

RANCHO SANTIAGO COMMUNITY COLLEGE DISTRICT
DISTRICT OFFICE - BUSINESS OPERATIONS/FISCAL SERVICES

To: Board of Trustees	Date: December 7, 2015
Re: Approval of RFP # 1271 Student Health Services - Electronic Medical Record Software & Hosting Service	
Action: Request for Approval	

BACKGROUND

Student Health & Wellness Services at both Santiago Canyon College and Santa Ana College have always used conventional paper medical records for management of all patient care and associated student health services. Beginning in 2002, with passage of the sweeping federal law known as HIPAA, the Health Information Portability and Accountability Act, health care providers in general began converting to Electronic Medical Records (EMR). Virtual EMR helps providers adhere to mandates for health information portability, accountability and privacy. This year, both colleges' Student Health Services are planning to transition from paper charts to EMR, the current standard of care for college-based student health services.

In general, college and university-based healthcare providers who have converted to digital medical records (EMR) have found this has made a positive impact on their student health service. In the state of California, 74% of California Community College Student Health Services have transitioned to an EMR. In fact, electronic medical records yield improved information efficiency, reduce medical errors and streamline recordkeeping, making clinical services run more smoothly, thus giving students the best care possible. EMR Software will serve to improve RSCCD Student Health Services efficiency to current standards of health care.

As part of the transitioning to an EMR software, a formal Request for Proposal (RFP) is required.

ANALYSIS

An RFP package was developed and distributed via email to five (5) bidders and twelve (12) bidders via District's website. Proposals were received from four (4) leading health companies. A committee was formed consisting of representatives from Information Technology and both college Student Health Services to review and evaluate proposals and ultimately make recommendation.

Following a thorough document review, as well as detailed program presentations from three (3) of the four (4) interested EMR companies, it was concluded that the proposal from Point and Click Solutions, Inc., has the best value as well as being the lowest responsive and responsible bidder. Also, the software complies with the accessibility requirements of Section 508 of the Rehabilitation Act of 1973.

This is a five-year contract with an annual cost of \$6,000 plus \$5,840.00 for one-time implementation cost for SCC and an annual cost of \$7,600.00 plus \$6,960.00 one-time implementation cost for SAC. Attached are the agreements for each college. Below are the four (4) RFP responses.

SITE	BIDDER			
	Five-Year Cost			
	Point & Click Solutions, Inc.	Pyramed Health Systems	Medicat, LLC	Nextgen Healthcare
SCC	\$ 35,840.00	\$ 39,653.41	\$ 38,000.00	\$ 64,660.00
SAC	\$ 44,960.00	\$ 52,701.48	\$ 67,000.00	\$ 106,260.00
Total	\$ 80,800.00	\$ 92,354.89	\$ 105,000.00	\$ 170,920.00

RECOMMENDATION

It is recommended that the Board of Trustees accept the RFPs and approve the award to Point and Click Solutions, Inc. for RFP #1268 – Student Health Services-Electronic Medical Record Software and Hosting Service as presented.

Fiscal Impact:	\$80,800.00 (5-years)	Board Date: December 7, 2015
Prepared by:	Tracey Conner-Crabbe, Director of Purchasing Services	
Submitted by:	Peter J. Hardash, Vice Chancellor, Business Operations/Fiscal Services	
Recommended by:	Raúl Rodríguez, Ph.D., Chancellor	

POINT AND CLICK SOLUTIONS, INC. SOFTWARE HOSTING AGREEMENT

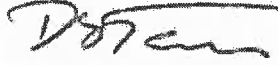

This Agreement, and any Attachments incorporated herein and made a part hereof (hereinafter the "Agreement"), by and between Rancho Santiago Community College District – Santa Ana College (hereinafter "Client"), and Point and Click Solutions, Inc., a Massachusetts corporation, with its principal place of business located at 6 Lincoln Knoll Lane, Suite 101, Burlington, MA 01803 (hereinafter "PNC"), for the provision of a Hosted Practice Management System [PMS] and Electronic Health Record System [EHR] and related consulting, setup, training and support services, all as more fully described herein, is effective on the last date signed by a party below.

This contract contains the following sections:

- Section A [Pricing Proposal]
- Section B [Payment Schedule]
- Section C [Statement of Work]
- Section D [Client Requirements]
- Section F [Service Level Agreement]
- Section G [Standard Terms and Conditions]

PNC is a provider of software, hosting services and consulting services to Student Health Centers and Student Counseling Centers at Universities and Colleges.

PNC will provide Client with Services as identified in the Pricing Proposal Section

 Signature Point and Click Solutions Inc.	<u>DAVID TAN</u> Name	<u>PRESIDENT/CEO</u> Title	<u>12/31/2015</u> Date
 Signature Client	<u>Peter J. Hardash</u> Name	<u>Vice Chancellor, Business Operations & Fiscal Services</u> Title	<u>12/15</u> Date

Section A – Pricing Proposal

Santa Ana College

Hosted System Price Summary

This proposal and any discounts will be honored for one year from the proposal issue date of **10/12/2015**.

Additional items can be purchased any time and will be pro-rated. Additional purchases after one year from the proposal issue date will be based on the current price list at the time of the additional purchase.

This includes all server hardware, OS licenses, database licenses, application licenses, support and training.

Hosting Price Summary	
One Time Installation, Setup, Training & Travel Costs	(\$6,960.00)
Pro-Rated 1st Year Partial Subscription	\$7,600.00
Year 2 Anticipated Subscription	\$7,600.00
Year 3 Subscription	\$7,600.00
Year 4 Subscription	\$7,600.00
Year 5 Subscription	\$7,600.00
Total (5 Years)	\$44,960.00

Section B – Payment Schedule

Setup fees are not refundable after setup work has started.

Prorated 1st year fees must be paid prior to go live.

Annual renewals must be paid prior to renewal dates. Invoices are sent 60 days prior to renewal dates.

~~There is no commitment period.~~

There are no refunds for early termination.

Section C - Statement of Work

Point and Click Solutions will provide the following deliverables:

- **Deliver Project Plan for Review and Approval.** This is the initial project deliverable. It defines the scope of the project. No further work can occur until this has been completed and signed off.
- **Provision Databases and Applications on Hosted Servers.**
- **Remotely Train Staff and Local Trainers.** All training is delivered by Webinars and Web Meetings.
- **Assist with System Setup.** PNC will provide remote assistance on setup to help ensure that the setup is both accurate and complete.
- **Assist with Setup Verification.** PNC will remotely assist with the verification of the setup.
- **Deploy Practice Management and Electronic Medical Record System.** This involves deploying registration, scheduling, billing, order entry and clinical documentation on the provisioned database.
- **Migrate any Legacy Data that Client and PNC have agreed to move.** We offer both pre-packaged and custom migration options. The details of the migration will be described in the project plan. The migration details for pre-packaged migrations follows a well defined structure. Custom migrations are often more difficult to fully define prior to commencement and this will need to be recognized in the project plan. There must be mutual agreement and sign off on the migration details in the project plan before migration work can commence.
- **Setup Registration Interface(s).** Setup a University registration interface. If more than one interface is required (i.e. employees, outside school) it must be explicitly purchased.
- **Setup OpenCheckIn.** This is the self check-in kiosk software. It will require suitable self check-in kiosks to be purchased in order to be installed.

This Statement of Work outlines the standard and optional deliverables. These items are described in more detail in the Project Plan document.

All items that are performed will be verified for completeness.

All items that are installed will be tested to ensure they are operational.

Section D - Client Requirements

Point and Click Solutions will require the following items from the Client in order to successfully deliver its products and services.

- **Fast Reliable Internet Access from the Client Facility.** PNC will require fast reliable internet access from the client facility in order to provide services over the internet. If internet speeds are not adequate system performance will be impacted.
- **Local Area Network within the Client facility.** It is important that the Client Facility Local Area Network is of adequate performance. If Local Area speed is not adequate system performance will be impacted.
- **Client Hardware.** Non-Server client hardware also needs to be defined, purchased and installed. It must meet or exceed PNC minimum requirements for running PNC applications. This may include desktop PCs, laptops, tablets, printers, label printers, scanners, Self-Check-In Kiosks and other items. Details of the client hardware requirements are provided in the Point and Click Solutions Hardware Requirements Document. Client hardware must be installed and tested 3 weeks before deployment.
- **Access to legacy data if a data migration is required by Client.** Access must be provided at least 3 months before deployment if a migration of legacy data is to be performed. Data must be available early enough to ensure adequate time to write or adjust existing migration scripts and verify the migration results are successful.
- **Configure System.** PNC will assist with system configuration but the Client itself must be involved with many of the configuration decisions. This will involve setting up schedules, pick lists and templates. These decisions have workflow and operational impact. These decisions need to be made carefully and should be resolved well in advance of deployment. Configuration and setup must be completed prior to deployment or the deployment may need to be postponed.
- **Train Users.** PNC will train staff by Webinars and Web meetings. Client sites need to ensure that all of their Users are available for training and are trained to a satisfactory level of competence prior to deployment or the deployment may need to be postponed till the next round of training.
- **Basic Security.** The Client is responsible for maintaining standard security practices, such as requiring passwords to be changed regularly to protect their patient data. PNC shall have no responsibility or liability for the Client's lapses in standard security practices.
- **Test and Validate System for Deployment Readiness.** It is critical that preparations are complete before starting the deployment. The Client is responsible for ensuring that all necessary preparations have been made. This will involve testing migrated data to ensure the migration was successful, testing all hardware, and verifying all interfaces and data feeds.
- **Test All Workstation Software Installations.** Client, with PNC's assistance, will check that all participating workstations have the software installed correctly.
- **Test All User Accounts and Permissions.** Client, with PNC's assistance, will check that all users have accounts, are aware of their passwords and have logged in and verified that they have all the necessary permissions for their job role.

Section F – Service Level Agreement

Support Services

PNC support provides assistance for product questions, suspected bugs, operational problems, product failures, scheduled upgrades and patches.

Non-Urgent support requests should be delivered by the support web portal or via the support email address. Urgent support requests should be called in by the toll free support phone line.

Support questions that can be answered immediately by support will be logged and answered.

Support issues that require additional interaction will be assigned a Support Ticket Number (STN). STN's are assigned a priority by the PNC Support team and worked in a priority order. Urgent issues are handled immediately. The STN is the issue tracking number and is reported back to the Client. All communications involving this issue should quote the STN in the subject line.

Resolving an STN may involve answering questions, repairing databases, helping identify hardware faults by ruling out software components, preparing workarounds, loading patches and in some cases escalating issues to engineering to create new patches.

If the support issue is serious enough to require an engineering change and the magnitude of the engineering change is large, a temporary workaround will be created and PNC will schedule a more permanent fix in a future release.

Support Hours

PNC's support is for extended business hours 8am till 8pm EST Mon-Fri. If a mission critical situation occurs PNC will respond and/or continue working outside of standard hours. Emergency support is provided 24x7.

Urgent Issue Response Time

PNC attempts to respond to all urgent support phone calls within one (1) hour. This is an anticipated response time, not a guaranteed response time. PNC has consistently met this response time in the past and has systems in place to ensure this response time is maintained in the future.

PNC has a 24 hr/7 days per week answering service and an emergency escalation protocol if the answering service or the main office communications are down. In an emergency situation, if contact is not made within thirty (30) minutes via the toll free support hotline, sites should use the cell phone based escalation protocol. PNC's offices are based in Massachusetts and PNC's answering service is located in Virginia to minimize the possibility that weather or power outages will affect communications. PNC's employees are distributed over more than 5 states providing us with an effective cell phone escalation protocol in the event of a disaster that disables East Coast communications.

Non Covered Items

Support does not cover the following items:

- Custom Reports

- Custom Clinical Templates
- Custom Patient Questionnaires
- Custom Patient Forms

These are open-ended projects. They are handled by hourly rate custom consulting. During deployment PNC will at PNC's discretion, provide some assistance in this area, but more extensive or on-going projects will be addressed by custom consulting.

Release Frequency

There is one major release per year that PNC specifically tries to align with the academic calendar. PNC attempts to provide major releases in early summer so schools can install at a time when patient volume is light. Release dates will be delayed if testing identifies any issues in a new release. Specific patches may be released throughout the year to deal with reported bugs or issues. All such releases and patches will be provided by PNC to Client while covered under PNC's standard maintenance fees.

Training and Follow Up

PNC provides extensive Webinar based training as part of deployment. However, sites with an active maintenance and support contract are also free to attend future webinar training at no cost. This can be useful for Client's new staff who can attend the same training sessions that the existing staff went thru as part of deployment.

Section G – Standard Terms and Conditions

SECTION G.1 - SOFTWARE LICENSE

1.1 GRANT OF LICENSE. PNC hereby grants to the Client a non-transferable, non-exclusive license to use the PNC Computer Programs (in executable form only) and Program Materials (together called "Software") listed in the Pricing Proposal attached hereto and when signed by both parties made a part hereof, at only the locations specified in the Modifications to Standard Agreement (the "License"). This License covers use of the Software for Client's work only. Client may not sublicense or otherwise provide the Software to a third party, or process work via an electronic or any other telecommunications link to another computer system, except for transfer of data to Client's other computers. The license requires the Client to be current with all Software Hosting Fees.

1.2 PROTECTION AND SECURITY. Client acknowledges that the Software is protected under U.S. and international copyright laws and treaties and also constitutes trade secrets of PNC. Client agrees not to reverse engineer or try to uncover the source code for the Software, not to modify or prepare derivative works of the Software, and not to transfer or otherwise make available the Software in any form to any person other than employees, consultants or agents of Client or PNC who have a need to know and are subject to confidentiality obligations consistent with this paragraph. Client agrees to use reasonable precautions, but in no event less than the precautions it uses to protect its own confidential information, including instructions to its employees, to protect the trade secret status of the Software. All copies of the Software, whether provided by PNC or made by Client, are the property of PNC and shall be destroyed or returned to PNC promptly upon termination of this Agreement. The obligations of this paragraph shall survive any termination of this Agreement.

1.3 LIMITED WARRANTY FOR STANDARD SOFTWARE. PNC warrants to Client that for 60 days from the date of go-live ("Warranty Period") the Software in its original form (that is, absent modifications or customization by any person, including PNC and Client) (the "Standard Software"), will substantially perform the material functions described in the User Manuals for the Standard Software when operated on Hardware and with the Third Party software purchased from, or pre-approved in writing by, PNC in accordance with the User Manuals (the "Express Warranty"). PNC does not warrant that the Software will meet Client's requirements, that the operation of the Software will be uninterrupted or error-free, or that all Software errors can or will be corrected. For any breach of the Express Warranty, Client's sole and exclusive remedy, and PNC's entire liability and obligation shall be, at PNC's election, to promptly correct any error(s) in the Standard Software or the User Manuals, provided that no change may be made hereunder to the User Manuals which deletes or materially degrades any material feature or function of the Software. In the event that an error in the Standard Software cannot be corrected, PNC shall refund to Client the *pro rata* portion of the license fee paid by Client that is allocable to any loss of functionality in the Software or deviation from the specifications or the User Manuals.

OTHER THAN AS EXPRESSLY SET FORTH ABOVE, THE SOFTWARE IS PROVIDED "AS IS" AND PNC DOES NOT MAKE ANY EXPRESS OR IMPLIED WARRANTIES, CONDITIONS, OR REPRESENTATIONS TO CLIENT OR ANY OTHER PARTY WITH RESPECT TO THE SOFTWARE, THE USER MANUALS, OR ANY OTHER GOODS OR SERVICES PROVIDED HEREUNDER, WHETHER ORAL OR WRITTEN, AND WHETHER EXPRESS, IMPLIED OR STATUTORY, INCLUDING WITHOUT LIMITATION ANY IMPLIED WARRANTY OR CONDITION OF MERCHANTABILITY, OF FITNESS FOR A PARTICULAR USE OR PURPOSE, OR AGAINST INFRINGEMENT, EACH OF WHICH IS EXPRESSLY EXCLUDED AND DISCLAIMED.

Further, PNC PROVIDES NO WARRANTY ON ANY THIRD PARTY SOFTWARE AND/OR HARDWARE NOT MANUFACTURED BY PNC. PNC shall either (i) assign to Client all warranties provided by the licensors of Ingenix and Medispan of content supplied to Client by PNC in accordance with this Agreement, and all warranties provided by the suppliers of any other third party goods and services furnished by PNC to Client hereunder, or (ii) to the extent any such warranty is non-assignable, shall cooperate with Client to ensure the benefits of such warranty made to PNC by the supplier.

1.4 ACCEPTANCE TESTING FOR STANDARD SOFTWARE. "Acceptance Testing" means one or more functional tests of the Standard Software, or of an interface or Custom Software Modification (if identified in the Pricing Proposal as due hereunder) to verify that the functionality of the item performs in all material respects in accordance with PNC's specifications for the item. Client will promptly alert PNC and communicate in writing to PNC, if the Standard Software as originally delivered fails to meet an acceptance test.

Client shall perform Acceptance Testing upon delivery of the Standard Software product and interface. Any Standard Software product or interface that remains in productive use for more than fourteen (14) days, or for which Client does not provide a notice of non-acceptance within thirty (30) days of go-live, is deemed to have met final acceptance.

If the Standard Software or an interface fails an acceptance test but proves useful after the acceptance period PNC and Client will negotiate in good faith a pro-rata payment based on the portion that is accepted versus the deficiency.

1.7 PAYMENT OF FEES. As consideration for (i) the services to be provided and the work to be performed by PNC in accordance with this Agreement, (ii) the Software, License and all third party software supplied by PNC to Client, and (iii) all other rights granted to Client herein, Client agrees to pay PNC all of the fees set forth in the Pricing Proposal in accordance with the payment terms in the Payment Schedule. PNC reserves the right to disengage the Software or limit access to modules or Client licenses if Client does not meet payment terms. Additionally, Client will be responsible for additional fees payable to PNC should Client elect to expand usage of the system beyond the configuration specified in this Agreement. Additional modules, Client licenses, subscriptions and services purchased within 12 months of the initial agreement signature date can use the prices and pre-authorized discounts associated with the initial agreement. Additional modules, Client licenses, subscriptions and services purchased more than 12 months after the initial agreement signature will be at prevailing rates and covered by a separate agreement or amendment.

1.8 TERM. This Agreement and the License granted hereunder are effective until terminated in accordance with Sections 1.9 (Termination by PNC) and 1.10 (Termination by Client) of this Agreement.

1.9 **TERMINATION BY PNC.** If Client breaches any of the material terms of this Agreement fails to pay or breaches any proprietary content of this Agreement, PNC shall have the right to terminate the Agreement and the License granted by this Agreement upon sixty (60) days written notice, unless Client cures such breach within the sixty (60) days period. In the event of termination pursuant to this Section 1.9, Client shall not be entitled to any refund.

1.10 **TERMINATION BY CLIENT.** If PNC breaches any of the material terms of this Agreement, or discontinues maintenance and support for the Software without appointing suggesting a competent successor to assume PNC's support obligations hereunder, Client shall have the right to terminate the License granted by this Agreement upon sixty (60) day written notice, unless within the sixty (60) day period (i) PNC cures such breach or (ii) for breaches not reasonably susceptible to cure within sixty days, PNC commences reasonable efforts to cure the breach and prosecutes these efforts diligently to completion. In the event of termination pursuant to this Section 1.10 prior to Acceptance, Client shall be entitled to a refund of any prepaid License fee and (only if the breach occurs before the end of the setup verification period), the pro-rata portion of any fee paid for implementation, training, consulting, maintenance and support services that have not been performed by PNC at the time of termination.

1.11 **ACTIONS UPON TERMINATION.** Upon any termination of this Agreement, all Software and all copies thereof shall be immediately destroyed or returned to PNC at Client's sole cost and expense, and Client shall notify PNC in writing of such action, provided that (i) Client may elect to have PNC provide a copy of all Client data and files maintained or stored by PNC in an agreed format, subject to any reasonable and customary charges of PNC for such service, and (ii) if termination is by Client due to PNC's breach, under Section 1.10 (Termination by Client), Client may elect to retain and use the Software (and defer such return or destruction) for up to six additional months (subject to all terms and conditions of the License), and such period of use shall reduce the refund otherwise due under thereunder. Upon termination any and all fees associated with this Agreement which have been incurred and earned up to the date of termination will be due and payable to PNC, except as provided in 1.10.

SECTION G.2 - SERVICES

2.1 **IMPLEMENTATION.** PNC agrees to provide to Client such hosting, installation and training services as may be more fully specified in the Pricing Proposal, attached hereto and made a part hereof. (If no training services are specified, none are due.) If Client desires additional training, it may order this in accordance with PNC's then-current training offerings, including web-based retraining.

2.3 **SYSTEM CONFIGURATION.** In order for PNC to install the system and to provide other services, Client shall provide from other sources equipment that constitutes a configuration previously approved by PNC. Such approval shall not be unreasonably withheld. Client shall permit the Software to be installed per PNC requirements.

2.4 **FEES.** Client agrees to pay PNC for the Services as more fully specified in the Services Section of the Pricing Proposal. Charges for Services not specified in Services Section will be quoted separately at Client's request prior to the provision of services; paid on a stage-by-stage or service-by-service basis, as further expressly provided; and billed at PNC's prevailing rates.

~~2.5—TRAVEL EXPENSES. Client will be responsible for all travel and out-of-pocket expenses reasonably incurred by PNC in performing implementation and support services. If Client selects the pre-paid travel option, no details of these expenses need to be provided to the Client and PNC will absorb any overage. If the pre-paid travel option has not been selected, out-of-pocket expenses will be billed at actual cost and PNC shall furnish Client with backup documentation to substantiate all travel and out-of-pocket expenses. Client agrees to pay the stated charges within thirty (30) days from date of receipt of PNC's invoice.~~

SECTION G.3 – HOSTING, MAINTENANCE, SUPPORT AND UPGRADES

3.1 **MAINTENANCE AND SUPPORT SERVICES.** PNC agrees to provide the Client with maintenance and support services. Maintenance and support services will only be provided on supported releases. PNC will ensure that the two most recent releases of PNC products will be supported. Client must upgrade or allow PNC to upgrade the site to supported releases to continue receiving maintenance and support services.

3.2 **FEES.** Client agrees to pay PNC the fees as specified in the Pricing Proposal.

If additional modules or client access licenses are added after the initial Agreement is signed, they are added at the prevailing license and support prices and will be covered by an addendum to the Agreement.

3.3 **FAILURE TO MAKE PAYMENT.** PNC will invoice clients prior to the subscription renewal date and payment will be due from Client on or before the renewal date. If a Client fails to make support payments by the renewal date, they will be given a 4 week grace period after which support will be discontinued and renewal of support will be at then-current support rates. The processing delay associated with reactivating support can be as much as 2 weeks and no support services will be provided until support services have been reactivated. Hosting services will be granted an 8 week grace period, after which some or all user accounts may be disabled.

3.4 **PATCHES and UPGRADES.** PNC will provide Client with access to all patches and upgrades for the products Client has licensed as part of their hosting and maintenance fee.

3.5 **ACCESS.** PNC may require remote access to the PNC systems in order to provide support. Certain types of support issues cannot be resolved without remote access.

3.6 **BACKUPS.** PNC is responsible for providing backup services for hosted servers.

3.7 OBTAINING SUPPORT. Client is responsible for being familiar with the standard and emergency procedures for obtaining support as described during training.

SECTION G.4 - GENERAL

4.1 PROPERTY. All Software, Custom Software Modifications, written specifications and documentation data on magnetic or optical disks and other similar items provided to Client under this Agreement, whether developed by PNC specifically for Client or otherwise, are and shall remain the property of PNC. It is agreed that all data and information furnished to PNC by the Client are to be regarded by the parties as confidential, remain the sole property of the Client, and are to be held in confidence and safekeeping by PNC through the exercise of precautions at least as stringent as it uses to protect its own confidential information.

4.2 LIMITATION OF LIABILITY: EXCLUSION OF CONSEQUENTIAL DAMAGES. Client acknowledges and agrees that IN NO EVENT SHALL PNC OR ANY OF PNC'S OFFICERS, DIRECTORS, EMPLOYEES, SHAREHOLDERS, AGENTS OR REPRESENTATIVES BE LIABLE TO CLIENT FOR ANY SPECIAL, INDIRECT, INCIDENTAL, EXEMPLARY, PUNITIVE, OR CONSEQUENTIAL DAMAGES OR LOSS OF GOOD WILL OR LOST PROFITS OR LOST OPPORTUNITIES IN ANYWAY RELATING TO THIS AGREEMENT OR RESULTING FROM THE USE OF OR INABILITY TO USE THE SOFTWARE OR THE PERFORMANCE OR NON-PERFORMANCE OF ANY HARDWARE, THIRD PARTY SOFTWARE AND/OR SERVICE, INCLUDING THE FAILURE OF ESSENTIAL PURPOSE, even if PNC has been notified of the possibility or likelihood of such damages occurring, and whether such liability is based on contract, tort, negligence, strict liability, products liability or otherwise.

IN THE EVENT THAT THE SOFTWARE OR ANY REPORT OR INFORMATION GENERATED BY THE SOFTWARE IS USED IN CONNECTION WITH ANY DIAGNOSIS OR TREATMENT BY CLIENT AND/OR EMPLOYEES, AGENTS, REPRESENTATIVES AND THE LIKE, CLIENT AGREES TO ACCEPT ALL RESPONSIBILITY IN CONNECTION THEREWITH, INCLUDING RESPONSIBILITY FOR INJURY, DAMAGE AND/OR LOSS RELATED TO SUCH DIAGNOSIS OR TREATMENT.

IN NO EVENT WILL PNC'S LIABILITY IN THE AGGREGATE FOR ANY DAMAGES TO CLIENT OR ANY THIRD PARTY FOR ANY MATTER ARISING UNDER THIS AGREEMENT EVER EXCEED THE SOFTWARE LICENSE FEES PAID BY CLIENT TO PNC HEREUNDER, REGARDLESS OF THE FORM OF ACTION, WHETHER BASED ON CONTRACT, TORT, NEGLIGENCE, STRICT LIABILITY, PRODUCTS LIABILITY OR OTHERWISE, EXCLUDING CLAIMS FOR INFRINGEMENT OF COPYRIGHTS AND TRADE SECRETS FOR WHICH PNC IS OBLIGATED TO INDEMNIFY CLIENT PURSUANT TO SECTION 4.3 (INDEMNIFICATION).

The provisions of this section 3.2 and the limitations of liability stated herein shall not apply to obligation assumed by PNC under the business associate agreement between Client and PNC.

4.3 INDEMNIFICATION. Each party shall indemnify and hold harmless the other party, its affiliates, and their officers, directors, agents, and employees from any loss, claim, or damage to person or property arising out of the indemnifying party's gross negligence, misconduct or breach of this Agreement, and Client shall indemnify PNC (and its officers and the like) for any loss, claim or damage arising out of Client's possession or use of the Software or Services provided hereunder, provided that each such loss, claim, or damage was not caused in whole or part by the intentional or negligent acts or omissions of the party who is seeking indemnification. This indemnification shall survive the termination of this Agreement.

PNC shall also indemnify Client against all third party claims, based on infringement of copyrights and trade secrets of such third parties and arising out of the possession or use of the Software or Services provided hereunder to Client. PNC shall have the right to control the defense, at its expense, and shall pay the costs and damages made in settlement or awarded as a result of any action brought against Client based on an allegation that any of the Software infringes any copyrights or trade secrets if PNC is notified promptly by Client in writing of any said action or allegation of infringement, and if PNC shall have had sole control of the defense of any such actions and all negotiations for its settlement or compromise. This indemnification shall survive the termination of this Agreement.

If Client is prevented from using the Software by reason of such alleged infringement, or if in PNC's opinion any item of Software is likely to become the subject of such a claim of infringement, PNC will, at its option and expense, (1) procure for Client the right to continue using the Software; or (2) replace or modify the same so that it becomes non-infringing (without substantially degrading its functionality). PNC shall not have any liability to Client under any provision of this paragraph if infringement or allegation thereof is based upon (a) any design, instruction, modification or contribution of Client, (b) the use of software not approved by PNC, or (c) use of any item of Software in a manner for which it was not intended.

THE FOREGOING STATES THE ENTIRE LIABILITY OF PNC AND THE SOLE REMEDY OF CLIENT WITH RESPECT TO CLAIMS OF INFRINGEMENT OR MISAPPROPRIATION.

4.4 DATA SAFEGUARDS AND CONFIDENTIALITY. PNC understands that in providing any of the Software, Support, Implementation or other Services to Client, PNC may have access to certain proprietary information. PNC agrees to take all reasonable steps to observe and maintain the confidentiality of such information and to ensure that each of its employees, agents, and representatives assigned to provide the Services shall be bound to observe and maintain the confidentiality of such information. To the extent PNC, its employees, agents, and representatives, have access to patient records, PNC, its employees, agents, and representatives shall observe and maintain patient confidentiality of records and related information to the extent required of them by applicable federal, state and local laws. All data submitted electronically or in writing by Client to PNC in connection with the Services to be performed by PNC is confidential and shall be safeguarded by PNC in accordance with this paragraph. PNC shall bear no responsibility for safeguarding information which is publicly available, already in PNC's possession or known to it at the time of disclosure, or obtained by PNC from third parties. This Agreement and its terms are confidential and will be maintained as such by both Client and PNC, unless otherwise required by applicable laws, a court or governmental agency of competent jurisdiction, and provided that either party may, as it deems appropriate, disclose the federal tax consequences and tax structure of the parties' agreement. The obligations of this paragraph shall survive the termination of this Agreement.

4.5 TAXES. Client is responsible for reporting and payment of any and all State, County and Local sales and/or use taxes that may be levied and payable because of this transaction. PNC will not collect or remit sales and/or use taxes.

4.6 GOVERNING LAW, FORUM SELECTION. The parties expressly agree that the laws of Massachusetts shall govern this Agreement. Any dispute arising out of or related to this Agreement shall be brought in the federal or state courts located in Massachusetts.

4.7 REGULATORY AGENCIES REQUIRED SOFTWARE MODIFICATIONS. PNC acknowledges that certain functions of the Software enable Client to meet regulatory requirements imposed by certain agencies, commissions and government bodies. When such regulations change requiring modification in the existing functions of the Software, PNC agrees to use commercially reasonable efforts to make modifications to the Software that enable the Software to meet the regulations and time frames stipulated by such parties, at no charge to Client. These parties include, but are not limited to: United States Government (HCFA, Medicare, FDA, HIPAA regulations, etc.), and other quasi-governmental agencies such as JCAHO, AAAHC and CARF. Such modifications may be included in Software Updates, Software Upgrades, or Software New Versions at the sole discretion of PNC. PNC is

4.8 USE OF CLIENT'S NAME. PNC may identify Client as a client and user of PNC Software and Services, including in client lists posted on the web, but shall not otherwise use the name of Client or its schools or divisions in any advertisement or promotional statement without the prior written permission of Client.

4.9 ASSIGNMENT. This Agreement is not assignable by either party without the prior written consent of the other party, which consent shall not be unreasonably withheld; provided, however, that PNC may assign all or any of its rights, obligations or privileges hereunder without the written consent of Client in connection with the sale or transfer of all or substantially all of the interests in or assets of PNC or of the assets of the PNC business unit or division to which this Agreement pertains.

4.10 SEVERABILITY. If any one or more of the provisions of the Agreement are held invalid, illegal, or unenforceable for any reason, this shall not affect the validity, legality, or enforceability of any other portion of the Agreement.

4.11 ENTIRE AGREEMENT. This writing expresses the parties' entire agreement superseding all prior agreements and understandings concerning the same subject matter, and there are no understandings or representations expressed or implied, not specified herein.

4.12 SECTION 508. PNC hereby warrants that the products or services to be provided under this agreement comply with the accessibility requirements of Section 508 of the Rehabilitation Act of 1973, as amended, and its implementing regulations. PNC agrees to respond promptly to and resolve any complaints regarding accessibility of its products or services that are brought to its attention. PNC further agrees to indemnify and hold harmless the District from and against any claim arising out of its failure to comply with these requirements. Failure to comply with these requirements shall constitute a breach and be grounds for termination of this agreement and/or action for damages.

