

5/16/02

**GENERAL OPERATIONAL AGREEMENT  
BETWEEN  
FREMONT NEWARK COMMUNITY COLLEGE DISTRICT  
AND  
KIDANGO, INC.**

This agreement is entered into this \_\_\_\_ day of \_\_\_\_, 2002 between Fremont Newark Community College District, a California Community College Public District (Ohlone) and Kidango, Inc., a California Public Benefit Corporation (Kidango).

**WITNESSETH**

**WHEREAS**, Ohlone desires to provide a model developmentally appropriate lab school setting for early childhood education students and others enrolled as students at Ohlone College;

**WHEREAS**, Ohlone desires to provide on-site childcare and part day preschool services for the children of students and employees of Ohlone and the community at their facility in Fremont, California;

**WHEREAS**, Kidango is in the business of developing and operating quality child development and lab school services; and

**NOW, THEREFORE**, in consideration of the mutual covenants herein contained, Ohlone and Kidango hereby contract to perform the acts, to assume the duties, and to provide the services hereinafter described.

**I. TERM**

**1.1** This Agreement shall be effective for an initial three (3) year term beginning July 1, 2002 with services to begin August 19<sup>th</sup>, 2002. Thereafter, this Agreement shall be automatically extended for successive two (2) year period(s) unless terminated as hereinafter set forth. All terms and provisions of this Agreement shall continue in full force and effect during the extension period(s). After six consecutive years of automatic extensions under this agreement, the renewal period shall become five (5) years.

**II. OBLIGATIONS OF THE PARTIES**

**2.1 Kidango agrees:**

- (a) to maintain a high-quality child care program for Ohlone that is developmentally appropriate and provides an emergent, child centered curriculum.
- (b) to maintain appropriate State and City licenses as required and associated insurance. Ohlone shall be additionally insured on all policies of insurance including Commercial General Liability (CGL) and auto liability (if required). Kidango shall carry a minimum of two million dollars (\$2,000,000) CGL insurance. The insurance provider shall notify Ohlone in writing at least 30 days prior to any changes in coverage affecting the child development center. Kidango will provide a copy of the certificates of insurance on an annual basis.
- (c) to indemnify, save, defend and keep harmless Ohlone against any and all liability, claims, and costs of whatsoever kind and nature due to injury to, or death of, any person or persons and loss in any way incident to or arising out of the occupancy, use, service, operations, or performance of work in connection with this contract, resulting in whole or in part from negligent acts, fault, or omissions of Kidango, any subcontractor, or any employee, agent of Kidango, or any representative of the contractor or any subcontractor.

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- (d) to perform all tasks necessary for operation of a high-quality child development center for as many children as may be accommodated by the available space pursuant to local ordinances, laws, and/or statutes including National Association for the Education of Young Children (NAEYC) standards.
- (e) to care for children of Ohlone students and employees and members of the community who are two through six years (unless they have started first grade) unless prohibited by the laws of the United States, the State of California, the County of Alameda, or the Cities of Fremont and Newark.
- (f) to be responsible for all operational costs not otherwise provided as the responsibility of Ohlone in other sections of this agreement, including but not limited to staffing and other operating costs for provision of the services described in this agreement, and to be responsible for replacement of equipment and supplies used in the operation of the program.
- (g) to provide the utility cleaning on a day-to-day basis inside and outside the building. Utility cleaning is unscheduled cleaning needed to take care of spills, moving small pieces of furniture, etc.
- (h) to operate the child development center a minimum of 7:00 am to 6:00 pm Monday through Friday, except for Kidango designated holidays and one training day per year.
- (i) to be responsive to, and work with Ohlone to promote a successful lab school and child development program.
- (j) to make reasonable efforts to publicize and market the center as appropriate. Ohlone will assist Kidango in marketing to Ohlone employees and students.
- (k) to be an equal opportunity, drug free workplace employer and comply with all relevant ordinances, laws, and statutes.
- (l) to be responsible for collecting tuition/charges directly from each patron for each child's care. Ohlone assumes no responsibility for collection of tuition charges/fees. Kidango has discretionary authority to raise tuition charges/fees with 30 days prior written notice to parents.
- (m) to meet with Ohlone on an annual basis to assess the operations and progress of the center.
- (n) to be responsible for staff recruitment and staff training in collaboration with Ohlone. Kidango will work closely with Ohlone College to maximize the use of training already provided by Ohlone College for the staff at the Ohlone Child Care Facility.
- (o) All teachers are expected to meet state requirements and preferably exceed them.
- (p) Kidango personnel, including employees of subcontractors, suppliers, etc. working at or visiting the child development center, shall abide by all appropriate traffic, parking, and security regulations in effect at the Ohlone facility.
- (q) Ohlone retains the right to inspect the child development center at any time. Further, Ohlone retains the right to review the financial records of the operation of the program at the Kidango offices with seven (7) days prior notice.
- (r) to obtain NAEYC accreditation for the child development center in the third year of operation and maintain the accreditation for the life of the contract.
- (s) provide disclosure for all services funded by third parties on the Ohlone campus and obtain approval for any services offered that are not part of this agreement.
- (t) to accommodate and not interfere with the construction of any future child development center.

**2.2 OHLONE agrees:**

- (a) to provide to Kidango, the facilities for the child development center in Exhibit 1, and all fixture-type improvements, including partitions, toilets, lavatories, kitchen sinks and cabinets, plumbing, electrical and telephone outlets, carpet, window blinds, office standard lighting and lighting fixtures, playground, in good working order and that meet all requirements of the State of California for licensure by the Department of Social Services, Community Care Licensing. The space that is granted to Kidango for use under this agreement is described in Exhibit 1 to this Agreement.
- (b) to provide at no cost to Kidango custodial services, grounds and mechanical maintenance of the facilities, utilities of the building (including heat and air conditioning, lights, electricity, garbage, sewer, and water), and telephone wiring for three phone lines , as previously provided to the lab school pursuant to Exhibit 2. Custodial services, mechanical maintenance and provision of utilities will be in accordance with the requirements of the State of California for licensure.
- (c) to provide to Kidango, the equipment and other movable fixtures necessary to the center's opening, including, but not limited to, kitchen equipment (refrigerator, microwave oven, stove, dishwasher), children's tables and chairs, cubbies, cribs, sleeping mats, computer, printer, indoor and outdoor play equipment, puzzles, toys, washing machine, and laundry dryer. Ohlone will also provide desks, chairs, tables, computer, printer, and file cabinets for Kidango's administrator and staff. These items will remain the property of Ohlone.
- (d) to provide any necessary documents within the possession, custody, or control of Ohlone, and to make any facility improvements necessary to obtain and maintain licensure and accreditation.
- (e) to be responsible for utilities for the building except as provided herein. Kidango will be responsible for all monthly telephone bills and internet and facsimile connection monthly charges.
- (f) to be responsive to reasonable requests by Kidango, and work with Kidango to promote a successful lab school and child development program.
- (g) to assist Kidango in marketing the child development center to Ohlone employees and students.
- (h) to assign a primary contact with whom the child development center director may communicate regularly.
- (i) to develop a larger child development center. During construction Ohlone agrees to provide a substitute space that meets all legal requirements.

**2.3 OHLONE and KIDANGO mutually agree:**

Ohlone and Kidango mutually agree that it is the intent of both parties to either modify the existing agreement or negotiate a new agreement for use of the new facility upon completion of a new child care facility at the Ohlone's Fremont campus.

**III. GENERAL COVENANTS AND CONDITIONS**

**3.1 Waiver as Affecting Future Performance**

No waiver of any breach of this Agreement shall be held to be a waiver of any other or subsequent breach. All remedies afforded in this Agreement shall be taken and construed as cumulative, that is in addition to every other remedy provided herein or by law.

### **3.2 Circumstances Excusing Performance**

This Agreement is subject to force majeure, and in the event that either party hereto shall be delayed or hindered in or prevented from the performance of any act required hereunder by season of strikes, lockouts, labor troubles, inability to procure materials, failure of power, restrictive Government laws or regulations, floods, riots, insurrections, war or other reasons of a like nature not reasonably within the control of the party delayed in performing any of its obligations under the terms of this Agreement, the performance of such obligations shall, upon timely notice to the other party, be excused for the period of the delay. The period of the performance of any such obligation shall be extended for an equivalent period. Nothing contained in this paragraph shall affect any contractual Agreement between Kidango and any of the parents or patrons of the children at the child development center.

### **3.3 Law of the State of California and of the United States to Govern**

This Agreement shall be and is deemed to be one under the laws of the State of California, and shall be construed under and given effect in accordance with the laws of the State, and governing statutes of the United States.

### **3.4 No Partnership Intended or Created**

Nothing in this Agreement is intended to, or shall be deemed to, constitute a partnership or joint venture between the parties. Kidango is an independent contractor and, as such, the parties recognize that no employer-employee relationship exists or will exist under this contract. Kidango contracts with Ohlone to furnish the specified services fully described herein and is accountable to Ohlone only for furnishing such services, materials, or work ordered. For the purpose of performance or obligations pertaining to this Agreement, no Kidango employee shall be subject to the supervision or control of any officer, employee, or Board Member of Ohlone. Kidango shall involve staff designated by Ohlone in the hiring interviews of the staff for the program. However, Kidango shall have all responsibility for staff of the program Ohlone and shall indemnify and hold Ohlone harmless for litigation or claims made by employees and past employees of Kidango that result from the operation of the program under this agreement.

### **3.5 Severability**

It is understood and agreed by the parties hereto that if any part, term, or provision of this Agreement is held by a court of law to be illegal or in conflict with any law of the state where made, the validity of the remaining portions or provisions shall not be affected. The rights and obligations of the parties shall be construed and enforced as if the Agreement did not contain that particular part, term, or provision held to be invalid.

### **3.6 Equal Opportunity Employer**

Each party represents that it shall not unlawfully discriminate in employment on the basis of race, religious creed, color, national origin, ancestry, age, physical disability, mental disability, medical condition, affiliation or nonaffiliation with a labor organization, marital status, sex, or sexual orientation, and that it will undertake affirmative action to ensure that its officers and employees engage in equal employment opportunity practices.

### **3.7 Paragraph Headings**

The paragraph headings appearing in this Agreement have been inserted for the purpose of convenience and ready reference. They do no purport to, and shall not be deemed to define, limit or extend the scope or intent of the paragraphs to which they pertain.

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### **3.8 Inclusion of All Terms and Conditions in Writing**

This Agreement and the Exhibits attached hereto and made a part hereof by reference herein embody the whole agreement of the parties. There are no promises, terms, conditions, or obligations other than those contained or referenced herein. This Agreement and the referenced exhibits shall supersede all previous communications, representations, or agreements, either verbal or written, between the parties hereto.

### **3.9 Written Modification**

There shall be no modification of this Agreement except by written modification by both parties to the agreement.

### **3.10 Arbitration**

This agreement shall be enforced through binding arbitration as prescribed by the American Arbitration Association to be held in the County of Alameda, California. The arbitrator shall be selected through mutual agreement and the cost borne equally by each party.

### **3.11 Definition of "Day"**

Unless otherwise written in a particular part of this Agreement, "day" means calendar day, inclusive of state and federal holidays, Saturdays, Sundays, and other days when Ohlone administrative offices are not open to the public. If the last day to take any action under this Agreement falls on a state or federal holiday, Saturday, Sunday, or other day when Ohlone administrative offices are not open to the public, the time to act shall be extended until the next following day when Ohlone administrative offices are open to the public.

## **IV. TERMINATION**

### **4.1**

Either party, with or without cause, may terminate this Agreement on the 1<sup>st</sup> day of July every second year after the first 3 years by giving at least 120 days prior written notice to the other party. This paragraph shall not restrict the right of either party to terminate this Agreement as set forth elsewhere in this Agreement.

### **4.2 Termination for Breach of Contract**

- (a) If either party violates any of the warranties and covenants undertaken herein, or any of the duties imposed upon it by this Agreement, except for those described in Paragraph 4.1 hereof, the other party shall be entitled to terminate this Agreement. The party desiring to terminate for such cause(s) shall give the offending party at least 90 days written notice, specifying the particulars wherein it is claimed that there has been a violation hereof. If at the end of such time, the party notified has not removed the cause of the complaint or remedied the purported violation, then the termination of this Agreement shall be deemed complete.
- (b) Notwithstanding the foregoing, if Ohlone at any time believes that a breach has occurred which may adversely affect the health and safety of the children attending the child development center, then Ohlone may immediately terminate all operations at the child development center and commence an investigation to determine whether or not a violation has occurred as a result of actions taken or not taken by Kidango. This investigation will entitle Ohlone to terminate this Agreement as set forth above.

#### **4.3 Termination in the Event of Bankruptcy or other Events**

- (a) In the event either party becomes insolvent, or proceedings in bankruptcy are commenced against either of the parties, or either is adjudicated as bankrupt, or a receiver of either is appointed and qualified, or if the assets of either party are assigned for the benefit of creditors, then either of the parties may terminate this Agreement and all further rights and obligations hereunder, by giving 30 days written notice to the other as provided in Paragraph 4.8.
- (b) If the Facility or any portion thereof shall be damaged or destroyed by fire or other casualty and Ohlone fails to repair, restore, rebuild, replace or provide a temporary licensesable facility any such damage or destruction within 45 days after such fire or other casualty, or shall fail to complete such work diligently; then Kidango may terminate this Agreement by giving 30 days written notice to Ohlone as provided for in Paragraph 4.8.
- (c) If the facility has insufficient enrollment to sustain operation due to causes beyond Kidango's control, such as staff reductions by Ohlone or lack of participation by Ohlone employees, Kidango reserves the right to renegotiate or terminate this agreement by giving 90 days written notice to Ohlone as provided for in Paragraph 4.8. Both parties will meet to negotiate a change in the agreement terms or termination of the agreement within 10 days of such notice.

#### **4.4 Disclaimer of Results**

Nothing in this Agreement shall be construed to warrant or guarantee any fiscal, managerial or otherwise administrative results unless specifically noted otherwise by amendment to this Agreement. Nothing in this paragraph hereto shall be construed to limit or otherwise modify any right which Ohlone has or may have in connection with the performance by, undertakings, and obligations of Kidango pursuant to the terms of this Agreement and the Exhibits referenced herein.

#### **4.5 Limitation of Liability**

Notwithstanding anything contained herein to the contrary, the parties agree that the sole and exclusive remedies for breach of this Agreement by either party shall be limited to an action for specific performance and/or termination in accordance with the terms hereof, and each party expressly waives its rights to all other legal or equitable remedies to which said party may be entitled to hereunder. In no event will either party be liable for any special, incidental or consequential damages even if a party has been advised of the possibility of such damages. The limitation on liability for breach provided in this part does not relieve Kidango of the duty to indemnify, save, defend and keep harmless Ohlone as provided in Part II.2.1(c), above.

#### **4.6 Assignment**

No assignment of this Agreement shall be valid or binding on either party unless the assignment is in writing and approved by the other party by endorsement thereon of that party's consent thereto.

#### **4.7 Binding Effect**

Provisions of this Agreement shall bind the parties mutually and their respective successors and assigns.

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**4.8 Notices**

All notices may be served on any of the parties hereto personally or may be served by sending a letter duly addressed by certified or registered mail.

Notices to be served on Kidango shall be mailed to or served at:

Paul B. Miller, Executive Director  
Kidango, Inc.  
4533 Mattos Drive  
Fremont, CA 94536

Unless instructed otherwise.

All notices to be served on Ohlone shall be mailed to or served at:

Dr. Floyd Hogue, President  
Ohlone College  
43600 Mission Boulevard  
Fremont, CA 94539

Unless instructed otherwise.

Changes to Section 4.8 shall be by written notice to the other party and shall not change or abrogate any other part of this agreement.

**IN WITNESS THEREOF**, the parties have hereto set their hands the day and year first written above.

**Fremont-Newark Community College District**, a California Community College District

By: \_\_\_\_\_  
Dr. Floyd Hogue, President

\_\_\_\_\_  
Date

**Kidango, Inc.**, a California Public Benefit Corporation

By: \_\_\_\_\_  
Paul B. Miller, Executive Director

\_\_\_\_\_  
Date