

Telecommunications Terms of Use

THESE TELECOMMUNICATIONS TERMS OF USE (this "Agreement") govern the Interconnected Voice-over-Internet-Protocol ("VoIP") telecommunications services, (the "Communications Services" or the "SP Services"), provided by SHOUTPOINT, INC., a California corporation ("SP"), pursuant to an active Service Order between SP and the subscribing school district on behalf of itself and each of its constituent schools (collectively, the "School District").

1. SP Services. SP shall provide the following services to School District for use over Shoutpoint's VoIP telecommunications network in accordance with this Agreement:
 - a. SP will provision telephone lines and phone numbers in the amount designated in the applicable Service Order.
 - b. Each telephone line supports up to 4,000 total minutes of usage per month, whether termination or origination, based on 6-second increments of usage (cumulatively, the "Monthly Allotment"). If School District exceeds its Monthly Allotment on any one or more lines, SP shall notify the School District on the first such occurrence. If School District exceeds an average of 4,000 total minutes of usage per month for one or more lines during any three (3) contiguous month period (including, if applicable, the first excess month of which they were notified), SP shall charge such party for the number of additional lines that would bring them into compliance with this standard, at the rate of \$37.50 per line, per month. If included in the Service Order, there is no extra charge for the SMS Messenger service, but usage of the SMS shall reduce Customer's available minutes of usage in the following manner: each SMS sent shall equal three (3) minutes of telecommunications usage. Customer understands that recipients must opt in to receive SMS and recipients may be charged by their carrier for SMS communication.
 - c. In emergency circumstances (i.e., School District's authorized personnel reasonably and in good faith, believes will assist in the elimination or mitigation of physical harm to School District's students, faculty, employees, or invitees (e.g., a school shooting, an earthquake, tornado or other natural disaster, or similar exigent circumstance) the subscribed lines can burst to 10 voice paths, which incrementally increases the speed that the messages are disseminated.
 - d. Calls will only be terminated in the United States and Canada.
 - e. Student Count. For the initial term and renewal term, the recommended number of lines and the Monthly Allotment will be based on the student count for the applicable school district. The applicable student count, recommended number of lines, and related cost will be reflected in the applicable Service Order for the initial term, and thereafter reflected in the annual invoice for each renewal term.
2. Service Limitations; 911 Service. As an interconnected VoIP provider, Shoutpoint is required to provide 911 service to its customers. However, Shoutpoint's 911 service operates differently than traditional 911. Shoutpoint must transmit all 911 calls, a callback number and the caller's registered physical location to the underlying carrier. Therefore, Shoutpoint must collect that information from you, and you must update Shoutpoint with any changes. Further, it takes up to 14 days before the 911 service or any change thereto becomes operational. Remember that our 911 Dialing service will not function in the event of a broadband or power outage or if your broadband, ISP or ShoutPoint service is terminated. Complete Shoutpoint 911 information is contained in the Service Order and at www.shoutpoint.com/forschools/911service
3. Term; Pricing.
 - a. Term. The initial term of this Agreement shall commence on the "In Service Date" set forth in the Service Order, which shall typically be July 1st of each given calendar year (or, in the initial year, such later start date as contemplated in Section 3.b. below, being the "In Service Date") and shall end on June 30th of the following calendar year (e.g. July 1, 2010 through June 30, 2011). However, the term shall automatically be renewed for one (1) year periods, unless either party provides the other with written notice of termination at least thirty (30) days, but no more than ninety (90) days, prior to the termination of the then current term. The term may terminate earlier upon the occurrence of one or more of the events described in Section 9 below.
 - b. Fees. School District shall pay to SP on or before the In Service Date (and each subsequent In Service Date should the term be renewed) an amount equal to \$345 annually per line and any setup fee defined in the Service Order. For contracts not commencing on July 1st of any given calendar year, the annual fee shall be reduced in a pro rata manner based on the following formula: (i) the number of days or partial days that the service shall be effective within such period ending on the next occurring June 30th, divided by (ii) 365. Following the initial term and upon thirty (30) days prior written notice, SP may increase the annual per line charge, effective as of July 1st of such year (the "Adjustment Date"), by one hundred percent (100%) of the percentage change, if any, shown by the Consumer Price Index - Urban Wage Earners and Clerical Workers, U.S. City Average (published by the U.S. Department of Labor - Bureau of Labor Statistics) for the month immediately preceding the Adjustment Date as compared with the month immediately preceding the initial In Service date or most recent preceding date on which such charges were previously adjusted hereunder, as the case may be.
4. Customer Service. SP shall provide Customer Service relating directly and solely to the SP Services. School District shall establish a customer service point of contact with SP for such purposes. The parties acknowledge that School District may utilize the services provided hereunder in conjunction with other hardware, software and other applications. The providers of such third party hardware, software and applications shall be solely responsible for all customer service related to usage with such third party products and services.
5. Confidentiality. "Confidential Information" means (a) the terms and conditions of this Agreement; (b) any and all information governed by any now-existing or future non-disclosure agreement (specifically including any such agreement or provision of any agreement between SP and School District), contractual provision, or law binding the parties; (c) any other information relating to either party that has been clearly marked or labeled as confidential, including without limitation information about either party's personnel, products, customers, or services; and (d) all aspects of the services provided hereunder, and any underlying software, including without limitation all source code, object code, algorithms or logic contained therein, and any other form of written or recorded material relating thereto, which the parties acknowledge is owned by and confidential to SP.

Notwithstanding the foregoing, the term "Confidential Information" specifically excludes (i) information that is now in the public domain or subsequently enters the public domain through no action or fault of the other party; (ii) information that is known to either party without restriction prior to receipt from the other party; (iii) information that either party receives from any third party having a legal right to transmit such information, and not under any obligation to keep such information confidential; and (iv) information independently developed by either party without using the other party's Confidential Information. The party relying on any of the above exclusions has the burden of proving the presence of such exclusion. Each party also understands and agrees that misuse and/or disclosure of that information could adversely affect the other party's business. Accordingly, the parties agree that each party, (i) shall use and reproduce the other party's Confidential Information only for purposes of this Agreement and only to the extent necessary for such purpose, (ii) shall restrict disclosure of the other party's Confidential Information to its employees or agents with a need to know and who have agreed in writing to be bound by the terms of this Agreement, (iii) shall not disclose the other party's Confidential Information to any third party without the prior written approval of the other party, and (iv) shall maintain and protect the other party's Confidential Information with at least that degree of care that such party utilizes to maintain and protect its own most confidential information, but in any event using at least a commercially reasonable degree of care. Notwithstanding the foregoing, it shall not be a breach of this Agreement for either party to disclose Confidential Information of the other party if compelled by law to do so, provided the other party has been given prior written notice to permit such other party a reasonable opportunity to object to the legal requirement to disclose. The parties acknowledge and agree that violation of this paragraph may cause irreparable harm, and the total amount of monetary damages for injury to such party will be impossible to calculate and, therefore, an inadequate remedy. Accordingly, the non-breaching party may (a) seek injunctive relief against the breaching party or (b) exercise any other rights and seek any other remedies to which the non-breaching party may be entitled at law, in equity and/or under this Agreement.

6. No Conveyance. School District shall not assign, transfer, sublicense, or otherwise convey its right to use the SP Services hereunder, or any part thereof, to any person, by operation of law or otherwise, without SP's prior written consent, which may be given or withheld in SP's sole discretion. Any breach or attempted breach of this provision shall be null and void and shall entitle SP to immediately terminate this Agreement without any cure period.
7. Limited Warranty; Limitation of Damages. SP warrants that, during the ninety (90) day period (the "Warranty Period") commencing on the In Service Date of the initial term, the SP Services will operate in substantial conformity with industry standards when used in strict compliance therewith. If a material defect occurs, SP's sole obligation under this warranty is to remedy such defect in a commercially reasonable manner.
 - a. THE LIMITED WARRANTY SET FORTH ABOVE IS THE ONLY WARRANTY MADE BY SP, AND SP DOES NOT MAKE, AND SCHOOL DISTRICT HEREBY EXPRESSLY WAIVES, ALL OTHER WARRANTIES, WHETHER EXPRESSED OR IMPLIED. SP HEREBY EXPRESSLY DISCLAIMS ALL WARRANTIES OF MERCHANTABILITY AND/OR FITNESS FOR A PARTICULAR PURPOSE. IN PERFORMING THE SERVICES CONTEMPLATED BY THIS AGREEMENT, SP SHALL HAVE NO LIABILITY (INCLUDING WITHOUT LIMITATION ANY LOST BUSINESS PROFITS OR ANY LOSS, DAMAGE OR DESTRUCTION OF DATA) TO SCHOOL DISTRICT, ITS AGENTS, EMPLOYEES OR CONTRACTORS, FOR PERSONAL INJURY OR PROPERTY DAMAGE UNLESS SUCH DAMAGE IS CAUSED BY SP'S GROSS NEGLIGENCE OR WILLFUL MISCONDUCT. SP SHALL HAVE NO LIABILITY WITH RESPECT TO ITS OBLIGATIONS UNDER THIS AGREEMENT OR OTHERWISE FOR CONSEQUENTIAL, EXEMPLARY, INCIDENTAL OR PUNITIVE DAMAGES, EVEN IF IT HAS BEEN ADVISED OF THE POSSIBILITY OF SUCH DAMAGES. IN ANY EVENT, THE LIABILITY OF SP TO SCHOOL DISTRICT FOR ANY REASON AND UPON ANY CAUSE OF ACTION WHATSOEVER SHALL BE LIMITED TO FEES ACTUALLY PAID BY SCHOOL DISTRICT TO SP FOR THE APPLICABLE SP SERVICES, SUBJECT HOWEVER TO A TWELVE (12) MONTH STRAIGHT LINE DEPRECIATION COMMENCING ON THE IN SERVICE DATE OR THE EFFECTIVE DATE OF ANY SUBSEQUENT TERM OR EXTENSION. SP'S OBLIGATIONS UNDER THIS AGREEMENT, BUT NOT THE EXCLUSIONS AND WAIVERS OF WARRANTY CONTAINED HEREIN, SHALL TERMINATE AND BECOME NULL AND VOID IF ANY MODIFICATIONS ARE MADE TO THE SP SERVICES BY ANY PARTY OTHER THAN SP.
 - b. School District acknowledges that SP exercises no control whatsoever over the content of information passing through School District's equipment, or through equipment or facilities used by SP to provide the SP Services. School District will, at all times, use the SP Services in compliance with all applicable laws and regulations. It is School District's sole responsibility to ensure that the information it transmits or otherwise processes with use of the SP Services complies with all applicable laws and regulations.
8. Indemnification.
 - a. SP will defend, hold harmless and indemnify School District against any damages finally awarded or amounts paid in settlement as a result of any claim or threat of claim brought by a third party against School District to the extent based on an allegation that the SP Services infringe any U.S. patent, copyright, trademark, trade secret or other proprietary right of a third party. The foregoing obligation is subject to the Limitation of Damages provision set forth in Section 7 above
 - b. Except to the extent limited by applicable law, School District shall indemnify and hold harmless SP and SP's officers, directors, employees, and agents, and shall defend, at its expense, and pay the cost of any damages, settlement or award (including reasonable attorneys' fees and costs) for all claims resulting from (i) School District's breach of this Agreement; (ii) School District's violation or alleged violation of any law or regulation; or (iii) School District's other acts or omissions.
 - c. If either party seeks indemnification provided for in this Section, the party seeking indemnification will cooperate with and provide reasonable assistance in the defense or settlement of any claim or legal proceeding. School District and SP will not make public any terms, or the mere existence, of any settlements. If the indemnifying party fails to promptly investigate and defend or settle any claim of which it is notified in writing by the indemnified party, then the indemnified party has the right to have sole control of the defense of the claim and all negotiations for its settlement or compromise, and the indemnifying party shall pay, as they become due, all of the reasonable costs and expenses (including reasonable attorneys' fees) reasonably incurred by the indemnified party in its defending or negotiating settlement of the claim, and the indemnifying party shall satisfy any resulting settlement, award, or judgment.

9. Termination. Upon the occurrence of one or more of the following events by one party (the "Breaching Party"), then the other party (the "Non-breaching Party") may terminate this Agreement immediately (except as specifically set forth the contrary) upon providing written notice of termination to the Breaching Party:
- a. If a party commits a breach of this Agreement and fails to cure that breach within thirty (30) days after receiving written notice from the Non-breaching Party stating the nature of the breach with reasonable particularity;
 - b. [Reserved]
 - c. If a party terminates its business;
 - d. If, voluntarily or involuntarily, a bankruptcy petition or similar proceeding under state law is filed with respect to a party; and
 - e. If a party becomes insolvent or makes a general assignment for the benefit of creditors.

In the event School District terminates this Agreement for SP's uncured breach, School District shall be reimbursed a pro rata portion of the fees paid for services to be rendered following such termination. In the event that SP terminates this Agreement for School District's uncured breach, SP shall be entitled to keep all fees paid to SP prior to such date. The foregoing remedies are in addition to any other legal or equitable remedies available to such party under the circumstance. In the event that School District makes any payment required under this Agreement more than five (5) days late, then in addition to the amount past due School District shall owe SP (i) a penalty in the amount of 5% of such past due amount and (ii) interest in the amount of twelve percent (12%) per annum or, if lesser, the maximum interest rate allowed under applicable law.

10. [Reserved]

11. Force Majeure. Neither party shall be liable to the other for any delay or failure in performance of any part of this Agreement to the extent that such delay or failure is caused by a Force Majeure Event (defined below). The Party claiming relief under this Section shall notify the other in writing of the existence of the Force Majeure Event relied on and shall be excused on a day-by-day basis to the extent of such prevention, restriction or interference until the cessation or termination of said Force Majeure Event. "Force Majeure Event" means an unforeseeable event caused by any of the following conditions: act of God; fire; flood; labor strike; sabotage; material shortages or unavailability or other delay not resulting from the responsible party's failure to timely place orders; lack of or delay in transportation; government codes, ordinances, laws, rules, regulations or restrictions; war or civil disorder; or any other cause beyond the reasonable control of such party. This paragraph shall not apply to any payment obligation of either party.

12. Miscellaneous.

- a. Modifications to Manner of Use. The services provided hereunder are subject to evolving regulation, technology and related industry standards. As such, it is possible that changes to the technical or operational requirements of one or more services may occur during the term of this Agreement. In the event of such a change, SP will notify Customer via email and post the changes at www.shoutpoint.com/termsupdates.
- b. Interpretation. These Terms of Use, together with all mutually executed Service Orders or other documents referenced herein, evidences the complete understanding and Agreement of the parties with respect to the subject matter hereof and supersedes and merges any prior understandings or agreements. The captions, headings, and articles contained herein are solely for convenience of reference and shall not affect the construction or interpretation of this Agreement. Both parties acknowledge that they have read and understand the terms of this Agreement. This Agreement shall be interpreted fairly, and shall not be interpreted more or less favorably for either party.
- c. Governing Law; Attorneys' Fees. This Agreement shall be governed by and construed in accordance with the laws of the State in which School District, or the applicable constituent school, is located. In the event of a dispute arising out of this Agreement, the prevailing party shall be entitled to recover its costs and reasonable attorneys' fees incurred in connection with such action.
- d. Severability; Waivers. If any provision, or any part thereof, of this Agreement shall be invalid or unenforceable under applicable law, said provision shall be ineffective to the extent of such invalidity only, without in any way affecting the remaining parts of said provision or the remaining provisions of this Agreement. The failure of either party to give a notice of default or to enforce strict performance of any provision of this Agreement shall not be construed as a waiver of its right to assert or rely upon such provision or any other provision of this Agreement.
- e. Authority. Each person executing any Service Order represents and warrants that he or she have/they have the authority to enter into this Agreement on behalf of such party, and that the entity they represent has been duly formed, is validly existing, and is qualified to do business in the jurisdictions in which they conduct business.
- f. Counterparts. Each Service Order may be executed in one or more counterparts (including by facsimile or other electronic means), each of which shall be deemed to be an original and all of which, when taken together, will be deemed to constitute one and the same Agreement.
- g. Taxes. Each party shall be fully responsible for the payment of any and all taxes required by law to be paid by that party. Neither party shall be responsible for the payment of taxes imposed on or against the net income of the other party.
- h. No Agency. This Agreement does not render either party the agent or legal representative of the other, nor does it create a partnership or joint venture between the parties. Neither party shall have any authority to bind the other party in any manner whatsoever.
- i. Remedies Cumulative. The rights and remedies afforded to the Parties herein are, unless otherwise noted, cumulative rather than exclusive. Notwithstanding the preceding, in no event shall School District's remedies exceed the limitation of SP's liability set forth in paragraph 8.a. above.

- j. Survival. The rights and obligations of the parties under Sections 2, 3 (but only to the extent of charges due and owing that remain unpaid as of the effective date of termination), 5, 7, 8, 9, and 12 of this Agreement shall survive the expiration or earlier termination of this Agreement.
- k. Successors; Assigns. This Agreement shall be binding upon and inure to the benefit of School District's permitted successors and assigns. Upon providing notice to School District, SP may assign part or all of this Agreement to another party. The Agreement shall be binding upon and inure to the benefit of SP's successors and assigns.
- l. Notices. All notices, consents, waivers and other communications under this Agreement must be in writing and will be deemed to have been duly given when (i) delivered by hand (with written confirmation of receipt), (ii) sent by fax (with written confirmation of receipt), provided that a copy is mailed by certified or registered mail, return receipt requested, or (iii) when received by the addressees if sent by an nationally recognized express delivery service (which delivery confirmed by tracking number), in each case to the appropriate addresses and fax numbers set forth below, or to such other addresses or fax numbers as a party may designate by notice to the other party: