where the Company on the Commencement Date has ceased to be responsible for the operation of the relevant Site.

8.3 The Authority, as Landlord, has served on the Company, as tenant, a notice in relation to each Lease in the form set out in schedule 7 to the Regulatory Reform (Business Tenancies) (England and Wales) Order 2003 ("Order").



- 8.4 The Company (or a person duly authorised by the Company) has made a statutory declaration in the form or substantially in the form set out in paragraph 8 of schedule 2 to the Order in relation to each Lease.
- 8.5 The Authority and the Company agree that the provisions of sections 24 to 28 of the 1954 Act be excluded in relation to each Lease.
- 8.6 The Company is not entitled to any compensation under section 37 of the 1954 Act when the relevant Lease ends.

**8.7 Authority and Provider to Enter Site**

The Company acknowledges that the Leases remain subject to the licence granted to the Provider under the Project Agreement and acknowledges that the Authority, the Provider and the Senior Lender and each of their employees, servants, agents and sub-contractors and (in the case of the Senior Lender only) any Appointed Representative or Suitable Substitute Contractor (as defined in the Direct Agreement) have sufficient authority to enter the PFI Sites from time to time for the purpose of carrying out their obligations under the Project Documents and shall not withhold such access.

- 8.8 The Company shall procure that in occupying the Sites, there shall be no act or omission by the Company, or Company Related Parties which shall give rise to a right for any person to obtain title to or any right or interest over either Site or any part of them and/or cause any material disruption to the provision of the Works (if any) and/or the Services.

**9 COMPANY ASSETS**

- 9.1 The Company is entitled to use its own equipment and assets so as to facilitate the provision of education services by the Company at the Academy.
- 9.2 The Company acknowledges that Company Assets are and shall remain the responsibility of the Company and the Services provided by the Provider do not (unless otherwise agreed in writing by the Authority after receiving consent from the Provider) extend to any of the Company Assets.
- 9.3 The Company is responsible for any costs incurred by the Company in relation to the Company Assets.
- 9.4 For the avoidance of doubt, the Existing School, and any fixtures, fittings or equipment provided under the Project Documents or in respect of which the Authority is the legal or beneficial owner shall (unless transferred in accordance with clause 9.5 or otherwise by separate agreement) remain owned by the Authority.
- 9.5 Immediately upon termination or expiry of the Project Agreement (howsoever arising) if the Company shall at that time be operating the Academy the Authority shall transfer or procure the transfer to the Company of the PFI Provider Assets (at no cost to the Company).
- 9.6 The Company shall ensure that any hazardous materials or equipment used or intended to be used in the provision of Educational Services or in connection with its activities at the Sites are kept under control and in safe keeping in accordance with



all relevant Legislation and shall ensure that all such materials are properly and clearly labelled on their containers.

- 9.7 The Company shall maintain a COSHH register in relation to the Academy, a copy to be held at the Academy and copied to the Provider (and only in relation to materials brought on to either Site by the Company or the Authority).

## **10 FIRE REGULATIONS**

- 10.1 The Company and Authority shall each act reasonably and in good faith to procure that an up to date fire folder is maintained for the Academy in accordance with the government guidance referring to the Fire Precautions Workplace Regulations 1997 amended 1999. In particular, the Company shall:

- 10.1.1 prepare risk assessments for emergency events including fires;
- 10.1.2 prepare and communicate the evacuation procedures including instruction to staff and pupils at the Academy on the correct action when discovering a fire and on the correct action when the fire alarm is sounded;
- 10.1.3 prepare notices/signs reinforcing the evacuation procedures; and
- 10.1.4 ensure and maintain discipline of occupants of the Academy to prevent fires and deliberate and/or accidental activation of the system.

## **11 PROGRAMMED MAINTENANCE**

- 11.1 Where the Provider proposes to carry out Programmed Maintenance which may impact on the Educational Services at the Academy, the Authority will not authorise the carrying out of such maintenance by the Provider without prior consultation with the Company Representative (and the Authority shall have due regard to any representations made). Where the Company reasonably considers that the Programmed Maintenance would, if implemented, have a material and adverse effect on the Educational Services at the Academy, the Authority will not authorise the carrying out of such maintenance without the prior consent of the Company.
- 11.2 The Authority shall provide the Company with a copy of the Provider's Schedule of Programmed Maintenance (insofar as it relates to the Academy) in each year of this Agreement. The Authority shall act reasonably and shall take the Company's comments on the Schedule of Programmed Maintenance into account when making submissions to the Provider. Without prejudice to the generality of the foregoing:
- 11.2.1 the Company shall be entitled to raise comments on the Schedule of Programmed Maintenance and the Authority shall act reasonably and shall take the Company's comments on the Schedule of Programmed Maintenance into account when making submissions to the Provider for variations to be made to the Schedule of Programmed Maintenance under clause 24.3 of the Project Agreement;
  - 11.2.2 the Company shall, at any time, be entitled to request that the Authority exercise such rights as it has pursuant to the Review Procedure to request the Provider to accelerate or defer any Programmed Maintenance in accordance with clause 24.4 of the Project Agreement; and

11.2.3 where the Schedule of Programmed Maintenance contains proposals which would, if implemented, have a material and adverse effect on the Educational Services at the Academy, the Authority shall make submissions to the Provider for variations to be made to the Schedule of Programmed Maintenance, as reasonably requested by the Company.

11.3 The Company shall be responsible for, and shall release and indemnify the Authority or any Authority Related Party on demand from and against all liability for losses arising from any relief from liability, Compensation Event and/or indemnity which the Provider claims pursuant to clause 33.12.11 of the Project Agreement following the Commencement Date where such claim is made in respect of any cause of action arising after the Commencement Date.

## **12 PAYMENT OF CONTRIBUTION**

### **12.1 Contribution**

In consideration for the provision of the Services to the Academy, the Company shall with effect from the Commencement Date pay to the Authority the Relevant Proportion (as adjusted from time to time) in monthly instalments on each Payment Date occurring after the commencement of this Agreement.

### **12.1A Affordability Gap**

The Company undertakes to pay to the Authority, in addition to the Relevant Proportion due under clause 12.1, any sum received by it from the Secretary of State for Education or his agent in respect of the Affordability Gap (as defined in the Principal Agreement), whether received as part of the General Annual Grant or as an Earmarked Annual Grant. The Company shall make such payment to the Authority at the same time as the DFE is required to pay the DSG for the relevant year to the Authority.

### **12.2 VAT**

If any supply made or referred to in this Agreement is or becomes chargeable to VAT, then the person receiving the supply (the "**Recipient**") shall in addition pay the person making the supply (the "**Supplier**") the amount of that VAT against receipt by the Recipient from the Supplier of a proper VAT invoice in respect of that supply.

### **12.3 Adjustment for Part Years**

Where:

12.3.1 this Agreement commences part way through the accounting year (being each year commencing 1 April or as otherwise agreed); or

12.3.2 this Agreement and/or the Project Agreement is terminated or expires part way through the accounting year;

then the amount to be paid by the Company in respect of that year will be adjusted pro rata by reference to the number of days in that year in which Services are provided under the Project Agreement, as the case may be, compared to the number of days in that year and, in the case of Clause 12.3.2 the Authority shall repay the Company any excess paid to the Authority by the Company within twenty (20) Business Days of such termination.

#### 12.4 **Not used**

#### 12.5 **Utilities**

The Company shall be responsible for the payment of all bills relating to utilities consumed on the Sites, including gas, water, sewerage, electricity, coal, oil, ICT, ICT Services, internet service provision, voice and data telephone calls and line rentals (as well as uniform business rates).

#### 12.6 **Interest on Late Payment**

Save where otherwise specifically provided, where any payment or sum of money due from one party to another party 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 and it is agreed between the parties that the Prescribed Rate provides a substantial remedy pursuant to Sections 8 and 9 of the Late Payment of Commercial Debts (Interest) Act 1998.

#### 12.7 **Adjustment of Contribution**

12.7.1 Subject to clause 12.7.2, the Relevant Proportion shall be adjusted:

- 12.7.1.1 in accordance with the provisions regarding indexation of the Indexed Element set out in paragraph 2.2 of Part A of Schedule 6 (Payment Mechanism) of the Project Agreement; and/or
- 12.7.1.2 on the occurrence of the circumstances referred to in clause 16.5 or 16.6; and/or
- 12.7.1.3 on the occurrence of the circumstances referred to in clause 18 (Benchmarking and Market Testing); and/or
- 12.7.1.4 on the occurrence of the circumstances referred to in clause 26.3.1; and/or
- 12.7.1.5 where the Unitary Payment is increased or decreased pursuant to the Project Agreement following the occurrence of a Qualifying Change in Law which affects the Academy, the Relevant Proportion shall be adjusted by the same amount that relates to the Academy,

and as specifically provided for elsewhere in this Agreement.

12.7.2 Where the Relevant Proportion is to be adjusted in accordance with the terms of this Agreement, the adjustment shall be proportionate having regard to all relevant matters including but not limited to:

- 12.7.2.1 any change to the Unitary Payment;
- 12.7.2.2 the proportion of the Unitary Payment represented by the Relevant Proportion;



12.7.2.3 the effect on the Academy and the Company;

12.7.2.4 the effect on the Authority

and shall be reasonable in all the circumstances.

## **12A CATERING AND NNDR**

12A.1 The Authority shall supply to the Company on a monthly basis evidence of the number of free school meals served at the School in the preceding month and which the Authority is liable for under the Project Agreement. The parties note that the Relevant Proportion includes payments relating to Category B meals (pupils). The Company shall be liable, in addition, to pay to the Authority all amounts required to discharge its liability in relation to Category C meals (staff) within five (5) Business Days of receipt of such evidence.

12A.2 The Company shall be directly liable to the relevant authority for National Non Domestic Rates.

## **13 PERFORMANCE REGIME**

### **13.1 Deductions**

The Authority is entitled under the Project Documents to, inter alia, make Deductions. The provisions of this Clause 13 shall apply to the administration of and accounting for such Deductions in respect of the Academy.

### **13.2 Reporting**

The Company shall procure that the Principal of the Academy (or a person authorised by the Company) shall in relation to the Academy:

13.2.1 use the Helpdesk established under the Project Agreement, as the case may be, to report any service failures eligible for Deductions;

13.2.2 promptly report any apparent Unavailability of relevant areas to the Helpdesk, in relation to the Project Agreement and to the Authority's Representative;

13.2.3 promptly review any report of the performance of the Provider provided by the Authority and promptly notify any inaccuracies relating to the Academy to the Authority's Representative; and

13.2.4 promptly report and notify to the Authority's Representative any acts or omissions of the Provider which the Company believes may reasonably constitute a breach by the Provider of the Project Agreement.

### **13.3 Attribution of Deductions**

13.3.1 Any deductions made by the Authority pursuant to the Project Agreement to the extent that they relate to the Academy shall be credited to the Company as a proportional reduction of monthly instalments of the Relevant Proportion pursuant to Schedule 2 (Calculation of the Relevant Proportion).



## 14 SURVEYS

- 14.1 The Authority and the Company shall liaise throughout the term of this Agreement on matters relating to the condition of the buildings and any other structures, cabling, services and of the grounds which comprise the Sites.
- 14.2 The Authority in exercising its rights to survey the PFI Sites and buildings on the PFI Sites under the Project Agreement shall liaise with the Company Representative and shall have regard to the views of the Company in setting times for a surveyor to assist the Authority in the undertaking of any such survey.

## 15 INDEMNITIES

Where any party (the "**Indemnified Party**") wishes to make a claim under this Agreement against the other (the "**Indemnifying Party**") whether in relation to a claim made against it by a third party (a "**Third Party Claim**") or otherwise, then any and all claims by the Indemnified Party shall be made in accordance with Clause 4 (Normal Payment Matters) of the Principal Agreement.

## 16 INSURANCE

- 16.1 The Company acknowledges that it is responsible for procuring and maintaining insurances which:

- 16.1.1 cover the risk of any and all damages, losses, claims, actions costs, expenses, proceedings, demands, charges, physical loss, theft and/or indirect loss to the Company and Company Assets; and
- 16.1.2 are otherwise required by Legislation in relation to risks relevant to the operation of the Academy and the provision of Educational Services at the Academy.

### 16.2 Company Insurance Requirements

The Company shall not take any action or fail to take any reasonable action, or (insofar as it is reasonably within its power) permit anything to occur in relation to it, which would entitle any insurer to refuse to pay any claim under any Project Insurance to which it is an insured, a co-insured or an additional insured person, or noted on the policy.

### 16.3 Authority Insurance Obligations

The Authority shall use all reasonable endeavours to procure due compliance by the Provider of its obligations under clause 62 (Insurance) of the Project Agreement to procure the existence of the Project Insurances and shall in particular procure that such insurances:

- 16.3.1 where requested by the Company, and where the same is possible, name the Company as co insured; and
- 16.3.2 where the Company is co insured, include within the terms of such insurances non vitiation protection and a waiver of subrogation rights; and

16.3.3 are in terms that comply with the other provisions of clause 62 (Insurance) of the Project Agreement,

and shall exercise its rights and/or remedies under the Project Agreement to such ends.

#### **16.4 Evidence of Policies**

The Authority shall provide to the Company on reasonable notice:

16.4.1 copies of the material damage insurance policy relating to the PFI Sites; and

16.4.2 evidence that the premiums payable under the Project Insurances referred to in Clause 16.3 have been paid and that such Project Insurances are in full force and effect.

16.4A Without prejudice to Clause 16.4 the Authority shall forward to the Company copies of any renewal certificates received from the Provider pursuant to Clause 62.6 of the Project Agreement.

#### **16.5 Sharing of Relevant Insurances Premium Risk Sharing**

If, pursuant to Schedule 22 of the Project Agreement, it is agreed or determined that the Authority is responsible for meeting the costs of insurance policy premium variations relating to the Academy:

16.5.1 the Authority shall forthwith notify the Company of the same;

16.5.2 the Company shall make an appropriate adjustment to the Relevant Proportion to ensure the Authority is left in a no better and no worse position in relation to the insurance costs attributable to the Academy than before the premium variation occurred within ten (10) Business Days of receipt of notice; and

16.5.3 on the next immediate and subsequent Payment Date, payments of the Relevant Proportion shall be adjusted so as to ensure the Authority is in no better and no worse position in relation to the insurance costs attributable to the Academy than before the premium variation occurred.

16.6 If, pursuant to Schedule 22 of the Project Agreement, it is agreed or determined that the Authority is to receive the benefit of any insurance policy premium variations relating to the Academy:

16.6.1 the Authority shall forthwith notify the Company of the same;

16.6.2 the Company shall make an appropriate adjustment to the Relevant Proportion to reflect that part of the decrease attributed to the Company within ten (10) Business Days of receipt of notice; and

16.6.3 on the next immediate and subsequent Payment Date, payments of the Relevant Proportion shall be adjusted to reflect that part of the decrease attributed to the Company in accordance with clause 16.6.2.

## **17 DAMAGE AND VANDALISM**

17.1 Not used

### **17.2 Authority Damage to the PFI Facilities**

17.2.1 The Company shall procure that the Company Representative and the principal cooperates with the Provider in agreeing whether or not any damage is Authority Responsible Vandalism (as defined by clause 61.6.2 of the Project Agreement).

17.2.2 Any damage on the PFI Sites occurring in accordance with clause 61.6 (Vandalism) of the Project Agreement which is occasioned by the Company and/or Company Related Parties shall (except to the extent covered by any relevant Project Insurance) be the responsibility of the Company to the extent it is the responsibility of the Authority under the Project Documents ("**Authority Damage**").

17.2.3 The Company shall reimburse the Authority for any such liability arising from any such Authority Damage within ten (10) Business Days of receipt of an invoice for the same from the Authority.

### **17.3 Responsible Keyholders**

The Company notes and shall comply with the Authority's obligations under clause 61.6.9 of the Project Agreement (insofar as they relate to the Academy) and shall reimburse the Authority (within ten (10) Business Days of receipt of an invoice for the same from the Authority) for any liability properly incurred by the Authority pursuant to the Project Agreement which arises from the Company's failure to comply with such obligations.

## **18 BENCHMARKING AND MARKET TESTING**

18.1 In exercising its rights pursuant to Clause 28 (Market Testing and Benchmarking) of the Project Agreement, the Authority shall consult with the Company Representative and all matters affecting the Academy which arise pursuant to any benchmarking or market testing exercise shall, so far as is compatible with the programme for the undertaking of the benchmarking exercise and any subsequent market testing, be referred to the School Liaison Procedure for consideration.

18.2 Where as a result of the benchmarking and market testing procedures referred to in Clause 18.1, there is an adjustment to the Unitary Payment, the Relevant Proportion paid by the Company shall be adjusted to take account of the outcome of the benchmarking and market testing procedures so that any such adjustment of the Relevant Proportion coincides with an adjustment of the Unitary Payment pursuant to Clause 28 of the Project Agreement and leaves the Authority in a no better and no worse position than before the benchmarking and market testing procedures were undertaken in accordance with the Project Agreement provided that any adjustment made to the Relevant Proportion shall be no greater (if the Relevant Proportion is increased) or lesser (if the Relevant Proportion is reduced) than the average percentage adjustment which is made to the payment which is equivalent to the Relevant Proportion for the other PFI Schools following the completion of such benchmarking and market testing procedures at the PFI Schools in accordance with the Project Agreement. For the purposes of this Clause 17.3 the



PFI Schools are the schools referred to in Recital C together with any successor schools or academies.

## **19 CONSULTATION AND LIAISON**

The Authority shall convene a meeting of the School Liaison Committee in accordance with the procedures provided for in Schedule 1 no less frequently than quarterly.

## **20 USE AND CONTROL OF THE SCHOOL**

20.1 The Company acknowledges that pursuant to the Project Agreement and this Agreement:

20.1.1 not used;

20.1.2 the Authority's youth service shall be entitled to agree Authority Designated Community Use of the Academy in accordance with clause 29.6 of the Project Agreement.

20.1.3 not used;

20.1.4 not used;

20.1.5 Administrative Use and Ad Hoc Use of the Academy are permitted under Clause 29.4 of the Project Agreement at no additional charge for up to the Bank Hours;

20.1.6 not used;

20.1.7 Additional School Use of the Academy is permitted under Clause 29.5 of the Project Agreement at no additional charge for up to the Bank Hours;

20.1.8 School Use is permitted under Clause 29.1.1 of the Project Agreement; and

20.1.9 the Provider may permit additional Authority Designated Community Use or Additional School Use of the Academy by the Company and shall be entitled to charge for such use as set out in clause 29 of the Project Agreement.

20.2 Subject to Clause 8 of this Agreement and the provisions of clause 20.1.1, the Authority shall permit the Company to exercise all rights in relation to the use of the Academy as permitted under Clause 29 of the Project Agreement and shall not do anything which shall limit or interfere with such use, including that (subject to clause 8 of this Agreement and the provisions of clause 20.1.1), the Authority shall not agree any School Use, Administrative Use, Ad Hoc Use, NFPC Designated Community Use or Authority Designated Community Use in relation to the Academy or other use or any change of such use of the Academy without the consent of the Company.

### **20.3 Terms**

No later than 15 March in each year, the Company shall notify the Authority of the dates for Terms (including any half-term holidays) in the period 1<sup>st</sup> September to 31<sup>st</sup> August following that notice. The Company acknowledges the importance to the

Authority of the dates for and length of Terms and half term holidays. Where the Company requires Terms to have an aggregate yearly duration in excess of 195 days or where it proposes any material change to the structure of the Terms (being a change which reduces the length of any holiday by more than five (5) Business Days or introduces a term structure substantially different to the existing term structure) it shall propose an Authority Change pursuant to this Agreement. For the purposes of the year ending 31 August 2017, the Terms will be as follows:

Autumn Term:	05/09/2016 to 16/12/2016
Spring Term	03/01/2017 to 07/04/2017
Summer Term	24/04/2017 to 21/07/2017

## **21 AUTHORITY INDEMNITY**

### **21.1 Indemnity for acts or omissions of the Provider**

The Authority shall be responsible for and shall release and indemnify the Company, in respect of all Project Document Losses suffered or incurred by the Company or any servant, agent or representative of the Company to the extent that either:

- 21.1.1 the Authority recovers such Project Document Losses from the Provider; or
- 21.1.2 the Authority would have been entitled to recover such Project Document Losses under the provisions of the Project Agreement save for failures by the Authority to perform its obligations under this Agreement;

whichever is the larger amount.

### **21.2 Indemnity for acts or omissions of the Authority and Authority Related Parties**

The Authority shall, subject to clause 21.4 (Authority not Responsible), be responsible for, and shall release and indemnify the Company or any Company Related Party on demand from and against all liability for Academy Direct Losses arising from:

- 21.2.1 death or personal injury;
- 21.2.2 loss of or damage to property (including property belonging to the Company or for which it is responsible) but excluding the land, buildings, plant, equipment and other assets which are the responsibility of the Provider to provide under the Project Agreement and which form part of the Academy; and
- 21.2.3 third party actions, claims and/or demands (other than any which are the subject of the indemnity in clause 21.3) brought against the Company or any Company Related Party,

which may arise out of, or in consequence of the performance or non-performance by the Authority of its obligations under this Agreement or the presence on either Site of the Authority or any Authority Related Party.

- 21.3 The Authority shall, subject to clause 21.4 (Authority not Responsible), be responsible for, and shall release and indemnify the Company or any Company Related Party, on demand from and against all liability for Academy Direct Losses

and Indirect Losses arising from third party actions, claims or demands (as described in clause 21.2.3) brought against the Company or any Company Related Party for breach of statutory duty which may arise out of, or in consequence of a breach by the Authority of its obligations under this Agreement to the extent that there are no other remedies available to the Company under this Agreement.

- 21.3A The Authority shall be responsible for and shall release and indemnify the Company, in respect of all losses suffered or incurred by the Company which the Authority would have been entitled to recover from the Provider under Clause 61.1 of the Project Agreement but for the Provider having available to it a defence in Clause 61.2 (Provider Not Responsible) to the extent that the Authority or an Authority Related Party was the cause of such defence.

#### **21.4 Authority not Responsible**

The Authority shall not be responsible or be obliged to indemnify the Company:

- 21.4.1 for any matter referred to in clause 21.2, 21.3 or 21.3A that arises as a direct result of the Authority acting on a written notice issued by the Company;
- 21.4.2 for any injury, loss, damage, cost and expense caused by the negligence or wilful misconduct of the Company or any Company Related Party (other than to the extent such negligence or wilful misconduct would not have occurred but for a breach by the Authority of its obligations under this Agreement) or by the breach of the Company of its obligations under this Agreement; or
- 21.4.3 to the extent that any cost and expense related to any injury, loss or damage, is the responsibility of the Company pursuant to clause 17 (Damage).

#### **21.5 Authority Compensation**

Without prejudice to any rights of the Company at common law or in equity, where the Company suffers or incurs Academy Direct Losses or Indirect Losses in connection with a breach by the Authority or an Authority Related Party of the Project Agreement and/or this Agreement or any other liability attributable to the Authority or the Authority Related Party under the Project Agreement or the negligence or wilful misconduct of the Authority or an Authority Related Party, and the indemnities contained in clauses 21.1 to 21.4 (inclusive) do not apply, the Authority shall compensate the Company for all such Academy Direct Losses and Indirect Losses.

## **22 ADDITIONAL INCOME**

### **22.1 Income Calculation**

The Company shall provide all reasonable assistance to the Authority where, in accordance with Clause 29 of the Project Agreement, the Authority and Contractor seek to agree the net income generated from use of the Academy through Third Party use or Community Use.



## **22.2 Third Party Use – Approval**

The Authority hereby agrees with the Company that where the Company reasonably considers that the presence or continued presence on a Site of a person employed or engaged by the Provider, the Authority or their respective Related Parties is undesirable, the Authority shall at the request of the Company exercise such powers as may be available to the Authority pursuant to the Project Agreement to refuse admission to such person and to remove such person from the relevant Site.

## **22.3 Existing School Responsibility**

For the avoidance of doubt, the Company acknowledges that, until the Company has taken occupation of the Academy pursuant to the Leases, control of the Existing School remains with the Authority.

## **22.4 Income Share**

Any income relating to the PFI Sites payable to the Authority under the Project Agreement shall be credited to the Company.

# **23 DISPUTE RESOLUTION**

## **23.1 Dispute Resolution Procedure**

Where the Company does not believe that the Provider is undertaking its obligations in accordance with the requirements of the Project Agreement insofar as they relate to the Academy, the Company may (acting reasonably) request the Authority to consider in accordance with Clause 4 whether to submit such a dispute to the Dispute Resolution Procedure contained in the Project Agreement on behalf of the Company. The Authority shall act reasonably when considering any such request.

23.2 If a dispute arises in relation to any aspect of this Agreement, the Company and the Authority shall consult in good faith in an attempt to come to an agreement in relation to the disputed matter. If the Authority and the Company fail to resolve the dispute within ten (10) Business Days of the initial consultation between them then either may refer the matter to be resolved by a person nominated by or on behalf of DFE. DFE shall act reasonably in making such nomination, including ensuring the impartiality of the nominee regardless of whether there may be any financial benefit to DFE dependant on the nominee's decision. Subject to a decision made by a person nominated by or on behalf of DFE under this Clause, each party shall in relation to the Project Agreement bear their own costs arising from a dispute pursuant to this Clause 23.2.

23.3 Should a dispute arise which the Authority would not otherwise pursue other than at the Company's request, the Company shall reimburse the Authority in relation to all reasonable and proper costs incurred by the Authority in submitting the matter to the relevant adjudicator pursuant to the Project Agreement.

# **24 EMPLOYEES**

24.1 Without prejudice to Clause 4, the Authority undertakes to duly enforce the provisions of Clause 30 (TUPE) of the Project Agreement for the benefit of the Company where requested to do so by the Company (acting reasonably).

24.2 In the event that the Company becomes aware of a breach by the Provider of any obligations under Clause 30 (TUPE) of the Project Agreement, the Company shall give notice (including reasonable particulars of the alleged breach) to the Authority and the Authority undertakes to promptly take up such matter with the Provider enforcing the terms of the relevant clause to the maximum extent practicable in the circumstances.

24.3 Where the Company considers that any person employed at the Academy (whether in connection with the Works or Services or otherwise) should be removed pursuant to the power available to the Authority under the Project Agreement, the Company shall be entitled to serve written notice on the Authority requiring the Authority to exercise its power to procure removal of that person from the relevant PFI Site and the Authority shall promptly do so.

## **25 EMPLOYEE TRANSFERS**

The parties shall co-operate and consult with relevant employees as required under TUPE so that the parties may comply with their respective obligations under TUPE in connection with the Project and obligations in the Academy Contracts.

## **26 EXERCISE OF AUTHORITY CHANGE AND CHANGE MECHANISM**

### **26.1 Changes Not Proposed by the Company**

Where there is any proposal for an Authority Change or a Provider Change ("**Change**") under the Project Agreement that is not proposed by the Company:

26.1.1 the Authority shall notify the Company and the DFE of all relevant information in relation to the proposed Change including without limitation, the Authority's opinion, the available options, the decision required and time periods for both parties to respond; and

26.1.2 the Authority shall not agree to any proposed Change which is reasonably likely to have an adverse effect upon the provision of the Services at the Academy or a material adverse financial impact on the Academy, without the prior consent of:

(a) the Company (which shall not be unreasonably withheld or delayed); or

(b) DFE, in the event that either:

(i) the Company has not provided its consent under Clause 26.1.2(a); or

(ii) the proposed Change would have a material adverse financial impact on the Academy.

### **26.2 Changes Proposed by the Company**

26.2.1 The Company may at its own cost, acting reasonably, request the Authority to request an Authority Change pursuant to the Project Agreement and shall provide the Authority and DFE with all relevant information in relation to the proposed Authority Change including so far

as it is able, all matters set out in Clause 57.1.4 of the Project Agreement.

26.2.2 The Authority may decline to submit an Authority Notice of Change to the Provider, where if to put forward such a proposed Authority Change to the Provider would:

- (a) be prejudicial to the Project as a whole or another school within the Project;
- (b) Not Used;
- (c) be in breach of the requirements for Authority Changes set out in Clause 57 of the Project Agreement; and/or
- (d) result in material additional costs or increased liabilities for the Authority in a manner not adequately compensated for by either the Company and/or DFE.

26.2.3 Where the Authority does not decline the Company's proposed Authority Change pursuant to Clause 26.2.2:

- (a) the Authority shall submit an Authority Notice of Change to the Provider as soon as practicable and keep the Company informed as to any information regarding the proposed Authority Change received from the Provider as well as any revisions, estimates and/or amendments to that proposed Authority Change;
- (b) the Company shall at its own cost provide all assistance to the Authority, including: procuring additional information to assist the proposed Authority Change; details of proposals for provision of funding for capital expenditure required to implement the Authority Change, attending relevant discussions with the Provider in seeking to agree the contents of the Estimate provided by the Provider in accordance with Clause 57.1.7 of the Project Agreement;
- (c) the Authority shall promptly provide the Company with a copy of the Estimate relevant to the Authority Change (including any revisions to such Estimate) and a copy of the proposed notice confirming the Authority Change;
- (d) the Company shall provide written notice to the Authority either confirming the relevant Estimate or requesting the Authority withdraw the relevant Authority Notice of Change within at least ten (10) Business Days before the Authority is required to advise the Provider that either the contents of the relevant Estimate are agreed by the Authority or the Authority Notice of Change is withdrawn in accordance with Clause 57.1.11 of the Project Agreement;
- (e) subject to Clause 26.3.4 the Authority shall not confirm with the Provider any Estimate in relation to an Authority Notice of Change requested by the Company under this Clause 26.2, without the



prior written consent of the Company (not to be unreasonably withheld or delayed); and

- (f) subject to Clause 26.3.4 the Authority shall not withdraw an Authority Notice of Change requested by the Company under this Clause 26.2, without the prior written consent of the Company (not to be unreasonably withheld or delayed).

### **26.3 Payment for Changes**

Where any Change is likely to lead to an adjustment of the Unitary Payment or any payments from the Authority to the Provider of a lump sum:

26.3.1 where pursuant to Clause 26.2 there is an increase in payments from the Authority to the Provider or the payment to the Provider of a lump sum arising from the implementation of an Authority Notice of Change requested by the Company, the Company shall, unless agreed otherwise in writing by the parties bear the entire increase or reimburse the full amount of the lump sum to the Authority, to the extent related to the Company's request;

26.3.2 where pursuant to Clause 26.1, there is an increase in payments from the Authority to the Provider or the payment to the Provider of a lump sum arising from the implementation of a Change under the Project Agreement, the Company shall, unless agreed otherwise in writing between the parties, pay to the Authority such proportion of the Authority's increased liability which relates to the Academy through either:

- (a) a contribution to payment of a lump sum payable by the Authority to the Provider in relation to the Change; or
- (b) an adjustment to the Relevant Proportion,

so as to ensure the Authority is left in no better and no worse position than if the Change had not been implemented;

26.3.3 where pursuant to either Clause 26.1 or Clause 26.2, there is a decrease in payments from the Authority to the Provider arising from the implementation of the Change, a proportionate adjustment to the Relevant Proportion to reflect such decrease shall apply as soon as reasonably practicable following the implementation of the relevant Authority Change so as to ensure the Authority is left in no better and no worse position than if the Change had not been implemented;

26.3.4 notwithstanding Clause 26.1 and Clause 26.2, where the Company has not responded to the Authority within the time periods reasonably required by the Authority, the Authority may, after giving reasonable warning, proceed to exercise its rights and/or satisfy its obligations in the Project Documents in relation to the proposed Authority Change and/or Provider Change and any decision made by the Authority in respect of such change shall be deemed to be approved by the parties pursuant to this Clause 26.

## **27 TERMINATION**

### **27.1 Occurrence**

This Agreement shall terminate on the earlier of the:

27.1.1 expiry or termination of the Project Agreement; or

27.1.2 closure of the Academy; or

27.1.3 termination of the Funding Agreement save where this Agreement is to be or has been novated to a suitable replacement sponsor pursuant to the terms of the Principal Agreement; or

27.1.4 termination of the Leases pursuant to Clause 6.7 thereof.

## **28 ASSIGNMENT ETC.**

28.1 In the event that the Authority novates, assigns or otherwise transfers its rights and obligations under the Project Agreement to another person then the Authority will novate this Agreement and the Leases to that party.

28.2 Notwithstanding Clause 28.1, this Agreement and the Leases may be novated in accordance with the terms of the Principal Agreement.

28.3 Subject to Clauses 28.1 and 28.2, no party shall otherwise novate, assign or transfer its rights or obligations under this Agreement without the prior written consent of the other party.

## **29 GOVERNING LAW**

### **29.1 Applicable Law**

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

### **29.2 Jurisdiction**

Except as provided in this agreement, the parties agree that any disputes between the parties shall be subject to the exclusive jurisdiction of the courts of England and Wales.

## **30 THIRD PARTY RIGHTS**

### **30.1 Entitlement of Third Parties**

No term of this Agreement is intended to give any entitlement as against any party to any person who is not a party to this Agreement.

### **30.2 Exclusion of Contracts (Rights of Third Parties) Act 1999**

No term of this Agreement may be enforced by any person other than a party to this Agreement under the Contracts (Rights of Third Parties) Act 1999.

## **31 MISCELLANEOUS PROVISIONS**

### **31.1 Provisions to Remain in Force**

If any term, condition or provision of this Agreement shall be held to be invalid, unlawful or unenforceable to any extent, such term, condition or provision shall not affect the validity, legality and enforceability of the other provisions of or any other documents referred to in this Agreement.

### **31.2 Entire Agreement**

This Agreement and the documents referred to in this Agreement contain all the terms which the parties have agreed in relation to the subject matter of this Agreement.

### **31.3 Waiver**

No term or provision of this Agreement shall be considered as waived by a party to this Agreement unless a waiver is given in writing by that party. No waiver shall be a waiver of a past or future default or breach, nor shall it amend, delete or add to the terms, conditions or provisions of this Agreement unless (and only to the extent) expressly stated in that waiver.

### **31.4 Counterparts**

This Agreement may be executed and delivered in any number of counterparts, each of which so executed will be an original, but together will constitute one and the same instrument.

### **31.5 Intellectual Property Rights**

31.5.1 At the request of the Company where required to exercise its rights or perform its obligations under this Agreement and where permitted by the Project Agreement the Authority shall grant to the Company a sub-licence in respect of Intellectual Property Rights licensed to the Authority under or pursuant to the Project Agreement which may only be used by the Company in accordance with the Approved Purposes.

31.5.2 The Company hereby grants to the Authority a non exclusive irrevocable and royalty free licence (carrying the right to grant sub-licences) to use for the duration of this Agreement solely for the purposes of discharging the Authority's obligations in relation to the PFI Facilities and/or the PFI Sites under the Project Agreement any Intellectual Property Rights which are or may become vested in the Company.

### **31.6 Confidentiality**

31.6.1 Neither the Company nor the Authority 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 (such consent not to be unreasonably withheld or delayed).

31.6.2 The parties shall comply with their duties and responsibilities under the Data Protection Acts 1984 and 1998 in the performance of this Agreement and shall not unlawfully process or disclose information subject to those Acts.



### **31.7 Freedom of Information**

The parties agree that they will each cooperate to the extent they are legally able to do so to enable any party receiving a request for information under the Freedom of Information Act 2000 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 persons as appropriate and responding to any requests by the party receiving a request for comments or other assistance.

### **31.8 Amendments**

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

### **31.9 No Agency**

31.9.1 Nothing in this Agreement shall be construed as creating a partnership or as a contract of employment between the parties.

31.9.2 Save as expressly provided otherwise in this Agreement, the Company shall not be, or be deemed to be, an agent of the Authority and the Company shall not hold itself out as having authority or power to bind the Authority in any way.

### **31.10 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 or otherwise.

### **31.11 Further Assurance**

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

### **31.12 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.

## **32 NOTICES**

### **32.1 Form of Notice**

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 or by hand, leaving the same at:

If to the Authority:

Director of Legal and Democratic Services  
Rotherham Borough Council  
Riverside House

Main Street  
Rotherham  
S60 1AE

If to the Company:

Chief Executive  
Wickersley Partnership Trust  
Bawtry Road  
Wickersley  
Rotherham  
S66 1JL

### **32.2 Communication with Representatives**

Where the information or documentation is to be provided or submitted to the Authority's Representative or the Company Representative it shall be provided or submitted by sending the same by first class post or by hand, leaving the same at:

If to the Authority's Representative: Director of Legal and Democratic Services  
Rotherham Borough Council  
Riverside House  
Main Street  
Rotherham  
S60 1AE

If to the Company Representative: Chief Executive  
Wickersley Partnership Trust  
Bawtry Road  
Wickersley  
Rotherham  
S66 1JL

### **32.3 Change of Address**

Any party to this Agreement (and any Representative) may change its nominated address or facsimile number by prior notice to the other parties.

### **32.4 Service**

Notices given by post shall be effective upon the earlier of actual receipt and two (2) Business Days after mailing. Notices delivered by hand shall be effective upon delivery.

### **32.5 Accrued Rights**


The Parties agree that this Agreement shall be extended if at any time it becomes apparent to any Party that any of their obligations or rights accruing to any of them in respect of this Agreement will not have been carried out or completed by the termination of the Project Agreement.

**IN WITNESS** whereof the parties have executed this Agreement as a Deed.

**EXECUTED** as a **DEED** (but  
not delivered until the date hereof)  
by the affixing of the Common Seal  
of **Rotherham Borough Council**  
in the presence of:

\_\_\_\_\_  
Authorised Officer

**EXECUTED** as a **DEED** by and on behalf )  
of **Wickersley Partnership Trust** )  
acting by: )

  
\_\_\_\_\_  
Director / Secretary

  
\_\_\_\_\_  
Director



## **SCHEDULE 1 – SCHOOL LIAISON PROCEDURE**

### **1. SCHOOL LIAISON COMMITTEE**

The Company shall establish and maintain for the duration of this Agreement a Liaison Committee for the School (the “**School Liaison Committee**”), and shall invite representatives from the Authority and the Provider to attend as required.

### **2. FUNCTIONS**

The functions of the School Liaison Committee shall be:

- 2.1 to provide a means for the joint review where appropriate of all aspects of the performance of this Agreement; and
- 2.2 to provide a forum for joint strategic discussion and consideration of all aspects with regard to this Agreement including ensuring dissemination of information and consideration of the views of all the stakeholders connected with the Project Agreement; and
- 2.3 consideration of issues relating to:
  - 2.3.1 any requests for consents or approvals;
  - 2.3.2 Authority Changes; and
  - 2.3.3 any other matters of concern.

### **3. ROLE**

The role of the School Liaison Committee is to make recommendations to the Company and to the Authority, which the Company and the Authority may accept or reject at their complete discretion. Neither the School Liaison Committee itself, nor its members acting in that capacity, shall have any authority to vary any of the provisions of this Agreement or to make any decision binding on the parties. No discussion, review or recommendation by the School Liaison Committee shall relieve the Company or the Authority of any liability or vary any such liability or any right or benefit.

### **4. REPRESENTATIVES**

The Company and the Authority may appoint their representatives on the School Liaison Committee and remove those representatives and appoint replacements, by written notice delivered to the other at any time.

### **5. PRACTICES AND PROCEDURES**

Subject to the provisions of this Schedule, the members of the School Liaison Committee may adopt such procedures and practices for the conduct of the activities of the School Liaison Committee as they consider appropriate, from time to time.

## **6. VOTING**

Each member of the School Liaison Committee shall have one vote each.

## **7. CHAIRPERSON**

The chairperson of the School Liaison Committee ("the **Chairperson**") shall be nominated by the Company.

## **8. FREQUENCY OF MEETINGS**

The School Liaison Committee shall meet at such intervals as the School Liaison Committee shall determine.

## **9. CONVENING OF MEETINGS**

The Chairperson of the School Liaison Committee may convene a meeting at any time, or a meeting may be convened upon three members of the School Liaison Committee notifying the Chairperson that a meeting should be held.

## **10. NOTICES OF MEETINGS**

Not less than ten Business Days' notice (identifying the agenda items to be discussed at the meeting) shall be given to convene a meeting of the School Liaison Committee, except that in emergencies a meeting may be called at any time on such notice as may be reasonable in the circumstances.

## **11. ATTENDANCE AT MEETINGS**

Meetings of the School Liaison Committee should normally involve the attendance (in person or by alternative) of representatives at the meeting. Where the representatives of the School Liaison Committee consider it appropriate (by affirmative vote of all those voting on the matter) meetings may also be held by telephone or another form of telecommunication by which each participant can hear and speak to all other participants at the same time.

## **12. MINUTES**

Minutes of all decisions and meetings of the School Liaison Committee shall be kept by the Company and copies circulated promptly to the Authority, normally within ten (10) Business Days of the making of the decision or the holding of the meeting.

## **SCHEDULE 2 – CALCULATION OF THE RELEVANT PROPORTION**

### **THE ACADEMY'S FUNDING CONTRIBUTIONS TO PFI**

- 1 In this Agreement the "Relevant Proportion" shall have the following meaning:
  - 1.1 for the financial year in which the Commencement Date falls, the Relevant Proportion shall be £484,882 and the parties note the sum paid on behalf of the Existing School by its Governing Body in respect of this financial year;
  - 1.2 thereafter the Relevant Proportion will be re-calculated annually in accordance with Clause 12.7.1 of this Agreement. Therefore, the Relevant Proportion will be indexed in line with paragraph 2.2 of Part A of Schedule 6 (Payment Mechanism) of the Project Agreement, that is by applying the annual change in January's RPIX value, which is published in February, and is effective from April.
- 2 In this Agreement the "Affordability Gap" shall have the following meaning:
  - 2.1 for the financial year in which the Commencement Date falls, the Affordability Gap shall, subject to paragraph 2.2 below, be £531,854 the parties note the sum paid on behalf of the Existing School by its Governing Body in respect of this financial year.
  - 2.2 thereafter the Affordability Gap will be re-calculated annually in accordance with Clause 12.1A of this Agreement. Therefore, the Affordability Gap will be indexed in line with paragraph 2.2 of Part A of Schedule 6 (Payment Mechanism) of the Project Agreement, that is by applying the annual change in January's RPIX value, which is published in February, and is effective from April.



## **SCHEDULE 3 – CORPORATE WARRANTIES**

### **PART 1 - WARRANTIES BY THE COMPANY**

#### **1 DUE INCORPORATION OF THE COMPANY AND ITS CAPACITY**

- 1.1 The Company is duly incorporated under the law of England and Wales and has the corporate power to own its assets and to carry on its activities as they are now being conducted.
- 1.2 The Company:
  - 1.2.1 has the power to enter into and to exercise its rights and perform its obligations under this Agreement; and
  - 1.2.2 has taken all necessary action to authorise the execution of and the performance by it of its obligations under this Agreement.
- 1.3 The Company is not subject to any other statutory or contractual obligation, compliance with which will or is likely to, have a material adverse effect on the ability of the Company to perform its obligations under this Agreement, the Funding Agreement or the Principal Agreement.
- 1.4 This Agreement constitutes or will when executed constitute legal, valid, binding and enforceable obligations on the Company.
- 1.5 Every consent and approval required by the Company in connection with the execution, delivery, validity or enforceability of this Agreement or the performance by the Company of its obligations under this Agreement have been obtained or made and is in full force and effect and there has been no fault in the observance of the conditions or restrictions (if any) imposed or in connection with any of the same.

#### **2 NO LITIGATION**

No claim is presently being asserted and no litigation, arbitration or administrative proceeding is presently in progress or, to the best of the knowledge of the Company, pending or threatened against the Company or any of its assets which will or might have a material adverse effect on the ability of the Company to perform its obligations under this Agreement.

#### **3 SOLVENCY OF THE COMPANY**

- 3.1 No proceedings or other steps have been taken and not discharged (nor, to the best of the knowledge of the Company threatened) for its winding-up or dissolution or for the appointment of a receiver, administrative receiver, administrator, liquidator or similar officer in relation to any of the Company's assets or revenues.
- 3.2 The Company undertakes to inform the Authority as soon as reasonably practicable of any proposed meetings of creditors which relate to the Company's business.

## **PART 2 - WARRANTIES BY THE AUTHORITY**

- 1 The Acceptance Certificates were issued under Clause 21.4 of the Project Agreement on 24<sup>th</sup> April 2006;
- 2 The copies of the documents issued to the Company and/or its advisers listed in Part 3 of this Schedule are complete and accurate copies of the documents in question.
- 3 There have been no changes or amendments to the Project Agreement (dated 31 March 2003 and amended on 13 June 2003) affecting the Academy other than as set out in the Supplemental Agreements (i) No. 1 dated 22 November 2010, (ii) No. 2 dated 27 March 2012, (iii) No. 3 dated 28 March 2012, (iv) No. 4 dated 1 June 2012, (v) No. 5 dated 30 July 2012 and (vi) Deeds of Variation dated 1 April 2013, 31 July 2013, 30 September 2013, 28 February 2014, 8 July 2014, 1 February 2016 and 14 June 2016 and a further Deed of Variation dated on or about the date of this Agreement.
- 4 There are not now, nor have there been any disputes referred to adjudication pursuant to Clause 67 of the Project Agreement.

### **PART 3 DOCUMENTS**

- 1** The Project Agreement and Schedules dated 31 March 2003 and amended on 13 June 2003 and as subsequently amended via Supplemental Agreements (i) No. 1 dated 22 November 2010, (ii) No. 2 dated 27 March 2012, (iii) No. 3 dated 28 March 2012, (iv) No. 4 dated 1 June 2012, (v) No. 5 dated 30 July 2012 and (vi) Deeds of Variation dated 1 April 2013, 31 July 2013, 30 September 2013, 28 February 2014, 8 July 2014, 1 February 2016 and 14 June 2016.



## SCHEDULE 4 - LEASES