mdltm SOFTWARE LICENSE AGREEMENT

This Software License Agreement accompanies an executable version of proprietary mdltm software, under license by ETS, as defined below ("Licensed Software") and related explanatory materials ("User Documentation") (collectively, the "Licensed Product"). Please read this Agreement carefully. If you accept, complete and sign this agreement, you may install the Licensed Software and use in accordance with the terms and conditions hereunder; if you do not agree to any of the terms or conditions of this Agreement, you are not permitted to use the Licensed Product and should return the Licensed Software and the User Documentation to the address above.

1. **Definitions**.

- a) "Licensed Software" means the executable version of "mdltm" software for estimating diagnostic models with dichotomous and ordinal skill levels, including a compensatory version of the fusion model, multidimensional discrete IRT models, as well as multi-group IRT and diagnostic models, using the customary EM algorithm. It includes parameter estimation, a classifier and a person parameter estimation algorithm, provisions for scale linkages and parameter restrictions, and model-data as well as item-fit measures for all the models estimable with this system.
- b) "Licensee" means, you, the user authorized to use the Licensed Product in accordance with this Agreement.

2. License and Scope of Use.

- a) Software License. Upon ETS's receipt of a completed, signed Software License Agreement, ETS grants to Licensee, and Licensee accepts, a limited, revocable, non-exclusive, non-transferable license to, store, load, execute and display (collectively, "Use") the Licensed Product (the "Software License") for purposes expressly permitted hereby. Licensee's Use of the Licensed Product shall be solely for (i) internal research purposes, (ii) educational use in the classroom, or (iii) evaluation purposes, only. The Licensed Product may not be used to perform any services for any third party or for any commercial use (including work for the government) whatsoever. The Software License shall be for a period of twelve (12) months, effective upon execution of this Agreement, and shall automatically renew for an additional twelve-month period at the end of each year unless earlier terminated pursuant to Section 7. Neither the Software License nor any other provision of this Agreement shall be construed as creating, expressly or by implication, any right or interest to access, use, modify, copy or own the source code for the Licensed Software.
- b) Transfer and Other Restrictions. Except as specifically authorized by another provision of this Agreement, Licensee may not copy, relocate, move, sublicense, rent, loan, lease or otherwise distribute or transfer the Licensed Product without ETS's prior written consent and any attempt to the contrary shall be void and of no legal effect. Licensee may however install the Licensed Product on multiple computers for classroom use. Further, Licensee agrees not to embed, integrate or bundle the Licensed Software with any other technology, system or software.
- c) <u>Exception.</u> Notwithstanding Section 2(b), Licensee may make one copy of the Licensed Software solely for archival/backup purposes.
- 3. **User Documentation**. ETS shall provide to Licensee, one (1) copy of the User Documentation on computer readable

media. Licensee's rights in and to the User Documentation are limited to reproducing the User Documentation solely for the purposes of any Use of the Licensed Software by Licensee. ETS is not obligated to provide any support, maintenance, bug fixes, upgrades, enhancements or modifications under this Agreement. Licensee however, may contact ETS with comments and suggestions regarding the Licensed Software.

4. Ownership; Confidential Information.

- a) Licensee acknowledges that the Licensed Product is and shall remain the exclusive property of ETS's licensor, and that Licensee has no right, title, or interest in or to the Licensed Product except as expressly granted in this Agreement.
- b) Acknowledgement. Licensee acknowledges that the Licensed Product (including the User Documentation, translations, compilations, partial copies and derivative works) and additional confidential and proprietary information received from or on behalf of ETS shall belong exclusively to ETS or its licensor ("Confidential and Proprietary Information"). Confidential and Proprietary Information does not include information that Licensee can show is (i) already known by Licensee prior to receipt of the Licensed Product in the public domain through no wrongful act of Licensee; or (iii) received by Licensee from a third party who was free to disclose such information.
- c) Covenants. With respect to the Confidential and Proprietary Information, and as expressly authorized herein, Licensee shall not use, commercialize or disclose the Confidential and Proprietary Information to any person or entity. Licensee shall not (i) alter or remove from any Licensed Product any proprietary, copyright, trademark or trade secret legend; or (ii) attempt to decompile, decompose, disassemble, reconstruct or reverse engineer the Licensed Product or other Confidential and Proprietary Information (and any information derived in violation of such covenant shall automatically be deemed Confidential and Proprietary Information owned exclusively by ETS); or (iii) use the Licensed Product to develop functionally-similar computer applications or allow, authorize or cause any third party to do so. Licensee shall use at least the same degree of care in safeguarding the Confidential and Proprietary Information as Licensee uses in safeguarding its own confidential information, but in no event less than reasonable due diligence and care.
- LICENSEE ACKNOWLEDGES AND Disclaimer. AGREES THAT, THE LICENSED PRODUCT IS PROVIDED TO LICENSEE "AS-IS". ETS EXPRESSLY DISCLAIMS ANY AND ALL WARRANTIES AND REPRESENTATIONS, WHETHER EXPRESS IMPLIED, WHETHER ARISING BY STATUTE OR OTHERWISE IN LAW OR FROM A COURSE OF DEALING OR USAGE OF TRADE, INCLUDING BUT NOT LIMITED TO ANY WARRANTY OF ACCURACY, COMPLETENESS, PERFORMANCE, RESULTS. COMPUTER STOPPAGE OR FAILURE, NON-INFRINGEMENT, TITLE, AND THE IMPLIED WARRANTIES OF MERCHANTABILITY, AND FITNESS FOR A PARTICULAR PURPOSE.

6. Limitations of Remedies and Liabilities.

a) IN NO EVENT SHALL ETS BE RESPONSIBLE OR LIABLE FOR ANY DAMAGES ARISING OUT OF THE USE OF THE LICENSED PRODUCT OR ARISING UNDER THIS AGREEMENT, WHETHER IN TORT, CONTRACT OR OTHERWISE, TO LICENSEE, OR TO ANY OTHER PERSON OR ENTITY.

b) ETS SHALL NOT BE LIABLE FOR ANY DIRECT, INDIRECT, INCIDENTAL, CONSEQUENTIAL, PUNITIVE, SPECIAL, OR SIMILAR DAMAGES, INCLUDING WITHOUT LIMITATION, DAMAGES OR LOSS OF PROFITS, LOSS OF GOODWILL, WORK STOPPAGE, COMPUTER/HARDWARE FAILURE OR MALFUNCTION, LOSS OF WORK PRODUCT, OR ANY AND ALL OTHER COMMERCIAL OR NON-COMMERCIAL DAMAGES OR LOSSES WHETHER DIRECTLY OR INDIRECTLY CAUSED, WHETHER IN TORT, CONTRACT, OR OTHERWISE, EVEN IF ADVISED OF THE POSSIBILITY OF SUCH DAMAGES.

7. Term and Termination.

- a) <u>Term.</u> This Agreement shall commence upon installation of the Licensed Software and shall continue for a period of twelve (12) months and will automatically renew for and additional twelve-month period each year unless otherwise terminated in accordance with this Section 7.
- b) <u>Termination</u>. Either party may terminate this Agreement at any time upon written notice to the other party.
 c) <u>Effect of Termination</u>. Upon termination of this Agreement: (i) the license to the Licensed Software immediately terminates; and (ii) Licensee shall cease all use of the Licensed Product, and return or destroy, all Confidential and Proprietary Information in its possession or control. Licensee shall certify to ETS in writing, within fifteen (15) days after such termination, that Licensee has complied with the foregoing sentence.
- 8. **Survival**. The provisions contained in Sections 4, 5, 6, 7, 8 and 10 shall survive the termination of this Agreement for any reason in accordance with their respective terms.
- 9. Export Regulations. The transfer of technology across national boundaries is regulated by the United States Government. Licensee shall not acquire, ship, transport, export, or re-export the Licensed Product, directly or indirectly, into any country in violation of any applicable law (including but not limited to, the United States Export Administration Act and the regulations promulgated thereunder) nor will Licensee use the Licensed Product for any purpose prohibited by such laws.

10. Miscellaneous.

- a) <u>Severability</u>. If any provision of this Agreement shall be determined to be void, invalid, unenforceable or illegal for any reason, then the validity and enforceability of all of the remaining provisions hereof shall not be affected thereby. Furthermore, if any particular provision of this Agreement shall be adjudicated to be invalid or unenforceable, then such provision shall be deemed amended by limiting and reducing it so to be as close to the parties' intent while remaining valid and enforceable to the maximum extent compatible with the applicable laws of such jurisdiction, such amendment only to apply with respect to the operation of such provision in the applicable jurisdiction in which the adjudication is made.
- b) <u>Waiver and Remedies</u>. No waiver by either of the parties hereto of any failure by the other party to keep or perform any covenant or condition of this Agreement shall be deemed a waiver of any preceding or succeeding breach of the same or any other covenant or condition. Except for

- those remedies denominated as sole and exclusive remedies in this Agreement, the remedies herein provided shall be deemed cumulative, and the exercise of one shall not preclude the exercise of any other remedy nor shall the specifications of remedies herein exclude any rights or remedies at law or in equity which may be available.
- c) <u>Transferability</u>. Licensee shall not assign, transfer or encumber the rights granted under this Agreement, in whole or in part, without obtaining the prior written consent of ETS.
- d) <u>United States Governmental Restrictions</u>. The Licensed Product is a "commercial item" as that term is defined pursuant to United States governing regulations in 48 C.F.R. 2.101 (Oct. 1998), consisting of "commercial computer software" and "commercial computer software documentation," as such terms are used in 48 C.F.R 12.212 (Oct. 1998). Consistent with 48 C.F.R. 12.212 and 48 C.F.R. 227.7202-1 through 227.7202-4 (June 1995), all U.S. Government Licensees and users acquire the Licensed Product with only those rights set forth in this Agreement.
- e) <u>Headings</u>. The headings of the Sections hereof are for convenience only and do not in any way limit or amplify the terms and conditions of this Agreement.
- f) Governing Law. This Agreement shall be construed and interpreted and its performance shall be governed by the federal laws of the United States and the laws of the State of New Jersey, U.S.A, without regard to conflicts of law principles of any jurisdiction in any country throughout the world
- g) Publications. In the event Licensee desires to lecture or publish any manuscripts, abstracts, papers, including, but not limited to a thesis, or public releases of scientific merit describing the Licensed Software or any results or theory related to said Licensed Software (each, a "Scientific Publication"), the Scientific Publication shall first be submitted to ETS, in its full and final textual form, at least thirty (30) days prior to submission to any third party. In the event ETS determines that the Scientific Publication contains patentable invention or intellectual property to which ETS has rights pursuant to Agreement, submission and/or publication of the proposed Scientific Publication by Licensee shall be postponed upon ETS's notice for a maximum of an additional thirty (30) days, or such longer period as agreed by the parties, to permit ETS to protect any and all rights in the Scientific Publication, including, without limitation, patent rights. ETS shall further have the right to suggest revisions to the Scientific Publication as are necessary to protect any and all trade secrets, and Licensee agrees to make such revisions as are necessary to protect any and all trade secrets. Further, Licensee shall include acknowledgement of Matthias Von Davier's ownership of the Licensed Software in all approved publications that refer to the Licensed Software.
- h) <u>Amendments</u>. This Agreement may not be modified or amended except in a writing executed by authorized representatives of both parties whereupon such new documentation shall become a supplement to this Agreement.
- i) Entire Agreement. This Agreement, contains the entire agreement between the parties with respect to the subject matter hereof, and supersedes all other oral or written representations, statements, promises, agreements and letters or other expressions of intent of any kind with respect to the subject matter hereof between them.

BY SIGNING BELOW, YOU HAVE READ, UNDERSTAND AND AGREE TO BE LEGALLY BOUND BY THE TERMS AND CONDITIONS OF THIS SOFTWARE LICENSE AGREEMENT.

BY:		_
PRINT NAME:		
ORGANIZATION/INSTITUTION	(if	applicable)
TITLE:		_
ADDRESS:		_
TELEPHONE:		
FACSIMILE:		
EMAIL ADDRESS:		
DATE:		
PLEASE SEND COMPLETED, SIGTO:	GNED A	GREEMENT

Donna Lembeck Educational Testing Service Rosedale Road MS 03-T Princeton, NJ 08541