No. 27931

IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

AMBER MAURICIO and SHELLI GRINAGER,

Plaintiffs/Appellants,

vs.

DENNIS M. DAUGAARD; THE STATE OF SOUTH DAKOTA; DR. MELODY SCHOPP; RICHARD L. SATTGAST; THE SOUTH DAKOTA DEPARTMENT OF EDUCATION; THE SOUTH DAKOTA BOARD OF EDUCATION; and THE OFFICE OF THE STATE TREASURER OF SOUTH DAKOTA,

Defendants/Appellees.

On Appeal from the Circuit Court of the Sixth Judicial District
Hughes County, South Dakota
The Honorable Mark Barnett, Circuit Court Judge

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ORAL ARGUMENT REQUESTED

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PRELIMINARY STATEMENT

References to pleadings and other documents in the underlying record, *Mauricio and Grinager v. Daugaard, et al.*, Hughes County Civil File No. 32CIV15-292, are supported by a citation to the record, preceded by the prefix "R." Materials contained in the Appendix will also include an Appendix citation, preceded by the prefix "A."

JURISDICTIONAL STATEMENT

Appellants appeal from a final judgment of the Circuit Court of the Sixth Judicial Circuit, Hughes County, that was filed by the Circuit Court on June 13, 2016. R701-02. Notice of entry of the judgment was served on Appellants on June 20, 2016. R703-04. Appellants filed their Notice of Appeal on July 12, 2016. R728-29. The Court has jurisdiction over this appeal pursuant to SDCL § 15-26A-3(1).

STATEMENT OF THE ISSUES

I. Whether the circuit court erred by granting summary judgment in favor of the State on Appellants' claim that the State's membership and participation in the Smarter Balanced Assessment Consortium ("SBAC") violates the Compact Clause of the United States Constitution?

The circuit court erred by granting summary judgment in favor of the State on Appellants' claim that the State's membership and participation in SBAC violates the Compact Clause of the United States Constitution. SBAC constitutes an interstate compact within the meaning of the Compact Clause, and thus it requires consent from the United States Congress. SBAC has never sought or received congressional consent, and thus its existence and operations—including the State's participation therein—violate the Compact Clause.

- *United States Steel Corp. v. Multistate Tax Comm'n*, 434 U.S. 452 (1978).
- *Northeast Bancorp v. Bd. of Governors of Fed. Reserve Sys.*, 472 U.S. 159 (1985).
- U.S. CONST. Art. I, § 10, cl. 3.

II. Whether the circuit court erred by granting summary judgment in favor of the State on Appellants' claim that administering SBAC's computer-adaptive assessments violates SDCL § 13-3-55?

The circuit court erred by granting summary judgment in favor of the State on Appellants' claim that administering SBAC's computer-adaptive assessments violates SDCL § 13-3-55. Section 13-3-55 requires the State to administer the "same assessment" to all students in each grade. But the computer-adaptive SBAC assessments pose markedly different questions to each student who takes the test. This violates § 13-3-55.

- *Magellan Pipeline Co. v. S.D. Dep't of Rev. & Reg.*, 2013 S.D. 68, 837 N.W.2d 402.
- *In re Certification of a Question of Law*, 2014 S.D. 57, ¶ 8, 851 N.W.2d 924.
- SDCL § 13-3-55.

STATEMENT OF THE CASE

This case involves an appeal from a final judgment from the Circuit Court of the Sixth Judicial Circuit, Hughes County, issued by the Honorable Mark Barnett. Appellants brought this taxpayer action to challenge disbursements by Appellees (together, "the State") to the Smarter Balanced Assessment Consortium ("SBAC"). The parties filed cross-motions for summary judgment. The circuit court granted Appellees' motion for summary judgment, denied Appellants' motion for summary judgment, and entered judgment in favor of Appellees. The circuit court concluded that, although SBAC does constitute an interstate compact, the Compact Clause does not require that the United States Congress consent to SBAC. The court further concluded that the computer-adaptive standardized testing created by SBAC and implemented by the State satisfies the requirements of SDCL § 13-3-55 that the State administer the "same assessment" to all South Dakota public school students at a given grade level. Appellants timely appealed.

STATEMENT OF FACTS

This case presents a taxpayer challenge to the disbursement of South Dakota taxpayer funds to the Smarter Balanced Assessment Consortium ("SBAC"), an illegal interstate compact whose existence and operation violate the U.S. Constitution, federal statutes, and South Dakota law. SBAC's origins date to 2009, when the National Governors Association and the Council of Chief State School Officers announced an initiative to develop a national, uniform set of educational-assessment standards for

English language arts and mathematics called the Common Core State Standards ("Common Core").

Later that year, the U.S. Department of Education ("DOE") issued an invitation to the States to apply for Race to the Top ("RTTT") grant funding, pursuant to the American Recovery and Reinvestment Act of 2009. *See* 74 Fed. Reg. 59836 (Nov. 18, 2009). The grant invitation conditioned RTTT grant funding on, in part, "[t]he extent to which the State has demonstrated its commitment to adopting a common set of high-quality standards." *Id.* at 59843. To demonstrate the requisite "commitment," a State had to (a) "participat[e] in a consortium of States that . . . [i]s working toward jointly developing and adopting a common set of K-12 standards . . . that are supported by evidence that they are internationally benchmarked and build toward college and career readiness by the time of high school graduation," and (b) "demonstrat[e] its commitment to and progress toward adopting a common set of K-12 standards . . . by August 2, 2012 . . . and to implementing the standards thereafter in a well-planned way." *Id.* Only months later, the DOE provided further incentive for the creation of interstate educational consortia, announcing that under the RTTT grant program it would "provide[] funding to consortia of States to develop assessments" aligned with common K-12 standards. *See* 75 Fed. Reg. 18171 (April 9, 2010). To be eligible for funding, a consortium of states "must include at least 15 states," *id.*, and require the adoption of uniform academic-performance assessment standards by the 2014-15 school year, *id.* at 18171-72.

Two interstate consortia, SBAC and a similar entity called "PARCC," were created in response to this invitation for RTTT funding. On June 9, 2010, the Governor's

Chief of Staff Neil Fulton, Superintendent of Schools Tom Oster, and President of the South Dakota Board of Education Kelly Duncan executed a "Memorandum of Understanding" with SBAC, purporting to commit South Dakota to serve as a member of SBAC. R31-45.[1] Through this Memorandum of Understanding, these state officials purported to make binding commitments to SBAC on South Dakota's behalf. *See id.* Officials from 31 other states executed similar Memoranda of Understanding. Critically, Congress has never authorized the creation or operations of SBAC, either expressly or impliedly.

On or about June 15, 2010, the State of Washington—purportedly acting on behalf of SBAC—submitted a RTTT grant application. R52-219. The grant application explained that SBAC would develop a uniform "multi-state assessment system based on the Common Core State Standards." R56. It further stated that the role of SBAC is "***to radically reshape the education system in participating States***." R69 (emphasis added). On or about September 28, 2010, the DOE awarded SBAC a grant of approximately $159 million, plus a supplemental award of more than $15 million to "help participating States successfully transition to common standards and assessments." R236-37. On January 7, 2011, SBAC executed a Cooperative Agreement with the DOE, providing for substantial federal involvement in SBAC. R238-49.

On or about July 31, 2014, Secretary of Education Melody Schopp signed an updated Memorandum of Agreement and Understanding with SBAC. R334-62, A105-34 ("MOUA"). The 2015 MOUA purports to govern South Dakota's continued

[1] Citations of pages in the Record have the prefix R (*e.g.*, R31), while citations of the Appendix have the prefix A (*e.g.*, A13).

participation in SBAC after SBAC has relocated to the University of California-Los Angeles in late 2014. For the first time, it requires financial payments directly from South Dakota to SBAC.

The MOUA purports to create a binding commitment by South Dakota to abide by SBAC's decisions on educational policy. The MOUA states, "[b]y entering into this [MOUA], Member is . . . agreeing to be bound by the Governing Board Procedures and by all other decisions and actions of the Governing Board that are intended by the terms of this [MOUA] to bind Member." R348, A119, ¶ 3.1. The MOUA states, "[t]he signatories to this [MOUA] represent that they have the authority to bind their respective organizations to this [MOUA]." R360, A131, ¶ 9.9.

The MOUA creates a complex governance structure for SBAC. It includes a Governing Board composed of representatives from member States, R348, A119, ¶ 3.1; an Executive Committee with responsibility for major operational decisions, R349, A120, ¶ 3.4; independent staffing and a multimillion-dollar annual budget, *id.* ¶ 3.5; and an elaborate system of "rules, policies, and procedures" to govern its operations, R343-44, A114-15, ¶ 1.11, R349, A120, ¶ 3.3.

The MOUA also purports to restrict the ability of member States to withdraw from SBAC. R346-47, A117-18, ¶ 2.2. In order to withdraw, a State must give nine months' notice to SBAC and pay an additional year's worth of membership fees. R347, A118, ¶ 2.2(c). The MOUA also purports to circumscribe a State's ability to withdraw from SBAC, even if state law requires withdrawal. *Id.* Further, South Dakota and other member States agreed to abide by not-yet-adopted Governing Board Procedures. R343-

44, A114-15, ¶ 1.11; R348, A119, ¶ 3.1. Pursuant to the MOUA, the State is required to make monthly installment payments, and its annual financial commitment to SBAC is $680,628.50. R352, A123, ¶ 5.1(c); R336, A107.

On or about January 30, 2015, SBAC adopted the Governing Board Procedures, pursuant to which Governing Member States such as South Dakota agreed to "[u]se the achievement standards and reporting scales initially adopted by Smarter Balanced in November 2014." R363-76, A134-47 ("Governing Board Procedures"). The Governing Board Procedures require that Governing Members cede control over core educational decisions in numerous other ways. *See id.* Among other things, the Governing Board procedures provide, without qualification: "Decisions of the Governing Board ***shall be binding*** on all Members." R367, A138, ¶ IV.A.4 (emphasis added).

The SBAC assessments administered by the State pursuant to the MOUA are "computer-adaptive" tests. R433-35, A148-50. In a computer-adaptive test, the assessment "adjusts the difficult of questions throughout the assessment" based on whether the test-taker correctly answers each question. R433, A148. "By adapting to the student as the assessment is taking place, ***these assessments present an individually tailored set of questions to each student*** . . . ." *Id.* (emphasis added).

ARGUMENT

I. THE SMARTER BALANCED ASSESSMENT CONSORTIUM IS AN UNCONSTITUTIONAL INTERSTATE COMPACT TO WHICH CONGRESS HAS NEVER CONSENTED, IN VIOLATION OF THE COMPACT CLAUSE.

For 225 years, the States have submitted *regulatory* interstate compacts—*i.e.*, those that are not merely advisory, but purport to *bind* the States on matters of policy—to Congress for approval, as required by the Compact Clause of Article I, Section 10, Clause 3 of the U.S. Constitution. SBAC is an interstate compact that purports to bind its member States, and thus it requires Congress's consent. Moreover, SBAC satisfies every one of the U.S. Supreme Court's criteria for interstate compacts requiring Congressional consent: (1) it threatens the authority of the U.S. Congress by attempting to evade 50 years of statutory policy; (2) it undermines the independent sovereignty of its member States by purporting to dictate their educational-policy decisions and to restrict their ability to withdraw; (3) it threatens the sovereignty of non-member States by aiming to create an educational "cartel" surrounding Common Core; (4) it possesses an elaborate independent governance structure; and (5) it purports to allow its member States collectively to exercise power that they lack individually. The circuit court plainly erred by concluding that, as a matter of law, SBAC's existence and operations—and the State's participation therein—do not violate the Compact Clause.

A. Standard of Review.

The Court "review[s] a circuit court's entry of summary judgment under the de novo standard of review." *Heitmann v. Am. Family Mut. Ins. Co.*, 2016 S.D. 51, ¶ 8, 883 N.W.2d 506, 508. "Summary judgment is appropriate 'if the pleadings, depositions,

answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." *North Star Mut. Ins. v. Korzan*, 2015 S.D. 97, ¶ 12, 873 N.W.2d 57, 61 (quoting SDCL 15-6-56(c)).

B. The Original Understanding of the Compact Clause, and the 225-Year History of Congressional Practice Under the Clause, Demonstrate that SBAC Is Unconstitutional.

The Compact Clause provides that "no State shall, without Consent of Congress . . . enter into any Agreement or Compact with another State." U.S. CONST. Art. I, § 10, cl. 3. When confronted with a new question of constitutional interpretation, such as the constitutionality of SBAC under the Compact Clause, the United States Supreme Court "look[s] first to evidence of the original understanding of the Constitution." *Alden v. Maine*, 527 U.S. 706, 741 (1999); *see also, e.g.*, *Sch. Dist. Of Abington Township v. Schempp*, 374 U.S. 203, 294 (1963) (Brennan, J., concurring) ("The line we must draw between the permissible and the impermissible is one which accords with history and faithfully reflects the understanding of the Founding Fathers."). The validity of SBAC under the Compact Clause is a new question of constitutional interpretation, and the Court should give decisive weight to the original meaning of the Clause. *See, e.g.*, *Crawford v. United States*, 541 U.S. 36, 50 (2004).

The history and original understanding of the Compact Clause demonstrate that SBAC constitutes an interstate compact requiring congressional consent. The Articles of Confederation provide the historical background for the Compact Clause. Under the Articles, States could enter into agreements with one another without the consent of the

Congress of the Confederation. The Articles prohibited a state from "enter[ing] into any conference, agreement, alliance or treaty" with a foreign nation without first obtaining congressional consent. ARTS. OF CONFED. VI. But the Articles required a State to obtain congressional consent only to "enter into [a] treaty, confederation or alliance" with one or more other states. *Id.* Under the Articles, the Congress of the Confederation's "consent was not required for mere 'agreements' between States." *United States Steel Corp. v. Multistate Tax Comm'n*, 434 U.S. 452, 460 n.10 (1978).

The Framers' experience under the Articles of Confederation convinced them that even mere "agreements" between States posed substantial risks to the young Nation. "[I]t soon became clear that the Articles of Confederation were insufficient to prevent the states from creating factions and degenerating into separate nations." Derek T. Muller, *The Compact Clause and the National Popular Vote Interstate Compact*, 6 ELECTION L.J. 372, 378 (2007). In light of the national instability under the Articles, the Framers added substantial limitations on such agreements in the new Constitution. The Constitution prohibited outright the interstate treaties, confederations, and alliances previously permitted (with congressional consent) by the Articles. *See* U.S. CONST. Art. I, § 10, cl. 1 ("No State shall enter into any Treaty, Alliance, or Confederation . . . ."); *Barron v. Baltimore*, 32 U.S. 243, 249 (1833). And the Constitution required congressional consent for the interstate "agreements" that the Articles of Confederation had left unrestricted. *See* U.S. CONST. Art. I, § 10, cl. 3. Thus, unlike the Articles, the Constitution required congressional consent even for interstate agreements that do not "hav[e] a tendency to break up or weaken" the national union. *Wharton v. Wise*, 153 U.S. 155, 167 (1894).

Every early constitutional commentator to address the issue understood the Compact Clause to require congressional consent for virtually all interstate agreements. For example, in 1803, St. George Tucker explained that, under the Compact Clause, "agreements, or compacts, concerning transitory or local affairs, or such as cannot possibly affect any other interest but that of the parties, may still be entered into by the respective states, ***with the consent of congress***." *Multistate Tax Comm'n*, 434 U.S. at 463 n.13 (quoting 1 W. BLACKSTONE, COMMENTARIES, APPENDIX 310 (S. Tucker ed. 1803)) (emphasis added). Similarly, Justice Joseph Story understood the Compact Clause to require congressional consent even for agreements addressing "mere private rights of sovereignty; such as questions of boundary; interests in land situated in the territory of each other; and other internal regulations for the mutual comfort and convenience of the States bordering on each other." 2 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1403, p. 264 (T. Cooley ed. 1873) (quoted in *Multistate Tax Comm'n*, 434 U.S. at 464). Likewise, Henry Clay observed to the Supreme Court in 1823 that the Compact Clause extends "to all agreements or compacts, no matter what is the subject of them." *Green v. Biddle*, 21 U.S. (8 Wheat.) 1, 39 (1823) (quoted in *Multistate Tax Comm'n*, 434 U.S. at 463 n.14). Thus, under the original understanding of the Compact Clause, virtually *all* interstate agreements—"no matter what the subject of them," including those concerning only "transitory or local affairs" or addressing "mere private rights of sovereignty"—require Congress's consent.

Similarly, the Supreme Court looks to "history, practice, [and] precedent" to discern the meaning of the U.S. Constitution. *Alden,* 527 U.S. at 741. "[T]raditional

ways of conducting government give meaning to the Constitution." *Mistretta v. United States*, 488 U.S. 361, 401 (1989) (quotation and brackets omitted). In this case, historical practice strongly indicates that the Constitution requires Congress's consent, at very least, for interstate compacts that purport to be *binding*—in other words, those that purport to dictate state action on matters of policy—rather than merely advisory. Congress and the States have a 225-year history of submitting binding interstate compacts for approval to Congress.

As the U.S. Supreme Court has recognized, as an historical matter, "most multilateral compacts have been submitted for congressional approval." *Multistate Tax Comm'n*, 434 U.S. at 471. Indeed, a review of federal statutes reveals at least 224 instances of Congress explicitly granting consent by statute for States to enter into compacts or formal agreements, from 1791 to 2008.[2] This non-exhaustive list includes such well-known compacts as the Driver License Compact and the Multistate Lottery Association. The list also includes numerous education-related compacts, such as the Western States Compact on Higher Education, 67 Stat. 490 (1953); the New England Higher Education Compact, 68 Stat. 982 (1954); and the New Hampshire-Vermont

[2] *See, e.g.*, 1 Stat. 189 (1791); 3 Stat. 609 (1820); 4 Stat. 101 (1825); 40 Stat. 909 (1934); 49 Stat. 1490 (1936); 50 Stat. 535 (1937); 50 Stat. 617 (1937); 52 Stat. 200 (1938); 52 Stat. 1163 (1938); 53 Stat. 1071 (1939); 63 Stat. 152 (1949);64 Stat. 568 (1950); 66 Stat. 315 (1952); 67 Stat. 490 (1953); 68 Stat. 982 (1954); 72 Stat. 635 (1958); 74 Stat. 1031 (1960); 76 Stat. 249 (1962); 77 Stat. 332 (1963); 83 Stat. 14 (1969); 98 Stat. 399 (1984); 99 Stat. 1842 (1986); 110 Stat. 884 (1996); 112 Stat. 3212 (1998); 122 Stat. 3739 (2008) (25 of 224 examples) (all providing Congress's explicit consent to regulatory or *binding* interstate compacts, on topics including resource management, transportation, highway safety, criminal law enforcement, education, waste disposal, conservation, boundaries, etc.).

Interstate School Compact, 83 Stat. 14 (1969). Clearly, when it comes to *binding* interstate compacts, Congressional consent is the historical norm, not the exception.

C. SBAC Requires Congressional Authorization under the Compact Clause, Because It Undermines the Authority of the U.S. Congress.

To be sure, the Supreme Court has held that not every agreement between States requires congressional approval under the Compact Clause. *Northeast Bancorp v. Bd. of Governors of Fed. Reserve Sys.*, 472 U.S. 159, 175 (1985). But the Supreme Court has held that interstate agreements fall within the Compact Clause—and require congressional authorization—when they implicate interests central to our system of federalism. In particular, as described below, three kinds of interstate compacts require congressional approval: (1) those that threaten the authority of the federal government, (2) those that threaten the sovereignty of member States, and (3) those that threaten the sovereignty of non-member States. Critically, in making this assessment, "the pertinent inquiry is one of ***potential***, rather than actual, impact." *Multistate Tax Comm'n*, 434 U.S. at 472 (emphasis added).

First, the Supreme Court has made clear that interstate compacts having the potential to undermine the authority of the federal government require congressional approval. The Clause aims to prevent the "enhancement of state power at the expense of the federal supremacy." *Multistate Tax Comm'n*, 434 U.S. at 470. The Clause thus applies to "***any*** combination tending to the increase of political power in the States, which may encroach upon or interfere with the just supremacy of the United States." *Id.* at 471 (quotation omitted).

SBAC clearly possesses the "potential" to undermine the authority of the federal government, because it circumvents 50 years of Congressional policy, set forth in numerous federal statutes, forbidding the implementation of a national curriculum by the DOE and the exercise of federal control over state and local educational policy. For example, in 1965, Congress enacted the General Education Provisions Act of 1965, 20 U.S.C. §§ 1221 *et seq.*, which prohibited any "department, agency, officer, or employee of the United States to exercise any direction, supervision, or control over the curriculum [or] program of instruction" of any state or local educational agency. 20 U.S.C. § 1232a (emphasis added). Likewise, the Department of Education Organization Act of 1979 ("DEOA"), 20 U.S.C. §§ 3401 *et seq.*, prohibits the DOE "to exercise any direction, supervision, or control over the curriculum [or] program of instruction" of any state or local educational institution. 20 U.S.C. § 3403(b) (emphasis added). The DEOA asserts the "intention of the Congress . . . to protect the rights of State and local governments and public and private educational institutions in the areas of educational policies and administration of programs and to strengthen and improve the control of such governments and institutions over their own educational programs and policies." 20 U.S.C. § 3403(a).

In the Elementary and Secondary Education Act of 1965 ("ESEA"), as amended by the No Child Left Behind Act of 2001 ("NCLB"), 20 U.S.C. §§ 6301 *et seq.*, Congress reiterated this policy. "The legislative history [of the ESEA], the language of the Act, and the regulations clearly reveal the intent of Congress to place plenary responsibility in local and state agencies for the formulation of suitable programs under the Act." *Wheeler*

v. Barrera, 417 U.S. 402, 415-16 (1974), *judgment modified on other grounds*, 422 U.S. 1004 (1975). "There was a pronounced aversion in Congress to 'federalization' of local educational decisions." *Id.*

The ESEA provides that "[n]othing in this Act shall be construed to authorize an officer or employee of the Federal Government to mandate, direct, or control a State, local education agency, or school's curriculum, program of instruction, or allocation of State or local resources." 20 U.S.C. § 7907(a). The ESEA prohibits the DOE from using funds under the statute "to endorse, approve, or sanction any curriculum designed to be used in an elementary school or secondary school." 20 U.S.C. § 7907(b). The ESEA further provides that "no State shall be required to have academic content or ***student academic achievement standards*** approved or certified by the Federal Government, in order to receive assistance under this Act." 20 U.S.C.§ 7907(c)(1) (emphasis added).

Most recently, the Every Student Succeeds Act, which reauthorized the ESEA, explicitly provided that the Secretary of Education "shall not attempt to influence, incentivize, or coerce State . . . adoption of the Common Core State Standards . . . or participation" in any "voluntary partnership with another State to develop and implement . . . State academic standards and assessments . . . ." Every Student Succeeds Act, Pub. L. 114-95 (2015), § 1111(j).

Despite these clear congressional pronouncements, the DOE—with the cooperation of state officials—induced the creation of SBAC as part of a scheme to implement national curricular uniformity, directly flouting these Congressional directives. In order to obtain the substantial funding available under the Race to the Top

("RTTT") grant program, states were required to demonstrate a "commitment to adopting a common set of high-quality standards." 74 Fed. Reg. 59836, 59843 (Nov. 18, 2009); 75 Fed. Reg. 19496, 19503 (April 14, 2010). States had to demonstrate the requisite "commitment" by "participat[ing] in a consortium of States that . . [i]s working toward jointly developing and adopting a common set of K-12 standards." 74 Fed. Reg. at 59843. States participating in such a consortium were also required to commit to adopting those common assessment standards. *Id.* The DOE imposed these conditions on RTTT funding precisely to induce the creation of interstate consortia like SBAC that would implement uniform national educational-assessment standards. Indeed, SBAC's stated purpose was "***to replace the existing patchwork of State standards***" with uniform national standards, 74 Fed. Reg. 59733 (emphasis added), and thus evade Congress's prohibition against federalizing educational standards and curriculum. In short, SBAC's explicit purpose is to allow the DOE to evade fifty years of Congressional policy forbidding a national curriculum and nationalized education standards. An interstate consortium whose explicit purpose is to circumvent Congress's authority is just the sort of compact that should require Congress's approval under the Compact Clause.

The circuit court offered two primary responses to these points. First, the circuit court emphasized that, on their face, these federal statutes restrict the activities only of the DOE, not the States. R692, A15. Thus, the circuit court reasoned, the State's conduct here could not violate the federal statutes. *See id.* But the constitutional question here is not whether the State has violated the federal statutes. Rather, the Court must consider whether SBAC "may encroach upon or interfere with *the just supremacy of*

the United States." *Multistate Tax Comm'n*, 434 U.S. at 471 (emphasis added). The "just supremacy of the United States" refers to the supremacy of federal ***law***, not simply the actions of federal ***officials***. It is the "Constitution, and the laws of the United States which all be made in pursuance thereof" that are "supreme" in our constitutional order. U.S. CONST. ART. VI. SBAC enlists State officials to aid in the evasion and violation of duly enacted federal laws by a major federal executive agency. Thus, SBAC's existence and operation have at least the potential to threaten "the just supremacy of the United States." *See Multistate Tax Comm'n*, 434 U.S. at 471. It is irrelevant whether SBAC's members have themselves violated the terms of the statutes in the process.

Second, the circuit court concluded that the DOE had not violated federal law, because the DOE had sought to implement national achievement standards rather than a national curriculum. R692, A15. This reasoning overlooks the fact that, as two former DOE officials emphasized, "[a] change to common K-12 standards will inevitably result in changes in curriculum, programs of instruction, and instructional materials to align with the standards." Robert S. Eitel & Kent D. Evers, *The Road to a National Curriculum: The Legal Aspects of the Common Core Standards, Race to the Top, and Conditional Waivers*, 13 ENGAGE 13, 17-18 (2012); *see also* Nancy Kober & Diane Stark Rentner, CENTER FOR EDUCATION POLICY, *Common Core State Standards: Progress and Challenges in School Districts' Implementation* (2011), *at* http://www.cep-dc.org/displayDocument.cfm?DocumentID=374, at 4-8 (detailing widespread belief amongst school administrators that adopting Common Core will require significant curricular changes and adoption of Common Core-aligned curricular materials). Indeed,

the coerced adoption of the Common Core Standards has already led to widespread curricular changes. *See, e.g.*, Paul Warren & Patrick Murphy, *California's Transition to the Common Core State Standards* (2014), http://www.cslnet.org/wp-content/uploads/2013/07/Californias-Transition-to-the-Common-Core-State-Standards.pdf, at 6-10 (describing four states' curricular and instructional-material changes in light of adopting the Common Core performance-assessment standards). The coerced adoption of Common Core "has placed the nation on the road to a national curriculum." Eitel & Evers, *supra*, at 21.

D. SBAC Requires Congressional Authorization under the Compact Clause, Because It Threatens the Sovereignty of Member States, Including South Dakota, to Control Educational Policy within Their Borders.

In assessing interstate agreements under the Compact Clause, the Supreme Court considers whether there has been "any delegation of sovereign power" to the organization, or whether, in contrast, "each State retains complete freedom to adopt or reject the rules and regulations" prescribed by the joint organization. *Multistate Tax Comm'n*, 434 U.S. at 473. SBAC violates the Compact Clause because the consortium intrudes upon the sovereignty of its member States, including South Dakota, to control educational policy within their borders. It does so in at least two ways: (1) it extracts a purportedly binding commitment from member States to abide by the consortium's decisions on matters of educational policy; and (2) it imposes significant legal and practical restrictions on the member States' ability to withdraw. This infringement on state sovereignty occurs in educational policy, an area of long delegated exclusively to the States. *See United States v. Lopez*, 514 U.S. 549, 564 (1995).

1. SBAC purports to exercise *binding*, not merely advisory, authority over the State on questions of educational policy.

The MOUA purports to bind SBAC members to the decisions of SBAC's Governing Board and Executive Committee. The MOUA provides: "By entering into this MOU, Member is . . . ***agreeing to be bound*** by the Governing Board Procedures and by all other decisions and actions of the Governing Board that are intended by the terms of this MOU to bind Member." R348, A119, ¶ 3.1 (emphasis added). Likewise, "[t]he Executive Committee will be authorized to act on behalf of the Governing Board." R349, A120, ¶ 3.4. Moreover, the DOE required the States to make just such binding commitments as a critical condition of any RTTT grant application. *See* 75 Fed. Reg. 18171, 18174 (April 9, 2010) (requiring that member States enter into "binding agreements" that would "[b]ind each member of the consortium to every statement and assurance made in the application"). In other words, the DOE *required* that SBAC be created as a *binding* compact, not merely advisory, as a condition of receiving the initial RTTT funding. A merely advisory compact could not achieve the DOE's stated goal of "replac[ing] the existing patchwork of state standards" with uniform national standards. 74 Fed. Reg. 59688, 59733 (Nov. 18, 2009).

SBAC's Governing Board Procedures further demonstrate that SBAC is a binding compact, and that membership in SBAC involves the delegation of sovereign state powers to the compact. The MOUA provides that member states must abide by the Governing Board Procedures. R348, A119, ¶ 3.1. Under the Governing Board Procedures, a Governing Member such as South Dakota agrees to: "Use the achievement standards and reporting scales initially adopted by Smarter Balanced in November 2014";

"[S]upport the decisions made by the Governing Board"; "Abide by the terms of the [MOUA]"; "Adhere to the policies and principles detailed in these Governing Board Procedures as adopted and amended"; and "Actively engage in Smarter Balanced discussions and activities." R366, A137. Most notably, the Governing Board Procedures state, without further qualification: "Decisions of the Governing Board ***shall be binding on all Members***." R367, A138.

For these reasons, SBAC contrasts sharply with the Multistate Tax Commission, which the Supreme Court upheld on the basis that its promulgations were strictly advisory in nature and did not bind the member States. *See Multistate Tax Comm'n*, 434 U.S. at 457 (observing that the Commission's "regulations are advisory only," and "[t]hey have no force in any member State until adopted by that State in accordance with its own law"). As the Supreme Court noted, the Multistate Tax Commission's tasks were to "study state and local tax systems," "develop and recommend proposals," and "compile and publish information that may assist member States" in implementing tax policy. *Id.* at 456. The Commission had the authority to "adopt uniform administrative regulations," but the Supreme Court emphasized that "[t]hese regulations are advisory only." *Id.* at 457. "Each member State has the power to reject, disregard, amend, or modify any rules or regulations promulgated by the Commission. They have no force in any member State until adopted by that State in accordance with its own law." *Id.*

In *Multistate Tax Commission*, the Supreme Court viewed the *advisory* nature of the Multistate Tax Commission as determinative. The Court determined whether there had been "any delegation of sovereign power to the Commission" by asking whether

"each State retains complete freedom to adopt or reject the rules and regulations of the Commission." *Id.* at 473. Because each State had such "complete freedom to adopt or reject" the Commission's rules, the Commission was an advisory compact that did not require Congress's consent. *Id.* SBAC, by contrast, purports to extract a binding commitment from member States to abide by the decisions of its Governing Board. Its member States do not purport to have "complete freedom to adopt or reject" SBAC's decisions about the administration of educational assessments. Rather, they "agree[] to be bound by the Governing Board procedures and all other decisions and actions of the Governing Board." R348, A119, ¶ 3.1. In fact, the federal regulations that occasioned SBAC's creation explicitly *required* such binding commitments. Under the clear terms of *Multistate Tax Commission*, therefore, SBAC violates the Compact Clause.

The circuit court suggested that the State has no contractual *obligation* to administer the SBAC assessments, only the right to use them. R695, A18. To the contrary, the State's agreements with SBAC plainly *require* the State to administer the SBAC assessments. The MOUA states that the State "agree[s] to be bound by the Governing Board Procedures." R348, A119, ¶ 3.1. The Governing Board Procedures, in turn, provide that the State "agrees to . . . [u]se the achievement standards and reporting scales initially adopted by Smarter Balanced in November 2014 as the basis for federal accountability reporting." R366, A137. "Achievement standards" are score cut-offs associated with a specific assessment. American Institute for Research, *National Benchmarks for State Achievement Standards*, *available at* 5 (Feb. 22 2016), http://www.air.org/sites/default/files/downloads/report/National-Benchmarks-State-

Achievement-Standards-February-2016_rev.pdf. For example, under the SBAC 4th Grade Mathematics Achievement Standards, a student has "Nearly Met" grade-level expectations if she scores at least 2411 points on the SBAC test, "Met" grade-level expectations if she scores at least 2485, and "Exceeded" expectations if she scores at least 2549 points. *Id.* These achievement standards are directly tied to performance on the tests written and approved by SBAC. *See id.*

It is obvious that, if the State must use SBAC's achievement standards, and if those achievement standards are nothing more than scores on SBAC's testing materials, then the State necessarily must administer SBAC's testing materials. As an analogy, the admissions policies of many colleges require applicants to report an ACT or SAT score. While those policies do not expressly require an applicant to *take* the ACT or SAT, the applicant cannot *report* a score on those exams without *taking* them. Thus, to comply with the colleges' admissions policy, applicants *must* take the ACT or SAT. There can be no serious doubt that by agreeing to be bound by the Governing Board Procedures, the State made a binding commitment to administer the testing materials created by SBAC. R348, A119, ¶ 3.1; R366, A137. This reflects a cession of state control over core aspects of educational decision making.

The circuit court also contended that the State's agreements with SBAC do not threaten the State's control over educational policy, because those agreements do not prescribe "any punishment or consequence for administering a different assessment test or failure to comply with the MOUA." R695, A18. On the contrary, South Dakota state officials are presumed to act in accordance with the binding contractual commitments

they have made, even if they can evade consequences for breach. In any event, the circuit court's description of the MOUA is incorrect. SBAC plainly could sue the State for breach of contract if the State were to breach its contractual obligations. *See, e.g.*, *Sisney v. Reisch*, 2008 S.D. 72, ¶ 13, 754 N.W.2d 813, 819 (2008). And no provision of the MOUA limits the remedies that SBAC could recover in such an action. To be sure, as the circuit court noted, ¶ 2.2(a) of the MOUA permits SBAC to terminate the agreement if the State defaults on its obligations. R695, A18; R346, A117, ¶ 2.2(a). But the MOUA does not prescribe that this is the *exclusive* remedy for a breach of the MOUA. "[A] remedy reserved by contract does not deprive a party of other lawful remedies." *Wolken v. Bunn*, 422 N.W.2d 417, 419 (S.D. 1988). "Where there is no limitation in the contract which makes the remedies enumerated therein exclusive, a party is entitled to the remedies thus specified, or he may at his election pursue any other remedy which the law affords." *Id.* (quotation and ellipsis omitted). Thus, SBAC could sue the State for breach of contract, and it could seek all remedies permitted under South Dakota law, including money damages and/or specific performance.

For these reasons, the State's participation in SBAC threatens the State's ability to make decisions regarding educational policy and thus requires the consent of Congress under the Compact Clause.

2. SBAC purports to restrict the ability of member States to withdraw from the consortium through binding contractual commitments.

Moreover, in assessing whether a compact infringes on member-state sovereignty, the Supreme Court also considers whether states may withdraw freely and unilaterally

from the interstate agreement. *See Multistate Tax Comm'n*, 434 U.S. at 473; *Northeast Bancorp*, 472 U.S. at 175. SBAC imposes both substantial contractual obstacles to the States' ability to withdraw freely from the compact. Paragraph 2.2(c) of South Dakota's 2014 MOUA with SBAC, entitled "Termination for Convenience," provides that "either party may terminate this MOU effective as of June 30 of any year . . . by providing the other party with written notice of its intent to terminate on or before the preceding October 1. By way of illustration, if a Member [State] wished to terminate for convenience effective as of June 30, 2016, the Member [State] would need to notify UC no later than October 1, 2015." R347, A118, ¶ 2.2(c). In other words, by signing the MOUA, a member state purportedly agrees not to withdraw from the consortium without *nine months' advance notice* and an additional year of fees. *Id.* Though the MOUA authorizes alternative methods of withdrawal in special circumstances, it makes clear these alternatives are "not intended to provide [South Dakota] with an expedited alternative under Section 2.2(c)." *Id.* ¶ 2.2(d).

The circuit court discounted these contractual barriers to withdrawal largely because several other States have successfully withdrawn from SBAC. R696, A19. But the Supreme Court does not require that withdrawal must be *impossible* before a compact falls under the Compact Clause. Rather, *any* potential limitation on the State's ability to withdraw implicates the Compact Clause, since the Supreme Court requires that "each State is free to withdraw *at any time*." *Multistate Tax Comm'n*, 434 U.S. at 473 (emphasis added). Under MOUA, member States purport to give up their freedom to withdraw from SBAC "at any time," *id*., instead agreeing to abide by an elaborate set of

advance-notice and fee provisions prior to withdrawal, R346-47, A117-18. Thus, under the Compact Clause, SBAC requires congressional consent, which it has never received.

E. SBAC Requires Congress's Authorization, Because It Threatens the Sovereignty of Non-Member States Over Educational Policy within Their Own Borders.

The Compact Clause also requires congressional approval of interstate compacts that threaten the sovereignty and authority of non-member states. Because interstate agreements "may affect the interests of States other than those parties to the agreement . . . Congress must exercise national supervision through its power to grant or withhold consent." Felix Frankfurter & James M. Landis, *The Compact Clause of the Constitution—A Study in Interstate Adjustments*, 34 YALE L.J. 685, 695 (1925). In *Multistate Tax Commission*, the Supreme Court considered whether the interstate agreement "impair[ed] the sovereign rights of nonmember states." 434 U.S. at 477. Similarly, in *Northeast Bancorp*, the Court considered whether the compact "enhance[d] the political power of [participating] States at the expense of other States." 472 U.S. at 176; *see also Cuyler v. Adams*, 449 U.S. 433, 440 n.8 (1981) (considering whether an interstate compact is "likely to disadvantage other States to an important extent"); *Rhode Island v. Massachusetts*, 37 U.S. 657, 726 (1838) (stating that the Compact Clause "guard[s] against the derangement of [the States'] federal relations with the other states of the Union").

SBAC's existence and operations pose a significant threat to the autonomy of non-member states to make core educational-policy choices. The original memberships of SBAC and PARCC (the other interstate consortium implementing the Common Core

standards) included nearly every state in the nation. The consortia were designed to grant a near monopoly over K-12 educational standards in English language arts and mathematics to Common Core. The educational uniformity established by SBAC and PARCC threatens to make it exceptionally difficult for non-member states to opt out of Common Core, as textbooks and other instructional materials align with Common Core. *See* Eitel & Evers, *supra* at 17-18 (article by former DOE officials, explaining that "[a] change to common K-12 standards will inevitably result in changes in curriculum, programs of instruction, and instructional materials to align with the standards"). Other standardized tests have begun adjusting their assessment standards to align to Common Core. *See, e.g.*, Lindsey Teppe, *The Common Core is Driving the Changes to the SAT*, THE ATLANTIC (Mar. 10, 2014), *available at* http://www.theatlantic.com/education/archive/2014/03/the-common-core-is-driving-the-changes- to-the-sat/284320/. And many colleges may place particular emphasis on Common Core assessment results when making admissions decisions. *See* Lindsey Teppe, NEW AMERICA FOUNDATION, *Common Core Goes to College* 10-12 (2014), *at* https://www.newamerica.org/downloads/CCGTC_7_18_2pm.pdf. In short, the purpose of SBAC and PARCC is to create a *de facto* education "cartel" aligned to Common Core—a cartel so dominant within the educational establishment that it will become, as a practical matter, impossible for non-member States to opt out. SBAC threatens to "disadvantage [non-member] States to an important extent," *Cuyler*, 449 U.S. at 440 n.8, and thus it requires Congress's consent.

F. SBAC Possesses the "Classic Indicia" of an Interstate Compact, as Identified by the U.S. Supreme Court.

The U.S. Supreme Court has identified certain characteristics, or "classic indicia," of interstate compacts indicating that a compact requires congressional authorization under the Compact Clause. *Northeast Bancorp*, 472 U.S. at 175. These "classic indicia" include (1) the existence of an independent governance structure; (2) the delegation of sovereign power to the compact; (3) restrictions on withdrawing from the compact; and (4) the compact's exercise of powers that the states could not exercise individually. SBAC possesses all of these hallmarks of an interstate compact requiring Congressional approval.

1. SBAC has an independent governance structure.

First, the Court heavily considers whether a "joint organization or body has been established to regulate" the subject matter of the compact. *Northeast Bancorp*, 472 U.S. at 175. Ordinarily, "States may not create an interstate agency without the express approval of Congress; they surrendered their right to do so 'in the plan of the Convention' when they accepted the Interstate Compact Clause." *Port Authority Trans-Hudson Corp. v. Feeney*, 495 U.S. 299, 314 (1990) (Brennan, J., concurring in part and concurring in the judgment). In this case, SBAC possesses a "joint organization" and "body . . . established to regulate" the subject-matter of the compact, both before and after its association with UCLA. *Northeast Bancorp*, 472 U.S. at 175. In fact, SBAC has an elaborate governance structure. The MOUA vests governance of SBAC in the Governing Board, which consists of member States. *See* R343-44, A114-15, ¶¶ 1.9; 1.10, 1.16. "The Governing Board will provide direction and oversight with respect to

Products and Services to be provided by [SBAC] to the Members," and "[t]he Governing Board will be responsible for approving the Planning Documents." R348, A119, ¶ 3.1. The Governing Board establishes Governing Board Procedures that bind the member States. *Id.* ("Member . . . agree[s] to be bound by the Governing Board Procedures and by all other actions and decisions of the Governing Board . . . ."); R343, A114, ¶ 1.11 (providing that the "Governing Board Procedures" adopted by the Governing Board "will govern the operations of the Governing Board and the Executive Committee"). The Governing Board directs the actions of SBAC relating to all consortium activities. R348-49, A119-20, ¶ 3.2.

The MOUA also establishes an Executive Committee with responsibility for management and oversight of SBAC's activities, but subject to the Governing Board. R343, A114, ¶ 1.10; R349, A120 ¶ 3.4. The Governing Board forms the Executive Committee, *id.* ¶ 3.4, and the Executive Committee is "authorized to act on behalf of the Governing Board." *Id.* Moreover, the complex governance structure established by the MOUA also provides for independent staffing and a multimillion-dollar annual budget, *id.* ¶ 3.5; and an elaborate system of "rules, policies, and procedures" to govern its operations, R343-44, A114-15, ¶ 1.11, R349, A120, ¶ 3.3. None of these are directly responsible to any individual State's government or voters.

SBAC's Governing Board Procedures add further detail and complexity to this governance structure. They provide specific procedures for the operations of the Governing Board and Executive Committee. R366-68, 370-74, A137-39, 141-45. The Governing Board Procedures create numerous other offices and positions. *See* R368,

A139 (providing for the appointment of "K-12 Leads"); R369, A139 (providing for the appointment of "Higher Education Leads"); R374-75, A145-46 (providing for an "Executive Director" and other staff positions); R375-76, A146-47 (providing for the establishment of several committees).

SBAC's complex governance structure demonstrates that SBAC is the sort of "joint organization or body" that the Supreme Court has recognized as a hallmark of an interstate compact requiring congressional authorization. *See Northeast Bancorp*, 472 U.S. at 175.

2. SBAC involves the delegation of sovereign power to the compact.

As discussed in Part I.D.1 above, SBAC receives a substantial delegation of sovereign power over educational policy from its member States, by extracting a purportedly binding commitment from state officials to abide by SBAC's decisions on matters of educational policy.

3. SBAC imposes contractual limitations on withdrawal.

As discussed in Part I.D.2 above, SBAC imposes significant contractual and practical restrictions on each State's freedom to withdraw.

4. SBAC purports to allow member States to exercise collective powers that States could not exercise individually.

Fourth, the Supreme Court looks to whether an interstate compact enables its member states to "exercise any powers they could not exercise in its absence." *Multistate Tax Comm'n*, 434 U.S. at 472. SBAC permits its member States, acting collectively through the consortium, to dictate the educational-assessment policies of other member States, including those States that dissent from the consortium's decisions. *See* R366,

A137 (requiring member States to adopt "achievement standards and reporting scales" promulgated by SBAC, and to "support the decisions made by the Governing Board"); R368, A139 (authorizing decision making by two-thirds of the voting quorum, thus permitting the imposition of non-unanimous decisions on dissenting states). Similarly, under the MOUA, the member States "agree to be bound by the Governing Board Procedures and by all other decisions and actions of the Governing Board that are intended by the terms of this MOU to bind Member." R348, A119 ¶ 3.1. The member States agree to be subject to the Governing Board's "direction and oversight." *Id.*

The Governing Board Procedures summarize the authority of the Governing Board as follows: "Decisions of the Governing Board ***shall be binding on all Members***." R367, A138. In other words, a voting bloc of member States on the Governing Board dictate the educational policy decisions of dissenting members in the minority. *Id.* SBAC is thus a quintessential binding or "regulatory" compact—it purports to dictate policy of its member States. Absent the interstate compact, of course, no State or voting bloc of States could purport to bind another State's decisions on educational policy. This is a critical indicium of a compact requiring Congress's consent.

The circuit court acknowledged this serious problem. R693, A16. But the court nevertheless dismissed the point, because "[n]o party provides this court with any examples of issues that the Governing Board has decided and whether those decisions reflect educational policy." *Id.* As an initial matter, to the extent that the evidence before the court left uncertainty on this point, those evidentiary gaps cut ***against*** granting summary judgment in favor of the State. "The burden rests with the moving party to

clearly demonstrate the absence of genuine issues of material fact and entitlement to judgment as a matter of law." *North Star*, 2015 S.D. 97, ¶ 12, 873 N.W.2d 57 at 61.

Moreover, the pertinent question is not whether the Governing Board has *already* made binding decisions regarding educational policy, but whether the Governing Board has the *potential* to do so in the future. In the Compact Clause context, "the pertinent inquiry is one of potential, rather than actual, impact." *Multistate Tax Comm'n*, 434 U.S. at 472. Nothing in the MOUA or the Governing Board Procedures prohibits the Governing Board from making binding decisions that affect member States' educational policy. On their face, those purportedly binding documents raise at least the potential that the Governing Board will make decisions that affect the educational policy of member States, including South Dakota. Thus, SBAC requires congressional consent.

II. SBAC'S COMPUTER-ADAPTIVE TEST DOES NOT PROVIDE "THE SAME ASSESSMENT" TO EVERY STUDENT AT EACH GRADE LEVEL, IN VIOLATION OF SDCL § 13-3-55.

A. Standard of Review.

The Court reviews both the grant of summary judgment and questions of statutory interpretation *de novo*. *See Heitmann*, 2016 S.D. 51, ¶ 8, 883 N.W.2d at 508; *State v. Powers*, 2008 S.D. 119, ¶ 7, 758 N.W.2d 918, 920.

B. SBAC's Computer-Adaptive Testing System Violates South Dakota Law, Because It Does Not Administer "the Same Assessment" to All Students in Each Grade Level.

The SBAC-created computer-adaptive testing system violates South Dakota law, because it administers a different test to each student who takes the exam. Section 13-3-55 of the South Dakota Codified Laws provides:

> Academic achievement ***tests***. Every public school shall annually administer ***the same assessment*** to all students in grades three to eight, inclusive, and in grade eleven. The ***assessment*** shall measure the academic progress of each student. . . . The ***tests*** shall be administered within timelines established by the Department of Education . . . Each state-designed ***test*** shall be correlated with the state's content standards. The South Dakota Board of Education may promulgate rules pursuant to chapter 1-26 to provide for administration of all ***assessments***."

SDCL § 13-3-55 (emphases added). In other words, South Dakota law requires that "***the same assessment***" be administered to every student in each of grades three to eight and eleven, and that these "tests" shall be "correlated with the state's content standards." *Id.* (emphasis added). The statute clearly uses the word "assessment" and the word "test" interchangeably.

The SBAC system does not provide "the same assessment" to each student in a given grade level. Rather, the SBAC system provides "computer-adaptive tests" that "adapt[] to the student as the assessment is taking place" and "present ***an individually tailored set of questions to each student***" as the test is administered. R433, A148 (emphasis added). "Based on student responses, the computer program adjusts the difficulty of questions throughout the assessment. For example, a student who answers a question correctly will receive a more challenging item, while an incorrect answer generates an easier question." *Id.* "The assessments draw from a large bank of questions," *id.*, and "students receive different questions based on their responses." *Id.* The system's "adaptive software" "[b]uilds the best test for each student by selecting questions that satisfy the test blueprint and match student performance." R434, A148. These "adaptive tests are customized to each student." R435, A149. In other words, the

system not only presents different questions to each student who takes the test, but it also presents different questions *every time the test is taken*.

Even though this system presents different test questions to every test-taker, the circuit court concluded that SBAC presents "the same assessment" to each student in a given grade level. R699, A22. The circuit court relied on Black's Law Dictionary's definition of "assessment" as "the determination of the rate or amount of something." *Id.* (quoting BLACK'S LAW DICTIONARY 133 (9th ed. 2009)). Because the SBAC system supposedly determines the "amount or rate" of student academic achievement, the circuit court reasoned, it constitutes "the same assessment" even though *the actual test* differs for each student. *Id.*

This was error. First, the circuit court erred by relying on an inapplicable technical definition of the statutory term "assessment" rather than the term's plain-English meaning. "When interpreting a statute, [the Court] begin[s] with the plain language and structure of the statute." *Magellan Pipeline Co. v. S.D. Dep't of Rev. & Reg.*, 2013 S.D. 68, ¶ 9, 837 N.W.2d 402, 404 (quotation omitted). "Words used [in the South Dakota Codified Laws] are to be understood in their ordinary sense . . . ." SDCL 2-14-1. In the educational context, the word "assessment" is a synonym for "test." *See, e.g.*, WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 131 (2002) (defining "assessment" as "an appraisal or evaluation (as of merit)"); *id.* at 2363 (defining "test" as "an examination to determine factual knowledge or mental proficiency esp. given to students during the course of a school term and covering a limited part of the year's work"). In other words, requiring "the same assessment" for all students at each grade

level is equivalent to requiring "the same test." In educational contexts, the word "assessment" is "often used interchangeably with test." *National Council on Measurement in Education*, GLOSSARY OF IMPORTANT ASSESSMENT AND MEASUREMENT TERMS, *available at* http://www.ncme.org/ncme/NCME/Resource_Center/Glossary/NCME/Resource_Center/Glossary1.aspx?hkey=4bb87415-44dc-4088-9ed9-e8515326a061#anchorA; *see also id.* (defining "test" as "[a]n evaluation instrument, usually composed of questions or items, which have right answers or best answers, that is used to measure an individual's aptitude or level of achievement in some domain").

Rather than relying on the plain meaning of the statutory term "assessment," the circuit court incorrectly relied on an inapplicable and awkward technical meaning of the term. The definition of "assessment" in Black's Law Dictionary, on which the circuit court relied, does not refer to *educational* assessments at all—it refers specifically to *economic* valuation, as one might expect in a technical legal dictionary. In fact, the circuit court neglected to quote Black's definition in full—it defines "assessment" as "[d]etermination of the rate or amount of something, ***such as a tax or damages***." BLACK'S LAW DICTIONARY 125 (8th ed. 2004) (emphasis added). Using this inapplicable definition out of context, the circuit court lapsed into awkward locutions, such as describing the SBAC assessment as measuring "the rate or amount" of educational progress. R699, A22. Such awkwardness signals an erroneous interpretation. "[Courts] do not force term-of-art definitions into contexts where they plainly do not fit and produce nonsense." *Johnson v. United States*, 559 U.S. 133, 139-40 (2010) (quotation

omitted). The circuit court should have applied the plain meaning of "assessment." *See Magellan Pipeline*, 2013 S.D. 68, ¶ 9, 837 N.W.2d at 404. And under the term's plain meaning, the requirement that "the same assessment" be administered to all students clearly means that all students must take the same test.

The statutory context further buttresses this conclusion. "[I]t is fundamental that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme." *In re Certification of a Question of Law*, 2014 S.D. 57, ¶ 8, 851 N.W.2d 924, 927. As noted above, Section 13-3-55 uses "assessment" and "test" *interchangeably*. The introductory phrase of the section refers to "academic achievement ***tests***," and then the statute immediately refers to requiring "the same ***assessment***" for each student, and requiring that "assessment" shall "measure academic progress." SDCL 13-3-55. The next sentence refers to writing tests as "achievement tests," and then the statute refers to the "assessment instruments" for those "achievement tests." *Id.* The statute then refers collectively to both the writing tests and the academic-achievement "assessment[s]" as "tests" that "shall be administered within timelines established by the Department of Education," and it directs that each "test shall be correlated with the state's content standards." *Id.* Finally, the statute refers to the "administration of all assessments." *Id.* In other words, in keeping with plain English and common educational parlance, the statute uses "assessment" to mean "test."

Moreover, while the circuit court misconstrued the plain meaning of "assessment" in Section 13-3-55, the court completely overlooked the statute's use of "the same." Under its plain and ordinary meaning, "the same" means "resembling ***in every way***,"

"conforming ***in every respect***," and "IDENTICAL, SELFSAME." WEBSTER'S THIRD, at 2007 (emphasis added). In other words, the requirement that "the *same* assessment" be administered to "all students" in each grade level, SDCL § 13-3-55, mandates that each student be given a test that "resembl[es] in every way," "conform[s] in every respect," and is "identical" to the test administered to every other student. WEBSTER'S THIRD, at 2007.

SBAC's computer-adaptive testing system fails to satisfy this unambiguous statutory requirement. As noted above, under the SBAC system, the test given to each student *differs* almost completely from the test given to every other student. Indeed, the test differs every time it is taken. SBAC's system "present[s] ***an individually tailored set of questions to each student***" every time. R433, A148. If the phrase "the same assessment" means anything at all, it prohibits this highly variable method of test-taking.

Moreover, there is nothing absurd in giving the statute its plain meaning in this context. On the contrary, requiring "the same assessment" for every student at each grade level plainly promotes fairness and the appearance of fairness in student assessments. One persistent criticism of computer-adaptive tests, like the SBAC system, is that they do not present the same set of questions to each student, rendering apples-to-apples comparisons of student performance impossible. *See, e.g., GMAT Tip: Adapting to a Computer-Adaptive Test*, BLOOMBERG.COM (April 3, 2013), *available at* http://www.bloomberg.com/news/articles/2013-04-03/gmat-tip-adapting-to-a-computer-adaptive-test ("When you answer an easier question incorrectly, the system feeds you an even easier question and reduces its estimate of your ability. In making a silly mistake,

you've dug yourself a hole."); Public Schools of North Carolina, *Accountability and Curriculum Reform Effort, Computerized Adaptive Testing: How CAT May Be Utilized in the Next Generation of Assessments* 19 (2010), *available at* http://www.ncpublicschools.org/docs/acre/publications/2010/publications/20100716-01.pdf (observing that "a system where each student might receive a different test 'form' . . . might raise questions of fairness and equity"); Lawrence M. Rudner, *An On-line, Interactive, Computer Adaptive Testing Tutorial* ("Rudner"), *at* http://echo.edres.org:8080/scripts/cat/catdemo.htm (describing "numerous limitations" of computer-adaptive testing, including that "[w]ith each examinee receiving a different set of questions, there can be perceived inequities"). Indeed, one of the potential inequities for which computer-adaptive tests are commonly criticized is that they do not let examinees go back and review their answers, thus favoring some test-taking styles over others. *See* Rudner ("[R]esearch consistently reports that examinees want a chance to review their answers"). Further, because the test differs for every student, such tests prevent the valuable group-teaching opportunity of allowing the teacher to go over the test with the entire class to permit the students to discuss and learn from each other's mistakes.

Thus, SDCL § 13-3-55 requires the State to administer *the same test* to each student in a single grade level. It is undisputed that the SBAC assessments do not administer the same set of test questions to each student. Indeed, the computer-adaptive technology makes this impossible. Thus, administering the SBAC assessments violate South Dakota law.

CONCLUSION

For the reasons stated above, the Court should reverse the circuit court's grant of summary judgment in favor of the State, and remand this case to the circuit court for further proceedings consistent with the Court's disposition.

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

In accordance with SDCL § 15-26A-66(b)(4), I certify that this brief complies with the requirements set forth in the South Dakota Codified Laws. The body of the brief uses proportionally spaced Times New Roman with 12-point typeface. Excluding the table of contents, table of cases, jurisdictional statement, statement of legal issues, addendum materials, and certificates of counsel, the brief contains 9,489 words as calculated by Microsoft Word.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that the foregoing was served on the following attorney for the Appellees via e-mail and United States mail:

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Dated: September 29, 2016.

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APPENDIX TO APPELLANTS' OPENING BRIEF

APPELLANTS' APPENDIX TABLE OF CONTENTS

STATE OF SOUTH DAKOTA	)	IN CIRCUIT COURT
	) :SS	
COUNTY OF HUGHES	)	SIXTH JUDICIAL CIRCUIT

AMBER MAURICIO and, SHELLI GRINAGER, Plaintiffs,	)	CIV NO. 15-292
v.	)	
DENNIS DAUGAARD, in his official capacity as the Governor of the State of South Dakota, and	)	ORDER DENYING STATE'S MOTION TO DISMISS, DENYING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT, GRANTING STATE'S MOTION FOR SUMMARY JUDGMENT, AND DENYING STATE'S MOTION TO STRIKE
THE STATE OF SOUTH DAKOTA, and	)	
DR. MELODY SCHOPP, in her official capacity as the Secretary of the South Dakota Department of Education, and	)	
RICHARD SATTGAST, in his official capacity as South Dakota State Treasurer, and	)	
SOUTH DAKOTA DEPARTMENT OF EDUCATION, and	)	
SOUTH DAKOTA BOARD OF EDUCATION, and	)	
OFFICE OF THE STATE TREASURER OF SOUTH DAKOTA, Defendants.	)	

WHEREAS, the Court enters its Memorandum Decision on June 13, 2016, and that Memorandum Decision constitutes the Court's findings of fact and conclusion of law, and is expressly incorporated by reference the same herein, it shall be and hereby is

ORDERED that the Defendants' motion to dismiss is DENIED; it is further hereby

ORDERED that Plaintiffs' motion for summary judgment is DENIED; it is further hereby

ORDERED that the Defendants' motion for summary judgment is GRANTED; and it is further hereby

ORDERED that the Defendants' motion to strike is DENIED.

Dated this 13th day of June, 2016.

BY THE COURT:

Mark Barnett

Honorable Mark Barnett
Circuit Court Judge

CIRCUIT COURT OF SOUTH DAKOTA
SIXTH JUDICIAL CIRCUIT

HUGHES COUNTY COURTHOUSE
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June 13, 2016

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RE: Hughes County Civ. No. 15-292: Amber Mauricio and Shelli Grinager v. Dennis Daugaard, et al.

MEMORANDUM DECISION

Amber Mauricio and Shelli Grinager petitioned for declaratory judgment and injunctive relief against several State officials and State offices. The State moved for dismissal or in the alternative, for summary judgment. Plaintiffs also moved for summary judgment. The State also filed a motion to strike.

FACTUAL BACKGROUND

Amber Mauricio and Shelli Grinager ("Plaintiffs") are citizens, residents, and taxpayers of the State of South Dakota. Plaintiffs petitioned this Court for declaratory and injunctive relief concerning South Dakota's membership in the Smarter Balanced Assessment Consortium ("SBAC"). Plaintiffs contend that South Dakota's participation as a member of SBAC violates the Compact Clause of the U.S. Constitution. Plaintiffs also argue that the computer-adaptive nature of the assessment test violates state statute. Plaintiffs have sued the following individuals in their official capacities: Governor Dennis Daugaard, Secretary Melody Schopp of the South Dakota Department of Education, and State Treasurer Richard Sattgast. South Dakota Department of Education, Board of Education, and Treasurer's Office are also defendants in this case. All defendants will be generally referred to as "the State."

In 2009, the National Governors Association and the Council of Chief State School Officers initiated an effort to develop a national, uniform set of standards in English language arts and mathematics for grades K–12 called the Common Core State Standards ("Common Core").

In November of 2009, as part of the American Recovery and Reinvestment Act of 2009, the U.S. Department of Education introduced Race to the Top ("RTTT") grant funding and invited States to apply. To qualify for funding, states had to demonstrate their commitment to "high-quality standards," which they could do by "participat[ing] in a consortium of States that . . . [i]s working toward jointly developing and adopting a common set of K–12 standards . . . that are supported by evidence that they are internationally benchmarked and build toward college and career readiness by the time of high school graduation." Overview Information; Race to the Top Fund; Notice Inviting Applications for New Awards for Fiscal Year (FY) 2010, 74 Fed. Reg. 59836-01 (proposed Nov. 18, 2009).

Further incentivizing for the creation of these educational consortia, the U.S. Department of Education announced that, under the RTTT grant program, it would provide funding to consortia of States to develop assessments aligned with the common K–12 standards. To be eligible for funding, each consortium of States had to include at least 15 states, and it had to require its member states to adopt

uniform academic performance assessment standards by the 2014–2015 school year. Federal regulations regarding the adoption of a "common set of K-12 standards" require a commitment of 85 percent of the state's standards. *Id.* at 59838.

Smarter Balanced Assessment Consortium ("SBAC") was one of two multi-state consortia formed to take advantage of the RTTT assessment funding. Partnership for Assessment of Readiness for College and Careers ("PARCC") was the second consortium.

In June 2010, South Dakota officials executed a memorandum of understanding with SBAC, initially as an advisory state. Subsequently, South Dakota became a governing state member within SBAC. Within the 2010 memorandum of understanding, South Dakota agreed to "adopt the Common Core Standards which are college- and career-ready standards, and to which the Consortium's assessment system will be aligned, no later than December 31, 2011." *Complaint*, Exh. 1 at 3. South Dakota also agreed to fully implement statewide SBAC's summative assessments in grades 3–8 and high school for both mathematics and English language arts no later than the 2014–2015 school year; adhere to the governance of SBAC as outlined in the document; agree to support SBAC's decisions; agree to follow agreed-upon timelines; be willing to participate in the decision-making process and, because South Dakota was a governing state in the consortium, be willing to participate in final decisions; and identify and implement a plan to address barriers in state law, statute, regulation, or policy to implementing SBAC's proposed assessment system.

In June of 2010, the State of Washington, acting on behalf of SBAC (consisting of 31 States at the time), submitted an application for RTTT funding. In September of 2010, the U.S. Department of Education awarded a grant of approximately $159 million in RTTT funds to SBAC, plus a supplemental award of over $15 million to help participating States successfully transition to common standards and assessments.

Working in the background is the No Child Left Behind Act of 2001 ("NCLB"). "NCLB's core provision that one hundred percent of students would be proficient on assessments aligned to state standards by the 2013-2014 school year was proving unworkable as the financial penalties for failing to meet this target were taking their toll on states, districts, and schools."[1] In September of 2011, the U.S. Department of Education announced a plan to allow states to obtain waivers from some of the onerous provisions of NCLB if the states had both college-ready and career-ready statewide standards for all students and "high-quality assessments." 20 U.S.C.A. § 7861. Adopting these college- and career-ready state

[1] Judson Kempson, *Star-Crossed Lovers: The Department of Education and the Common Core*, 67 Admin. L. Rev. 595, 597 (2015).

standards and membership in a consortium were among the options for obtaining a waiver to NCLB.

SBAC's federal funding from the RTTT grant ended in late 2014. To continue its assessment development efforts after the RTTT grant ended, SBAC moved its activities to the University of California, Los Angeles. Since July 1, 2014, SBAC has operated in coordination with UCLA's Graduate School of Education and Information Studies, National Center for Research on Evaluation, Standards and Student Testing. The participating states jointly fund SBAC through payments to the University of California.

In late 2014, the State, through Secretary Schopp of the South Dakota Department of Education, entered into a Memorandum of Understanding and Agreement ("MOUA") with the Regents of the University of California ("UC") regarding the State's continued participation in SBAC. In the MOUA, the State agreed to participate in SBAC's governing board and be bound by SBAC's governing board procedures and "all other decisions and actions" of the governing board that were intended to bind SBAC's members. The MOUA indicated that the State would have access to SBAC's assessment products and, as a member state, would have input in the development and implementation process of those products. The MOUA indicated that the State's annual fee as a member state of SBAC for 2014–2015 would be $680,628.50.

The MOUA provides four avenues to terminate the agreement: for breach, for violation of state law, for convenience, and for withdrawal of authority or non-appropriation of funds, with differing notice requirements. If SBAC takes action that violates a state law or either party breaches the MOUA, the State may terminate the MOUA on thirty days written notice. To terminate for convenience, the State must give at least a nine-month notice. If the State Legislature fails to appropriate funds to pay the membership fee or reduces or limits the State's ability to perform, then a sixty-day advance notice shall be given when reasonably possible in light of the circumstances. This method of termination must be used in good faith and not as an expedited way to get around the nine-month notice of termination for convenience.

In November of 2015, Plaintiffs, who are South Dakota residents and taxpayers, filed a petition for declaratory and injunctive relief against the State challenging the State's membership in and payment of dues to SBAC. Plaintiffs allege that the State's membership in SBAC is illegal on three grounds: (1) it violates the Compact Clause of the U.S. Constitution, Art. I, § 10, cl. 3; (2) it violates federal law guaranteeing state and local control of curriculum, programs of instruction, and related matters in public schools; and (3) the computer-adaptive nature of the Smarter Balanced assessment test violates South Dakota law requiring that each student receive the same assessment.

The State submitted a motion to dismiss the entire Complaint for failure to state a claim for which relief can be granted. SDCL 15-6-12(b)(5). In subsequent briefing, the State requested that if the court were to consider documents outside of the pleadings, to treat the State's motion to dismiss as a summary judgment motion under SDCL 15-6-12(b). The State submitted their statement of undisputed material facts and affidavit with attachment. Plaintiffs had the opportunity to respond.

In addition, Plaintiffs filed a summary judgment motion with the required documents and the State responded. The State also submitted a motion to strike. The Court will analyze each motion in turn as each has a different standard.

I. Whether the Court should grant the State's motion to dismiss the Complaint?

A. Legal Standard.

> A motion to dismiss under SDCL 15-6-12(b) tests the legal sufficiency of the pleading, not the facts which support it. For purposes of the pleading, the court must treat as true all facts properly pled in the complaint and resolve all doubts in favor of the pleader. The motions are viewed with disfavor and seldom prevail. Pleadings should not be dismissed merely because the court entertains doubts as to whether the pleader will prevail in the action. Further, the rules of procedure favor the resolution of cases upon the merits by trial or summary judgment rather than on failed or inartful accusations. The court accepts the pleader's description of what happened along with any conclusions reasonably drawn therefrom. A complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.

N. Am. Truck & Trailer, Inc. v. M.C.I. Commc'n Servs., Inc., 2008 S.D. 45, ¶ 6, 751 N.W.2d 710, 712 (internal citations and quotations omitted).

B. Failure to state a claim upon which relief can be granted, SDCL 15-6-12(b)(5)?

When "determining whether to grant a motion under SDCL 15-6-12(b)(5), the court considers the complaint's allegations and any exhibits which are attached and

accepts the pleader's description of what happened along with any conclusions which may be reasonably drawn therefrom." *Eide v. E.I. Du Pont De Nemours & Co.*, 1996 S.D. 11, ¶ 8, 542 N.W.2d 769, 771. All relevant documents are attached as exhibits to Plaintiffs' Complaint. There are no outside documents which the court needs to consider in order to rule on the motion to dismiss.

The State argues that the Complaint fails to state a claim upon which relief can be granted. SDCL 15-6-12(b)(5). The Complaint alleges that the State entered into an interstate compact creating SBAC and failed to receive Congressional consent as required by the Compact Clause.

"No State shall, without the Consent of Congress . . . enter into any Agreement or Compact with another State . . . ." U.S. Const. art. I, § 10, cl. 3. It is undisputed that Congress has not given consent to any state to enter into any agreement with another state for the development and administration of an assessment test.[2] However, the U.S. Supreme Court does not read the Compact Clause literally. *U.S. Steel Corp. v. Multistate Tax Comm'n*, 434 U.S. 452, 459-60, 98 S. Ct. 799, 806, 54 L. Ed.2d 682 (1978). The Supreme Court refused to require approval unless the Compact allows "modes of interstate cooperation that . . . enhance state power to the detriment of federal supremacy." *Id.* at 460, 98 S. Ct. at 806. "The relevant inquiry must be one of impact on our federal structure." *Id.* at 471, 98 S. Ct. at 811.

There are two issues, whether Plaintiffs allege sufficient facts, accepted as true, that SBAC is a "compact" subject to the Compact Clause, and whether SBAC required Congressional consent because it enhances state power to the detriment of federal supremacy. To be a compact, the U.S. Supreme Court has identified some "classic indicia": (1) joint organization or body to regulate a particular multistate function, (2) a state's sovereign power is conditioned on actions by another state, (3) the compact restricts modification or withdrawal from the compact or the modification or repeal of its own laws unilaterally, and (4) the compact can exercise powers that the states could not exercise individually. *See Northeast Bancorp, Inc., v. Bd. of Governors of Federal Reserve System, et al.*, 472 U.S. 159,175, 105 S. Ct. 2545, 2554, 86 L. Ed.2d 112 (1985).

If SBAC is a compact, the current test for whether Congressional consent is required is whether that agreement tends to increase "political power in the States,

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[2] The State does not dispute that Congress never gave consent. Congress, through the ARRA provided grant funding to states relating to "standards and assessments" if states took "steps to improve State academic content standards and student academic achievement standards." 123 Stat. 115 (2009); Complaint, ¶ 34. In ARRA, Congress never directly or indirectly authorized or consented to states forming a consortium to develop common state education standards. Complaint, ¶ 34. It was the U.S. Department of Education that allocated the ARRA funds to the Race to the Top grant program and conditioned receipt on states participating in a consortium that works "toward jointly developing adopting a common set of K-12 standards." Complaint, ¶ 35; *see* 74 Fed. Reg. 59836.

which may encroach upon or interfere with the just supremacy of the United States." *Id.* at 471-73, 98 S. Ct. at 812-13 ("whether the Compact enhances state power *quoad* the National Government"). "This rule states the proper balance between federal and state power with respect to compacts and agreements among States." *Id.* This "inquiry is one of potential, rather than actual, impact upon federal supremacy." *Id.* at 472, 98 S. Ct. at 812.

The Complaint alleges sufficient facts that the State entered into the MOUA in partnership with UC, which was the vehicle that continued the State's membership in SBAC (from the 2010 agreements). Complaint, ¶ 89. According to the Complaint, the MOUA is the partnership and membership agreement between the State and SBAC through UC. Complaint, ¶ 89. The Complaint also asserts that SBAC has a joint organization of many states with a Governing Board and Executive Committee. Complaint, ¶¶ 93-98. The Complaint also interprets the MOUA and the Governing Board Procedures for SBAC to bind all the states to its decisions, purportedly restricting South Dakota's freedom to unilaterally change the assessment test product to match its educational policies. Complaint, ¶¶ 93, 96. The Complaint, in general, alleges that the State has agreed to cede some of its sovereign power over its educational policies because it is has agreed to be bound by the SBAC Governing Board's decisions on such matters. Complaint, ¶ 93. Further, Plaintiffs allege that the MOUA unreasonably restricts South Dakota from withdrawing from SBAC for convenience reasons (i.e., nine-month notice and payment of one year membership fees). Complaint, ¶¶ 100-01. Lastly, the Complaint alleges that SBAC allows a majority of states to dictate the educational policy of a minority of states, a power no individual state has without the governance structure of SBAC. Complaint, ¶¶ 60-61. Accepting the Complaint's allegations as true on its face, it alleges sufficient facts to warrant Plaintiffs' claim of relief that SBAC is an interstate compact.

The Complaint also alleges sufficient facts that SBAC enhances South Dakota's political power *quoad* the federal government, and thus subject to the Compact Clause. According to the Complaint, SBAC grants a state the authority to dictate educational policy on another state (explaining that a majority of member state officials on the Governing Board can bind minority member states by a 2/3 majority vote on any issue). Complaint, ¶¶ 60-61. Likewise, SBAC can exercise authority over other states to a greater extent than any one state acting individually. *Id.* Insofar as SBAC diminishes the national government's power, the Complaint seems to proffer that SBAC threatens Congressional supremacy by not seeking its consent when SBAC was formed. *See* Complaint, ¶¶ 72-74. Thus, SBAC's existence undermines Congress's authority. *See id.*

Applying the standard of review to this motion to dismiss, the court treats these allegations as true. Although the alleged facts seem thin and require artful interpretations of the nature of SBAC's operations, it is not for this court to "entertain doubts as to whether the pleader will prevail in the action." *N. Am.*

Truck & Trailer, Inc., 2008 S.D. 45, ¶ 6, 751 N.W.2d at 712. Further, motions to dismiss are disfavored; the rules of procedure favor the resolution of cases upon the merits by trial or by summary judgment. *Id.* The Complaint sufficiently pleads that by signing the MOUA, the State engaged as a member of SBAC. The Complaint sufficiently pleads that SBAC is a compact subject to the Compact Clause because it increases states' political power to the detriment of the federal government. Plaintiffs have alleged sufficient facts. To this extent, the State's motion to dismiss is denied.

C. Failure to Join Indispensable Parties, SDCL 15-6-19(a).

The State's motion to dismiss also claims that Plaintiffs failed to join federal defendants as indispensable parties. SDCL 15-6-19(a). The State's motion is premised on statements and arguments made by Plaintiffs about the actions of the U.S. Department of Education, such as distributing and conditioning RTTT funding, coercing states with NCLB waiver opportunities, and violating several federal statutes prohibiting a national curriculum. However, these statements are provided as context to the court to understand the landscape on which the MOUA was signed and SBAC operates.[3] The Complaint only requests declaratory relief that SBAC is an illegal entity and requests that the State be enjoined from remitting any further payment to SBAC. Plaintiffs are not requesting this court find culpability in the actions of any federal agency, including the U.S. Department of Education, and the court will not venture that path. Plaintiffs are not asking for any retroactive declaration regarding the 2010 agreements or legitimacy of the RTTT funding.[4] Plaintiffs' prayer for relief is limited to declaring SBAC illegal and enjoining the State's future payment of fees. Plaintiffs can obtain all the relief they seek without a federal defendant. This case can be disposed of without requiring joinder of a federal defendant.

D. Motion to Dismiss the Claim for Attorney Fees.

Lastly, the State moves for dismissal of attorney fees request in the prayer for relief. Plaintiffs briefed no response. "[A]ttorney fees may only be awarded by contract or when specifically authorized by statute." *Adrian v. McKinnie*, 2004 S.D. 84, ¶ 19, 684 N.W.2d 91, 100 (quoting O'Connor v. King, 479 N.W.2d 162, 166 (S.D. 1991)). "[A]ttorney fees may not be awarded pursuant to a statute unless the statute expressly authorizes the award of attorney fees in such circumstances." *Rupert v. City of Rapid City*, 2013 S.D. 13, ¶ 38, 827 N.W.2d 55, 69. SDCL 15-6-

[3] Plaintiffs' Memorandum in Opposition to Defendants' Motion to Dismiss, at 7.
[4] *Id.* at 10.

54(d) provides that a claim for attorneys' fees "shall be made by motion" and "must be filed no later than fourteen days after entry of judgment." SDCL 15-6-54(d). A motion to dismiss a claim for attorneys' fees before any motion for fees has been made and before a judgment has been entered is premature. The Court, however, notes that, without ruling on this motion, South Dakota law is clear that "[n]o provision in the South Dakota's Declaratory Judgment Act allows for an award of attorney's fees to the prevailing party." *Pub. Entity Pool for Liab. v. Score*, 2003 S.D. 17, ¶ 8, 658 N.W.2d 64, 68; *See* SDCL ch. 21–24.

II. Whether Plaintiffs are entitled to a judgment as a matter of law on whether SBAC is an illegal interstate compact?

Having ruled that Plaintiffs survive the motion to dismiss, the court will now consider the arguments on the merits. Plaintiffs move for summary judgment in their favor for a declaration that SBAC is illegal and an injunction on the State from issuing any payment to SBAC or UC. Plaintiffs submit a memorandum of law, a statement of undisputed material facts, and an affidavit with many attachments. The State, in response, requests that if the court will consider documents outside of the pleadings, to treat its motion to dismiss as a summary judgment motion (under SDCL 15-6-12(b)) and asked the court to find that SBAC is not a compact subject to the Compact Clause, and that the State has not violated any federal and state statute. The State submits its own statement of undisputed material facts, a response to Plaintiffs' statement, and also an affidavit with many attachments. Plaintiffs respond to the State's statement of facts.

A. Legal Standard.

The standard for a motion for summary judgment is well-settled. Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." SDCL 15–6–56(c). "The burden rests with the moving party to clearly demonstrate the absence of genuine issues of material fact and entitlement to judgment as a matter of law. All reasonable inferences drawn from the facts must be viewed in favor of the non-moving party." *N. Star Mut. Ins. v. Korzan*, 2015 S.D. 97, ¶ 12, 873 N.W.2d 57, 61 (citations omitted). The non-moving "party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in § 15-6-56, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him." SDCL 15-6-56(e). "A disputed fact is not 'material' unless it would affect the outcome of

the suit under the governing substantive law in that a 'reasonable jury could return a verdict for the nonmoving party.'" *Robinson v. Ewalt*, 2012 S.D. 1, ¶ 10, 808 N.W.2d 123, 126 (quoting *Gul v. Ctr. for Family Med.,* 2009 S.D. 12, ¶ 8, 762 N.W.2d 629, 633.)

B. SBAC is an interstate compact.

The first issue is whether the State entered into a "compact" with other states. The document speaks for itself that only South Dakota and UC are signatories to the MOUA. *See* MOUA. No other state has signed this State's MOUA. Instead, each member state signs their own MOUA with UC, but no two states sign the same document. Thus, the heart of the disputed is the *effect* of executing the MOUA which makes the State a Member of SBAC and requires the State "to be bound by the [SBAC] Governing Board Procedures and by all other decisions and actions of the [SBAC] Governing Board that are intended by the terms of this MOU to bind Member." MOUA, ¶ 3.1. Plaintiffs argue that by this language, the State has entered into an interstate compact operating as SBAC with all member states. The State argues that, technically, the MOUA is not an interstate compact because no other state has signed the State's MOUA, so there is no contract or agreement signed by two states.[5]

In *Northeast Bancorp*, before determining enhancement of state power and infringement on federal supremacy, the issue was whether there was an agreement amounting to a compact. *Northeast Bancorp, Inc.,* 472 U.S. at 175, 105 S. Ct. at 2554. The U.S. Supreme Court examined similar statutes of Massachusetts and Connecticut and found that several classic indicia of a compact were missing. *Id.* Without a compact or agreement, there could be no violation of the Compact Clause. *Id.*

To be a compact, the U.S. Supreme Court has identified some "classic indicia": (1) joint organization or body to regulate a particular multistate function, (2) a state's sovereign power is conditioned on actions by another state, (3) the compact restricts modification or withdrawal from the compact or the modification or repeal of its own laws unilaterally, (4) the compact can exercise powers that the states could not exercise individually, (5) similar agreements or statutes, and (6) cooperation among States. *See Northeast Bancorp, Inc.,* 472 U.S. at 175, 105 S. Ct. at 2554. Although not stated in *Northeast Bancorp*, an express writing would also

[5] The Court reviewed each parties' Statement of Undisputed Material Facts. It finds only one material dispute, whether the MOUA is a separate, state-specific contract with UC, or whether the MOUA creates the compact, SBAC. Plaintiffs are asking for a legal determination of this issue. All other disputes are either different interpretations of legal statutes or documents, or not material to the current dispute. This case is ripe for summary judgment disposition.

be indicative of a compact. *See id.* (comparing whether codified statutes equate to a compact).

The written documents, MOUA and Governing Board Procedures, create the multistate consortium of SBAC. Each Member has a similar MOUA to South Dakota's MOUA. SBAC is a joint organization for the regulation and oversight of the Smarter Balanced assessment test. The State has the power to provide input into the creation of the test but does not have sole design authority. It shares that authority among the other Member states. The MOUA and Governing Board Procedures limit the State's withdrawal from SBAC by requiring notice under the circumstances. The SBAC Governing Board can vote and determine an issue regarding the assessment test over the objection of a minority state, which the State cannot do individually. These state actions constitute an agreement or a compact.

C. SBAC does not enhance State political power quoad federal supremacy.

Finding that SBAC is a compact, the next issue is whether that compact needs Congressional consent. The Court answers this in the negative. "No State shall, without the Consent of Congress . . . enter into any Agreement or Compact with another State . . . ." U.S. Const. art. I, § 10, cl. 3. SBAC is a consortium of states who agreed to serve on a Board to oversee and direct the creation of the Smarter Balanced assessment test. It is undisputed that Congress has not given consent to any state to enter into any agreement with another state for the development and administration of an assessment test.[6] However, the U.S. Supreme Court does not read the Compact Clause literally. *U.S. Steel Corp. v. Multistate Tax Comm'n*, 434 U.S. 452, 459-60, 98 S. Ct. 799, 806, 54 L. Ed.2d 682 (1978). The Supreme Court refused to require approval unless the Compact allows "modes of interstate cooperation that . . . enhance state power to the detriment of federal supremacy." *Id.* at 460, 98 S. Ct. at 806. "The relevant inquiry must be one of impact on our federal structure." *Id.* at 471, 98 S. Ct. at 811.

"[T]he application of the Compact Clause is limited to agreements that are directed to the formation of any combination tending to the increase of political power in the States, which may encroach upon or interfere with the just supremacy of the United States." *Id.* at 471-73, 98 S. Ct. at 812-13 (Congressional consent is

[6] The State does not dispute that Congress never gave consent. Congress, through the ARRA provided grant funding to states relating to "standards and assessments" if states took "steps to improve State academic content standards and student academic achievement standards." 123 Stat. 115 (2009); Complaint, ¶ 34. In ARRA, Congress never directly or indirectly authorized or consented to states forming a consortium to develop common state education standards. Complaint, ¶ 34. It was the U.S. Department of Education that allocated the ARRA funds to the Race to the Top grant program and conditioned receipt on states participating in a consortium that works "toward jointly developing and adopting a common set of K-12 standards." Complaint, ¶ 35; see 74 Fed. Reg. 59836.

only required when "the Compact enhances state power *quoad* the National Government"). "This rule states the proper balance between federal and state power with respect to compacts and agreements among States." *Id.* This "inquiry is one of potential, rather than actual, impact upon federal supremacy." *Id.* at 472, 98 S. Ct. at 812.

Plaintiffs first argue that SBAC's existence undermines federal supremacy because it did not seek Congressional approval in violation of the Compact Clause. This is a circular argument. Plaintiffs are asking this court to hold that SBAC needs to ask for consent because they failed to ask for consent. The failure to get consent cannot be the grounds for requiring consent. SBAC only needs consent if SBAC encroaches on federal supremacy, and there is no encroachment if consent is not required.

Plaintiffs argue that SBAC is operating in violation of federal statutes. Plaintiffs identify several statutes, GEPA,[7] DEOA,[8] ESEA,[9] NCLB,[10] and ESSA,[11] which all generally state that no U.S. Department of Education program shall authorize the Department "to exercise any direction, supervision, or control over the curriculum, program of instruction, administration, or personnel of any educational institution" or school. *See e.g.*, GEPA. The ESEA provides that "no State shall be required to have academic content or student academic achievement standards approved or certified by the Federal Government, in order to receive assistance under this Act." 20 U.S.C. § 7907(c)(1). The ESSA goes further and provides that the U.S. Department of education "shall not attempt to influence, incentivize, or coerce State adoption of the Common Core State Standards or participation in any voluntary partnership with another State to develop and implement State academic standards and assessments. . . ."[12] These statutes establish a Congressional directive that the U.S. Department of Education should not implement a national curriculum or condition funding on approval of academic achievement standards.

ESSA also provides, "A State retains the right to enter into a voluntary partnership with another State to develop and implement the challenging State

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[7] General Education Provisions Act of 1965 ("GEPA"), 20 U.S.C. §§ 1221 *et seq.*

[8] Department of Education Organization Act of 1979 ("DEOA"), 20 U.S.C. §§ 3401 *et seq.* ("intention of the Congress . . . to protect the rights of State and local governments and public and private educational institutions in the areas of educational policies and administration of programs and to strengthen and improve the control of such governments and institutions over their own educational programs and policies.")

[9] Elementary and Secondary Education Act of 1965 ("ESEA"), 20 U.S.C. §§ 6301 *et seq.*, 7907(a) ("nothing in this Act shall be construed to authorize an officer or employee of the Federal Government to mandate, direct, or control a State, local education agency, or school's curriculum, program of instruction . . .") (*amended by* NCLB).

[10] No Child Left Behind Act of 2001 ("NCLB"), 20 U.S.C. §§ 6301 *et seq.*

[11] Every Student Succeeds Act of 2015 ("ESSA"), Every Student Succeeds Act, Pub. L. 114-95, § 1111(j) (2015).

[12] *Id.*

academic standards and assessments required under this section." ESSA § 1111(j) ("Voluntary Partnership").

On their face, each of the cited provisions by Plaintiffs limits the actions of the *federal* Department of Education. These statutes explicitly restrict the federal Secretary of Education.[13] To determine if SBAC's existence violates these federal statutes, Plaintiffs are asking this court to sit in judgment of the U.S. Department of Education's action and course of conduct. This is not a lawsuit against any federal agency. No federal agency is a party. None of these statutes regulate actions of a state department of education. No statute has been cited that prevents a consortium of states from agreeing to create an assessment test product and administer it.

Plaintiffs allege that the effect of the U.S. Department of Education's actions is to create a national curriculum. Plaintiffs argue that by conditioning funding on the adoption of Common Core state standards, it is effectively coercing all states into adopting the same standards. This is speculative, goes against reality, and the Court has no jurisdiction to determine the lawfulness of U.S. Department of Education's actions.

Most of the cited statutes all prohibit a national *curriculum,* not national achievements standards. Both parties agree that curriculum is different from content standards.[14] Plaintiffs, however, argue that by setting a common set of K-12 state standards, it necessarily also sets curriculum because "what gets tested is what gets taught."[15] While setting standards may have some speculative, unknown and indirect effect on the development of curriculum, no federal agency has set any national curriculum or program of instruction, and any allegation that the *federal* Department of Education has violated these statutes is irrelevant; this court has no jurisdiction to entertain the allegation.

Further, to the extent that this argument is based on actions in 2010 regarding RTTT funding, this Court can give no injunctive relief against past conduct. Plaintiffs admit that they are not making any claims against RTTT funding, and that facts related the RTTT and 2010 MOUs were provided only for context to understand the nature of SBAC's current governance.

Perhaps most compelling to this court on the issue of threatened federal supremacy is that education policy and curriculum are wholly state concerns, and

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[13] *Id.*

[14] Defendants' Statement of Undisputed Material Facts, ¶ 2; Plaintiffs' Response to Defendants' Statement of Undisputed Material Facts, ¶ 2.

[15] Plaintiffs' Response to Defendants' Statement of Undisputed Material Facts, ¶ 2.

the federal government has no authority or preemption of education policy.[16] Just as the ESEA provides, states have plenary responsibility over their own educational institutions and schools.[17] There can be no usurpation of authority when the federal branch does not occupy that field. Plaintiffs do not contest a state's right to adopt these standards and develop a correlating assessment test individually, so there can be no argument SBAC threatens federal supremacy when multiple states exercise that right individually or together.

As to enhancing state power in relation to federal supremacy, Plaintiffs contend that the State's membership in SBAC both enhances the State's political power and threatens it. It enhances it because the SBAC Governing Board, made of up state officials, can bind other states to the Board's educational policies and vice versa, SBAC threatens the State's power because the Board can bind the State's educational policies. The idea is that a situation could arise where, for example, 14 member states of the Governing Board could decide one issue and South Dakota would be forced to accept that decision despite dissent.

No party provides this court with any examples of issues that the Governing Board has decided and whether those decisions reflect educational policy or simply administrative procedure or general oversight and direction to UC in creating the test. Viewing the facts favorable to the non-moving party, the State asserts that the decisions of the Governing Board "only relate to the direction and oversight given to UC regarding the products and services to be offered by UC to the separate states under their individual agreements."[18] The extent of the Board's authority is found in the MOUA and Governing Board Procedures. The majority of the Board's responsibilities are administrative in nature and procedural to establish an orderly consortium. *See generally* MOUA, ¶¶ 3.1-3.5.

The MOUA states,

> The Governing Board will provide direction and oversight with respect to Products and Services to be provided by Smarter Balanced to the Members. The Governing Board will be responsible for approving the Planning Documents annually and otherwise as required by this MOU or by the Governing Board Procedures. . . . By entering into

[16] Complaint, ¶¶ 18, 19-28; *see also* U.S. Const. Amend. X. Plaintiffs argue that because education is not an enumerated power of the federal government, the Tenth Amendment precludes the federal government from directly controlling education systems, standards, or curriculum.
[17] *Wheeler v. Barrera*, 417 U.S. 402, 415-16, 94 S. Ct. 2274, 2282, 41 L. Ed. 2d 159 (1974), *modified on other grounds,* 422 U.S. 1004, 95 S. Ct. 2625, 45 L. Ed. 2d 667 (1975) ("The legislative history, the language of the Act, and the regulations clearly reveal the intent of Congress to place plenary responsibility in local and state agencies for the formulation of suitable programs under the Act. There was a pronounced aversion in Congress to 'federalization' of local educational decisions.").
[18] *Defendants' Brief in Opposition*, at 10.

> this MOU, Member is agreeing to participate in the Governing Board in accordance with the terms hereof, and is further agreeing to be bound by the Governing Board Procedures and by all other decisions and actions of the Governing Board that are intended by the terms of this MOU to bind Member.

MOUA, ¶ 3.1. The MOUA expressly requires that the following decisions and actions will only be made or taken by UC after Members provides their input at Governing Board meetings and after the Governing Board provides that input to UC:

> (a) Hiring and termination of key SB employees;
> (b) Approval of the annual SB budget, to be proposed by SB, approval of other annual Planning Documents, and approval of changes to the Planning Documents as required by the Governing Board Procedures;
> (c) Approval of Annual Fees; and
> (d) Any modification to the Products and Services proposed to be offered to all Members.

MOUA, ¶ 3.5.

The Governing Board Procedures state that these "Procedures establish a governance structure for the orderly operation and decision making of Smarter Balanced at [UC.]" Complaint, Ex. 11 at 1. It goes on to state, "The Governing Board shall vote on all policies and other matters of significant importance that come before it." Complaint, Ex. 11 at 5. The Governing Board must approve "annual Planning documents and "changes to the Planning Documents," and "[m]odification[s] to the products and services proposed to be offered to Members." *Id.* The Executive Committee members also have a responsibility to "[i]dentify and frame policy decisions to be forwarded to the Governing Board for action." *Id.* at 8. However, Plaintiffs provided no evidence of the nature the "policy decisions" referred to here, whether they deal with educational policies or SBAC governance policies.

Relevant for determining if a State's sovereignty is threatened, the U.S. Supreme Court in *U.S. Steel* considered a state's freedom to withdraw at any time from the compact. *U.S. Steel*, 434 U.S. at 473, 98 S. Ct. at 813. The MOUA is initially a three-year term with automatic yearly renewals. The MOUA allows four methods for the State to exit SBAC and terminate the MOUA. If the State strongly disagrees with a decision of the Board, such as one that invades the State's education policies, the State can withdraw from the compact *within a reasonable amount of time*. If either party breaches the MOUA and fails to cure the breach within thirty days, the non-breaching party may terminate the MOUA. MOUA, ¶

2.2(a). A member state can terminate with a thirty-day written notice if SBAC Governing Board takes action that violates the State's laws. MOUA, ¶ 2.2(b). A member state can terminate with a reasonable advance written notice if "(i) Member's state withdraws, or materially reduces or limits the Member's ability to perform Member's duties under this MOA, or (ii) Member's state fails to appropriate funds necessary for Member's Annual Fee." MOUA, ¶ 2.2(d).[19] Either party can terminate the MOUA for any reason or convenience effective June 30 of any year by providing notice before October 1 of the previous year. MOUA, ¶ 2.2(c).

The State's sovereignty is further preserved because the State can refuse to administer the test. *Absent from the MOUA is a contractual promise that the State will administer the Smarter Balanced test*. Instead, the MOUA "grants to Member the nonexclusive . . . right and license to use the Assessment System," *a license which the State could choose not to exercise*. MOUA, ¶ 9. Plaintiffs assert that the State is bound to administer the Smarter Balanced test but does not cite the court any punishment or consequence for administering a different assessment test or failure to comply with the MOUA.[20] The State could expect a forfeiture of fees paid but neither SBAC, any other state, UC, or the federal Department of Education can force the State to administer the Smarter Balanced test. There is no liquidated damages clause. Also, the MOUA contemplates breach by either party and provides that the remedy is simply termination of the agreement if the breach is not cured. MOUA, ¶ 2.2(a).

It is worth noting that the State has complete freedom to regulate its education policies concerning assessments and standards. The State chose to adopt Common Core state standards. The next step was for the State to seek a standardized test which reflects those achievement standards. The State chose the Smarter Balanced test (over the PARCC test or any of the many other tests provided). The State made a broad sea-change in its educational policy and adopted the Common Core standards. If the State decides to change their educational policies and standards again, it is free to withdraw from SBAC and re-instate prior standards or adopt new standards. Ultimately, it is the State's choice. Because it voluntarily adopted new standards, the State voluntarily joined a consortium to help defray the cost of developing an assessment test while also having some input and decision-making responsibility as a governing member.

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[19] The 2014 State Legislature passed this law, "Prior to July 1, 2016, the Board of Education may not, pursuant to § 13-3-48, adopt any uniform content standards drafted by a multistate consortium which are intended for adoption in two or more states." SDCL 13-3-48.1.

[20] In U.S. Steel, the Court placed importance on the fact the compact had no power to punish a failure to comply. Here, Plaintiffs cite no consequences of the State's failure to comply with the MOUA. The MOUA only states that if either party breaches and fails to cure a material breach, then either party can terminate the agreement. The MOUA contains no liquidated damages or reference to remedies at law for breaches.

Plaintiffs argue that the U.S. Department of Education has coerced the State into adopting Common Core in a number of ways, such as incentivizing the transition with federal funding, or granting NCLB or ESEA flexibility waivers. Oklahoma overcame this second tactic and repealed Common Core and reinstated its previous standards. 70 Okla. Stat. § 11-103.6a. Missouri withdrew funding of its membership fee for SBAC. Missouri H.B. 2 § 2.070 (2015); *see Sauer v. Nixon*, 474 S.W.3d 624, 628 (Mo. Ct. App. 2015) (dismissing the appeal as moot because Missouri's legislature prohibited funding SBAC membership). Wisconsin also passed a law ordering the state to cease participation in SBAC. W.S.A 115.293 (2015). South Carolina passed a law prohibiting it from being a governing or advisory state in SBAC and prohibiting it from administering the Smarter Balanced assessment test. SC LEGIS 200 § 5 (2014), 2014 South Carolina Laws Act 200 (H.B. 3893). These legislative actions demonstrate that all four states felt free to leave the Compact in spite of the financial penalty. Furthermore, a Louisiana District Court recently found

> The evidence of widespread failure of NCLB, and the escalating and ultimately severe consequences for NCLB non-compliance, suggests that States may be under a fair amount of pressure to obtain ESEA waivers. However, motivation to seek waivers in order to ameliorate the consequences of NCLB non-compliance is not tantamount to coercion.

Jindal v. United States Dep't of Educ., 2015 WL 5474290, at *14 (M.D. La. Sept. 16, 2015). Therefore, there may be economic pressures to adopt Common Core, but those pressures are not coercive and have been overcome.

Another way to get the waiver besides adopting Common Core state standards is that states can apply for an ESEA waiver if the "State has adopted college and career ready standards with the agreement of state higher education agencies that the K-12 standards prepare students for college[.]" Participating in a consortium is only one way of adopting these standards to qualify for a waiver but a non-member state has other options to still qualify for the waiver. *Jindal,* at * 16 (stating that "[t]he evidence revealed 'a number of States that have received the ESEA flexibility that have not adopted the Common Core State Standards.'").

SBAC or its member states have not aggrandized their power by participating in the consortium. The State is exercising the same amount of authority it has without the compact. In *U.S. Steel*, the U.S. Supreme Court found no enhancement of state power when what the states were doing collectively, each state has the authority to do individually. Without SBAC, the State has the plenary power to adopt whatever achievement standards it wishes, contract with any third-party, like UC, to develop an assessment test that follows its achievement standards, and administer that test without any federal government oversight. As

the State argued at oral argument, by being a member, the State neither gains nor loses political power. The State Legislature continues to have authority over educational curriculum, achievement standards, and assessment tests. *See* Title 13 *et seq*. SBAC does not prevent or obstruct the State legislature's power to act. SBAC simply provides the opportunity to the State to give input as to the oversight and direction of the test and receive the test at a discount membership price. The State has not ceded any of its sovereign powers or enhanced its powers by participating in SBAC.

As a final argument, Plaintiffs claim that SBAC, acting in furtherance of the U.S. Department of Education's conduct, impairs the sovereign rights of nonmember states. In *U.S. Steel*, the U.S. Supreme Court rejected the argument that the compact exerted economic pressure to join upon nonmember states in violation of their "sovereign right." "Unless that pressure transgresses the bounds of the Commerce Clause or the Privileges and Immunities Clause . . . , it is not clear how our federal structure is implicated." *U.S. Steel*, 434 U.S. at 478, 98 S. Ct. at 815. Plaintiffs do not alleged any violation of either of these constitutional provisions and have made no argument that SBAC touches upon constitutional strictures. Instead, Plaintiffs argue that because many states have adopted Common Core standards, the ACT or SAT, textbooks, and other instructional materials will change to align with those standards, making it harder for other states to resist those standards or find non-Common Core materials. This argument does not hold water. In reality, many states, like Oklahoma and Wisconsin, have repealed Common Core state standards and have withdrawn from the consortia, *see infra,* or like Texas, never adopted Common Core state standards.[21]

In summary, Plaintiffs argue that the State surrendered its sovereign rights over education policy because it agreed to be bound by SBAC and the Board's decisions, which allegedly include educational policy issues. Plaintiffs repeat this same general assertion over and over in their briefing. But this fails to prove what educational policy decisions the Governing Board has the power to make which also usurps the State's sovereignty. It cannot be forgotten that the State made the

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[21] Tex. Educ. Code Ann. § 28.002(b):

> (b-2) The State Board of Education may not adopt common core state standards to comply with a duty imposed under this chapter.
>
> (b-3) A school district may not use common core state standards to comply with the requirement to provide instruction in the essential knowledge and skills at appropriate grade levels under Subsection (c).
>
> (b-4) Notwithstanding any other provision of this code, a school district or open-enrollment charter school may not be required to offer any aspect of a common core state standards curriculum.

Tex. Educ. Code Ann. § 39.023(a):

> (a-3) The agency may not adopt or develop a criterion-referenced assessment instrument under this section based on common core state standards as defined by Section 28.002(b-1).

decision to adopt Common Core state standards and to change their assessment test to match those standards. The State exercised its sovereignty by deciding to join a consortium to gain financial aid in order to transition to Common Core. Further, in order to test at those standards, the State exercised its sovereignty to join SBAC and participate in the creation of a product it will administer to test its students. If the product does not turn out as the State wants it to, it cannot be forced to use a product that runs counter to the State's educational policy. By joining SBAC, the State is exercising all the authority it would have independent of SBAC. The State loses no sovereignty nor is its sovereignty enhanced. Assuming the Governing Board can make educational policy, just like South Dakota, if another state's educational policies run counter to the Governing Board's decisions, that state can voluntary choose to accept the change or withdraw from SBAC. If the departure from policy is grave enough, that state's legislature can pass a law so that administering that standard assessment test would be a violation of law and that state could be out in thirty days, or that legislature could de-authorize that state's authority to participate in SBAC or de-fund the membership, and that state would be released in sixty days. That state could also just breach the whole MOUA and be out immediately, although subject to potential breach of contract claims. If the departure from a state's education policy is not as grave, the state can withdraw for convenience within nine months.

SBAC is a compact but is not subject to the Compact Clause because it does not enhance the State's political power while diminishing federal supremacy.

III. Whether the Smarter Balanced assessment test violates SDCL 13-3-55?

Plaintiffs also seek to enjoin the State from administering the Smarter Balanced test because it allegedly violates State law. Plaintiffs claim that the computer-adaptive nature of the Smarter Balanced test violates SDCL 13-3-55, entitled "Academic achievement tests," which provides,

> Every public school district shall annually administer the same assessment to all students in grades three to eight, inclusive, and in grade eleven. The assessment shall measure the academic progress of each student. . . .

SDCL 13-3-55. Plaintiffs interpret "same assessment" to mean each student in each grade must answer the same questions, but because the Smarter Balanced assessment is computer-adaptive, the questions either get easier or harder depending on the student's answer to a previous question.

South Dakota statutory interpretation rules are well-settled:

> Words and phrases in a statute must be given their plain meaning and effect. When the language in a statute is clear, certain and unambiguous, there is no reason for construction, and the Court's only function is to declare the meaning of the statute as clearly expressed. Since statutes must be construed according to their intent, the intent must be determined from the statute as a whole, as well as enactments relating to the same subject. But, in construing statutes together it is presumed that the legislature did not intend an absurd or unreasonable result.

Whitesell v. Rapid Soft Water & Spas, Inc., 2014 S.D. 41, ¶ 14, 850 N.W.2d 840, 843. "[The court] may not, under the guise of judicial construction, add modifying words to the statute or change its terms." *State v. Moss*, 2008 S.D. 64, ¶ 15, 754 N.W.2d 626, 631.

The statute uses the broader term "assessment" rather than the more specific word "questions." Had the Legislature intended every student in the same grade answer the same questions, the Legislature could have been more specific, but this Court cannot add words to the statute. As written, SDCL 13-3-55 only requires that each student take the same *assessment*. That means that if the Department of Education chooses to administer the Smarter Balanced assessment test, then every student in each grade three through eight, and grade eleven, in all public school districts across the State must take the Smarter Balanced assessment test.

The Court applies the plain meaning of the word "assessment." It is not defined in Title 13 of the Code. Black's Law defines "assessment" as a "determination of the rate or amount of something." Black's Law Dictionary 133 (9th ed. 2009). In the context of this statute, it is the determination of the amount of "academic progress of each student." The plain meaning of an "assessment" is a test that measures the amount of academic progress of each student. The title of the statute itself refers to the broad "academic achievement tests." By requiring the same assessment, the statute prohibits one student from taking Smarter Balanced test, one taking CTBS, one taking Pearson, yet another taking PARCC's test. Every student in the State takes the Smarter Balanced assessment test; therefore, they take the same assessment. In fact, because it is computer-adaptive, the purpose of the statute, to "measure the academic progress of each student" is better achieved.

Plaintiffs assert that if each student answers different questions, then the test does not fairly compare one student against his peers. However, the statute does not say that each student should be tested *against their peers* or that the measure of a student's academic progress shall be measured in comparison to his peers versus against himself as he progresses through each grade.

IV. Whether the Court should grant the State's Motion to Strike?

Defendants submitted a motion to strike all references to 2010 agreements and previous federal grants as being immaterial under SDCL 15-6-12. In light of this Court's ruling above, the Motion to Strike is denied.

CONCLUSION

After considering submissions and briefs, oral arguments of counsel, and the applicable law, the State's motion to dismiss is denied, Plaintiffs' motion for summary judgment is denied and State's motion for summary judgment is granted. The State's motion to strike is also denied.

Honorable Mark Barnett
Circuit Court Judge

STATE OF SOUTH DAKOTA)
COUNTY OF HUGHES)

IN CIRCUIT COURT
SIXTH JUDICIAL CIRCUIT

AMBER MAURICIO and SHELLI GRINAGER,

Plaintiffs,

vs.

DENNIS M. DAUGAARD, in his official capacity as the Governor of the State of South Dakota, et al.,

Defendants.

Case No. 32CIV15-000292

PLAINTIFFS' STATEMENT OF UNDISPUTED MATERIAL FACTS

PLAINTIFFS' STATEMENT OF UNDISPUTED MATERIAL FACTS

In support of their Motion for Summary Judgment, Plaintiffs Amber Mauricio and Shelli Grinager ("Plaintiffs") submit this statement of undisputed facts:

1. Amber Mauricio is, and at all relevant times has been, a taxpayer, citizen, and resident of the State of South Dakota. *See* Affidavit of Amber Mauricio, attached as Exhibit A hereto.

2. Shelli Grinager is, and at all relevant times has been, a taxpayer, citizen, and resident of the State of South Dakota. *See* Affidavit of Shelli Grinager, attached as Exhibit B hereto.

3. The Common Core Standards for English language arts are available at http://doe.sd.gov/octe/documents/ELA_LitSt.pdf, and the Common Core Standards for mathematics are available at http://www.corestandards.org/wp-content/uploads/Math_Standards1.pdf.[1] The Standards are incorporated by reference herein.

[1] All websites were last visited on February 22, 2016.

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4. In or about June 2010, former Secretary of Education Tom Oster; Neil Fulton, Chief of Staff for former Governor M. Michael Rounds; and former BOE President Dr. Kelly Duncan executed a Memorandum of Understanding with SBAC. *See* Memorandum of Understanding, Exhibit 1 to Plaintiffs' Complaint; Affidavit of Michael Martinich-Sauter, attached as Exhibit C hereto, ¶ 3. This Memorandum of Understanding ("MOU") purported to commit South Dakota to serve as an "Advisory State" in SBAC. *Id.*

5. South Dakota subsequently adjusted its membership status to become a "Governing State" in SBAC. *See* Smarter Balanced Assessment Consortium, Member States, Exhibit 16 to Martinich-Sauter Affidavit; Martinich-Sauter Affidavit, ¶ 18. South Dakota remains a Governing State member in SBAC. *Id.*

6. Officials of the other States that were members of SBAC at the time of its application executed Memoranda of Understanding with SBAC similar or identical to the MOU. *See*, *e.g.*, Memorandum of Understanding between SBAC and the State of Missouri, Exhibit 17 to Martinich-Sauter Affidavit; Memorandum of Understanding between SBAC and the State of Wisconsin, Exhibit 18 to Martinich-Sauter Affidavit; Memorandum of Understanding between SBAC and the State of Michigan, Exhibit 19 to Martinich-Sauter Affidavit; Smarter Balanced Assessment Consortium, State Policymakers, Exhibit 20 to Martinich-Sauter Affidavit, *at* http://www.smarterbalanced.org/k-12-education/policymakers ("To join Smarter Balanced, states agree to abide by a memorandum of understanding (MOU) signed by the State's Commissioner or Superintendent of Education, the Governor, and the President of the State School Board (if applicable)."); Martinich-Sauter Affidavit, ¶¶ 19-22.

7. On or about June 15, 2010, the State of Washington—purporting to act on behalf of SBAC and all states that had signed Memoranda of Understanding, including South Dakota—

submitted an application for a Race To The Top Fund Assessment Program Comprehensive Assessment System Grant. *See* RTTT Grant Application, Exhibit 2 to Plaintiffs' Complaint; Martinich-Sauter Affidavit, ¶ 4.

8. On or about July 1, 2010, SBAC adopted a Governance Structure Document ("Governance Document") that purported to supersede any provisions of governance in the Memoranda of Understanding executed by officials of the member states. *See* Governance Document, Exhibit 3 to Plaintiffs' Complaint; Martinich-Sauter Affidavit, ¶ 5.

9. On or about September 28, 2010, the U.S. Department of Education awarded a grant of RTTT funds in the amount of approximately $159 million to SBAC, plus a supplemental award of over $15 million to "help participating States successfully transition to common standards and assessments." Sept. 28, 2010 Letter to Hon. Christine Gregoire, Exhibit 4 to Plaintiffs' Complaint; Martinich-Sauter Affidavit, ¶ 6.

10. On or about September 28, 2010, the U.S. Department of Education awarded a grant of RTTT funds in the amount of approximately $170 million to the Partnership for Assessment of Readiness for College and Careers ("PARCC"). *See* September 28, 2010 Letter to Governor Charlie Crist from Joseph Contay, Exhibit 21 to Martinich-Sauter Affidavit; Martinich-Sauter Affidavit, ¶ 23.

11. There were 31 states in SBAC at the time it submitted its grant application. There were 25 states (plus the District of Columbia) in PARCC at the time it submitted its grant application. In all, 43 states were members of one or both of the consortia at the time of the applications. *See* National Conference of State Legislatures, Information Related to the Assessment Consortia, Exhibit 22 to Martinich-Sauter Affidavit; Martinich-Sauter Affidavit, ¶ 24.

12. On or about January 7, 2011, SBAC executed a "Cooperative Agreement" with the U.S. Department of Education. *See* Cooperative Agreement, Exhibit 5 to Plaintiffs' Complaint; Martinich-Sauter Affidavit, ¶ 7.

13. On September 23, 2011, the federal Department of Education announced the Conditional No Child Left Behind ("NCLB") Waiver Plan. *See* U.S. Dept. Of Educ., ESEA Flexibility Policy Document, Exhibit 6 to Plaintiffs' Complaint; Martinich-Sauter Affidavit, ¶ 8.

14. Adoption of Common Core and membership in one of the two testing consortia (SBAC or PARCC) constituted explicit "safe harbors" for States that seek NCLB waivers. *See* ESEA Flexibility Request Form, at 10-11 (Feb. 10, 2012), Exhibit 7 to Plaintiffs' Complaint; Martinich-Sauter Affidavit, ¶ 9.

15. After Oklahoma withdrew from PARCC and reinstated Oklahoma's previously-existing educational standards, on August 28, 2014, the U.S. Department of Education denied Oklahoma's application for extending its NCLB waiver and reinstituted numerous regulatory restrictions dictating many details of school administration. *See* August 28, 2014 Letter to Hon. Janet Barresi, Exhibit 8 to Plaintiffs' Complaint; Martinich-Sauter Affidavit, ¶ 10.

16. Similarly, the U.S. Department of Education threatened to withhold hundreds of millions of dollars of federal funding from the State of Oregon for allowing parents and students to opt out of Common Core-aligned tests prepared by the consortia. *See* May 27, 2015 Letter to Rob Saxton, Exhibit 9 to Plaintiffs' Complaint; Martinich-Sauter Affidavit, ¶ 11.

17. On or about July 31, 2014, Defendant Secretary of Education Dr. Melody Schopp executed a Memorandum of Understanding and Agreement with SBAC. *See* July 31, 2014 Memorandum of Understanding and Agreement ("MOUA"), Exhibit 10 to Plaintiffs' Complaint; Martinich-Sauter Affidavit, ¶ 12.

18. SBAC's public statements confirm that SBAC continues to exist as an interstate compact operating under the direction of its member States. *See* Smarter Balanced Assessment Consortium, "What will happen when Smarter Balanced assessments are implemented in the 2014-15 school year," Frequently Asked Questions, Exhibit 13 to Martinich-Sauter Affidavit (explaining that after the partnership with the University, SBAC "will continue to be a state-led organization committed to providing high-quality assessment tools and information to educators and policymakers in member states"); Smarter Balanced, States Move Forward with Smarter Balanced, Exhibit 23 to Martinich-Sauter Affidavit (including statement by SBAC executive director that "[t]he future of Smarter Balanced as a state-led consortium is strong . . . . The Consortium will continue to be governed by its member states and will be supported by member dues."); Martinich-Sauter Affidavit, ¶¶ 15, 25.

19. Other States that are members of SBAC have executed similar MOU As with SBAC. *See*, *e.g.*, Memorandum of Understanding and Agreement between SBAC and the State of Nevada, *available at*; Smarter Balanced Assessment Consortium, State Policymakers, Exhibit 20 to Martinich-Sauter Affidavit ("To join Smarter Balanced, states agree to abide by a memorandum of understanding (MOU) signed by the State's Commissioner or Superintendent of Education, the Governor, and the President of the State School Board (if applicable)."); Martinich-Sauter Affidavit, ¶ 22.

20. SBAC assessments are "computer-adaptive assessments," which means that a computer selects new questions for a student based on the answers provided by the student to previous questions. *See* Smarter Balanced Assessment Consortium, Computer Adaptive Testing, Exhibit 14 to Martinich-Sauter Affidavit; Smarter Balanced Assessment Consortium, Creating a

Computer Adaptive Test, Exhibit 15 to Martinich-Sauter Affidavit; Martinich-Sauter Affidavit, ¶¶ 16, 17.

21. On or about January 30, 2015, SBAC adopted a new set of Governing Board Procedures to replace the Governance Document. *See* Jan. 30, 2015 Governing Board Procedures ("Governing Board Procedures"), Exhibit 11 to Plaintiffs' Complaint; Martinich-Sauter Affidavit, ¶ 13.

Dated: February 23, 2016.

Respectfully submitted,

/s/ Robert J. Rohl

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STATE OF SOUTH DAKOTA	)	IN CIRCUIT COURT
	: SS	
COUNTY OF HUGHES	)	SIXTH JUDICIAL CIRCUIT
AMBER MAURICIO, et al. Plaintiffs, vs. DENNIS M. DAUGAARD, in his official capacity as Governor of the State of South Dakota, et al. Defendants.	)	32 CIV. 15-292 DEFENDANTS' RESPONSE TO PLAINTIFFS' STATEMENT OF UNDISPUTED MATERIAL FACTS

In response to Plaintiffs' Statement of Undisputed Material Facts, Defendants have filed a Motion to Strike a number of immaterial paragraphs. This Response is filed subject to and without waiving arguments raised in that motion.

1. Not disputed.

2. Not disputed.

3. The link provided for mathematics is incorrect. It should be: http://doe.sd.gov/ContentStandards/documents/math/Math_Standards1.pdf.

4. Not disputed.

5. Not disputed.

6. Not disputed.

7. Not disputed

8. The use of the word "supersede" in this paragraph does not properly characterize the role of this document. The Governing Structure

Document supplemented, but did not supplant, the language of the 2010 MOU. *See* Governance Structure Document, Exhibit 3 to Plaintiffs' Complaint at p. 1 (preamble).

9. Not disputed.

10. Not disputed.

11. The numbers provided in this paragraph do not appear to match those on the webpage cited. Defendants do not dispute that as of June 2010, there were 17 governing and 14 advisory states for a total of 31 states participating.

12. Not disputed.

13. Not disputed.

14. Disputed – See Affidavit of Abby Javurek-Humig (J.H. Aff) at ¶¶ 27-28.

15. Disputed – See J.H. Aff. at ¶ 29.

16. Disputed – See J.H. Aff. at ¶ 30.

17. Dr. Melody Schopp executed a Memorandum of Understanding, on July 31, 2014, with the Regents of the University of California (described in Defendants' materials as the UC-MOU), not SBAC. *See* Compl. Ex. 10.

18. Whether the UC-MOU is an interstate compact is a question of law to be decided by this Court.

19. Undisputed that other states have entered into agreements similar to the UC-MOU with the Regents of the University of California.

20. Not disputed.

21. On or about January 30, 2015, a revised set of Governing Board Procedures were adopted.

Dated this 17th day of March, 2016.

/s/ Richard M. Williams
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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the Defendants' Response to Plaintiffs' Statement of Undisputed Material Facts in the above-entitled matter was served by using Odyssey File and Serve upon Robert Rohl, at rjr@johnsoneiesland.com on this 17th day of March, 2016.

/s/ Richard M. Williams
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Deputy Attorney General

STATE OF SOUTH DAKOTA : SS COUNTY OF HUGHES	)	IN CIRCUIT COURT SIXTH JUDICIAL CIRCUIT
AMBER MAURICIO, et al. Plaintiffs, vs. DENNIS M. DAUGAARD, in his official capacity as Governor of the State of South Dakota, et al. Defendants.	)	32 CIV. 15-292 DEFENDANTS' STATEMENT OF UNDISPUTED MATERIAL FACTS

In opposition to Plaintiffs' Motion for Summary Judgment, Defendants submit this statement of undisputed material facts. Defendants have filed a Motion to Strike a number of immaterial paragraphs in Plaintiffs Statement of Undisputed Material Facts, and this statement is filed subject to and without waiving arguments raised in that motion.

1. The Secretary of the South Dakota Department of Education (SD DOE) is required to prepare and submit to the South Dakota Board of Education academic content standards for kindergarten through grade twelve. SDCL 13-3-48; Affidavit of Abby Javurek-Humig (J-H Aff.), attached as Exhibit A hereto at ¶ 4.

2. Content standards are distinct from curriculum. Generally, content standards specify what should be learned, and curriculum involves the means and methods of instruction. South Dakota content standards do not dictate specific curriculum. J-H Aff. at ¶ 5.

3. In order to measure student achievement within these content standards, certain academic assessments and reporting requirements were implemented. *See generally* SDCL ch. 13-3; J-H Aff. at ¶ 6.

4. In 2010, to aid the development of an assessment system which would correspond to the academic content standards in English language arts and mathematics, in a more economically efficient and effective manner than the State could do alone, State officials entered into a Memorandum of Understanding (2010 MOU). Through this agreement, the member states created Smarter Balanced Assessment Consortium (SBAC). Compl. Ex. 1; J-H Aff. at ¶ 7.

5. SBAC participated in the "Race to the Top Fund Assessment Program: Comprehensive Assessment Systems Grant Application," in accordance with the Notice Inviting Applications (NIA) for the Race to the Top Fund (RTTT) Assessment Program for the Comprehensive Assessment Systems Grant Application, published in the Federal Register on April 9, 2010. 75 Fed. Reg. 18171-18185; J-H Aff. at ¶ 8.

6. The NIA offered federal funding to support a limited number of grant projects to develop, but not implement, a new generation of appropriately valid and reliable assessments that would be understood as measuring student progress, leading to college and career readiness. J-H Aff. at ¶ 9.

7. Through the 2010 MOU and subsequent amendments thereto, with the State of Washington acting as fiscal agent, SBAC applied for, and received, federal RTTT assessment grant funds. Compl. Ex. 2; J.H. Aff. at ¶ 10.

8. SBAC used the federal grant to begin developing assessments on behalf of the member states. No State funds were contributed. While SBAC was receiving RTTT grant funding, it assisted the participating states in creating and implementing educational assessment tools. South Dakota educators were involved in this process. J.H. Aff. at ¶ 11.

9. In 2014, the RTTT grant funding was due to expire. *See* Compl Ex. 10 (UC-MOU). In order to continue receiving services regarding the creation and implementation of assessment tools, individual state agencies entered into separate, state-specific MOUs with the Regents of the University of California (UC), and each agreed to pay an annual fee. *Id.*; J-H Aff. at ¶ 12.

10. The University of California-Los Angeles (UCLA) agreed to provide assessment Products and Services under the moniker "Smarter Balanced." *See* Compl Ex. 10 (UC-MOU) at ¶ F, § 5.5. Under the terms of the UC-MOU, UCLA succeeded the state of Washington as fiscal agent and assumed the assets and contracts held by SBAC. *Id.* at ¶ E; J-H Aff. at ¶ 13.

11. Through this process, the services once provided by SBAC transitioned to UCLA. *See* Compl Ex. 10 (UC-MOU) at ¶¶ A-F, § 5.5. Secretary Melody Schopp signed the UC-MOU on behalf of SD DOE. *Id.* at p. 21; J-H Aff. at ¶ 14.

12. The UC-MOU is the only agreement by which the State of South Dakota agreed to pay fees in order to participate in Smarter Balanced. SD DOE has a separate contract with American Institutes for Research (AIR) to deliver the assessments, score the assessments, and report student results for

the State. UCLA protects the intellectual property and does the background research needed to ensure the test remains valid, reliable, and secure. *See* J-H Aff. at ¶ 15.

13. Pursuant to the UC-MOU, states signing similar MOUs became members of a Governing Board. The Governing Board's function is to provide administrative support and guidance to UC regarding the creation of the educational assessments and tools produced by UC and provided to the individual states. Governing Board Procedures have been adopted to inform UC regarding policy and administrative procedures. Compl. Ex. 11; J-H Aff. at ¶ 16.

14. Although the UC-MOU, § 3.1 provides that members will be bound by the Governing Board Procedures and decisions of the Governing Board, those decisions only relate to the direction and oversight given to UC regarding the products and services to be offered by UC to the separate states under their individual agreements. No provision of the UC-MOU requires a state, including the SD DOE, to utilize any product or service ~~that is contrary to state law.~~ In practice, states that are members of the Governing Board contract with a separate vendor for the delivery of the assessment to their students. *See* J.H. Aff. at ¶ 17.

15. Currently, fifteen states, one territory, and the Bureau of Indian Education are members of the Governing Board. *See* J.H. Aff. at ¶ 18.

16. UC is not a member of the Governing Board and in no event can UC be bound by the Governing Board Procedures. Compl. Ex. 10 at ¶ 3.3; J.H. Aff. at ¶ 19.

17. The Governing Board Procedures cannot modify the UC-MOU or the obligations between the individual states signing similar MOUs and UC. Compl. Ex. 10 at ¶ 3.3; J.H. Aff. at ¶ 20.

18. The Smarter Balanced assessment itself is a test which is administered electronically once per year, in the spring, to students in grades three through eight and eleven. Other voluntary assessments and related resources may be provided throughout the year. J.H. Aff. at ¶ 21.

19. The Smarter Balanced assessment is aligned to South Dakota's content standards in English language arts and mathematics. The Smarter Balanced assessment measures achievement in the applicable content standards, but it does not dictate the means and methods of instruction of the standards. J.H. Aff. at ¶ 22.

20. The assessment follows an overall test blueprint which specifies the number of and types of questions associated with each section of the assessment. Exhibit 15 to Martinich-Sauter Affidavit. Within this overall blueprint, part of the assessment is computer adaptive, with the difficulty of questions changing based on student responses to measure the academic progress of each student. J.H. Aff. at ¶ 23.

21. Since 2014, the only agreement through which SD DOE receives services for Smarter Balanced assessments is the UC-MOU. AIR delivers the

assessments, scores the assessments, and reports the results. J.H. Aff. at ¶ 24.

22. The RTTT grant expired in 2014 and has not been renewed. *See* J.H. Aff. at ¶ 25.

23. The No Child Left Behind Act (NCLB) has been amended and is now the Every Student Succeeds Act (ESSA). Pub. L. 114-95; J.H. Aff. at ¶ 26.

24. The ESEA Flexibility documents did not require the adoption of common core standards or reference "safe harbors". Exh. 7 to Plaintiffs' Complaint. The application announcement/ flexibility request gave two options for the adoption of standards:

> 1. State has adopted college and career ready standards consistent with the definition of college and career ready, common to a significant number of states.
>
> 2. State has adopted college and career ready standards with the agreement of state higher education agencies that the K-12 standards prepare students for college (students do not need remediation in math or English if they have met the standards).

See J.H. Aff. at ¶ 27.

25. The application announcement/ flexibility request gave three options for the adoption of assessments aligned to college and career ready standards:

> 1. Participation in the consortia.
>
> 2. State is in the process of developing assessments that are aligned to state college and career ready standards.
>
> 3. State already has developed such assessments.

See J.H. Aff. at ¶ 28.

Dated this 17th day of March, 2016.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the Defendants' Statement of Undisputed Material Facts in the above-entitled matter was served by using Odyssey File and Serve upon Robert Rohl, at rjr@johnsoneiesland.com on this 17th day of March, 2016.

/s/ Richard M. Williams
Richard M. Williams
Deputy Attorney General

STATE OF SOUTH DAKOTA	)	IN CIRCUIT COURT
	) SS	
COUNTY OF HUGHES	)	SIXTH JUDICIAL CIRCUIT

AMBER MAURICIO and SHELLI GRINAGER, Plaintiffs, vs. DENNIS M. DAUGAARD, in his official capacity as the Governor of the State of South Dakota, et al., Defendants.	Case No. 32CIV15-000292 **PLAINTIFFS' RESPONSE TO DEFENDANTS' STATEMENT OF UNDISPUTED MATERIAL FACTS**

PLAINTIFFS' RESPONSE TO DEFENDANTS'
STATEMENT OF UNDISPUTED MATERIAL FACTS

Plaintiffs submit this Response to Defendants' Statement of Undisputed Material Facts. The paragraph numbers in this Response to the paragraph numbers in Defendants' Statement of Undisputed Material Facts.

1. Undisputed.

2. Undisputed that "Content standards are distinct from curriculum. Generally, content standards specify what should be learned, and curriculum involves the means and methods of instruction." Disputed that "South Dakota content standards do not dictate specific curriculum." The Affidavit of Abby Javurek-Humik provides no support for this proposition other than the conclusory statement "South Dakota content standards do not dictate specific curriculum." Affidavit of Abby Javurek-Humig, ¶ 5. To the contrary, it is universally accepted that high-stakes standardized testing compels schools to "teach to the test." As Joan Herman, co-director emeritus of the National Center for Research on Evaluation, Standards and Student testing at UCLA (where SBAC is housed) explained, "***What gets tested is what gets taught***. . . . To the extent that the assessments well represent the spirit and meaning of the standards, the

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spirit and meaning of the standards will get taught. Where the assessments fall short, curriculum, instruction and teach will likely fall short as well." Quoted in Adrienne Lu, *States Reconsider Common Core Tests*, Washington Post (Feb. 20, 2014), *available at* https://www.washingtonpost.com/national/states-reconsider-common-core-tests/2014/02/20/9e16efd4-8779-11e3-a5bd-844629433ba3_story.html (emphasis added). Thus, contrary to the State's assertion, South Dakota's content standards directly affect the curriculum that is taught in South Dakota public schools.

3. Undisputed.

4. Undisputed that South Dakota officials entered into the 2010 MOU. Disputed that SBAC provides academic content standards "in a more economically efficient and effective manner than the State could do alone." Defendants cite no evidence to support this claim.

5. Undisputed.

6. Undisputed that the Race to the Top ("RTTT") invitation "offered federal funding to support a limited number of grant projects to develop . . . a new generation of appropriately valid and reliable assessments that would be understood as measuring student progress, leading to college and career readiness." Disputed that the RTTT invitation excluded the "implement[ation]" of the uniform assessments created using RTTT grant funds. To the contrary, implementation of uniform assessments was an essential component of the invitation for funding. The invitation specifically required that applicants "ensure that the summative assessment components of the assessment system (in both mathematics and English language arts) ***will be fully implemented statewide in each State in the consortium no later than the 2014-2015 school year***." 75 Fed. Reg. 18171, 18171 (April 9, 2010) (emphasis added). The

invitation further provided that "[a]n eligible applicant awarded a grant under this category must . . . Ensure that the summative assessment components of the assessment system in both mathematics and English language arts are fully implemented statewide by each State in the consortium no later than the 2014-2015 school year." *Id.* at 18175; *see also id.* at 18176-77. The RTTT invitation further explained that "[i]t is the expectation of the Department that States that adopt assessment systems developed with [RTTT] grants will use assessments in these systems to meet the assessment requirements in Title I of the ESEA." *Id.* at 18171-72. SBAC implemented this requirement by requiring all member States—including the State of South Dakota—to agree to "[f]ully implement statewide the Consortium summative assessment in grades 3-8 and high school for both mathematics and English language arts no later than the 2014-2015 school year." Complaint, Ex. 1, at 3.

7. Undisputed.

8. Undisputed.

9. Undisputed, except to the extent that the reference to "separate, state-specific MOUs" suggests that SBAC consists of a set of unrelated bilateral agreements between individual States and the University of California. *See* Pl. Mem. in Opp. to Mot. to Dismiss, at 2-3.

10. Undisputed that UCLA succeeded the State of Washington as the fiscal agent of SBAC. Disputed that "[t]he University of California-Los Angeles (UCLA) agreed to provide assessment Products and Services under the moniker 'Smarter Balanced.'" Pursuant to the 2014 MOUA, Smarter Balanced, or SBAC, is an entity separate and distinct from UCLA. UCLA does not operate "under the moniker 'Smarter Balanced.'" SBAC is composed of its "Members,"

which "means, collectively, every state, commonwealth or United States territory that enters into a memorandum of understanding and agreement with UC for participation in SB." Complaint, Ex. 10, at ¶ 1.16. The MOUA creates an elaborate governance structure under the control of member States, independent of the University of California. *See, e.g.*, *id.*, ¶¶ 1.9, 1.10. Governance of SBAC is vested in the Governing Board, which consists of member States. *Id.*, ¶¶ 3.1, 3.2, 3.3. The University of California is not a member of the Governing Board and is not bound by the Governing Board Procedures. *Id.*, ¶ 3.3. The University's employees and agents are not agents of SBAC. *Id.*, ¶ 3.7. The University's role is simply to serve as the "fiscal and administrative agent" for SBAC, while SBAC continues to exist as a separate entity composed of member States. *Id.*, Recital A. Each MOUA expressly provides that the University of California "will have no formal input regarding, and no responsibility for (and UC expressly disclaims any and all such responsibility or liability), the Governing Board Procedures or their implementation." *Id.* ¶ 3.3. Unlike the member States, the University of California is "not a party to the Governing Board Procedures and will not be bound in any way by the Governing Board Procedures." *Id.* In drafting Governing Board Procedures, the member States are explicitly authorized to supersede the individual MOUAs between the University and each member State. *Id.* ¶ 1.11. The MOUA describes SBAC as "a state-led enterprise" that is "subject to the direction of the Governing Board," not the University. *Id.* Recitals A, E. The decisions of the Governing Board, which consists of member States, are binding on other member States, not on the University. Complaint, Ex. 11, at 5. Further, it is disputed that the University of California has "assumed the assets and contracts held by SBAC." The 2014

MOUA clearly specifies that UC merely holds these assets and contracts "on behalf of and solely for the benefit of" SBAC and its Members. *See id.* ¶¶ 4.1(b); 4.1(d).

11. Undisputed that "Secretary Melody Schopp signed the UC-MOU on behalf of SD DOE." Undisputed that SBAC relocated its offices to UCLA. Disputed to the extent that the State contends that SBAC is identical to or a part of UCLA. As explained in ¶ 10 above, SBAC is an entity distinct and separate from UCLA.

12. Undisputed. For purposes of clarification, Plaintiffs note that when the State asserts that AIR "deliver[s] the assessments," the assessments to which the State refers are assessments created by SBAC. *See* Complaint, Ex. 10, ¶¶ 1.1, 5.6(d).

13. Undisputed that "[p]ursuant to the UC-MOU, states signing similar MOUs became members of a Governing Board." Disputed that the Governing Board's functions are limited to "provid[ing] administrative support and guidance to UC regarding the creation of the educational assessments and tools produced by UC and provided to the individual states." The Governing Board manages and oversees *SBAC* as well as the University's actions as an agent of SBAC. Complaint, Ex. 10, ¶¶ 3.1, 3.2, 3.7. Disputed that the "Governing Board Procedures have been adopted to inform UC regarding policy and administrative procedures." The Governing Board Procedures are specifically intended to bind member States—including the State of South Dakota—to their contents, which go far beyond mere administrative procedures. *See* Complaint, Ex. 10 ¶ 3.1 ("By entering into this MOU, ***Member is agreeing to be bound by the Governing Board Procedures*** . . . ."); Complaint, Ex. 11 (Governing Board Procedures). For example, as described in their Reply in Support of Summary Judgment, the Governing Board

Procedures purportedly require the State to administer educational assessments created by SBAC. *See* Complaint, Ex. 10, ¶ 3.1; Complaint, Ex. 11, at 4.

14. Undisputed that "[i]n practice, states that are members of the Governing Board contract with a separate vendor for the delivery of the assessment to their students." For purposes of clarification, Plaintiffs note that when the State asserts that AIR "deliver[s] the assessments," the assessments to which the State refers are assessments created by SBAC. *See* Complaint, Ex. 10, ¶¶ 1.1, 5.6(d). The remainder of ¶ 14 is disputed. The interpretation of the MOUA is a question of law, and the Affidavit of Abby Javurek-Humig constitutes improper extrinsic evidence used to interpret a contract. The MOUA provisions regarding the Governing Board Procedures, as well as the Governing Board Procedures, speak for themselves, and they demonstrate that the Governing Board Procedures plainly go beyond "direction and oversight given to UC regarding the products and services to be offered by UC to the separate states under their individual agreements." *See* Complaint, Ex. 10, ¶¶ 1.12, 3.1, 3.2, 3.3; Complaint, Ex. 11. Moreover, as explained in detail in Plaintiffs' Reply in Support of Summary Judgment, the MOUA and the Governing Board Procedures clearly purport to require the State to administer educational assessments created by SBAC. *See* Complaint, Ex. 10, ¶ 3.1; Complaint, Ex. 11, at 4.

15. Undisputed.

16. Undisputed.

17. Disputed. The quoted language of the 2014 MOUA refers to the relationship between the contracting State and the University of California, not to the relations between the States. Paragraph 3.3 of the 2014 MOUA provides: "In addition, for the avoidance of doubt, UC

will not be a party to the Governing Board Procedures and will not be bound in any way by the Governing Board Procedures, and under no circumstances will the Governing Board Procedures effect any modification to this MOU or ***to the respective obligations of Member and UC to one another hereunder***." Complaint, Ex. 10, ¶ 3.3 (emphasis added). Another provision of the 2014 MOUA provides that the Governing Board Procedures *can* supersede and alter the obligations of Member States *to each other*: "[I]n the event of any conflict between the Governing Board Procedures and this MOU concerning the allocation of authority between the Governing Board and the Executive Committee, ***the Governing Board Procedures will take precedence*** . . . ." *Id.* ¶ 1.11 (emphasis added). Moreover, the 2014 MOUA provides that each state "agree[s] to be bound by the Governing Board Procedures and all other decisions and actions of the Governing Board that are intended by the terms of this MOU to bind Member." *Id.* ¶ 3.1.

18. Undisputed.

19. Undisputed that "[t]he Smarter Balanced assessment is aligned to South Dakota's content standards in English language arts and mathematics." For clarification, "South Dakota's content standards in English language arts and mathematics" are the Common Core State Standards. *See* Plaintiffs' Statement of Undisputed Material Facts, ¶ 3; Defendants' Response to Plaintiffs' Statement of Undisputed Material Facts, ¶ 3. Undisputed that "[t]he Smarter Balanced assessment measures achievement in the applicable content standards." Disputed that the Smarter Balanced assessment "does not dictate the means and methods of instruction of the standards." *See* ¶ 2 *supra*.

20. Undisputed.

21. Undisputed. For purposes of clarification, the "assessments" to which the State refers are assessments created by SBAC. *See* Complaint, Ex. 10, ¶¶ 1.1, 5.6(d).

22. Undisputed.

23. Undisputed that Congress has enacted the Every Student Succeeds Act ("ESSA") to amend and replace in part the No Child Left Behind Act ("NCLB"). Disputed that NCLB "is now" the ESSA. Various aspects of the ESSA become effective at different times. *See* Pub. L. 114-95 (2015) § 5. The relevant portions of the ESSA do not become effect until, at the earliest, July 1, 2016. *Id.* § 5(b); *see also id.*, § 5(e). Thus, nearly all aspects of NCLB remain in effect, and the ESSA will not begin to replace NCLB in any way relevant to this case until, at the earliest, July 1, 2016.

24. Undisputed that the two "options" for the adoption of standards were provided in the ESEA Flexibility documents. Disputed that these do not constitute "safe harbors." Requiring the state to fall into one of two mandatory "options" is equivalent to setting up "safe harbors."

25. Disputed. The language provided does not appear in the ESEA Flexibility documents, and does not accurately paraphrase those documents. The documents speak for themselves. *See* Complaint, Ex. 7, at 17.

Dated this 29th day of March, 2016.

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**Pro hac vice pending*

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United States Constitution, Article I, Section 10

No state shall enter into any treaty, alliance, or confederation; grant letters of marque and reprisal; coin money; emit bills of credit; make anything but gold and silver coin a tender in payment of debts; pass any bill of attainder, ex post facto law, or law impairing the obligation of contracts, or grant any title of nobility.

No state shall, without the consent of the Congress, lay any imposts or duties on imports or exports, except what may be absolutely necessary for executing it's inspection laws: and the net produce of all duties and imposts, laid by any state on imports or exports, shall be for the use of the treasury of the United States; and all such laws shall be subject to the revision and control of the Congress.

No state shall, without the consent of Congress, lay any duty of tonnage, keep troops, or ships of war in time of peace, enter into any agreement or compact with another state, or with a foreign power, or engage in war, unless actually invaded, or in such imminent danger as will not admit of delay.

SDCL 13-3-55

Academic achievement tests. Every public school district shall annually administer the same assessment to all students in grades three to eight, inclusive, and in grade eleven. The assessment shall measure the academic progress of each student. Every public school district shall annually administer to all students in at least two grade levels an achievement test to assess writing skills. The assessment instruments shall be provided by the Department of Education, and the department shall determine the two grade levels to be tested. The tests shall be administered within timelines established by the Department of Education by rules promulgated pursuant to chapter 1-26 starting in the spring of the 2002-2003 school year. Each state-designed test shall be correlated with the state's content standards. The South Dakota Board of Education may promulgate rules pursuant to chapter 1-26 to provide for administration of all assessments.

20 U.S.C. § 1232a

No provision of any applicable program shall be construed to authorize any department, agency, officer, or employee of the United States to exercise any direction, supervision, or control over the curriculum, program of instruction, administration, or personnel of any educational institution, school, or school system, or over the selection of library resources, textbooks, or other printed or published instructional materials by any educational institution or school system, or to require the assignment or transportation of students or teachers in order to overcome racial imbalance.

20 U.S.C. § 3403

(a) Rights of local governments and educational institutions

It is the intention of the Congress in the establishment of the Department to protect the rights of State and local governments and public and private educational institutions in the areas of educational policies and administration of programs and to strengthen and improve the control of such governments and institutions over their own educational programs and policies. The establishment of the Department of Education shall not increase the authority of the Federal Government over education or diminish the responsibility for education which is reserved to the States and the local school systems and other instrumentalities of the States.

(b) Curriculum, administration, and personnel; library resources

No provision of a program administered by the Secretary or by any other officer of the Department shall be construed to authorize the Secretary or any such officer to exercise any direction, supervision, or control over the curriculum, program of instruction, administration, or personnel of any educational institution, school, or school system, over any accrediting agency or association, or over the selection or content of library resources, textbooks, or other instructional materials by any educational institution or school system, except to the extent authorized by law.

(c) Funding under pre-existing programs

The Secretary shall not, during the period within eight months after May 4, 1980, take any action to withhold, suspend, or terminate funds under any program transferred by this chapter by reason of the failure of any State to comply with any applicable law requiring the administration of such a program through a single organizational unit.

20 U.S.C. § 7907

(a) General prohibition

Nothing in this chapter shall be construed to authorize an officer or employee of the Federal Government, including through a grant, contract, or cooperative agreement, to mandate, direct, or control a State, local educational agency, or school's curriculum, program of instruction, or allocation of State or local resources, or mandate a State or any subdivision thereof to spend any funds or incur any costs not paid for under this chapter.

(b) Prohibition on endorsement of curriculum

Notwithstanding any other provision of Federal law, no funds provided to the Department under this chapter may be used by the Department, whether through a grant, contract, or cooperative agreement, to endorse, approve, develop, require, or sanction any curriculum, including any curriculum aligned to the Common Core State Standards developed under the Common Core State

Standards Initiative or any other academic standards common to a significant number of States, designed to be used in an elementary school or secondary school.

(c) Local control

Nothing in this section shall be construed to--

(1) authorize an officer or employee of the Federal Government, whether through a grant, contract, or cooperative agreement to mandate, direct, review, or control a State, local educational agency, or school's instructional content, curriculum, and related activities;

(2) limit the application of the General Education Provisions Act (20 U.S.C. 1221 et seq.);

(3) require the distribution of scientifically or medically false or inaccurate materials or to prohibit the distribution of scientifically or medically true or accurate materials; or

(4) create any legally enforceable right.

(d) Prohibition on requiring Federal approval or certification of standards

(1) In general

Notwithstanding any other provision of Federal law, no State shall be required to have academic standards approved or certified by the Federal Government, in order to receive assistance under this chapter.

(2) Rule of construction

Nothing in this chapter shall be construed to prohibit a State, local educational agency, or school from using funds provided under this chapter for the development or implementation of any instructional content, academic standards, academic assessments, curriculum, or program of instruction that a State, local educational agency, or school chooses, as permitted under State and local law, as long as the use of such funds is consistent with the terms of the grant, contract, or cooperative agreement providing such funds.

(3) Building standards

Nothing in this chapter shall be construed to mandate national school building standards for a State, local educational agency, or school.

Federal Register

Wednesday,
November 18, 2009

Part IV

Department of Education

Overview Information; Race to the Top Fund; Notice Inviting Applications for New Awards for Fiscal Year (FY) 2010; Notice

DEPARTMENT OF EDUCATION

Overview Information; Race to the Top Fund; Notice Inviting Applications for New Awards for Fiscal Year (FY) 2010

Catalog of Federal Domestic Assistance (CFDA) Number: 84.395A.

DATES: *Applications Available:* November 18, 2009.

Deadline for Notice of Intent to Apply for Phase 1: December 8, 2009.

Date of Meeting for Potential Applicants: The Department intends to hold two technical assistance planning workshops. The first will be in Denver, Colorado, on December 3, 2009. The second will be in the Washington, DC area on December 10, 2009. We recommend that applicants attend one of these two workshops.

Deadlines for Transmittal of Applications:

Phase 1. Applications: January 19, 2010.

Phase 2 Applications: June 1, 2010. Phase 2 applicants addressing selection criterion (B)(1)(ii)(b) may amend their June 1, 2010 application submission through August 2, 2010 by submitting evidence of having adopted common standards after June 1, 2010. No other information may be submitted after June 1, 2010 in an amended application.

Deadlines for Intergovernmental Review:

Phase 1 Applications: March 18, 2010.

Phase 2 Applications: August 2, 2010.

Full Text of Announcement

I. Funding Opportunity Description

Purpose of Program: The purpose of the Race to the Top Fund, a competitive grant program authorized under the American Recovery and Reinvestment Act of 2009 (ARRA), is to encourage and reward States that are creating the conditions for education innovation and reform; achieving significant improvement in student outcomes, including making substantial gains in student achievement, closing achievement gaps, improving high school graduation rates, and ensuring student preparation for success in college and careers; and implementing ambitious plans in four core education reform areas:

(a) Adopting internationally-benchmarked standards and assessments that prepare students for success in college and the workplace;

(b) Building data systems that measure student success and inform teachers and principals in how they can improve their practices;

(c) Increasing teacher effectiveness and achieving equity in teacher distribution; and

(d) Turning around our lowest-achieving schools.

Priorities: These priorities are from the notice of final priorities, requirements, definitions, and selection criteria for this program, published elsewhere in this issue of the **Federal Register**.

Absolute Priority: For FY 2010, this priority is an absolute priority. Under 34 CFR 75.105(c)(3), we consider only applications that meet this priority. Applicants should address this priority throughout their applications.

Priority 1: Absolute Priority—Comprehensive Approach to Education Reform.

To meet this priority, the State's application must comprehensively and coherently address all of the four education reform areas specified in the ARRA as well as the State Success Factors Criteria in order to demonstrate that the State and its participating LEAs are taking a systemic approach to education reform. The State must demonstrate in its application sufficient LEA participation and commitment to successfully implement and achieve the goals in its plans; and it must describe how the State, in collaboration with its participating LEAs, will use Race to the Top and other funds to increase student achievement, decrease the achievement gaps across student subgroups, and increase the rates at which students graduate from high school prepared for college and careers.

Competitive Preference Priority: For FY 2010, this priority is a competitive preference priority. Under 34 CFR 75.105(c)(2)(i), we award 15 additional points to applications that meet this priority. Applicants should address this priority throughout their applications.

Priority 2: Competitive Preference Priority—Emphasis on Science, Technology, Engineering, and Mathematics (STEM).

To meet this priority, the State's application must have a high-quality plan to address the need to (i) offer a rigorous course of study in mathematics, the sciences, technology, and engineering; (ii) cooperate with industry experts, museums, universities, research centers, or other STEM-capable community partners to prepare and assist teachers in integrating STEM content across grades and disciplines, in promoting effective and relevant instruction, and in offering applied learning opportunities for students; and (iii) prepare more students for advanced study and careers in the sciences, technology, engineering, and mathematics, including by addressing the needs of underrepresented groups and of women and girls in the areas of science, technology, engineering, and mathematics.

Invitational Priorities: For FY 2010, these priorities are invitational priorities. With an invitational priority, we signal our interest in receiving applications that meet the priority; however, consistent with 34 CFR 75.105(c)(1), we do not give an application that meets an invitational priority preference over other applications.

Priority 3: Invitational Priority—Innovations for Improving Early Learning Outcomes.

The Secretary is particularly interested in applications that include practices, strategies, or programs to improve educational outcomes for high-need students who are young children (pre-kindergarten through third grade) by enhancing the quality of preschool programs. Of particular interest are proposals that support practices that (i) improve school readiness (including social, emotional, and cognitive); and (ii) improve the transition between preschool and kindergarten.

Priority 4: Invitational Priority—Expansion and Adaptation of Statewide Longitudinal Data Systems.

The Secretary is particularly interested in applications in which the State plans to expand statewide longitudinal data systems to include or integrate data from special education programs, English language learner programs,[1] early childhood programs, at-risk and dropout prevention programs, and school climate and culture programs, as well as information on student mobility, human resources (*i.e.*, information on teachers, principals, and other staff), school finance, student health, postsecondary education, and other relevant areas, with the purpose of connecting and coordinating all parts of the system to allow important questions related to policy, practice, or overall effectiveness to be asked, answered, and incorporated into effective continuous improvement practices.

The Secretary is also particularly interested in applications in which States propose working together to adapt one State's statewide longitudinal data system so that it may be used, in whole or in part, by one or more other States, rather than having each State build or continue building such systems independently.

Priority 5: Invitational Priority—P–20 Coordination, Vertical and Horizontal Alignment.

[1] The term English language learner, as used in this notice, is synonymous with the term limited English proficient, as defined in section 9101 of the ESEA.

The Secretary is particularly interested in applications in which the State plans to address how early childhood programs, K–12 schools, postsecondary institutions, workforce development organizations, and other State agencies and community partners (*e.g.*, child welfare, juvenile justice, and criminal justice agencies) will coordinate to improve all parts of the education system and create a more seamless preschool-through-graduate school (P–20) route for students. Vertical alignment across P–20 is particularly critical at each point where a transition occurs (*e.g.*, between early childhood and K–12, or between K–12 and postsecondary/careers) to ensure that students exiting one level are prepared for success, without remediation, in the next. Horizontal alignment, that is, coordination of services across schools, State agencies, and community partners, is also important in ensuring that high-need students (as defined in this notice) have access to the broad array of opportunities and services they need and that are beyond the capacity of a school itself to provide.

Priority 6: Invitational Priority—School-Level Conditions for Reform, Innovation, and Learning.

The Secretary is particularly interested in applications in which the State's participating LEAs (as defined in this notice) seek to create the conditions for reform and innovation as well as the conditions for learning by providing schools with flexibility and autonomy in such areas as—

(i) Selecting staff;

(ii) Implementing new structures and formats for the school day or year that result in increased learning time (as defined in this notice);

(iii) Controlling the school's budget;

(iv) Awarding credit to students based on student performance instead of instructional time;

(v) Providing comprehensive services to high-need students (as defined in this notice) (*e.g.,* by mentors and other caring adults; through local partnerships with community-based organizations, nonprofit organizations, and other providers);

(vi) Creating school climates and cultures that remove obstacles to, and actively support, student engagement and achievement; and

(vii) Implementing strategies to effectively engage families and communities in supporting the academic success of their students.

Final Requirements: The following requirements are from the notice of final priorities, requirements, definitions, and selection criteria, published elsewhere in this issue of the **Federal Register**.

Application Requirements:

(a) The State's application must be signed by the Governor, the State's chief school officer, and the president of the State board of education (if applicable). States will respond to this requirement in the application, Section III, Race to the Top Application Assurances. In addition, the assurances in Section IV must be signed by the Governor.

(b) The State must describe the progress it has made over the past several years in each of the four education reform areas (as described in criterion (A)(3)(i)).

(c) The State must include a budget that details how it will use grant funds and other resources to meet targets and perform related functions (as described in criterion (A)(2)(i)(d)), including how it will use funds awarded under this program to—

(1) Achieve its targets for improving student achievement and graduation rates and for closing achievement gaps (as described in criterion (A)(1)(iii)); the State must also describe its track record of improving student progress overall and by student subgroup (as described in criterion (A)(3)(ii)); and

(2) Give priority to high-need LEAs (as defined in this notice), in addition to providing 50 percent of the grant to participating LEAs (as defined in this notice) based on their relative shares of funding under Part A of Title I of the Elementary and Secondary Education Act of 1965 (ESEA) for the most recent year as required under section 14006(c) of the ARRA. (**Note:** Because all Race to the Top grants will be made in 2010, relative shares will be based on total funding received in FY 2009, including both the regular Title I, Part A appropriation and the amount made available by the ARRA).

(d) The State must provide, for each State Reform Conditions Criterion (listed in this notice) that it chooses to address, a description of the State's current status in meeting that criterion and, at a minimum, the information requested as supporting evidence for the criterion and the performance measures, if any (*see* Appendix A).

(e) The State must provide, for each Reform Plan Criterion (listed in this notice) that it chooses to address, a detailed plan for use of grant funds that includes, but need not be limited to—

(1) The key goals;

(2) The key activities to be undertaken and rationale for the activities, which should include why the specific activities are thought to bring about the change envisioned and how these activities are linked to the key goals;

(3) The timeline for implementing the activities;

(4) The party or parties responsible for implementing the activities;

(5) The information requested in the performance measures, where applicable (*see* Appendix A), and where the State proposes plans for reform efforts not covered by a specified performance measure, the State is encouraged to propose performance measures and annual targets for those efforts; and

(6) The information requested as supporting evidence, if any, for the criterion, together with any additional information the State believes will be helpful to peer reviewers in judging the credibility of the State's plan.

(f) The State must submit a certification from the State Attorney General that—

(1) The State's description of, and statements and conclusions concerning State law, statute, and regulation in its application are complete, accurate, and constitute a reasonable interpretation of State law, statute, and regulation; and

(2) At the time the State submits its application, the State does not have any legal, statutory, or regulatory barriers at the State level to linking data on student achievement or student growth to teachers and principals for the purpose of teacher and principal evaluation.

(g) When addressing issues relating to assessments required under the ESEA or subgroups in the selection criteria, the State must meet the following requirements:

(1) For student subgroups with respect to the National Assessment of Educational Progress (NAEP), the State must provide data for the NAEP subgroups described in section 303(b)(2)(G) of the National Assessment of Educational Progress Authorization Act (20 U.S.C. 9622) (*i.e.,* race, ethnicity, socioeconomic status, gender, disability, and limited English proficiency). The State must also include the NAEP exclusion rate for students with disabilities and the exclusion rate for English language learners, along with clear documentation of the State's policies and practices for determining whether a student with a disability or an English language learner should participate in the NAEP and whether the student needs accommodations;

(2) For student subgroups with respect to high school graduation rates, college enrollment and credit accumulation rates, and the assessments required under the ESEA, the State must provide data for the subgroups described in section 1111(b)(2)(C)(v)(II) of the ESEA (*i.e.,* economically

disadvantaged students, students from major racial and ethnic groups, students with disabilities, and students with limited English proficiency); and

(3) When asked to provide information regarding the assessments required under the ESEA, States should refer to section 1111(b)(3) of the ESEA; in addition, when describing this assessment data in the State's application, the State should note any factors (*e.g.,* changes in cut scores) that would impact the comparability of data from one year to the next.

Program Requirements:

Evaluation: The Institute of Education Sciences (IES) will conduct a series of national evaluations of Race to the Top's State grantees as part of its evaluation of programs funded under the ARRA. The Department's goal for these evaluations is to ensure that its studies not only assess program impacts, but also provide valuable information to State and local educators to help inform and improve their practices.

The Department anticipates that the national evaluations will involve such components as—

- Surveys of States, LEAs, and/or schools, which will help identify how program funding is spent and the specific efforts and activities that are underway within each of the four education reform areas and across selected ARRA-funded programs;
- Case studies of promising practices in States, LEAs, and/or schools through surveys and other mechanisms; and
- Evaluations of outcomes, focusing on student achievement and other performance measures, to determine the impact of the reforms implemented under Race to the Top.

Race to the Top grantee States are not required to conduct independent evaluations, but may propose, within their applications, to use funds from Race to the Top to support such evaluations. Grantees must make available, through formal (*e.g.,* peer-reviewed journals) or informal (*e.g.,* newsletters, Web sites) mechanisms, the results of any evaluations they conduct of their funded activities. In addition, as described elsewhere in this notice and regardless of the final components of the national evaluation, Race to the Top States, LEAs, and schools are expected to identify and share promising practices, make work available within and across States, and make data available in appropriate ways to stakeholders and researchers so as to help all States focus on continuous improvement in service of student outcomes.

Participating LEAs Scope of Work: The agreements signed by participating LEAs (as defined in this notice) must include a scope-of-work section. The scope of work submitted by LEAs and States as part of their Race to the Top applications will be preliminary. Preliminary scopes of work should include the portions of the State's proposed reform plans that the LEA is agreeing to implement. If a State is awarded a Race to the Top grant, its participating LEAs (as defined in this notice) will have up to 90 days to complete final scopes of work, which must contain detailed work plans that are consistent with their preliminary scopes of work and with the State's grant application, and should include the participating LEAs' specific goals, activities, timelines, budgets, key personnel, and annual targets for key performance measures.

Making Work Available: Unless otherwise protected by law or agreement as proprietary information, the State and its subgrantees must make any work (*e.g.,* materials, tools, processes, systems) developed under its grant freely available to others, including but not limited to by posting the work on a Web site identified or sponsored by the Department.

Technical Assistance: The State must participate in applicable technical assistance activities that may be conducted by the Department or its designees.

State Summative Assessments: No funds awarded under this competition may be used to pay for costs related to statewide summative assessments.

Program Definitions: These definitions are from the notice of final priorities, requirements, definitions, and selection criteria for this program, published elsewhere in this issue of the **Federal Register.**

Alternative routes to certification means pathways to certification that are authorized under the State's laws or regulations, that allow the establishment and operation of teacher and administrator preparation programs in the State, and that have the following characteristics (in addition to standard features such as demonstration of subject-matter mastery, and high-quality instruction in pedagogy and in addressing the needs of all students in the classroom including English language learners and student with disabilities): (a) Can be provided by various types of qualified providers, including both institutions of higher education and other providers operating independently from institutions of higher education; (b) are selective in accepting candidates; (c) provide supervised, school-based experiences and ongoing support such as effective mentoring and coaching; (d) significantly limit the amount of coursework required or have options to test out of courses; and (e) upon completion, award the same level of certification that traditional preparation programs award upon completion.

College enrollment refers to the enrollment of students who graduate from high school consistent with 34 CFR 200.19(b)(1) and who enroll in an institution of higher education (as defined in section 101 of the Higher Education Act, Public Law 105–244, 20 U.S.C. 1001) within 16 months of graduation.

Common set of K–12 standards means a set of content standards that define what students must know and be able to do and that are substantially identical across all States in a consortium. A State may supplement the common standards with additional standards, provided that the additional standards do not exceed 15 percent of the State's total standards for that content area.

Effective principal means a principal whose students, overall and for each subgroup, achieve acceptable rates (*e.g.,* at least one grade level in an academic year) of student growth (as defined in this notice). States, LEAs, or schools must include multiple measures, provided that principal effectiveness is evaluated, in significant part, by student growth (as defined in this notice). Supplemental measures may include, for example, high school graduation rates and college enrollment rates, as well as evidence of providing supportive teaching and learning conditions, strong instructional leadership, and positive family and community engagement.

Effective teacher means a teacher whose students achieve acceptable rates (*e.g.,* at least one grade level in an academic year) of student growth (as defined in this notice). States, LEAs, or schools must include multiple measures, provided that teacher effectiveness is evaluated, in significant part, by student growth (as defined in this notice). Supplemental measures may include, for example, multiple observation-based assessments of teacher performance.

Formative assessment means assessment questions, tools, and processes that are embedded in instruction and are used by teachers and students to provide timely feedback for purposes of adjusting instruction to improve learning.

Graduation rate means the four-year or extended-year adjusted cohort graduation rate as defined by 34 CFR 200.19(b)(1).

Highly effective principal means a principal whose students, overall and for each subgroup, achieve high rates (*e.g.,* one and one-half grade levels in an academic year) of student growth (as defined in this notice). States, LEAs, or schools must include multiple measures, provided that principal effectiveness is evaluated, in significant part, by student growth (as defined in this notice). Supplemental measures may include, for example, high school graduation rates; college enrollment rates; evidence of providing supportive teaching and learning conditions, strong instructional leadership, and positive family and community engagement; or evidence of attracting, developing, and retaining high numbers of effective teachers.

Highly effective teacher means a teacher whose students achieve high rates (*e.g.,* one and one-half grade levels in an academic year) of student growth (as defined in this notice). States, LEAs, or schools must include multiple measures, provided that teacher effectiveness is evaluated, in significant part, by student growth (as defined in this notice). Supplemental measures may include, for example, multiple observation-based assessments of teacher performance or evidence of leadership roles (which may include mentoring or leading professional learning communities) that increase the effectiveness of other teachers in the school or LEA.

High-minority school is defined by the State in a manner consistent with its Teacher Equity Plan. The State should provide, in its Race to the Top application, the definition used.

High-need LEA means an LEA (a) that serves not fewer than 10,000 children from families with incomes below the poverty line; or (b) for which not less than 20 percent of the children served by the LEA are from families with incomes below the poverty line.

High-need students means students at risk of educational failure or otherwise in need of special assistance and support, such as students who are living in poverty, who attend high-minority schools (as defined in this notice), who are far below grade level, who have left school before receiving a regular high school diploma, who are at risk of not graduating with a diploma on time, who are homeless, who are in foster care, who have been incarcerated, who have disabilities, or who are English language learners.

High-performing charter school means a charter school that has been in operation for at least three consecutive years and has demonstrated overall success, including (a) substantial progress in improving student achievement (as defined in this notice); and (b) the management and leadership necessary to overcome initial start-up problems and establish a thriving, financially viable charter school.

High-poverty school means, consistent with section 1111(h)(1)(C)(viii) of the ESEA, a school in the highest quartile of schools in the State with respect to poverty level, using a measure of poverty determined by the State.

High-quality assessment means an assessment designed to measure a student's knowledge, understanding of, and ability to apply, critical concepts through the use of a variety of item types and formats (*e.g.,* open-ended responses, performance-based tasks). Such assessments should enable measurement of student achievement (as defined in this notice) and student growth (as defined in this notice); be of high technical quality (*e.g.,* be valid, reliable, fair, and aligned to standards); incorporate technology where appropriate; include the assessment of students with disabilities and English language learners; and to the extent feasible, use universal design principles (as defined in section 3 of the Assistive Technology Act of 1998, as amended, 29 U.S.C. 3002) in development and administration.

Increased learning time means using a longer school day, week, or year schedule to significantly increase the total number of school hours to include additional time for (a) instruction in core academic subjects, including English; reading or language arts; mathematics; science; foreign languages; civics and government; economics; arts; history; and geography; (b) instruction in other subjects and enrichment activities that contribute to a well-rounded education, including, for example, physical education, service learning, and experiential and work-based learning opportunities that are provided by partnering, as appropriate, with other organizations; and (c) teachers to collaborate, plan, and engage in professional development within and across grades and subjects.[2]

Innovative, autonomous public schools means open enrollment public schools that, in return for increased accountability for student achievement (as defined in this notice), have the flexibility and authority to define their instructional models and associated curriculum; select and replace staff; implement new structures and formats for the school day or year; and control their budgets.

Instructional improvement systems means technology-based tools and other strategies that provide teachers, principals, and administrators with meaningful support and actionable data to systemically manage continuous instructional improvement, including such activities as: instructional planning; gathering information (*e.g.,* through formative assessments (as defined in this notice), interim assessments (as defined in this notice), summative assessments, and looking at student work and other student data); analyzing information with the support of rapid-time (as defined in this notice) reporting; using this information to inform decisions on appropriate next instructional steps; and evaluating the effectiveness of the actions taken. Such systems promote collaborative problem-solving and action planning; they may also integrate instructional data with student-level data such as attendance, discipline, grades, credit accumulation, and student survey results to provide early warning indicators of a student's risk of educational failure.

Interim assessment means an assessment that is given at regular and specified intervals throughout the school year, is designed to evaluate students' knowledge and skills relative to a specific set of academic standards, and produces results that can be aggregated (*e.g.,* by course, grade level, school, or LEA) in order to inform teachers and administrators at the student, classroom, school, and LEA levels.

Involved LEAs means LEAs that choose to work with the State to implement those specific portions of the State's plan that necessitate full or nearly-full statewide implementation, such as transitioning to a common set of K–12 standards (as defined in this notice). Involved LEAs do not receive a share of the 50 percent of a State's grant award that it must subgrant to LEAs in accordance with section 14006(c) of the

[2] Research supports the effectiveness of well-designed programs that expand learning time by a minimum of 300 hours per school year. (See Frazier, Julie A.; Morrison, Frederick J. ''The Influence of Extended-year Schooling on Growth of Achievement and Perceived Competence in Early Elementary School.'' Child Development. Vol. 69 (2), April 1998, pp.495–497 and research done by Mass2020.) Extending learning into before- and after-school hours can be difficult to implement effectively, but is permissible under this definition with encouragement to closely integrate and coordinate academic work between in-school and out-of school. (See James-Burdumy, Susanne; Dynarski, Mark; Deke, John. ''*When Elementary Schools Stay Open Late:* Results from The National Evaluation of the 21st Century Community Learning Centers Program.'' *http://www.mathematica-mpr.com/publications/redirect_PubsDB.asp?strSite=http://epa.sagepub.com/cgi/content/abstract/29/4/296* Educational Evaluation and Policy Analysis, Vol. 29 (4), December 2007, Document No. PP07–121.)

ARRA, but States may provide other funding to involved LEAs under the State's Race to the Top grant in a manner that is consistent with the State's application.

Low-minority school is defined by the State in a manner consistent with its Teacher Equity Plan. The State should provide, in its Race to the Top application, the definition used.

Low-poverty school means, consistent with section 1111(h)(1)(C)(viii) of the ESEA, a school in the lowest quartile of schools in the State with respect to poverty level, using a measure of poverty determined by the State.

Participating LEAs means LEAs that choose to work with the State to implement all or significant portions of the State's Race to the Top plan, as specified in each LEA's agreement with the State. Each participating LEA that receives funding under Title I, Part A will receive a share of the 50 percent of a State's grant award that the State must subgrant to LEAs, based on the LEA's relative share of Title I, Part A allocations in the most recent year, in accordance with section 14006(c) of the ARRA. Any participating LEA that does not receive funding under Title I, Part A (as well as one that does) may receive funding from the State's other 50 percent of the grant award, in accordance with the State's plan.

Persistently lowest-achieving schools means, as determined by the State: (i) Any Title I school in improvement, corrective action, or restructuring that (a) Is among the lowest-achieving five percent of Title I schools in improvement, corrective action, or restructuring or the lowest-achieving five Title I schools in improvement, corrective action, or restructuring in the State, whichever number of schools is greater; or (b) Is a high school that has had a graduation rate as defined in 34 CFR 200.19(b) that is less than 60 percent over a number of years; and (ii) Any secondary school that is eligible for, but does not receive, Title I funds that (a) Is among the lowest-achieving five percent of secondary schools or the lowest-achieving five secondary schools in the State that are eligible for, but do not receive, Title I funds, whichever number of schools is greater; or (b) Is a high school that has had a graduation rate as defined in 34 CFR 200.19(b) that is less than 60 percent over a number of years.

To identify the lowest-achieving schools, a State must take into account both (i) The academic achievement of the ''all students'' group in a school in terms of proficiency on the State's assessments under section 1111(b)(3) of the ESEA in reading/language arts and mathematics combined; and (ii) The school's lack of progress on those assessments over a number of years in the ''all students'' group.

Rapid-time, in reference to reporting and availability of locally-collected school- and LEA-level data, means that data are available quickly enough to inform current lessons, instruction, and related supports.

Student achievement means—

(a) For tested grades and subjects: (1) A student's score on the State's assessments under the ESEA; and, as appropriate, (2) other measures of student learning, such as those described in paragraph (b) of this definition, provided they are rigorous and comparable across classrooms.

(b) For non-tested grades and subjects: Alternative measures of student learning and performance such as student scores on pre-tests and end-of-course tests; student performance on English language proficiency assessments; and other measures of student achievement that are rigorous and comparable across classrooms.

Student growth means the change in student achievement (as defined in this notice) for an individual student between two or more points in time. A State may also include other measures that are rigorous and comparable across classrooms.

Total revenues available to the State means either (a) projected or actual total State revenues for education and other purposes for the relevant year; or (b) projected or actual total State appropriations for education and other purposes for the relevant year.

America COMPETES Act elements means (as specified in section 6401(e)(2)(D) of that Act): (1) A unique statewide student identifier that does not permit a student to be individually identified by users of the system; (2) student-level enrollment, demographic, and program participation information; (3) student-level information about the points at which students exit, transfer in, transfer out, drop out, or complete P–16 education programs; (4) the capacity to communicate with higher education data systems; (5) a State data audit system assessing data quality, validity, and reliability; (6) yearly test records of individual students with respect to assessments under section 1111(b) of the ESEA (20 U.S.C. 6311(b)); (7) information on students not tested by grade and subject; (8) a teacher identifier system with the ability to match teachers to students; (9) student-level transcript information, including information on courses completed and grades earned; (10) student-level college readiness test scores; (11) information regarding the extent to which students transition successfully from secondary school to postsecondary education, including whether students enroll in remedial coursework; and (12) other information determined necessary to address alignment and adequate preparation for success in postsecondary education.

Program Authority: American Recovery and Reinvestment Act of 2009, Division A, Section 14006, Public Law 111–5.

Applicable Regulations: (a) The Education Department General Administrative Regulations (EDGAR) in 34 CFR parts 74, 75, 77, 79, 80, 81, 82, 84, 85, 86, 97, 98, and 99. (b) The notice of final priorities, requirements, definitions, and selection criteria, published elsewhere in this issue of the **Federal Register.**

II. Award Information

Type of Award: Discretionary grant.

Estimated Available Funds: $4 billion to be awarded in two Phases.

Estimated Range of Awards: $20 million—$700 million.

Note: The Department is not bound by any estimates in this notice. The Department will decide on the size of each State's award based on a detailed review of the budget the State requests, considering such factors as the size of the State, level of LEA participation, and the proposed activities.

Project Period: Up to 48 months.

Budget Guidance: States are encouraged to develop budgets that match the needs they have outlined in their applications.

To support States in planning their budgets, the Department has developed nonbinding budget ranges for each State; these are listed below. These ranges may be used as rough blueprints to guide States as they think through their budgets, but States may prepare budgets that are above or below the ranges specified. The categories were developed by ranking every State according to its share of the national population of children ages 5 through 17, and identifying the natural breaks. Then, based on population, overlapping budget ranges were developed for each category.

Category 1—$350–700 million: California, Texas, New York, Florida.

Category 2—$200–400 million: Illinois, Pennsylvania, Ohio, Georgia, Michigan, North Carolina, New Jersey.

Category 3—$150–250 million: Virginia, Arizona, Indiana, Washington, Tennessee, Massachusetts, Missouri, Maryland, Wisconsin.

Category 4—$60–175 million: Minnesota, Colorado, Alabama, Louisiana, South Carolina, Puerto Rico,

Kentucky, Oklahoma, Oregon, Connecticut, Utah, Mississippi, Iowa, Arkansas, Kansas, Nevada.

Category 5—$20–75 million: New Mexico, Nebraska, Idaho, West Virginia, New Hampshire, Maine, Hawaii, Rhode Island, Montana, Delaware, South Dakota, Alaska, North Dakota, Vermont, Wyoming, District of Columbia.

III. Eligibility Information

1. *Eligible Applicants:* Eligible applicants are the 50 States, the District of Columbia, and Puerto Rico (referred to in this notice as State).

A State must meet the following requirements in order to be eligible to receive funds under this program.

(a) The State's applications for funding under Phase 1 and Phase 2 of the State Fiscal Stabilization Fund program must be approved by the Department prior to the State being awarded a Race to the Top grant.

(b) At the time the State submits its application, there must not be any legal, statutory, or regulatory barriers at the State level to linking data on student achievement (as defined in this notice) or student growth (as defined in this notice) to teachers and principals for the purpose of teacher and principal evaluation.

2. *Cost Sharing or Matching:* This program does not require cost sharing or matching.

IV. Application and Submission Information

1. *Address to Request Application Package:*

You can obtain an application package via the Internet or from the Education Publications Center (ED Pubs). To obtain a copy via the Internet, use the following address: *http://www.ed.gov/programs/racetothetop/index.html.* To obtain a copy from ED Pubs, write, fax, or call the following: Education Publications Center, P.O. Box 1398, Jessup, MD 20794–1398. Telephone, toll free: 1–877–433–7827. FAX: (301) 470–1244. If you use a telecommunications device for the deaf (TDD), call, toll free: 1–877–576–7734.

You can also contact ED Pubs at its Web site: *http://www.ed.gov/pubs/edpubs.html* or at its e-mail address: *edpubs@inet.ed.gov.*

If you request an application from ED Pubs, be sure to identify this program or competition as follows: CFDA 84.395A.

Individuals with disabilities can obtain a copy of the application package in an accessible format (*e.g.,* braille, large print, audiotape, or computer diskette) by contacting the person listed under **FOR FURTHER INFORMATION CONTACT** in section VII of this notice.

2. *Content and Form of Application Submission:* Requirements concerning the content of the application, together with the forms States must submit, are in the application package for this competition.

Page Limit: The application narrative (Section VI) is where the applicant addresses the selection criteria that reviewers use to evaluate applications. The Department recommends that applicants limit their narrative responses in Section VI of the application to no more than 100 pages of State-authored text, and limit their appendices to no more than 250 pages. The following standards are recommended:

- A ''page'' is 8.5″ x 11″, on one side only, with 1″ margins at the top, bottom, and both sides.
- Each page is numbered.
- Line spacing is set to 1.5 spacing, and the font used is 12 point Times New Roman.

3. *Submission Dates and Times:*

Applications Available: November 18, 2009.

Deadline for Notice of Intent to Apply: The Department will be able to develop a more efficient process for reviewing grant applications if we have a better understanding of the number of applications we will receive. Therefore, we strongly encourage each potential applicant to send an e-mail notice of its intent to apply for funding for Phase 1 to the e-mail address *RacetotheTop@ed.gov* by December 8, 2009. The Secretary may issue a deadline for notice of intent to apply for Phase 2 funding at a later time. The notice of intent to apply is optional; States may still submit applications if they have not notified the Department of their intention to apply.

Date of Meeting for Potential Applicants:

To assist States in preparing the application and to respond to questions, the Department intends to host two Technical Assistance Planning Workshops for potential applicants prior to the Phase 1 application submission deadline. The first will be in Denver, Colorado on December 3, 2009. The second will be in the Washington, DC area on December 10, 2009. We recommend that applicants attend one of these two workshops.

The purpose of the workshops would be for Department staff to review the selection criteria, requirements, and priorities with teams of participants responsible for drafting State applications, as well as for Department staff to answer technical questions about the Race to the Top program. The Department plans to release more details regarding the workshops in late November. Updates will be available at the Race to the Top Web site *http://www.ed.gov/programs/racetothetop.* Attendance at the workshops is strongly encouraged. For those who cannot attend, transcripts of the meetings will be available on our Web site. Announcements of any other conference calls or webinars and Frequently Asked Questions will also be available on the Race to the Top Web site.

Deadline for Transmittal of Applications:

Phase 1 Applications: January 19, 2010.

Phase 2 Applications: June 1, 2010. Phase 2 applicants addressing selection criterion (B)(1)(ii)(b) may amend their June 1, 2010 application submissions through August 2, 2010 by submitting evidence of having adopted common standards after June 1, 2010. No other information may be submitted in an amended application after June 1, 2010.

Deadlines for Intergovernmental Review:

Phase 1 Applications: March 18, 2010.

Phase 2 Applications: August 2, 2010.

Applications for grants under this competition, as well as any amendments regarding adoption of common standards that Phase 2 applicants may file after June 1 and through August 2, 2010, must be submitted in electronic format on a CD or DVD, with CD–ROM or DVD–ROM preferred. In addition, States must submit an original and one hard copy of Sections III and IV of the application, which include the Race to the Top Application Assurances and the Accountability, Transparency, Reporting and Other Assurances. E-mailed submissions will not be read. For information (including dates and times) about how to submit your electronic application, please refer to section IV.6, *Other Submission Requirements* in this notice. Evidence, if any, of adoption of common standards submitted after June 1, 2010, but by August 2, 2010, must be submitted using the same submission process described in section IV, *Application and Submission Information* of this notice.

The Department will not consider an application that does not comply with the deadline requirements.

Individuals with disabilities who need an accommodation or auxiliary aid in connection with the application process should contact the person listed under **FOR FURTHER INFORMATION CONTACT** in section VII of this notice. If the Department provides an accommodation or auxiliary aid to an individual with a disability in connection with the application

process, the individual's application remains subject to all other requirements and limitations in this notice.

4. *Intergovernmental Review:* This program is subject to Executive Order 12372 and the regulations in 34 CFR part 79. Information about Intergovernmental Review of Federal Programs under Executive Order 12372 is in the application package for this competition.

5. *Funding Restrictions:* We reference regulations outlining funding restrictions in the *Applicable Regulations* section of this notice.

6. *Other Submission Requirements:* Applications for grants under this competition must be submitted by mail or hand delivery. The Department strongly recommends the use of overnight mail. Applications postmarked on the deadline date but arriving late will not be read.

a. *Application Submission Format and Deadline.* Applications for grants under this competition, as well as any amendments regarding adoption of common standards that Phase 2 applicants may file after June 1 and through August 2, 2010, must be submitted in electronic format on a CD or DVD, with CD–ROM or DVD–ROM preferred. In addition, they must submit a signed original of Sections III and IV of the application and one copy of that signed original. Sections III and IV of the application include the Race to the Top Application Assurances and the Accountability, Transparency, Reporting and Other Assurances.

All electronic application files must be in a .DOC (document), .DOCX (document), .RTF (rich text), or .PDF (Portable Document) format. Each file name should clearly identify the part of the application to which the content is responding. If a State submits a file type other than the four file types specified in this paragraph, the Department will not review that material. States should not password-protect these files.

The CD or DVD should be clearly labeled with the State's name and any other relevant information.

The Department must receive all grant applications by 4:30:00 p.m., Washington, DC time, on the application deadline date. We will not accept an application for this competition after 4:30:00 p.m., Washington, DC time, on the application deadline date. Therefore, we strongly recommend that applicants arrange for mailing or hand delivery of their applications in advance of the application deadline date.

b. *Submission of Applications by Mail.* States may submit their application (*i.e.,* the CD or DVD, the signed original of Sections III and IV of the application, and the copy of that original) by mail (either through the U.S. Postal Service or a commercial carrier). We must receive the applications on or before the application deadline date. Therefore, to avoid delays, we strongly recommend sending applications via overnight mail. Mail applications to the Department at the following address: U.S. Department of Education, Application Control Center, *Attention:* (CFDA Number 84.395A) LBJ Basement Level 1, 400 Maryland Avenue, SW., Washington, DC 20202–4260.

If we receive an application after the application deadline, we will not consider that application.

c. *Submission of Applications by Hand Delivery.* States may submit their application (*i.e.,* the CD or DVD, the signed original of Sections III and IV of the application, and the copy of that original) by hand delivery (including via a courier service). We must receive the applications on or before the application deadline date, at the following address: U.S. Department of Education, Application Control Center, *Attention:* (CFDA Number 84.395A) 550 12th Street, SW., Room 7041, Potomac Center Plaza, Washington, DC 20202–4260.

The Application Control Center accepts hand deliveries daily between 8:00 a.m. and 4:30:00 p.m., Washington, DC time, except Saturdays, Sundays, and Federal holidays. If we receive an application after the application deadline, we will not consider that application.

d. *Envelope requirements and receipt:* When an applicant submits its application, whether by mail or hand delivery—

(1) It must indicate on the envelope that the CFDA number of the competition under which it is submitting its application is 84.395A; and

(2) The Application Control Center will mail to the applicant a notification of receipt of the grant application. If the applicant does not receive this notification, it should call the U.S. Department of Education Application Control Center at (202) 245–6288.

In accordance with EDGAR § 75.216(b) and (c), an application will not be evaluated for funding if the applicant does not comply with all of the procedural rules that govern the submission of the application or the application does not contain the information required under the program.

V. Application Review Information

Selection Criteria: The selection criteria and scoring rubric for this competition are from the notice of final priorities, requirements, definitions, and selection criteria, published elsewhere in this issue of the **Federal Register.** The reviewers will utilize the scoring rubric (which can also be found in Appendix B of this notice) in applying the following selection criteria:

A. State Success Factors

(A)(1) *Articulating State's education reform agenda and LEAs' participation in it:* The extent to which—

(i) The State has set forth a comprehensive and coherent reform agenda that clearly articulates its goals for implementing reforms in the four education areas described in the ARRA and improving student outcomes statewide, establishes a clear and credible path to achieving these goals, and is consistent with the specific reform plans that the State has proposed throughout its application;

(ii) The participating LEAs (as defined in this notice) are strongly committed to the State's plans and to effective implementation of reform in the four education areas, as evidenced by Memoranda of Understanding (MOUs) (as set forth in Appendix D) [3] or other binding agreements between the State and its participating LEAs (as defined in this notice) that include—

(a) Terms and conditions that reflect strong commitment by the participating LEAs (as defined in this notice) to the State's plans;

(b) Scope-of-work descriptions that require participating LEAs (as defined in this notice) to implement all or significant portions of the State's Race to the Top plans; and

(c) Signatures from as many as possible of the LEA superintendent (or equivalent), the president of the local school board (or equivalent, if applicable), and the local teachers' union leader (if applicable) (one signature of which must be from an authorized LEA representative) demonstrating the extent of leadership support within participating LEAs (as defined in this notice); and

(iii) The LEAs that are participating in the State's Race to the Top plans (including considerations of the numbers and percentages of participating LEAs, schools, K–12 students, and students in poverty) will translate into broad statewide impact, allowing the State to reach its ambitious

[3] *See* Appendix D for more on participating LEA MOUs and for a model MOU.

yet achievable goals, overall and by student subgroup, for—

(a) Increasing student achievement in (at a minimum) reading/language arts and mathematics, as reported by the NAEP and the assessments required under the ESEA;

(b) Decreasing achievement gaps between subgroups in reading/language arts and mathematics, as reported by the NAEP and the assessments required under the ESEA;

(c) Increasing high school graduation rates (as defined in this notice); and

(d) Increasing college enrollment (as defined in this notice) and increasing the number of students who complete at least a year's worth of college credit that is applicable to a degree within two years of enrollment in an institution of higher education.

(A)(2) *Building strong statewide capacity to implement, scale up, and sustain proposed plans:* The extent to which the State has a high-quality overall plan to—

(i) Ensure that it has the capacity required to implement its proposed plans by—

(a) Providing strong leadership and dedicated teams to implement the statewide education reform plans the State has proposed;

(b) Supporting participating LEAs (as defined in this notice) in successfully implementing the education reform plans the State has proposed, through such activities as identifying promising practices, evaluating these practices' effectiveness, ceasing ineffective practices, widely disseminating and replicating the effective practices statewide, holding participating LEAs (as defined in this notice) accountable for progress and performance, and intervening where necessary;

(c) Providing effective and efficient operations and processes for implementing its Race to the Top grant in such areas as grant administration and oversight, budget reporting and monitoring, performance measure tracking and reporting, and fund disbursement;

(d) Using the funds for this grant, as described in the State's budget and accompanying budget narrative, to accomplish the State's plans and meet its targets, including, where feasible, by coordinating, reallocating, or repurposing education funds from other Federal, State, and local sources so that they align with the State's Race to the Top goals; and

(e) Using the fiscal, political, and human capital resources of the State to continue, after the period of funding has ended, those reforms funded under the grant for which there is evidence of success; and

(ii) Use support from a broad group of stakeholders to better implement its plans, as evidenced by the strength of statements or actions of support from—

(a) The State's teachers and principals, which include the State's teachers' unions or statewide teacher associations; and

(b) Other critical stakeholders, such as the State's legislative leadership; charter school authorizers and State charter school membership associations (if applicable); other State and local leaders (*e.g.,* business, community, civil rights, and education association leaders); Tribal schools; parent, student, and community organizations (*e.g.,* parent-teacher associations, nonprofit organizations, local education foundations, and community-based organizations); and institutions of higher education.

(A)(3) *Demonstrating significant progress in raising achievement and closing gaps:* The extent to which the State has demonstrated its ability to—

(i) Make progress over the past several years in each of the four education reform areas, and used its ARRA and other Federal and State funding to pursue such reforms;

(ii) Improve student outcomes overall and by student subgroup since at least 2003, and explain the connections between the data and the actions that have contributed to—

(a) Increasing student achievement in reading/language arts and mathematics, both on the NAEP and on the assessments required under the ESEA;

(b) Decreasing achievement gaps between subgroups in reading/language arts and mathematics, both on the NAEP and on the assessments required under the ESEA; and

(c) Increasing high school graduation rates.

B. Standards and Assessments

State Reform Conditions Criteria

(B)(1) *Developing and adopting common standards:* The extent to which the State has demonstrated its commitment to adopting a common set of high-quality standards, evidenced by (as set forth in Appendix B)—

(i) The State's participation in a consortium of States that—

(a) Is working toward jointly developing and adopting a common set of K–12 standards (as defined in this notice) that are supported by evidence that they are internationally benchmarked and build toward college and career readiness by the time of high school graduation; and

(b) Includes a significant number of States; and

(ii)(a) For Phase 1 applications, the State's high-quality plan demonstrating its commitment to and progress toward adopting a common set of K–12 standards (as defined in this notice) by August 2, 2010, or, at a minimum, by a later date in 2010 specified by the State, and to implementing the standards thereafter in a well-planned way; or

(b) For Phase 2 applications, the State's adoption of a common set of K–12 standards (as defined in this notice) by August 2, 2010, or, at a minimum, by a later date in 2010 specified by the State in a high-quality plan toward which the State has made significant progress, and its commitment to implementing the standards thereafter in a well-planned way.[4]

(B)(2) *Developing and implementing common, high-quality assessments:* The extent to which the State has demonstrated its commitment to improving the quality of its assessments, evidenced by (as set forth in Appendix B) the State's participation in a consortium of States that—

(i) Is working toward jointly developing and implementing common, high-quality assessments (as defined in this notice) aligned with the consortium's common set of K–12 standards (as defined in this notice); and

(ii) Includes a significant number of States.

Reform Plan Criteria

(B)(3) *Supporting the transition to enhanced standards and high-quality assessments:* The extent to which the State, in collaboration with its participating LEAs (as defined in this notice), has a high-quality plan for supporting a statewide transition to and implementation of internationally benchmarked K–12 standards that build toward college and career readiness by the time of high school graduation, and high-quality assessments (as defined in this notice) tied to these standards. State or LEA activities might, for example, include: Developing a rollout plan for the standards together with all of their supporting components; in cooperation with the State's institutions of higher education, aligning high school exit criteria and college entrance requirements with the new standards and assessments; developing or acquiring, disseminating, and implementing high-quality instructional

[4] Phase 2 applicants addressing selection criterion (B)(1)(ii) may amend their June 1, 2010 application submission through August 2, 2010 by submitting evidence of adopting common standards after June 1, 2010.

materials and assessments (including, for example, formative and interim assessments (both as defined in this notice)); developing or acquiring and delivering high-quality professional development to support the transition to new standards and assessments; and engaging in other strategies that translate the standards and information from assessments into classroom practice for all students, including high-need students (as defined in this notice).

C. Data Systems To Support Instruction

State Reform Conditions Criteria

(C)(1) *Fully implementing a statewide longitudinal data system:* The extent to which the State has a statewide longitudinal data system that includes all of the America COMPETES Act elements (as defined in this notice).

Reform Plan Criteria

(C)(2) *Accessing and using State data:* The extent to which the State has a high-quality plan to ensure that data from the State's statewide longitudinal data system are accessible to, and used to inform and engage, as appropriate, key stakeholders (*e.g.,* parents, students, teachers, principals, LEA leaders, community members, unions, researchers, and policymakers); and that the data support decision-makers in the continuous improvement of efforts in such areas as policy, instruction, operations, management, resource allocation, and overall effectiveness.[5]

(C)(3) *Using data to improve instruction:* The extent to which the State, in collaboration with its participating LEAs (as defined in this notice), has a high-quality plan to—

(i) Increase the acquisition, adoption, and use of local instructional improvement systems (as defined in this notice) that provide teachers, principals, and administrators with the information and resources they need to inform and improve their instructional practices, decision-making, and overall effectiveness;

(ii) Support participating LEAs (as defined in this notice) and schools that are using instructional improvement systems (as defined in this notice) in providing effective professional development to teachers, principals, and administrators on how to use these systems and the resulting data to support continuous instructional improvement; and

(iii) Make the data from instructional improvement systems (as defined in this notice), together with statewide longitudinal data system data, available and accessible to researchers so that they have detailed information with which to evaluate the effectiveness of instructional materials, strategies, and approaches for educating different types of students (*e.g.,* students with disabilities, English language learners, students whose achievement is well below or above grade level).

D. Great Teachers and Leaders

State Reform Conditions Criteria

(D)(1) *Providing high-quality pathways for aspiring teachers and principals:* The extent to which the State has—

(i) Legal, statutory, or regulatory provisions that allow alternative routes to certification (as defined in this notice) for teachers and principals, particularly routes that allow for providers in addition to institutions of higher education;

(ii) Alternative routes to certification (as defined in this notice) that are in use; and

(iii) A process for monitoring, evaluating, and identifying areas of teacher and principal shortage and for preparing teachers and principals to fill these areas of shortage.

Reform Plan Criteria

(D)(2) *Improving teacher and principal effectiveness based on performance:* The extent to which the State, in collaboration with its participating LEAs (as defined in this notice), has a high-quality plan and ambitious yet achievable annual targets to ensure that participating LEAs (as defined in this notice)—

(i) Establish clear approaches to measuring student growth (as defined in this notice) and measure it for each individual student;

(ii) Design and implement rigorous, transparent, and fair evaluation systems for teachers and principals that (a) differentiate effectiveness using multiple rating categories that take into account data on student growth (as defined in this notice) as a significant factor, and (b) are designed and developed with teacher and principal involvement;

(iii) Conduct annual evaluations of teachers and principals that include timely and constructive feedback; as part of such evaluations, provide teachers and principals with data on student growth for their students, classes, and schools; and

(iv) Use these evaluations, at a minimum, to inform decisions regarding—

(a) Developing teachers and principals, including by providing relevant coaching, induction support, and/or professional development;

(b) Compensating, promoting, and retaining teachers and principals, including by providing opportunities for highly effective teachers and principals (both as defined in this notice) to obtain additional compensation and be given additional responsibilities;

(c) Whether to grant tenure and/or full certification (where applicable) to teachers and principals using rigorous standards and streamlined, transparent, and fair procedures; and

(d) Removing ineffective tenured and untenured teachers and principals after they have had ample opportunities to improve, and ensuring that such decisions are made using rigorous standards and streamlined, transparent, and fair procedures.

(D)(3) *Ensuring equitable distribution of effective teachers and principals:* The extent to which the State, in collaboration with its participating LEAs (as defined in this notice), has a high-quality plan and ambitious yet achievable annual targets to—

(i) Ensure the equitable distribution of teachers and principals by developing a plan, informed by reviews of prior actions and data, to ensure that students in high-poverty and/or high-minority schools (both as defined in this notice) have equitable access to highly effective teachers and principals (both as defined in this notice) and are not served by ineffective teachers and principals at higher rates than other students; and

(ii) Increase the number and percentage of effective teachers (as defined in this notice) teaching hard-to-staff subjects and specialty areas including mathematics, science, and special education; teaching in language instruction educational programs (as defined under Title III of the ESEA); and teaching in other areas as identified by the State or LEA.

Plans for (i) and (ii) may include, but are not limited to, the implementation of incentives and strategies in such areas as recruitment, compensation, teaching and learning environments, professional development, and human resources practices and processes.

(D)(4) *Improving the effectiveness of teacher and principal preparation programs:* The extent to which the State has a high-quality plan and ambitious yet achievable annual targets to—

(i) Link student achievement and student growth (both as defined in this notice) data to the students' teachers

[5] Successful applicants that receive Race to the Top grant awards will need to comply with the Family Educational Rights and Privacy Act (FERPA), including 34 CFR Part 99, as well as State and local requirements regarding privacy.

and principals, to link this information to the in-State programs where those teachers and principals were prepared for credentialing, and to publicly report the data for each credentialing program in the State; and

(ii) Expand preparation and credentialing options and programs that are successful at producing effective teachers and principals (both as defined in this notice).

(D)(5) *Providing effective support to teachers and principals:* The extent to which the State, in collaboration with its participating LEAs (as defined in this notice), has a high-quality plan for its participating LEAs (as defined in this notice) to—

(i) Provide effective, data-informed professional development, coaching, induction, and common planning and collaboration time to teachers and principals that are, where appropriate, ongoing and job-embedded. Such support might focus on, for example, gathering, analyzing, and using data; designing instructional strategies for improvement; differentiating instruction; creating school environments supportive of data-informed decisions; designing instruction to meet the specific needs of high-need students (as defined in this notice); and aligning systems and removing barriers to effective implementation of practices designed to improve student learning outcomes; and

(ii) Measure, evaluate, and continuously improve the effectiveness of those supports in order to improve student achievement (as defined in this notice).

E. Turning Around the Lowest-Achieving Schools

State Reform Conditions Criteria

(E)(1) *Intervening in the lowest-achieving schools and LEAs:* The extent to which the State has the legal, statutory, or regulatory authority to intervene directly in the State's persistently lowest-achieving schools (as defined in this notice) and in LEAs that are in improvement or corrective action status.

Reform Plan Criteria

(E)(2) *Turning around the lowest-achieving schools:* The extent to which the State has a high-quality plan and ambitious yet achievable annual targets to—

(i) Identify the persistently lowest-achieving schools (as defined in this notice) and, at its discretion, any non-Title I eligible secondary schools that would be considered persistently lowest-achieving schools (as defined in this notice) if they were eligible to receive Title I funds; and

(ii) Support its LEAs in turning around these schools by implementing one of the four school intervention models (as described in Appendix C): Turnaround model, restart model, school closure, or transformation model (provided that an LEA with more than nine persistently lowest-achieving schools may not use the transformation model for more than 50 percent of its schools).

F. General

State Reform Conditions Criteria

(F)(1) *Making education funding a priority:* The extent to which—

(i) The percentage of the total revenues available to the State (as defined in this notice) that were used to support elementary, secondary, and public higher education for FY 2009 was greater than or equal to the percentage of the total revenues available to the State (as defined in this notice) that were used to support elementary, secondary, and public higher education for FY 2008; and

(ii) The State's policies lead to equitable funding (a) between high-need LEAs (as defined in this notice) and other LEAs, and (b) within LEAs, between high-poverty schools (as defined in this notice) and other schools.

(F)(2) *Ensuring successful conditions for high-performing charter schools and other innovative schools:* The extent to which—

(i) The State has a charter school law that does not prohibit or effectively inhibit increasing the number of high-performing charter schools (as defined in this notice) in the State, measured (as set forth in Appendix B) by the percentage of total schools in the State that are allowed to be charter schools or otherwise restrict student enrollment in charter schools;

(ii) The State has laws, statutes, regulations, or guidelines regarding how charter school authorizers approve, monitor, hold accountable, reauthorize, and close charter schools; in particular, whether authorizers require that student achievement (as defined in this notice) be one significant factor, among others, in authorization or renewal; encourage charter schools that serve student populations that are similar to local district student populations, especially relative to high-need students (as defined in this notice); and have closed or not renewed ineffective charter schools;

(iii) The State's charter schools receive (as set forth in Appendix B) equitable funding, compared to traditional public schools, and a commensurate share of local, State, and Federal revenues;

(iv) The State provides charter schools with funding for facilities (for leasing facilities, purchasing facilities, or making tenant improvements), assistance with facilities acquisition, access to public facilities, the ability to share in bonds and mill levies, or other supports; and the extent to which the State does not impose any facility-related requirements on charter schools that are stricter than those applied to traditional public schools; and

(v) The State enables LEAs to operate innovative, autonomous public schools (as defined in this notice) other than charter schools.

(F)(3) *Demonstrating other significant reform conditions:* The extent to which the State, in addition to information provided under other State Reform Conditions Criteria, has created, through law, regulation, or policy, other conditions favorable to education reform or innovation that have increased student achievement or graduation rates, narrowed achievement gaps, or resulted in other important outcomes.

2. *Review and Selection Process:* The Department will screen applications that are received, as described in this notice, by the designated deadline, and will determine which States are eligible based on whether they have met eligibility requirement (b); the Department will not consider further those applicants deemed ineligible under eligibility requirement (b). As discussed below, States will be screened for eligibility under eligibility requirement (a) at the end of the selection process, before they would be granted awards.

The Department intends to use a two-tiered review process to judge the eligible applications. In the initial tier, the reviewers would consider only the written applications; in the finalist tier, reviewers would consider both the written applications and in-person presentations. In both tiers, the Department would use independent reviewers who have been chosen from a pool of qualified educators, scholars, and other individuals knowledgeable in education reform. The Department will thoroughly screen all reviewers for conflicts of interest to ensure a fair and competitive review process.

In the initial tier, reviewers will read, comment on, and score their assigned applications, using the selection criteria and scoring rubric included in this notice (see Appendix B). The Department will select the finalists after

considering the reviewers' scores. The finalists will move on to the finalist tier of the competition. Applicants who do not move on to the finalist tier will receive their reviewers' comments and scores as soon as possible.

The Department intends to ask each finalist to send a team to Washington, DC to present the State's proposal to a panel of reviewers. The panel will take this opportunity to ask the State's team further questions in order to gain a more comprehensive picture of the State's application proposal, including its plans and its capabilities to implement them. (Exact timing will be announced when the finalists are selected.) A State's presentation team may include up to five individuals; because the panel of reviewers is interested primarily in hearing from, and asking questions of, State leaders who would be responsible for implementing the State's Race to the Top plan, only those individuals who would have significant ongoing roles in and responsibilities in executing the State's plan should present, and in no case could presentation teams include consultants. At the conclusion of the presentation process, reviewers will finalize their scoring of the applications based on the selection criteria and scoring rubric in this notice.

After the review process is complete, the Secretary will select, consistent with 34 CFR 75.217, the grantees after considering the rank order of applications, each applicant's status with respect to the Absolute Priority and eligibility requirement (a), and any other relevant information. All applicants will receive their reviewers' comments and scores.

After awards are made for each phase of the competition, all of the submitted applications (both successful and unsuccessful) will be posted on the Department's Web site, together with the final scores each received. The Department also intends to post on its Web site a transcript and/or video of each finalist's presentation of its proposal.

States that apply in Phase 1 but are not awarded grants may reapply for funding in Phase 2 (together with those States that are applying for the first time in Phase 2). Phase 1 winners receive full-sized awards, and so do not apply for additional funding in Phase 2.

VI. Award Administration Information

1. *Award Notices:* If an application is successful, the Department will notify the States' U.S. Representatives and U.S. Senators and send the applicant a Grant Award Notification (GAN). We may notify the State informally, as well.

If an application is not evaluated or not selected for funding, the Department will notify the State.

2. *Administrative and National Policy Requirements:* We identify administrative and national policy requirements in the application package and reference these and other requirements in the *Applicable Regulations* section of this notice.

We reference the regulations outlining the terms and conditions of an award in the *Applicable Regulations* section of this notice and include these and other specific conditions in the GAN. The GAN also incorporates the approved application as part of the binding commitments under the grant.

3. *Reporting:* The following requirements are from the notice of final priorities, requirements, definitions, and selection criteria, published elsewhere in this issue of the **Federal Register**.

A State receiving Race to the Top funds must submit to the Department an annual report which must include, in addition to the standard elements, a description of the State's and its LEAs' progress to date on their goals, timelines, and budgets, as well as actual performance compared to the annual targets the State established in its application with respect to each performance measure. Further, a State receiving funds under this program and its participating LEAs are accountable for meeting the goals, timelines, budget, and annual targets established in the application; adhering to an annual fund drawdown schedule that is tied to meeting these goals, timelines, budget, and annual targets; and fulfilling and maintaining all other conditions for the conduct of the project. The Department will monitor a State's and its participating LEAs' progress in meeting the State's goals, timelines, budget, and annual targets and in fulfilling other applicable requirements. In addition, the Department may collect additional data as part of a State's annual reporting requirements.

To support a collaborative process between the State and the Department, the Department may require that applicants who are selected to receive an award enter into a written performance or cooperative agreement with the Department. If the Department determines that a State is not meeting its goals, timelines, budget, or annual targets or is not fulfilling other applicable requirements, the Department will take appropriate action, which could include a collaborative process between the Department and the State, or enforcement measures with respect to this grant, such as placing the State in high-risk status, putting the State on reimbursement payment status, or delaying or withholding funds.

A State that receives Race to the Top funds must also meet the reporting requirements that apply to all ARRA-funded programs. Specifically, the State must submit reports, within 10 days after the end of each calendar quarter, that contain the information required under section 1512(c) of the ARRA in accordance with any guidance issued by the Office of Management and Budget or the Department (ARRA Division A, Section 1512(c)).

In addition, for each year of the program, the State will submit a report to the Secretary, at such time and in such manner as the Secretary may require, that describes:

- The uses of funds within the State;
- How the State distributed the funds it received;
- The number of jobs that the Governor estimates were saved or created with the funds;
- The State's progress in reducing inequities in the distribution of highly qualified teachers, implementing a State longitudinal data system, and developing and implementing valid and reliable assessments for English language learners and students with disabilities; and
- If applicable, a description of each modernization, renovation, or repair project approved in the State application and funded, including the amounts awarded and project costs (ARRA Division A, Section 14008).

4. *Evidence and Performance Measures:* Appendix A to this notice contains a listing of the evidence and performance measures.

VII. Agency Contact

FOR FURTHER INFORMATION CONTACT: James Butler, U.S. Department of Education, 400 Maryland Ave., SW., room 3E108, Washington, DC 20202–6400. *Telephone:* 202–205–3775 or by *e-mail: racetothetop@ed.gov.*

If a TDD is needed, call the Federal Relay Service, toll free, at 1–800–877–8339.

VIII. Other Information

Accessible Format: Individuals with disabilities can obtain this document in an accessible format (*e.g.*, braille, large print, audiotape, or computer diskette) on request to the program contact person listed under **FOR FURTHER INFORMATION CONTACT.**

Electronic Access to This Document: You can view this document, as well as all other documents of this Department published in the **Federal Register**, in text or Adobe Portable Document Format (PDF) on the Internet at the

following site: *http://www.ed.gov/news/fedregister.* To use PDF you must have Adobe Acrobat Reader, which is available free at this site.

Dated: November 10, 2009.

Arne Duncan,

Secretary of Education.

Appendix A: Evidence and Performance Measures

A. State Success Factors

(A)(1) *Articulating State's education reform agenda and LEAs' participation in it.*

Evidence

Evidence for (A)(1)(ii):

- An example of the State's standard Participating LEA MOU, and description of variations used, if any.
- The completed summary table indicating which specific portions of the State's plan each LEA is committed to implementing, and relevant summary statistics (see Summary Table for (A)(1)(ii)(b)).
- The completed summary table indicating which LEA leadership signatures have been obtained (see Summary Table for (A)(1)(ii)(c)).

Evidence for (A)(1)(iii):

- The completed summary table indicating the numbers and percentages of participating LEAs, schools, K–12 students, and students in poverty (see Summary Table for (A)(1)(iii)).
- Tables and graphs that show the State's goals, overall and by subgroup, requested in the criterion, together with the supporting narrative. In addition, describe what the goals would look like were the State not to receive an award under this program.

Evidence for (A)(1)(ii) and (A)(1)(iii):

- The completed detailed table, by LEA, that includes the information requested in the criterion (see Detailed Table for (A)(1)).

Performance Measures

- None required.

(A)(2) *Building strong statewide capacity to implement, scale up, and sustain proposed plans.*

Evidence

Evidence for (A)(2)(i)(d):

- The State's budget, as completed in Section XI of the application. The narrative that accompanies and explains the budget and how it connects to the State's plan, as completed in Section XI of the application.

Evidence for (A)(2)(ii):

- A summary in the narrative of the statements or actions and inclusion of key statements or actions in the Appendix.

Performance Measures

- None required.

(A)(3) *Demonstrating significant progress in raising achievement and closing gaps.*

Evidence

Evidence for (A)(3)(ii): NAEP and ESEA results since at least 2003. Include in the Appendix all the data requested in the criterion as a resource for peer reviewers for each year in which a test was given or data was collected. Note that this data will be used for reference only and can be in raw format. In the narrative, provide the analysis of this data and any tables or graphs that best support the narrative.

Performance Measures

- None required.

(B) Standards and Assessments

(B)(1) *Developing and adopting common standards.*

Evidence

Evidence for (B)(1)(i):

- A copy of the Memorandum of Agreement, executed by the State, showing that it is part of a standards consortium.
- A copy of the final standards or, if the standards are not yet final, a copy of the draft standards and anticipated date for completing the standards.
- Documentation that the standards are or will be internationally benchmarked and that, when well-implemented, will help to ensure that students are prepared for college and careers.
- The number of States participating in the standards consortium and the list of these States.

Evidence for (B)(1)(ii):

For Phase 1 applicants:

- A description of the legal process in the State for adopting standards, and the State's plan, current progress, and timeframe for adoption.

For Phase 2 applicants:

- Evidence that the State has adopted the standards. Or, if the State has not yet adopted the standards, a description of the legal process in the State for adopting standards and the State's plan, current progress, and timeframe for adoption.

Performance Measures

- None required.

(B)(2) *Developing and implementing common, high-quality assessments.*

Evidence

Evidence for (B)(2):

- A copy of the Memorandum of Agreement, executed by the State, showing that it is part of a consortium that intends to develop high-quality assessments (as defined in this notice) aligned with the consortium's common set of K–12 standards; or documentation that the State's consortium has applied, or intends to apply, for a grant through the separate Race to the Top Assessment Program (to be described in a subsequent notice); or other evidence of the State's plan to develop and adopt common, high-quality assessments (as defined in this notice).
- The number of States participating in the assessment consortium and the list of these States.

Performance Measures

- None required.

(B)(3) *Supporting the transition to enhanced standards and high-quality assessments.*

Evidence

- Any supporting evidence the State believes will be helpful to peer reviewers.

Performance Measures

- Optional.

(C) Data Systems to Support Instruction

(C)(1) *Fully implementing a statewide longitudinal data system.*

Evidence

- Documentation for each of the America COMPETES Act elements (as defined in this notice) that is included in the State's statewide longitudinal data system.

Performance Measures

- None required.

(C)(2) *Accessing and using State data.*

Evidence

- Any supporting evidence the State believes will be helpful to peer reviewers.

Performance Measures

- Optional.

(C)(3) *Using data to improve instruction.*

Evidence

- Any supporting evidence the State believes will be helpful to peer reviewers.

Performance Measures

- Optional.

(D) Great Teachers and Leaders

(D)(1) *Providing high-quality pathways for aspiring teachers and principals.*

Evidence for (D)(1)(i):

- A description of the State's applicable laws, statutes, regulations, or other relevant legal documents, including information on the elements of the State's alternative routes (as described in the alternative routes to certification definition in this notice).

Evidence for (D)(1)(ii):

- A list of the alternative certification programs operating in the State under the State's alternative routes to certification (as defined in this notice), and for each:
  - The elements of the program (as described in the alternative routes to certification definition in this notice).
  - The number of teachers and principals that successfully completed each program in the previous academic year.
  - The total number of teachers and principals certified statewide in the previous academic year.

Performance Measures

- None required.

(D)(2) *Improving teacher and principal effectiveness based on performance.*

Evidence

- Any supporting evidence the State believes will be helpful to peer reviewers.

Performance Measures

General goals to be provided at time of application, including baseline data and annual targets:

- (D)(2)(i) Percentage of participating LEAs that measure student growth (as defined in this notice).
- (D)(2)(ii) Percentage of participating LEAs with qualifying evaluation systems for teachers.
- (D)(2)(ii) Percentage of participating LEAs with qualifying evaluation systems for principals.
- (D)(2)(iv) Percentage of participating LEAs with qualifying evaluation systems that are used to inform:
  - (D)(2)(iv)(a) Developing teachers and principals.
  - (D)(2)(iv)(b) Compensating teachers and principals.
  - (D)(2)(iv)(b) Promoting teachers and principals.
  - (D)(2)(iv)(b) Retaining effective teachers and principals.
  - (D)(2)(iv)(c) Granting tenure and/or full certification (where applicable) to teachers and principals.
  - (D)(2)(iv)(d) Removing ineffective tenured and untenured teachers and principals.

General data to be provided at time of application, including baseline data:

- Total number of participating LEAs.
- Total number of principals in participating LEAs.
- Total number of teachers in participating LEAs.

Data to be requested of grantees in the future:

- (D)(2)(ii) Number of teachers and principals in participating LEAs with qualifying evaluation systems.
- (D)(2)(iii) Number of teachers and principals in participating LEAs with qualifying evaluation systems who were evaluated as effective or better in the prior academic year.
- (D)(2)(iii) Number of teachers and principals in participating LEAs with qualifying evaluation systems who were evaluated as ineffective in the prior academic year.
- (D)(2)(iv)(b) Number of teachers and principals in participating LEAs with qualifying evaluation systems whose evaluations were used to inform compensation decisions in the prior academic year.
- (D)(2)(iv)(b) Number of teachers and principals in participating LEAs with qualifying evaluation systems who were evaluated as effective or better and were retained in the prior academic year.
- (D)(2)(iv)(c) Number of teachers in participating LEAs with qualifying evaluation systems who were eligible for tenure in the prior academic year.
- (D)(2)(iv)(c) Number of teachers in participating LEAs with qualifying evaluation systems whose evaluations were used to inform tenure decisions in the prior academic year.
- (D)(2)(iv)(d) Number of teachers and principals in participating LEAs who were removed for being ineffective in the prior academic year.

(D)(3) *Ensuring equitable distribution of effective teachers and principals.*

Evidence

Evidence for (D)(3)(i):

- Definitions of high-minority and low-minority schools as defined by the State for the purposes of the State's Teacher Equity Plan.

Performance Measures

Note: All information below is requested for Participating LEAs.

Performance Measures for (D)(3)(i):

General goals to be provided at time of application, including baseline data and annual targets:

- Percentage of teachers in schools that are high-poverty, high-minority, or both (as defined in this notice) who are highly effective (as defined in this notice).
- Percentage of teachers in schools that are low-poverty, low-minority, or both (as defined in this notice) who are highly effective (as defined in this notice).
- Percentage of teachers in schools that are high-poverty, high-minority, or both (as defined in this notice) who are ineffective.
- Percentage of teachers in schools that are low-poverty, low-minority, or both (as defined in this notice) who are ineffective.
- Percentage of principals leading schools that are high-poverty, high-minority, or both (as defined in this notice) who are highly effective (as defined in this notice).
- Percentage of principals leading schools that are low-poverty, low-minority, or both (as defined in this notice) who are highly effective (as defined in this notice).
- Percentage of principals leading schools that are high-poverty, high-minority, or both (as defined in this notice) who are ineffective.
- Percentage of principals leading schools that are low-poverty, low-minority, or both (as defined in this notice) who are ineffective.

General data to be provided at time of application, including baseline data:

- Total number of schools that are high-poverty, high-minority, or both (as defined in this notice).
- Total number of schools that are low-poverty, low-minority, or both (as defined in this notice).
- Total number of teachers in schools that are high-poverty, high-minority, or both (as defined in this notice).
- Total number of teachers in schools that are low-poverty, low-minority, or both (as defined in this notice).
- Total number of principals leading schools that are high-poverty, high-minority, or both (as defined in this notice).
- Total number of principals leading schools that are low-poverty, low-minority, or both (as defined in this notice).

Data to be requested of grantees in the future:

- Number of teachers and principals in schools that are high-poverty, high-minority, or both (as defined in this notice) who were evaluated as highly effective (as defined in this notice) in the prior academic year.
- Number of teachers and principals in schools that are high-poverty, high-minority, or both (as defined in this notice) who were evaluated as ineffective in the prior academic year.
- Number of teachers and principals in schools that are low-poverty, low-minority, or both (as defined in this notice) who were evaluated as highly effective (as defined in this notice) in the prior academic year.

• Number of teachers and principals in schools that are low-poverty, low-minority, or both (as defined in this notice) who were evaluated as ineffective in the prior academic year.

Performance Measures for (D)(3)(ii):

General goals to be provided at time of application, including baseline data and annual targets:

• Percentage of mathematics teachers who were evaluated as effective or better.

• Percentage of science teachers who were evaluated as effective or better.

• Percentage of special education teachers who were evaluated as effective or better.

• Percentage of teachers in language instruction educational programs who were evaluated as effective or better.

General data to be provided at time of application, including baseline data:

• Total number of mathematics teachers.

• Total number of science teachers.

• Total number of special education teachers.

• Total number of teachers in language instruction educational programs.

Data to be requested of grantees in the future:

• Number of mathematics teachers in participating LEAs who were evaluated as effective or better in the prior academic year.

• Number of science teachers in participating LEAs who were evaluated as effective or better in the prior academic year.

• Number of special education teachers in participating LEAs who were evaluated as effective or better in the prior academic year.

• Number of teachers in language instruction educational programs in participating LEAs who were evaluated as effective or better in the prior academic year.

(D)(4) *Improving the effectiveness of teacher and principal preparation programs.*

Evidence

• Any supporting evidence the State believes will be helpful to peer reviewers.

Performance measures

General goals to be provided at time of application, including baseline data and annual targets:

• Percentage of teacher preparation programs in the State for which the public can access data on the achievement and growth (as defined in this notice) of the graduates' students.

• Percentage of principal preparation programs in the State for which the public can access data on the achievement and growth (as defined in this notice) of the graduates' students.

General data to be provided at time of application, including baseline data:

• Total number of teacher credentialing programs in the State.

• Total number of principal credentialing programs in the State.

• Total number of teachers in the State.

• Total number of principals in the State.

Data to be requested of grantees in the future:

• Number of teacher credentialing programs in the State for which the information (as described in the criterion) is publicly reported.

• Number of teachers prepared by each credentialing program in the State for which the information (as described in the criterion) is publicly reported.

• Number of principal credentialing programs in the State for which the information (as described in the criterion) is publicly reported.

• Number of principals prepared by each credentialing program in the State for which the information (as described in the criterion) is publicly reported.

• Number of teachers in the State whose data are aggregated to produce publicly available reports on the State's credentialing programs.

• Number of principals in the State whose data are aggregated to produce publicly available reports on the State's credentialing programs.

(D)(5) *Providing effective support to teachers and principals.*

Evidence

• Any supporting evidence the State believes will be helpful to peer reviewers.

Performance Measures

• Optional.

(E) Turning Around the Lowest-Achieving Schools

(E)(1) *Intervening in the lowest-achieving schools and LEAs.*

Evidence

Evidence for (E)(1):

• A description of the State's applicable laws, statutes, regulations, or other relevant legal documents.

Performance Measures

• None required.

(E)(2) *Turning around the lowest-achieving schools.*

Evidence

• The State's historic performance on school turnaround, as evidenced by the total number of persistently lowest-achieving schools (as defined in this notice) that States or LEAs attempted to turn around in the last five years, the approach used, and the results and lessons learned to date.

Performance Measures

• The number of schools for which one of the four school intervention models (described in Appendix C) will be initiated each year.

(F) General

(F)(1) *Making education funding a priority.*

Evidence

Evidence for (F)(1)(i):

• Financial data to show whether and to what extent expenditures, as a percentage of the total revenues available to the State (as defined in this notice), increased, decreased, or remained the same.

Evidence for (F)(1)(ii):

• Any supporting evidence the State believes will be helpful to peer reviewers.

Performance Measures

• None required.

(F)(2) *Ensuring successful conditions for high-performing charter schools and other innovative schools.*

Evidence

Evidence for (F)(2)(i):

• A description of the State's applicable laws, statutes, regulations, or other relevant legal documents.

• The number of charter schools allowed under State law and the percentage this represents of the total number of schools in the State.

• The number and types of charter schools currently operating in the State.

Evidence for (F)(2)(ii):

• A description of the State's approach to charter school accountability and authorization, and a description of the State's applicable laws, statutes, regulations, or other relevant legal documents.

• For each of the last five years:

○ The number of charter school applications made in the State.

○ The number of charter school applications approved.

○ The number of charter school applications denied and reasons for the denials (academic, financial, low enrollment, other).

○ The number of charter schools closed (including charter schools that were not reauthorized to operate).

○ The reasons for the closures or non-renewals (academic, financial, low enrollment, other).

Evidence for (F)(2)(iii):

- A description of the State's applicable statutes, regulations, or other relevant legal documents.
- A description of the State's approach to charter school funding, the amount of funding passed through to charter schools per student, and how those amounts compare with traditional public school per-student funding allocations.

Evidence for (F)(2)(iv):

- A description of the State's applicable statutes, regulations, or other relevant legal documents.
- A description of the statewide facilities supports provided to charter schools, if any.

Evidence for (F)(2)(v):

- A description of how the State enables LEAs to operate innovative, autonomous public schools (as defined in this notice) other than charter schools.

Performance Measures

- None required.

(F)(3) *Demonstrating other significant reform conditions*

Evidence

Evidence for (F)(3):

- A description of the State's other applicable key education laws, statutes, regulations, or relevant legal documents.

Performance Measures

- None required.

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APPENDIX B. SCORING RUBRIC

I. Introduction

To help ensure inter-reviewer reliability and transparency for State Race to the Top applicants, the U.S. Department of Education has created and is publishing a rubric for scoring State applications. The pages that follow detail the rubric and allocation of point values that reviewers will be using. Race to the Top grants will be awarded on a competitive basis to States in two phases. The rubric will be used by reviewers in each phase to ensure consistency across and within review panels.

The rubric allocates points to each criterion and, in selected cases, to sub-criteria as well. In all, the Race to the Top scoring rubric includes 19 criteria and one competitive priority that collectively add up to 500 points. Several of these criteria account for a large number of points; others account for a comparatively small portion of a State's score.

It is important to emphasize that over half the points that reviewers may award to States are based on States' accomplishments prior to applying—their successes in increasing student achievement, decreasing the achievement gaps, increasing graduation rates, enlisting strong statewide support and commitment to their proposed plans, and creating legal conditions conducive to education reform and innovation. Finally, it bears underscoring that reviewers will be assessing multiple aspects of States' Race to the Top applications. States that fail to earn points or earn a low number of points on one criterion, can still win a Race to the Top award by presenting strong applications and histories of accomplishments on other criteria.

Notwithstanding the guidance being provided to reviewers, reviewers will still be required to make many thoughtful judgments about the quality of States' applications. Beyond judging a State's commitment to the four reform areas specified in the ARRA, reviewers will be assessing, based on the criteria, the comprehensiveness and feasibility of States' applications and plans. Reviewers will be asked to evaluate, for example, if States have set ambitious but achievable annual targets in their applications. Reviewers will need to make informed judgments about States' goals, the activities the State has chosen to undertake and the rationales for such activities, and the timeline and credibility of State plans.

Applicants address the absolute and competitive priorities throughout their applications. The absolute priority must be met in order for an applicant to receive funding. Applications that address the competitive priority comprehensively will earn extra points under that priority. Invitational priorities are extensions to the core reform areas; applicants are invited to address these, but are not granted additional points for doing so.

In this appendix there is information about the point values for each criterion and priority, guidance on scoring, and the rubric that will be provided to reviewers.

II. Points Overview

The chart below shows the maximum number of points that may be assigned to each criterion.

Selection Criteria	Points	Percent
A. State Success Factors	125	25%
(A)(1) Articulating State's education reform agenda and LEAs' participation in it	65	
(i) Articulating comprehensive, coherent reform agenda	*5*	
(ii) Securing LEA commitment	*45*	
(iii) Translating LEA participation into statewide impact	*15*	
(A)(2) Building strong statewide capacity to implement, scale up, and sustain proposed plans	30	
(i) Ensuring the capacity to implement	*20*	
(ii) Using broad stakeholder support	*10*	
(A)(3) Demonstrating significant progress in raising achievement and closing gaps	30	
(i) Making progress in each reform area	*5*	
(ii) Improving student outcomes	*25*	
B. Standards and Assessments	70	14%
(B)(1) Developing and adopting common standards	40	
(i) Participating in consortium developing high-quality standards	*20*	
(ii) Adopting standards	*20*	
(B)(2) Developing and implementing common, high-quality assessments	10	
(B)(3) Supporting the transition to enhanced standards and high-quality assessments	20	
C. Data Systems to Support Instruction	47	9%
(C)(1) Fully implementing a statewide longitudinal data system	24	
(C)(2) Accessing and using State data	5	
(C)(3) Using data to improve instruction	18	
D. Great Teachers and Leaders	138	28%
Eligibility Requirement (b)	eligibility	
(D)(1) Providing high-quality pathways for aspiring teachers and principals	21	
(D)(2) Improving teacher and principal effectiveness based on performance	58	
(i) Measuring student growth	*5*	
(ii) Developing evaluation systems	*15*	
(iii) Conducting annual evaluations	*10*	
(iv) Using evaluations to inform key decisions	*28*	
(D)(3) Ensuring equitable distribution of effective teachers and principals	25	
(i) Ensuring equitable distribution in high-poverty or high-minority schools	*15*	
(ii) Ensuring equitable distribution in hard-to-staff subjects and specialty areas	*10*	
(D)(4) Improving the effectiveness of teacher and principal preparation programs	14	
(D)(5) Providing effective support to teachers and principals	20	
E. Turning Around the Lowest-Achieving Schools	50	10%
(E)(1) Intervening in the lowest-achieving schools and LEAs	10	
(E)(2) Turning around the lowest-achieving schools	40	
(i) Identifying the persistently lowest-achieving schools	*5*	
(ii) Turning around the persistently lowest-achieving schools	*35*	
F. General	55	11%
Eligibility Requirement (a)	eligibility	
(F)(1) Making education funding a priority	10	
(F)(2) Ensuring successful conditions for high-performing charter schools and other innovative s	40	
(F)(3) Demonstrating other significant reform conditions	5	
Competitive Preference Priority 2: Emphasis on STEM	15	3%
TOTAL	**500**	**100%**

Subtotal: Accomplishments	260	52%
Subtotal: Plans	240	48%

III. About Scoring

About State Reform Conditions Criteria: The goal for State Reform Conditions Criteria is to ensure that, wherever possible, reviewers are provided with criterion-specific guidance that is clear and specific, making the decisions as "objective" as possible. (See application requirement (d) for the guidance provided to States concerning responding to State Reform Conditions Criteria in their applications.)

About Reform Plan Criteria: For Reform Plan Criteria, reviewers will be given general guidance on how to evaluate the information that each State submits; this guidance will be consistent with application requirement (e). Reviewers will allot points based on the quality of the State's plan and, where specified in the text of the criterion, whether the State has set ambitious yet achievable annual targets for that plan. In making these judgments, reviewers will consider the extent to which the State has:

- *A high-quality plan.* In determining the quality of a State's plan for a given Reform Plan Criterion, reviewers will evaluate the key goals, the activities to be undertaken and rationale for the activities, the timeline, the parties responsible for implementing the activities, and the credibility of the plan (as judged, in part, by the information submitted as supporting evidence). States are required to submit this information for each Reform Plan Criterion that the State addresses. States may also submit additional information that they believe will be helpful to peer reviewers.

- *Ambitious yet achievable annual targets* (only for those criteria that specify this). In determining whether a State has ambitious yet achievable annual targets for a given Reform Plan Criterion, reviewers will examine the State's targets in the context of the State's plan and the evidence submitted (if any) in support of the plan. There is no specific target that reviewers will be looking for here; nor will higher targets necessarily be rewarded above lower ones. Rather, reviewers will reward States for developing targets that – in light of the State's plan – are "ambitious yet achievable."

Note that the evidence that States submit may be relevant both to judging whether the State has a high-quality plan and whether its annual targets are ambitious yet achievable.

About Assigning Points: For each criterion, reviewers will assign points to an application. In general, the Department has specified total point values at the criterion level and in some instances, at the sub-criterion level. In the cases where the point totals have not been allocated to sub-criteria, each sub-criterion is weighted equally.

The reviewers will use the general ranges below as a guide when awarding points.

Maximum Point Value	Quality of Applicant's Response		
	Low	Medium	High
45	0 – 12	13 – 33	34 – 45
40	0 – 10	11 – 29	30 – 40
35	0 – 9	10 – 25	26 – 35
30	0 – 8	9 – 21	22 – 30
25	0 – 7	8 – 18	19 – 25

Maximum Point Value	Quality of Applicant's Response		
	Low	Medium	High
21	0 – 5	6 – 15	16 – 21
20	0 – 5	6 – 14	15 – 20
15	0 – 4	5 – 10	11 – 15
14	0 – 4	5 – 9	10 – 14
10	0 – 2	3 – 7	8 – 10
7	0 – 2	3 – 4	5 – 7
5	0 – 1	2 – 3	4 – 5

About Priorities: There are three types of priorities in the Race to the Top competition.

- The absolute priority cuts across the entire application and should not be addressed separately. It will be assessed, after the proposal has been fully reviewed and evaluated, to ensure that the application has met the priority. If an application has not met the priority, it will be eliminated from the competition.
- The competitive priority also cuts across the entire application. It is worth 15 points. Applicants will earn all or none of it, making it truly a competitive preference. In those cases where there is a disparity in the reviewers' determinations on the priority, the Department will award the competitive priority points only if a majority of the reviewers on a panel determine that an application should receive the priority points.
- The invitational priorities are addressed in their own separate sections. While applicants are invited to write to the invitational priorities, these will not earn points.

In the Event of a Tie: If two or more applications have the same score and there is not sufficient funding to support all of the tied applicants, the applicants' scores on criterion (A)(1)(ii), Securing LEA Commitment, will be used to break the tie.

IV. Reviewer Guidance for Criteria

A. State Success Factors

General Reviewer Guidance for (A)(1): In judging the quality of the applicant's response to this criterion, reviewers should refer to what the criterion asks, to the evidence requested in the application and presented by the applicant (if any), and to the elements of a high-quality plan as set forth in application requirement (d).

Reviewer Guidance Specific to (A)(1)(ii):

- *The model Memorandum of Understanding (MOU), provided in Appendix D to this notice, is an example of a strong MOU.*

(A)(1) **(maximum total points: 65)** Articulating State's education reform agenda and LEAs' participation in it: The extent to which—

(i) **(maximum subpoints: 5)** The State has set forth a comprehensive and coherent reform agenda that clearly articulates its goals for implementing reforms in the four education areas described in the ARRA and improving student outcomes statewide, establishes a clear and credible path to achieving these goals, and is consistent with the specific reform plans that the State has proposed throughout its application;

(ii) **(maximum subpoints: 45)** The participating LEAs (as defined in this notice) are strongly committed to the State's plans and to effective implementation of reform in the four education areas, as evidenced by Memoranda of Understanding (MOUs) (as set forth in Appendix D) or other binding agreements between the State and its participating LEAs (as defined in this notice) that include—

(a) Terms and conditions that reflect strong commitment by the participating LEAs (as defined in this notice) to the State's plans;

(b) Scope-of-work descriptions that require participating LEAs (as defined in this notice) to implement all or significant portions of the State's Race to the Top plans; and

(c) Signatures from as many as possible of the LEA superintendent (or equivalent), the president of the local school board (or equivalent, if applicable), and the local teachers' union leader (if applicable) (one signature of which must be from an authorized LEA representative) demonstrating the extent of leadership support within participating LEAs (as defined in this notice); and

(iii) **(maximum subpoints: 15)** The LEAs that are participating in the State's Race to the Top plans (including considerations of the numbers and percentages of participating LEAs, schools, K-12 students, and students in poverty) will translate into broad statewide impact, allowing the State to reach its ambitious yet achievable goals, overall and by student subgroup, for—

(a) Increasing student achievement in (at a minimum) reading/language arts and mathematics, as reported by the NAEP and the assessments required under the ESEA;

(b) Decreasing achievement gaps between subgroups in reading/language arts and mathematics, as reported by the NAEP and the assessments required under the ESEA;

(c) Increasing high school graduation rates (as defined in this notice); and

(d) Increasing college enrollment (as defined in this notice) and increasing the number of students who complete at least a year's worth of college credit that is applicable to a degree within two years of enrollment in an institution of higher education.

General Reviewer Guidance for (A)(2): In judging the quality of the applicant's response to this criterion, reviewers should refer to what the criterion asks, to the evidence requested in the application and presented by the applicant (if any), and to the elements of a high-quality plan as set forth in application requirement (d).

(A)(2) **(maximum total points: 30)** Building strong statewide capacity to implement, scale up, and sustain proposed plans: The extent to which the State has a high-quality overall plan to—

(i) **(maximum subpoints: 20)** Ensure that it has the capacity required to implement its proposed plans by—

(a) Providing strong leadership and dedicated teams to implement the statewide education reform plans the State has proposed;

(b) Supporting participating LEAs (as defined in this notice) in successfully implementing the education reform plans the State has proposed, through such activities as identifying promising practices, evaluating these practices' effectiveness, ceasing ineffective practices, widely disseminating and replicating the effective practices statewide, holding participating LEAs (as defined in this notice) accountable for progress and performance, and intervening where necessary;

(c) Providing effective and efficient operations and processes for implementing its Race to the Top grant in such areas as grant administration and oversight, budget reporting and monitoring, performance measure tracking and reporting, and fund disbursement;

(d) Using the funds for this grant, as described in the State's budget and accompanying budget narrative, to accomplish the State's plans and meet its targets, including where feasible, by

coordinating, reallocating, or repurposing education funds from other Federal, State, and local sources so that they align with the State's Race to the Top goals;

(e) Using the fiscal, political, and human capital resources of the State to continue, after the period of funding has ended, those reforms funded under the grant for which there is evidence of success; and

(ii) **(maximum subpoints: 10)** Use support from a broad group of stakeholders to better implement its plans, as evidenced by the strength of statements or actions of support from—

(a) The State's teachers and principals, which include the State's teachers' unions or statewide teacher associations; and

(b) Other critical stakeholders, such as the State's legislative leadership; charter school authorizers and State charter school membership associations (if applicable); other State and local leaders (e.g., business, community, civil rights, and education association leaders); Tribal schools; parent, student, and community organizations (e.g., parent-teacher associations, nonprofit organizations, local education foundations, and community-based organizations); and institutions of higher education.

General Reviewer Guidance for (A)(3): In judging the quality of the applicant's response to this criterion, reviewers should refer to what the criterion asks, and to the evidence requested in the application and presented by the applicant (if any).

(A)(3) **(maximum total points: 30)** Demonstrating significant progress in raising achievement and closing gaps: The extent to which the State has demonstrated its ability to—

(i) **(maximum subpoints: 5)** Make progress over the past several years in each of the four education reform areas, and used its ARRA and other Federal and State funding to pursue such reforms;

(ii) **(maximum subpoints: 25)** Improve student outcomes overall and by student subgroup since at least 2003, and explain the connections between the data and the actions that have contributed to—

(a) Increasing student achievement in reading/language arts and mathematics, both on the NAEP and on the assessments required under the ESEA;

(b) Decreasing achievement gaps between subgroups in reading/language arts and mathematics, both on the NAEP and on the assessments required under the ESEA; and

(c) Increasing high school graduation rates.

B. Standards and Assessments

State Reform Conditions Criteria

General Reviewer Guidance for (B)(1): In judging the quality of the applicant's response to this criterion, reviewers should refer to what the criterion asks and to the evidence requested in the application and presented by the applicant (if any).

Reviewer Guidance Specific to (B)(1)(i)(b)—Significant Number of States:

- *"High" points for a significant number of States are earned if the consortium includes a majority of the States in the country.*
- *"Medium" or "low" points are earned if the consortium includes one-half of the States in the country or less.*

Reviewer Guidance Specific to (B)(1)(ii):

- *"High" points are earned for: Phase 1 applicants' commitment to and progress toward adoption by August 2, 2010; and Phase 2 applicants' adoption by August 2, 2010.*
- *No "Medium" points are assigned for this criterion.*
- *"Low" points are earned for a high-quality plan to adopt by a later specified date in 2010.*
- *No points are earned for a plan that is not high-quality or for a plan to adopt later than 2010.*

(B)(1) **(maximum total points: 40)** Developing and adopting common standards: The extent to which the State has demonstrated its commitment to adopting a common set of high-quality standards, evidenced by (as set forth in Appendix B)—

(i) **(maximum subpoints: 20)** The State's participation in a consortium of States that—

(a) Is working toward jointly developing and adopting a common set of K-12 standards (as defined in this notice) that are supported by evidence that they are internationally benchmarked and build toward college and career readiness by the time of high school graduation; and

(b) Includes a significant number of States; and

(ii) **(maximum subpoints: 20)** (a) For Phase 1 applications, the State's high-quality plan demonstrating its commitment to and progress toward adopting a common set of K-12 standards (as defined in this notice) by August 2, 2010, or, at a minimum, by a later date in 2010 specified by the State, and to implementing the standards thereafter in a well-planned way; or

(b) For Phase 2 applications, the State's adoption of a common set of K-12 standards (as defined in this notice) by August 2, 2010, or, at a minimum, by a later date in 2010 specified by the State in a high-quality plan toward which the State has made significant progress, and its commitment to implementing the standards thereafter in a well-planned way.[6]

General Reviewer Guidance for (B)(2): In judging the quality of the applicant's response to this criterion, reviewers should refer to what the criterion asks and to the evidence requested in the application and presented by the applicant (if any).

Reviewer Guidance Specific to (B)(2)(ii) – Significant Number of States:

- *"High" points for a significant number of States are earned if the consortium includes a majority of the States in the country.*
- *"Medium" or "low" points are earned if the consortium includes one-half of the States in the country or less.*

(B)(2) **(maximum total points: 10)** Developing and implementing common, high-quality assessments: The extent to which the State has demonstrated its commitment to improving the quality of its assessments, evidenced by (as set forth in Appendix B) the State's participation in a consortium of States that—

(i) Is working toward jointly developing and implementing common, high-quality assessments (as defined in this notice) aligned with the consortium's common set of K-12 standards (as defined in this notice); and

(ii) Includes a significant number of States.

[6] Phase 2 applicants addressing selection criterion (B)(1)(ii) may amend their June 1, 2010 application submission through August 2, 2010 by submitting evidence of adopting common standards after June 1, 2010.

Reform Plan Criteria

General Reviewer Guidance for (B)(3): In judging the quality of the applicant's plan and annual targets (if any) for this criterion, reviewers should refer to what the criterion asks, to the evidence requested in the application and presented by the applicant (if any), and to the elements of a high-quality plan as set forth in application requirement (d).

(B)(3) **(maximum total points: 20)** Supporting the transition to enhanced standards and high-quality assessments: The extent to which the State, in collaboration with its participating LEAs (as defined in this notice), has a high-quality plan for supporting a statewide transition to and implementation of internationally benchmarked K-12 standards that build toward college and career readiness by the time of high school graduation, and high-quality assessments (as defined in this notice) tied to these standards. State or LEA activities might, for example, include: developing a rollout plan for the standards together with all of their supporting components; in cooperation with the State's institutions of higher education, aligning high school exit criteria and college entrance requirements with the new standards and assessments; developing or acquiring, disseminating, and implementing high-quality instructional materials and assessments (including, for example, formative and interim assessments (both as defined in this notice)); developing or acquiring and delivering high-quality professional development to support the transition to new standards and assessments; and engaging in other strategies that translate the standards and information from assessments into classroom practice for all students, including high-need students (as defined in this notice).

C. Data Systems to Support Instruction

State Reform Conditions Criteria

General Reviewer Guidance for (C)(1): In judging the quality of the applicant's response to this criterion, reviewers should refer to what the criterion asks and to the evidence requested in the application and presented by the applicant (if any).

Reviewer Guidance Specific to (C)(1):

- *Applicants earn two (2) points for every element the State has, out of 12 elements possible.*

(C)(1) **(maximum total points: 24)** Fully implementing a statewide longitudinal data system: The extent to which the State has a statewide longitudinal data system that includes all of the America COMPETES Act elements (as defined in this notice).

Reform Plan Criteria

General Reviewer Guidance for (C)(2): In judging the quality of the applicant's plan and annual targets (if any) for this criterion, reviewers should refer to what the criterion asks, to the evidence requested in the application and presented by the applicant (if any), and to the elements of a high-quality plan as set forth in application requirement (d).

(C)(2) **(maximum total points: 5)** Accessing and using State data: The extent to which the State has a high-quality plan to ensure that data from the State's statewide longitudinal data system are accessible to, and used to inform and engage, as appropriate, key stakeholders (e.g.,

parents, students, teachers, principals, LEA leaders, community members, unions, researchers, and policymakers); and that the data support decision-makers in the continuous improvement of efforts in such areas as policy, instruction, operations, management, resource allocation, and overall effectiveness.[7]

General Reviewer Guidance for (C)(3): In judging the quality of the applicant's plan and annual targets (if any) for this criterion, reviewers should refer to what the criterion asks, to the evidence requested in the application and presented by the applicant (if any), and to the elements of a high-quality plan as set forth in application requirement (d).

(C)(3) **(maximum total points: 18)** Using data to improve instruction: The extent to which the State, in collaboration with its participating LEAs (as defined in this notice), has a high-quality plan to—

(i) Increase the acquisition, adoption, and use of local instructional improvement systems (as defined in this notice) that provide teachers, principals, and administrators with the information and resources they need to inform and improve their instructional practices, decision-making, and overall effectiveness;

(ii) Support participating LEAs (as defined in this notice) and schools that are using instructional improvement systems (as defined in this notice) in providing effective professional development to teachers, principals, and administrators on how to use these systems and the resulting data to support continuous instructional improvement; and

(iii) Make the data from instructional improvement systems (as defined in this notice), together with statewide longitudinal data system data, available and accessible to researchers so that they have detailed information with which to evaluate the effectiveness of instructional materials, strategies, and approaches for educating different types of students (e.g., students with disabilities, English language learners, students whose achievement is well below or above grade level).

D. Great Teachers and Leaders

State Reform Conditions Criteria

General Reviewer Guidance for (D)(1): In judging the quality of the applicant's response to this criterion, reviewers should refer to what the criterion asks and to the evidence requested in the application and presented by the applicant (if any).

Reviewer Guidance Specific to (D)(1):

- *The criterion must be judged for both teachers and principals.*

Reviewer Guidance Specific to (D)(1)(i):

- *"High" points are earned by States that have alternative routes that (a) permit providers who operate independently of institutions of higher education (IHEs), and (b) include at least 4 of the 5 elements listed in the definition of alternative routes to certification (as defined in this notice).*
- *"Medium" points are earned by States that have alternative routes that (a) permit providers who operate independently of IHEs, and (b) include at least 2 of the 5 elements listed in the definition of alternative routes to certification (as defined in this notice).*

[7] Successful applicants that receive Race to the Top grant awards will need to comply with the Family Educational Rights and Privacy Act (FERPA), including 34 CFR Part 99, as well as State and local requirements regarding privacy.

- *"Low" points are earned by States that have alternative routes that (a) do not permit providers who operate independently of IHEs, OR (b) include only 1 of the 5 elements listed in the definition of alternative routes to certification (as defined in this notice).*

(D)(1) **(maximum total points: 21)** Providing high-quality pathways for aspiring teachers and principals: The extent to which the State has—

(i) Legal, statutory, or regulatory provisions that allow alternative routes to certification (as defined in this notice) for teachers and principals, particularly routes that allow for providers in addition to institutions of higher education;

(ii) Alternative routes to certification (as defined in this notice) that are in use; and

(iii) A process for monitoring, evaluating, and identifying areas of teacher and principal shortage and for preparing teachers and principals to fill these areas of shortage.

Reform Plan Criteria

General Reviewer Guidance for (D)(2): In judging the quality of the applicant's response to this criterion and annual targets, reviewers should refer to what the criterion asks, to the evidence requested in the application and presented by the applicant (if any), and to the elements of a high-quality plan as set forth in application requirement (d).

Reviewer Guidance Specific to (D)(2):

- *The criterion must be judged for both teachers and principals.*

(D)(2) **(maximum total points: 58)** Improving teacher and principal effectiveness based on performance: The extent to which the State, in collaboration with its participating LEAs (as defined in this notice), has a high-quality plan and ambitious yet achievable annual targets to ensure that participating LEAs (as defined in this notice)—

(i) **(maximum subpoints: 5)** Establish clear approaches to measuring student growth (as defined in this notice) and measure it for each individual student;

(ii) **(maximum subpoints: 15)** Design and implement rigorous, transparent, and fair evaluation systems for teachers and principals that (a) differentiate effectiveness using multiple rating categories that take into account data on student growth (as defined in this notice) as a significant factor, and (b) are designed and developed with teacher and principal involvement;

(iii) **(maximum subpoints: 10)** Conduct annual evaluations of teachers and principals that include timely and constructive feedback; as part of such evaluations, provide teachers and principals with data on student growth for their students, classes, and schools; and

(iv) **(maximum subpoints: 28)** Use these evaluations, at a minimum, to inform decisions regarding—

(a) Developing teachers and principals, including by providing relevant coaching, induction support, and/or professional development;

(b) Compensating, promoting, and retaining teachers and principals, including by providing opportunities for highly effective teachers and principals (both as defined in this notice) to obtain additional compensation and be given additional responsibilities;

(c) Whether to grant tenure and/or full certification (where applicable) to teachers and principals using rigorous standards and streamlined, transparent, and fair procedures; and

(d) Removing ineffective tenured and untenured teachers and principals after they have had ample opportunities to improve, and ensuring that such decisions are made using rigorous standards and streamlined, transparent, and fair procedures.

General Reviewer Guidance for (D)(3): In judging the quality of the applicant's plan and annual targets for this criterion, reviewers should refer to what the criterion asks, to the evidence requested in the application and presented by the applicant (if any), and to the elements of a high-quality plan as set forth in application requirement (d).

(D)(3) **(maximum total points: 25)** Ensuring equitable distribution of effective teachers and principals: The extent to which the State, in collaboration with its participating LEAs (as defined in this notice), has a high-quality plan and ambitious yet achievable annual targets to—

(i) **(maximum subpoints: 15)** Ensure the equitable distribution of teachers and principals by developing a plan, informed by reviews of prior actions and data, to ensure that students in high-poverty and/or high-minority schools (both as defined in this notice) have equitable access to highly effective teachers and principals (both as defined in this notice) and are not served by ineffective teachers and principals at higher rates than other students; and

(ii) **(maximum subpoints: 10)** Increase the number and percentage of effective teachers (as defined in this notice) teaching hard-to-staff subjects and specialty areas including mathematics, science, and special education; teaching in language instruction educational programs (as defined under Title III of the ESEA); and teaching in other areas as identified by the State or LEA.

Plans for (i) and (ii) may include, but are not limited to, the implementation of incentives and strategies in such areas as recruitment, compensation, teaching and learning environments, professional development, and human resources practices and processes.

General Reviewer Guidance for (D)(4): In judging the quality of the applicant's plan and annual targets for this criterion, reviewers should refer to what the criterion asks, to the evidence requested in the application and presented by the applicant (if any), and to the elements of a high-quality plan as set forth in application requirement (d).

Reviewer Guidance Specific to (D)(4):

- *The criterion must be judged for both teachers and principals.*

(D)(4) **(maximum total points: 14)** Improving the effectiveness of teacher and principal preparation programs: The extent to which the State has a high-quality plan and ambitious yet achievable annual targets to—

(i) Link student achievement and student growth (both as defined in this notice) data to the students' teachers and principals, to link this information to the in-State programs where those teachers and principals were prepared for credentialing, and to publicly report the data for each credentialing program in the State; and

(ii) Expand preparation and credentialing options and programs that are successful at producing effective teachers and principals (both as defined in this notice).

General Reviewer Guidance for (D)(5): In judging the quality of the applicant's plan and annual targets (if any) for this criterion, reviewers should refer to what the criterion asks, to the evidence requested in the application and presented by the applicant (if any), and to the elements of a high-quality plan as set forth in application requirement (d).

(D)(5) **(maximum total points: 20)** Providing effective support to teachers and principals: The extent to which the State, in collaboration with its participating LEAs (as defined in this notice), has a high-quality plan for its participating LEAs (as defined in this notice) to—

(i) Provide effective, data-informed professional development, coaching, induction, and common planning and collaboration time to teachers and principals that are, where appropriate, ongoing and job-embedded. Such support might focus on, for example, gathering, analyzing, and using data; designing instructional strategies for improvement; differentiating instruction; creating school environments supportive of data-informed decisions; designing instruction to meet the specific needs of high-need students (as defined in this notice); and aligning systems and removing barriers to effective implementation of practices designed to improve student learning outcomes; and

(ii) Measure, evaluate, and continuously improve the effectiveness of those supports in order to improve student achievement (as defined in this notice).

E. Turning Around the Lowest-Achieving Schools

State Reform Conditions Criteria

General Reviewer Guidance for (E)(1): In judging the quality of the applicant's response to this criterion, reviewers should refer to what the criterion asks and to the evidence requested in the application and presented by the applicant (if any).

Reviewer Guidance Specific to (E)(1):

- *10 points are earned by States that can intervene directly in both schools and LEAs.*
- *5 points are earned by States that can intervene directly in either schools or LEAs, but not both.*
- *0 points are earned by States that cannot intervene in either schools or LEAs.*

(E)(1) **(maximum total points: 10)** Intervening in the lowest-achieving schools and LEAs: The extent to which the State has the legal, statutory, or regulatory authority to intervene directly in the State's persistently lowest-achieving schools (as defined in this notice) and in LEAs that are in improvement or corrective action status.

Reform Plan Criteria

General Reviewer Guidance for (E)(2): In judging the quality of the applicant's plan and annual targets for this criterion, reviewers should refer to what the criterion asks, to the evidence requested in the application and presented by the applicant (if any), and to the elements of a high-quality plan as set forth in application requirement (d).

(E)(2) **(maximum total points: 40)** Turning around the lowest-achieving schools: The extent to which the State has a high-quality plan and ambitious yet achievable annual targets to—

(i) **(maximum subpoints: 5)** Identify the persistently lowest-achieving schools (as defined in this notice) and, at its discretion, any non-Title I eligible secondary schools that would be considered persistently lowest-achieving schools (as defined in this notice) if they were eligible to receive Title I funds; and

(ii) **(maximum subpoints: 35)** Support its LEAs in turning around these schools by implementing one of the four school intervention models (as described in Appendix C): turnaround model, restart model, school closure, or transformation model (provided that an LEA with more than nine persistently lowest-achieving schools may not use the transformation model for more than 50 percent of its schools).

F. General

State Reform Conditions Criteria

General Reviewer Guidance for (F)(1): In judging the quality of the applicant's response to this criterion, reviewers should refer to what the criterion asks and to the evidence requested in the application and presented by the applicant (if any).

Reviewer Guidance Specific to (F)(1)(i):

- *"High" points are earned if the percentage of the total revenues available to the State that were used to support elementary, secondary, and public higher education increased from FY 2008 to FY 2009.*
- *"Medium" points are earned if the percentage of the total revenues available to the State that were used to support elementary, secondary, and public higher education were substantially unchanged from FY 2008 to FY 2009.*
- *"Low" points are earned if the percentage of the total revenues available to the State that were used to support elementary, secondary, and public higher education decreased from FY 2008 to FY 2009.*

(F)(1) **(maximum total points: 10)** Making education funding a priority: The extent to which—

(i) The percentage of the total revenues available to the State (as defined in this notice) that were used to support elementary, secondary, and public higher education for FY 2009 was greater than or equal to the percentage of the total revenues available to the State (as defined in this notice) that were used to support elementary, secondary, and public higher education for FY 2008; and

(ii) The State's policies lead to equitable funding (a) between high-need LEAs (as defined in this notice) and other LEAs, and (b) within LEAs, between high-poverty schools (as defined in this notice) and other schools.

General Reviewer Guidance for (F)(2): In judging the quality of the applicant's response to this criterion, reviewers should refer to what the criterion asks and to the evidence requested in the application and presented by the applicant (if any).

Reviewer Guidance Specific to (F)(2)(i):

- *"High" points are earned if the State either has no cap on the number of charter schools, or it has a "high" cap (defined as a cap such that, if it were filled, ≥ 10% of the total schools in the State would be charter schools), and the State does not have restrictions, such as those referenced in the "note to reviewers" below, that would be considered even mildly inhibiting.*
- *"Medium" points are earned if the State has a "medium" cap on the number of charter schools (defined as a cap such that, if it were filled, ≥ 5% and < 10% of the total schools in the State would be charter schools), or the charter school law has sufficient flexibility to allow for an increase in the number of charter schools as if it were a medium or higher cap (e.g. by allowing for the creation of multiple campuses under the same charter), and the State does not have restrictions, such as those referenced in the "note to reviewers" below, that would be considered moderately or severely inhibiting.*
- *"Low" points are earned if the State has a "low" cap on the number of charter schools (defined as a cap such that, if it were filled, < 5% of the total schools in the State would be charter schools) OR if the State has restrictions, such as those referenced in the "note to reviewers" below, that would be considered severely inhibiting.*
- *No points are earned if the State has no charter school law.*
- *Note to reviewers: Charter school laws are so complex that it is hard to write rules to capture each possible obstacle to charter school growth; therefore, this rubric is meant to guide reviewers, not to bind them. For example, if a State limits the number of charter schools by limiting the share of statewide or district-level funding that can go to charter*

schools, rather than by explicitly limiting the number of charter schools, reviewers should convert the funding restriction into an approximately equivalent limit on the number of schools and fit that into the guidelines here. As reviewers assess the inhibitions on charter schools, they should look for restrictions such as: disallowing certain types of charter schools (e.g., startups or conversions); restricting charter schools to operate in certain geographic areas; and limiting the number, percent, or demographics of students that may enroll in charter schools. Some States have "smart caps" designed to restrict growth to high-performing charter schools; this is not a problem unless it effectively restricts any new (i.e., unproven) charter schools from starting.

Reviewer Guidance Specific to (F)(2)(iii):

- *"High" points are earned if the per-pupil funding to charter school students is ≥ 90% of that which is provided to traditional public school students.*
- *"Medium" points are earned if the per-pupil funding to charter school students is 80-89% of that which is provided to traditional public school students.*
- *"Low" points are earned if the per-pupil funding to charter school students is ≤ 79% of that which is provided to traditional public school students, or the State does not have a charter school law.*
- *No points are earned if the State has no charter school law.*

(F)(2) **(maximum total points: 40)** Ensuring successful conditions for high-performing charter schools and other innovative schools: The extent to which—

(i) The State has a charter school law that does not prohibit or effectively inhibit increasing the number of high-performing charter schools (as defined in this notice) in the State, measured (as set forth in Appendix B) by the percentage of total schools in the State that are allowed to be charter schools or otherwise restrict student enrollment in charter schools.

(ii) The State has laws, statutes, regulations, or guidelines regarding how charter school authorizers approve, monitor, hold accountable, reauthorize, and close charter schools; in particular, whether authorizers require that student achievement (as defined in this notice) be one significant factor, among others, in authorization or renewal; encourage charter schools that serve student populations that are similar to local district student populations, especially relative to high-need students (as defined in this notice); and have closed or not renewed ineffective charter schools.

(iii) The State's charter schools receive (as set forth in Appendix B) equitable funding compared to traditional public schools, and a commensurate share of local, State, and Federal revenues.

(iv) The State provides charter schools with funding for facilities (for leasing facilities, purchasing facilities, or making tenant improvements), assistance with facilities acquisition, access to public facilities, the ability to share in bonds and mill levies, or other supports; and the extent to which the State does not impose any facility-related requirements on charter schools that are stricter than those applied to traditional public schools.

(v) The State enables LEAs to operate innovative, autonomous public schools (as defined in this notice) other than charter schools.

General Reviewer Guidance for (F)(3): In judging the quality of the applicant's response to this criterion, reviewers should refer to what the criterion asks and to the evidence requested in the application and presented by the applicant (if any).

(F)(3) **(maximum total points: 5)** Demonstrating other significant reform conditions: The extent to which the State, in addition to information provided under other State Reform Conditions Criteria, has created, through law, regulation, or policy, other conditions favorable to

education reform or innovation that have increased student achievement or graduation rates, narrowed achievement gaps, or resulted in other important outcomes.

V. Reviewer Guidance for Priorities

Absolute Priority Guidance: The application will be judged to ensure that it has met the absolute priority set forth below. The absolute priority cuts across the entire application and should not be addressed separately. It is assessed, after the proposal has been fully reviewed and evaluated, to ensure that the application has met the priority. If an application has not met the priority, it will be eliminated from the competition.

Priority 1: Absolute Priority – Comprehensive Approach to Education Reform

To meet this priority, the State's application must comprehensively and coherently address all of the four education reform areas specified in the ARRA as well as the State Success Factors Criteria in order to demonstrate that the State and its participating LEAs are taking a systemic approach to education reform. The State must demonstrate in its application sufficient LEA participation and commitment to successfully implement and achieve the goals in its plans; and it must describe how the State, in collaboration with its participating LEAs, will use Race to the Top and other funds to increase student achievement, decrease the achievement gaps across student subgroups, and increase the rates at which students graduate from high school prepared for college and careers.

Competitive Priority Guidance: The application will be judged to determine whether it has met the competitive preference priority set forth below. The competitive preference priority will be evaluated in the context of the State's entire application. Therefore, a State that is responding to this priority should address it throughout the application, as appropriate, and provide a summary of its approach to addressing the priority. The reviewers will assess the priority as part of their review of a State's application and determine whether it has been met.

Priority 2: Competitive Preference Priority – Emphasis on Science, Technology, Engineering, and Mathematics (STEM). (competitive preference points: 15, all or nothing)

To meet this priority, the State's application must have a high-quality plan to address the need to (i) offer a rigorous course of study in mathematics, the sciences, technology, and engineering; (ii) cooperate with industry experts, museums, universities, research centers, or other STEM-capable community partners to prepare and assist teachers in integrating STEM content across grades and disciplines, in promoting effective and relevant instruction, and in offering applied learning opportunities for students; and (iii) prepare more students for advanced study and careers in the sciences, technology, engineering, and mathematics, including by addressing the needs of underrepresented groups and of women and girls in the areas of science, technology, engineering, and mathematics.

Invitational Priority Guidance: No points are awarded for invitational priorities.

Priority 3: Invitational Priority – Innovations for Improving Early Learning Outcomes.

The Secretary is particularly interested in applications that include practices, strategies, or programs to improve educational outcomes for high-need students who are young children (pre-kindergarten through third grade) by enhancing the quality of preschool programs. Of particular interest are proposals that support practices that (i) improve school readiness (including social, emotional, and cognitive); and (ii) improve the transition between preschool and kindergarten.

Invitational Priority Guidance: No points are awarded for invitational priorities.

Priority 4: Invitational Priority – Expansion and Adaptation of Statewide Longitudinal Data Systems.

The Secretary is particularly interested in applications in which the State plans to expand statewide longitudinal data systems to include or integrate data from special education programs, English language learner programs,[8] early childhood programs, at-risk and dropout prevention programs, and school climate and culture programs, as well as information on student mobility, human resources (i.e., information on teachers, principals, and other staff), school finance, student health, postsecondary education, and other relevant areas, with the purpose of connecting and coordinating all parts of the system to allow important questions related to policy, practice, or overall effectiveness to be asked, answered, and incorporated into effective continuous improvement practices.

The Secretary is also particularly interested in applications in which States propose working together to adapt one State's statewide longitudinal data system so that it may be used, in whole or in part, by one or more other States, rather than having each State build or continue building such systems independently.

Invitational Priority Guidance: No points are awarded for invitational priorities.

Priority 5: Invitational Priority – P-20 Coordination, Vertical and Horizontal Alignment.

The Secretary is particularly interested in applications in which the State plans to address how early childhood programs, K-12 schools, postsecondary institutions, workforce development organizations, and other State agencies and community partners (e.g., child welfare, juvenile justice, and criminal justice agencies) will coordinate to improve all parts of the education system and create a more seamless preschool-through-graduate school (P-20) route for students. Vertical alignment across P-20 is particularly critical at each point where a transition occurs (e.g., between early childhood and K-12, or between K-12 and postsecondary/careers) to ensure that students exiting one level are prepared for success, without remediation, in the next. Horizontal alignment, that is, coordination of services across schools, State agencies, and community partners, is also important in ensuring that high-need students (as defined in this notice) have access to the broad array of opportunities and services they need and that are beyond the capacity of a school itself to provide.

Invitational Priority Guidance: No points are awarded for invitational priorities.

Priority 6: Invitational Priority – School-Level Conditions for Reform, Innovation, and Learning.

The Secretary is particularly interested in applications in which the State's participating LEAs (as defined in this notice) seek to create the conditions for reform and innovation as well as the conditions for learning by providing schools with flexibility and autonomy in such areas as--

(i) Selecting staff;

(ii) Implementing new structures and formats for the school day or year that result in increased learning time (as defined in this notice);

[8] The term English language learner, throughout this notice, is meant to include students who are limited English proficient, as defined in section 9101 of the ESEA.

(iii) Controlling the school's budget;

(iv) Awarding credit to students based on student performance instead of instructional time;

(v) Providing comprehensive services to high-need students (as defined in this notice) (e.g., by mentors and other caring adults; through local partnerships with community-based organizations, nonprofit organizations, and other providers);

(vi) Creating school climates and cultures that remove obstacles to, and actively support, student engagement and achievement; and

(vii) Implementing strategies to effectively engage families and communities in supporting the academic success of their students.

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Appendix C. School Intervention Models

There are four school intervention models referred to in Selection Criterion (E)(2): Turnaround model, restart model, school closure, or transformation model. Each is described below.

(a) *Turnaround model.* (1) A turnaround model is one in which an LEA must—

(i) Replace the principal and grant the principal sufficient operational flexibility (including in staffing, calendars/time, and budgeting) to implement fully a comprehensive approach in order to substantially improve student achievement outcomes and increase high school graduation rates;

(ii) Using locally adopted competencies to measure the effectiveness of staff who can work within the turnaround environment to meet the needs of students,

(A) Screen all existing staff and rehire no more than 50 percent; and

(B) Select new staff;

(iii) Implement such strategies as financial incentives, increased opportunities for promotion and career growth, and more flexible work conditions that are designed to recruit, place, and retain staff with the skills necessary to meet the needs of the students in the turnaround school;

(iv) Provide staff with ongoing, high-quality, job-embedded professional development that is aligned with the school's comprehensive instructional program and designed with school staff to ensure that they are equipped to facilitate effective teaching and learning and have the capacity to successfully implement school reform strategies;

(v) Adopt a new governance structure, which may include, but is not limited to, requiring the school to report to a new ''turnaround office'' in the LEA or SEA, hire a ''turnaround leader'' who reports directly to the Superintendent or Chief Academic Officer, or enter into a multi-year contract with the LEA or SEA to obtain added flexibility in exchange for greater accountability;

(vi) Use data to identify and implement an instructional program that is research-based and ''vertically aligned'' from one grade to the next as well as aligned with State academic standards;

(vii) Promote the continuous use of student data (such as from formative, interim, and summative assessments) to inform and differentiate instruction in order to meet the academic needs of individual students;

(viii) Establish schedules and implement strategies that provide increased learning time (as defined in this notice); and

(ix) Provide appropriate social-emotional and community-oriented services and supports for students.

(2) A turnaround model may also implement other strategies such as—

(i) Any of the required and permissible activities under the transformation model; or

(ii) A new school model (*e.g.,* themed, dual language academy).

(b) *Restart model.* A restart model is one in which an LEA converts a school or closes and reopens a school under a charter school operator, a charter management organization (CMO), or an education management organization (EMO) that has been selected through a rigorous review process. (A CMO is a non-profit organization that operates or manages charter schools by centralizing or sharing certain functions and resources among schools. An EMO is a for-profit or non-profit organization that provides ''whole-school operation'' services to an LEA.) A restart model must enroll, within the grades it serves, any former student who wishes to attend the school.

(c) *School closure.* School closure occurs when an LEA closes a school and enrolls the students who attended that school in other schools in the LEA that are higher achieving. These other schools should be within reasonable proximity to the closed school and may include, but are not limited to, charter schools or new schools for which achievement data are not yet available.

(d) *Transformation model.* A transformation model is one in which an LEA implements each of the following strategies:

(1) *Developing and increasing teacher and school leader effectiveness.*

(i) *Required activities.* The LEA must—

(A) Replace the principal who led the school prior to commencement of the transformation model;

(B) Use rigorous, transparent, and equitable evaluation systems for teachers and principals that—

(*1*) Take into account data on student growth (as defined in this notice) as a significant factor as well as other factors such as multiple observation-based assessments of performance and ongoing collections of professional practice reflective of student achievement and increased high-school graduations rates; and

(*2*) Are designed and developed with teacher and principal involvement;

(C) Identify and reward school leaders, teachers, and other staff who, in implementing this model, have increased student achievement and high-school graduation rates and identify and remove those who, after ample opportunities have been provided for them to improve their professional practice, have not done so;

(D) Provide staff with ongoing, high-quality, job-embedded professional development (*e.g.,* regarding subject-specific pedagogy, instruction that reflects a deeper understanding of the community served by the school, or differentiated instruction) that is aligned with the school's comprehensive instructional program and designed with school staff to ensure they are equipped to facilitate effective teaching and learning and have the capacity to successfully implement school reform strategies; and

(E) Implement such strategies as financial incentives, increased opportunities for promotion and career growth, and more flexible work conditions that are designed to recruit, place, and retain staff with the skills necessary to meet the needs of the students in a transformation school.

(ii) *Permissible activities.* An LEA may also implement other strategies to

develop teachers' and school leaders' effectiveness, such as—

(A) Providing additional compensation to attract and retain staff with the skills necessary to meet the needs of the students in a transformation school;

(B) Instituting a system for measuring changes in instructional practices resulting from professional development; or

(C) Ensuring that the school is not required to accept a teacher without the mutual consent of the teacher and principal, regardless of the teacher's seniority.

(2) *Comprehensive instructional reform strategies.*

(i) *Required activities.* The LEA must—

(A) Use data to identify and implement an instructional program that is research-based and ''vertically aligned'' from one grade to the next as well as aligned with State academic standards; and

(B) Promote the continuous use of student data (such as from formative, interim, and summative assessments) to inform and differentiate instruction in order to meet the academic needs of individual students.

(ii) *Permissible activities.* An LEA may also implement comprehensive instructional reform strategies, such as—

(A) Conducting periodic reviews to ensure that the curriculum is being implemented with fidelity, is having the intended impact on student achievement, and is modified if ineffective;

(B) Implementing a schoolwide ''response-to-intervention'' model;

(C) Providing additional supports and professional development to teachers and principals in order to implement effective strategies to support students with disabilities in the least restrictive environment and to ensure that limited English proficient students acquire language skills to master academic content;

(D) Using and integrating technology-based supports and interventions as part of the instructional program; and

(E) In secondary schools—

(*1*) Increasing rigor by offering opportunities for students to enroll in advanced coursework (such as Advanced Placement or International Baccalaureate; or science, technology, engineering, and mathematics courses, especially those that incorporate rigorous and relevant project-, inquiry-, or design-based contextual learning opportunities), early-college high schools, dual enrollment programs, or thematic learning academies that prepare students for college and careers, including by providing appropriate supports designed to ensure that low-achieving students can take advantage of these programs and coursework;

(*2*) Improving student transition from middle to high school through summer transition programs or freshman academies;

(*3*) Increasing graduation rates through, for example, credit-recovery programs, re-engagement strategies, smaller learning communities, competency-based instruction and performance-based assessments, and acceleration of basic reading and mathematics skills; or

(*4*) Establishing early-warning systems to identify students who may be at risk of failing to achieve to high standards or graduate.

(3) *Increasing learning time and creating community-oriented schools.*

(i) *Required activities.* The LEA must—

(A) Establish schedules and implement strategies that provide increased learning time (as defined in this notice); and

(B) Provide ongoing mechanisms for family and community engagement.

(ii) *Permissible activities.* An LEA may also implement other strategies that extend learning time and create community-oriented schools, such as—

(A) Partnering with parents and parent organizations, faith- and community-based organizations, health clinics, other State or local agencies, and others to create safe school environments that meet students' social, emotional, and health needs;

(B) Extending or restructuring the school day so as to add time for such strategies as advisory periods that build relationships between students, faculty, and other school staff;

(C) Implementing approaches to improve school climate and discipline, such as implementing a system of positive behavioral supports or taking steps to eliminate bullying and student harassment; or

(D) Expanding the school program to offer full-day kindergarten or pre-kindergarten.

(4) *Providing operational flexibility and sustained support.*

(i) *Required activities.* The LEA must—

(A) Give the school sufficient operational flexibility (such as staffing, calendars/time, and budgeting) to implement fully a comprehensive approach to substantially improve student achievement outcomes and increase high school graduation rates; and

(B) Ensure that the school receives ongoing, intensive technical assistance and related support from the LEA, the SEA, or a designated external lead partner organization (such as a school turnaround organization or an EMO).

(ii) *Permissible activities.* The LEA may also implement other strategies for providing operational flexibility and intensive support, such as—

(A) Allowing the school to be run under a new governance arrangement, such as a turnaround division within the LEA or SEA; or

(B) Implementing a per-pupil school-based budget formula that is weighted based on student needs.

If a school identified as a persistently lowest-achieving school has implemented, in whole or in part within the last two years, an intervention that meets the requirements of the turnaround, restart, or transformation models, the school may continue or complete the intervention being implemented.

Appendix D. Participating LEA Memorandum of Understanding

Background

Participating LEAs (as defined in this notice) in a State's Race to the Top plan are required to enter into a Memorandum of Understanding (MOU) or other binding agreement with the State that specifies the scope of the work being implemented by the participating LEA (as defined in this notice).

To support States in working efficiently with LEAs to determine which LEAs will participate in the State's Race to the Top application, the U.S. Department of Education has produced a model MOU, which is attached. This model MOU may serve as a template for States; however, States are not required to use it. They may use a different document that includes the key features noted below and in the model, and they should consult with their State and local attorneys on what is most appropriate for their State that includes, at a minimum, these key elements.

The purpose of the model MOU is to help to specify a relationship that is specific to Race to the Top and is not meant to detail all typical aspects of State/LEA grant management or administration. At a minimum, a strong MOU should include the following, each of which is described in detail below: (i) Terms and conditions; (ii) a scope of work; and, (iii) signatures.

(i) Terms and conditions: Each participating LEA (as defined in this notice) should sign a standard set of terms and conditions that includes, at a minimum, key roles and responsibilities

of the State and the LEA; State recourse for LEA non-performance; and assurances that make clear what the participating LEA (as defined in this notice) is agreeing to do.

(ii) Scope of work: MOUs should include a scope of work (included in the model MOU as Exhibit I) that is completed by each participating LEA (as defined in this notice). The scope of work must be signed and dated by an authorized LEA and State official. In the interest of time and with respect for the effort it will take for LEAs to develop detailed work plans, the scope of work submitted by LEAs and States as part of their Race to the Top applications may be preliminary. Preliminary scopes of work should include the portions of the State's proposed reform plans that the LEA is agreeing to implement. (Note that in order to participate in a State's Race to the Top application an LEA must agree to implement all or significant portions of the State's reform plans.)

If a State is awarded a Race to the Top grant, the participating LEAs (as defined in this notice) will have up to 90 days to complete final scopes of work (which could be attached to the model MOU as Exhibit II), which must contain detailed work plans that are consistent with the preliminary scope of work and with the State's grant application, and should include the participating LEA's (as defined in this notice) specific goals, activities, timelines, budgets, key personnel, and annual targets for key performance measures.

(iii) Signatures: The signatures demonstrate (a) an acknowledgement of the relationship between the LEA and the State, and (b) the strength of the participating LEA's (as defined in this notice) commitment.

- With respect to the relationship between the LEA and the State, the State's counter-signature on the MOU indicates that the LEA's commitment is consistent with the requirement that a participating LEA (as defined in this notice) implement all or significant portions of the State's plans.
- The strength of the participating LEA's (as defined in this notice) commitment will be demonstrated by the signatures of the LEA superintendent (or an equivalent authorized signatory), the president of the local school board (or equivalent, if applicable) and the local teacher's union leader (if applicable).

Please note the following with regard to the State's Race to the Top application:

- In its application, the State need only provide an example of the State's standard Participating LEA MOU; it does not have to provide copies of every MOU signed by its participating LEAs (as defined in this notice). If, however, States and LEAs have made any changes to the State's standard MOU, the State must provide a description of the changes that were made. Please note that the Department may, at any time, request copies of all MOUs between the State and its participating LEAs.
- Please see criteria (A)(1)(ii) and (A)(1)(iii), and the evidence requested in the application, for more information and ways in which States will be asked to summarize information about the LEA MOUs.

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Model Participating LEA Memorandum of Understanding

This Memorandum of Understanding ("MOU") is entered into by and between _____ ("State") and _____ ("Participating LEA"). The purpose of this agreement is to establish a framework of collaboration, as well as articulate specific roles and responsibilities in support of the State in its implementation of an approved Race to the Top grant project.

I. SCOPE OF WORK

Exhibit I, the Preliminary Scope of Work, indicates which portions of the State's proposed reform plans ("State Plan") the Participating LEA is agreeing to implement. (Note that, in order to participate, the LEA must agree to implement all or significant portions of the State Plan.)

II. PROJECT ADMINISTRATION

A. PARTICIPATING LEA RESPONSIBILITIES

In assisting the State in implementing the tasks and activities described in the State's Race to the Top application, the Participating LEA subgrantee will:

1) Implement the LEA plan as identified in Exhibits I and II of this agreement;
2) Actively participate in all relevant convenings, communities of practice, or other practice-sharing events that are organized or sponsored by the State or by the U.S. Department of Education ("ED");
3) Post to any website specified by the State or ED, in a timely manner, all non-proprietary products and lessons learned developed using funds associated with the Race to the Top grant;
4) Participate, as requested, in any evaluations of this grant conducted by the State or ED;
5) Be responsive to State or ED requests for information including on the status of the project, project implementation, outcomes, and any problems anticipated or encountered;
6) Participate in meetings and telephone conferences with the State to discuss (a) progress of the project, (b) potential dissemination of resulting non-proprietary products and lessons learned, (c) plans for subsequent years of the Race to the Top grant period, and (d) other matters related to the Race to the Top grant and associated plans.

B. STATE RESPONSIBILITIES

In assisting Participating LEAs in implementing their tasks and activities described in the State's Race to the Top application, the State grantee will:

1) Work collaboratively with, and support the Participating LEA in carrying out the LEA Plan as identified in Exhibits I and II of this agreement;
2) Timely distribute the LEA's portion of Race to the Top grant funds during the course of the project period and in accordance with the LEA Plan identified in Exhibit II;
3) Provide feedback on the LEA's status updates, annual reports, any interim reports, and project plans and products; and
4) Identify sources of technical assistance for the project.

C. JOINT RESPONSIBILITIES

1) The State and the Participating LEA will each appoint a key contact person for the Race to the Top grant.
2) These key contacts from the State and the Participating LEA will maintain frequent communication to facilitate cooperation under this MOU.
3) State and Participating LEA grant personnel will work together to determine appropriate timelines for project updates and status reports throughout the whole grant period.
4) State and Participating LEA grant personnel will negotiate in good faith to continue to achieve the overall goals of the State's Race to the Top grant, even when the State Plan requires modifications that affect the Participating LEA, or when the LEA Plan requires modifications.

D. STATE RECOURSE FOR LEA NON-PERFORMANCE

If the State determines that the LEA is not meeting its goals, timelines, budget, or annual targets or is not fulfilling other applicable requirements, the State grantee will take appropriate enforcement action, which could include a collaborative process between the State and the LEA, or any of the enforcement measures that are detailed in 34 CFR section 80.43 including putting the LEA on reimbursement payment status, temporarily withholding funds, or disallowing costs.

III. ASSURANCES

The Participating LEA hereby certifies and represents that it:
1) Has all requisite power and authority to execute this MOU;
2) Is familiar with the State's Race to the Top grant application and is supportive of and committed to working on all or significant portions of the State Plan;
3) Agrees to be a Participating LEA and will implement those portions of the State Plan indicated in Exhibit I, if the State application is funded,
4) Will provide a Final Scope of Work to be attached to this MOU as Exhibit II only if the State's application is funded; will do so in a timely fashion but no later than 90 days after a grant is awarded; and will describe in Exhibit II the LEA's specific goals, activities, timelines, budgets, key personnel, and annual targets for key performance measures ("LEA Plan") in a manner that is consistent with the Preliminary Scope of Work (Exhibit I) and with the State Plan; and
5) Will comply with all of the terms of the Grant, the State's subgrant, and all applicable Federal and State laws and regulations, including laws and regulations applicable to the Program, and the applicable provisions of EDGAR (34 CFR Parts 75, 77, 79, 80, 82, 84, 85, 86, 97, 98 and 99).

IV. MODIFICATIONS

This Memorandum of Understanding may be amended only by written agreement signed by each of the parties involved, and in consultation with ED.

V. DURATION/TERMINATION

This Memorandum of Understanding shall be effective, beginning with the date of the last signature hereon and, if a grant is received, ending upon the expiration of the grant project period, or upon mutual agreement of the parties, whichever occurs first.

VI. SIGNATURES

LEA Superintendent (or equivalent authorized signatory) - required:

_____

Signature/Date

_____

Print Name/Title

President of Local School Board (or equivalent, if applicable):

_____

Signature/Date

_____

Print Name/Title

Local Teachers' Union Leader (if applicable):

_____

Signature/Date

_____

Print Name/Title

Authorized State Official - required:
By its signature below, the State hereby accepts the LEA as a Participating LEA.

_____

Signature/Date

_____

Print Name/Title

A. EXHIBIT I – PRELIMINARY SCOPE OF WORK

LEA hereby agrees to participate in implementing the State Plan in each of the areas identified below.

Elements of State Reform Plans	LEA Participation (Y/N)	Comments from LEA (optional)
B. Standards and Assessments		
(B)(3) Supporting the transition to enhanced standards and high-quality assessments		
C. Data Systems to Support Instruction		
(C)(3) Using data to improve instruction:		
(i) Use of local instructional improvement systems		
(ii) Professional development on use of data		
(iii) Availability and accessibility of data to researchers		
D. Great Teachers and Leaders		
(D)(2) Improving teacher and principal effectiveness based on performance:		
(i) Measure student growth		
(ii) Design and implement evaluation systems		
(iii) Conduct annual evaluations		
(iv)(a) Use evaluations to inform professional development		
(iv)(b) Use evaluations to inform compensation, promotion, and retention		
(iv)(c) Use evaluations to inform tenure and/or full certification		
(iv)(d) Use evaluations to inform removal		
(D)(3) Ensuring equitable distribution of effective teachers and principals:		
(i) High-poverty and/or high-minority schools		
(ii) Hard-to-staff subjects and specialty areas		
(D)(5) Providing effective support to teachers and principals:		
(i) Quality professional development		
(ii) Measure effectiveness of professional development		
E. Turning Around the Lowest-Achieving Schools		
(E)(2) Turning around the lowest-achieving schools		

For the Participating LEA

Authorized Signature/Date

Print Name/Title

For the State

Authorized Signature/Date

Print Name/Title

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Maryland Avenue, SW., room 4W414, Washington, DC 20202 or by e-mail: *readytolearn@ed.gov.*

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Dated: April 5, 2010.

James H. Shelton, III,

Assistant Deputy Secretary for Innovation and Improvement.

[FR Doc. 2010–8168 Filed 4–8–10; 8:45 am]

BILLING CODE 4000–01–P

DEPARTMENT OF EDUCATION

Overview Information; Race to the Top Fund Assessment Program; Notice Inviting Applications for New Awards for Fiscal Year (FY) 2010

Catalog of Federal Domestic Assistance (CFDA) Numbers: 84.395B (Comprehensive Assessment Systems grants) and 84.395C (High School Course Assessment Programs grants).

Dates:

Applications Available: April 9, 2010.

Deadline for Notice of Intent To Apply: April 29, 2010.

Date of Technical Assistance Meeting for Prospective Applicants: April 22, 2010.

Deadline for Transmittal of Applications: June 23, 2010.

Deadline for Intergovernmental Review: August 23, 2010.

Full Text of Announcement

I. Funding Opportunity Description

Purpose and Overview of Program: Authorized under the American Recovery and Reinvestment Act of 2009 (ARRA), the Race to the Top Fund Assessment Program provides funding to consortia of States to develop assessments that are valid, support and inform instruction, provide accurate information about what students know and can do, and measure student achievement against standards designed to ensure that all students gain the knowledge and skills needed to succeed in college and the workplace. These assessments are intended to play a critical role in educational systems; provide administrators, educators, parents, and students with the data and information needed to continuously improve teaching and learning; and help meet the President's goal of restoring, by 2020, the nation's position as the world leader in college graduates.

Through the Race to the Top Fund Assessment Program, the Department expects to award two categories of grants: (A) Comprehensive Assessment Systems grants, and (B) High School Course Assessment Programs grants. In this notice, we are establishing priorities, requirements, definitions, and selection criteria for each grant category. An eligible applicant (*i.e.,* a consortium of States) may apply for grants in both categories, provided it meets the eligibility requirements for each category. The Department will score and rank applications separately in each grant category. Following is an overview of the two grant categories:

(A) *Comprehensive Assessment Systems grants.* Over the past decade, State assessment results have brought much-needed visibility to disparities in achievement among different groups of students and helped meet increasing demands for data that can be used to improve teaching and learning. To fully meet the dual needs for accountability and instructional improvement, however, States need assessment systems that are based on standards designed to prepare students for college and the workplace, and that more validly measure student knowledge and skills against the full range of those standards and across the full performance continuum. Further, States need assessment systems that better reflect good instructional practices and support a culture of continuous improvement in education by providing information that can be used in a timely and meaningful manner to determine school and educator effectiveness, identify teacher and principal professional development and support needs, improve programs, and guide instruction.

This grant category supports the development of such assessment systems by consortia of States. Comprehensive Assessment Systems grants provide funding for the development of new assessment systems that measure student knowledge and skills against a common set of college- and career-ready standards (as defined in this notice) in mathematics and English language arts in a way that covers the full range of those standards, elicits complex student demonstrations or applications of knowledge and skills as appropriate, and provides an accurate measure of student achievement across the full performance continuum and an accurate measure of student growth over a full academic year or course. Assessment systems developed with Comprehensive Assessment Systems grants must include one or more summative assessment components in mathematics and in English language arts that are administered at least once during the academic year in grades 3 through 8 and at least once in high school and that produce student achievement data and student growth data (both as defined in this notice) that can be used to determine whether individual students are college- and career-ready (as defined in this notice) or on track to being college- and career-ready (as defined in this notice). In addition, assessment systems developed with Comprehensive Assessment Systems grants must assess all students, including English learners (as defined in this notice) and students with disabilities (as defined in this notice). Finally, assessment systems developed with Comprehensive Assessment Systems grants must produce data (including student achievement data and student growth data) that can be used to inform (a) determinations of school effectiveness; (b) determinations of individual principal and teacher effectiveness for purposes of evaluation; (c) determinations of principal and teacher professional development and support needs; and (d) teaching, learning, and program improvement.

To be eligible for a Comprehensive Assessment Systems grant, an eligible applicant must include at least 15 States, of which at least 5 States must be governing States (as defined in this notice). An eligible applicant receiving a Comprehensive Assessment Systems grant must ensure that the summative assessment components of the assessment system (in both mathematics and English language arts) will be fully implemented statewide in each State in the consortium no later than the 2014–2015 school year.[1] It is the expectation of the Department that States that adopt assessment systems developed with

[1] By requiring that member States fully implement the summative assessment components of the assessment system no later than the 2014–2015 school year, we believe that we are providing an eligible applicant receiving a Comprehensive Assessment Systems grant with an appropriate amount of time to design and develop summative assessments that meet the Absolute Priority and other requirements for this grant category.

Comprehensive Assessment Systems grants will use assessments in these systems to meet the assessment requirements in Title I of the ESEA.

In addition to meeting the need for assessment systems that can be used to determine whether students are college- and career-ready, this grant category seeks to ensure that the results from those systems will, in turn, be used meaningfully by institutions of higher education (IHEs). Under this grant category, we intend to promote collaboration and better alignment between public elementary, secondary, and postsecondary education systems by establishing a competitive preference priority for applications that include commitments from public IHEs or IHE systems to participate in the design and development of the consortium's final high school summative assessments and to implement policies that exempt from remedial courses and place into credit-bearing college courses students who meet the consortium-adopted achievement standard (as defined in this notice) for those assessments. An application that addresses this priority will receive competitive preference points based on the extent to which it demonstrates strong commitment from the public IHEs or IHE systems (as evidenced by letters of intent) and on the percentage of direct matriculation students (as defined in this notice) in public IHEs in the States in the consortium who are enrolled in those IHEs or IHE systems.

(B) *High School Course Assessment Programs grants.* In our nation's high schools, the rigor of courses offered varies and, in many cases, is not sufficient to prepare students for success in college and careers. To promote consistently high levels of rigor in high school courses across a well-rounded curriculum, this grant category supports the development of high school course assessment programs by consortia of States. High School Course Assessment Programs grants provide funding for the development of new assessment programs that cover multiple high school courses (which may include courses in core academic subjects and career and technical education courses) and that include a process for certifying the rigor of the assessments in the assessment program and for ensuring that assessments of courses covering similar content have common expectations of rigor. Each assessment in the assessment program must measure student knowledge and skills against standards from a common set of college- and career-ready standards in subjects for which such a set of standards exists, or otherwise against State or other rigorous standards; and must produce student achievement data and student growth data that can be used to inform (a) determinations of principal and teacher effectiveness and professional development and support needs, and (b) teaching, learning, and program improvement. In addition, assessments in the assessment program must be designed to assess the broadest possible range of students, including English learners and students with disabilities.

To be eligible for a High School Course Assessment Programs grant, an eligible applicant must include at least 5 governing States. An eligible applicant receiving a High School Course Assessment Programs grant must ensure that at least one course assessment developed under the assessment program will be implemented in each State in the consortium no later than the 2013–2014 school year and that all assessments in the assessment program will be operational no later than the 2014–2015 school year.[2] The Department will not require that assessments developed with High School Course Assessment Programs grants be used to meet the assessment requirements in Title I of the ESEA.

We believe that States and high schools will use the assessments in these assessment programs as part of coherent high school improvement efforts that include aligned curricula, instruction, and professional development. In that context, these assessments will play important roles in providing teachers, principals, students, and parents with the information they need to determine whether high school courses are sufficiently rigorous to prepare students for success in college and careers, as well as monitor student progress, adjust instruction, and ultimately improve student outcomes. To ensure that these assessment programs help students prepare for and transition to college successfully, we encourage eligible applicants to collaborate with IHEs in their design and development.

Within this grant category, the Department also seeks to promote the development of rigorous assessment programs for particular courses of high school study. To further the administration's goal of improving teaching and learning in the science, technology, engineering, and mathematics (STEM) subjects, we are establishing a competitive preference priority for applications that include a high-quality plan to develop, within the grant period and with input from one or more four-year degree-granting IHEs, assessments for high school courses that comprise a rigorous course of study designed to prepare high school students for postsecondary study and careers in the STEM fields. To help improve outcomes in career and technical education, we are also establishing a second competitive preference priority for applications that include a high-quality plan to develop, within the grant period and with relevant business community participation and support, assessments for high school courses that comprise a rigorous course of study in career and technical education that is designed to prepare high school students for success on technical certification examinations or for postsecondary education or employment.

As mentioned earlier, the Department supports the development, under both grant categories in this competition, of common assessments by consortia of States. We believe that States working together in consortia benefit from increased assessment resources and expertise and, thus, can develop assessments that are of higher quality than assessments developed by an individual State working on its own. In addition, bringing States together in consortia will improve the efficiency and cost-effectiveness of projects funded under this competition and ensure that the assessments that this competition supports are developed for as many States as possible as quickly as possible. Finally, the development of common assessments will enable the production of comparable data that can be used to identify and promote effective instructional strategies and practices more reliably across States.

In addition, we are requiring that eligible applicants receiving awards under either category in this competition develop assessment items and produce student data in a manner that is consistent with standards for interoperability, and that they make all assessment content (*i.e.,* assessments and assessment items) developed with funds from this competition freely available to States, technology platform providers, or others that request it for purposes of administering assessments, consistent with States' needs and with

[2] By requiring that at least one course assessment developed under the assessment program be implemented in each State in the consortium no later than the 2013–2014 school year and that all assessments in the assessment program be operational no later than the 2014–2015 school year, we believe that we are providing an eligible applicant receiving a High School Course Assessment Programs grant with an appropriate amount of time to design and develop course assessment programs that meet the Absolute Priority and other requirements for this grant category.

consortium or State requirements for test or item security. We believe that these requirements will ensure that assessment content developed with funds from this competition is widely available, including to States that are not part of consortia receiving funds under this competition as well as to commercial organizations wishing to further develop, extend, and incorporate the content into assessment products intended for State use. Moreover, we believe that making assessment content freely available will spur innovation in assessment technology and enable technology providers to compete for States' business on the basis of their developing efficient, effective, economical, and innovative assessment platforms.

The Department recognizes that there are assessment needs—particularly for alternate assessments based on alternate academic achievement standards and assessments of English language proficiency—that we do not attempt to address through this competition. We wish to note that we have plans to address these needs in other ways. For students with the most significant cognitive disabilities, alternate assessments based on alternate academic achievement standards are critical components of a complete assessment system. It is the Department's intent to support States in developing new alternate assessments based on alternate achievement standards, in coordination with this Race to the Top Assessment competition, through a separate competition that will be administered by the Department's Office of Special Education and Rehabilitative Services; we intend to issue a notice inviting applications for this program later this year. For English learners, new assessments of English language proficiency are also needed. The Department intends to set aside other funds in its FY 2011 budget to support State efforts to develop assessments of English language proficiency that are aligned with the college- and career-ready standards in English language arts currently being developed and adopted.

For additional information on the Race to the Top Fund Assessment Program, *see http://www2.ed.gov/programs/racetothetop-assessment/index.html.*

Note about Public and Expert Input Meetings: The design of this Race to the Top Fund Assessment Program competition has benefited significantly from a series of public and expert input meetings held by the Department. At these meetings, invited experts and members of the public provided input in response to questions, published in the **Federal Register** (*see* 74 FR 54795–54800 and 69081–69084), in the following programmatic areas: General and technical assessment issues, technology and innovation in assessment, high school assessments, assessing English learners, assessing students with disabilities, consortium and project management, and procurement. For information about these meetings, including transcripts and presentation materials, as well as other written input provided for this program, *see http://www2.ed.gov/programs/racetothetop-assessment/index.html.*

A. *Comprehensive Assessment Systems:*

Priorities: For the Comprehensive Assessment Systems grant category, we are establishing the following priorities for the FY 2010 grant competition only in accordance with section 437(d)(1) of the General Education Provisions Act (GEPA), 20 U.S.C. 1232(d)(1).

Absolute Priority: This priority is an absolute priority. Under 34 CFR 75.105(c)(3), we consider only applications that meet this priority. An eligible applicant should address this priority throughout the application narrative.

The priority is:

Comprehensive Assessment Systems Measuring Student Achievement Against Common College- and Career-Ready Standards. Under this priority, the Department supports the development of new assessment systems that will be used by multiple States; are valid, reliable, and fair for their intended purposes and for all student subgroups; and measure student knowledge and skills against a common set of college- and career-ready standards in mathematics and English language arts. To meet this absolute priority, an eligible applicant must demonstrate in its application that it will develop and implement an assessment system that—

(a) Measures student knowledge and skills against a common set of college- and career-ready standards (as defined in this notice) in mathematics and English language arts in a way that—

(i) Covers the full range of those standards, including standards against which student achievement has traditionally been difficult to measure;

(ii) As appropriate, elicits complex student demonstrations or applications of knowledge and skills;

(iii) Provides an accurate measure of student achievement across the full performance continuum, including for high- and low-achieving students; and

(iv) Provides an accurate measure of student growth over a full academic year or course;

(b) Consists of assessment components in mathematics and in English language arts that include, for each subject, one or more summative assessment components that—

(i) Are administered at least once during the academic year in grades 3 through 8 and at least once in high school; and

(ii) Produce student achievement data and student growth data (both as defined in this notice) that can be used to determine whether individual students are college- and career-ready (as defined in this notice) or on track to being college- and career-ready (as defined in this notice);

(c) Assesses all students, including English learners (as defined in this notice) and students with disabilities (as defined in this notice); and

(d) Produces data, including student achievement data and student growth data, that can be used to inform—

(i) Determinations of school effectiveness for purposes of accountability under Title I of the ESEA;

(ii) Determinations of individual principal and teacher effectiveness for purposes of evaluation;

(iii) Determinations of principal and teacher professional development and support needs; and

(iv) Teaching, learning, and program improvement.

Competitive Preference Priority: This priority is a competitive preference priority. Consistent with 34 CFR 75.105(c)(2)(i), we award additional points to an application as specified in the priority.

The priority is:

Collaboration and Alignment with Higher Education. The Department gives eligible applicants competitive preference points based on the extent to which they have promoted collaboration and alignment between member States' public elementary and secondary education systems and their public IHEs (as defined in section 101(a) of the Higher Education Act of 1965, as amended (HEA)) or systems of those IHEs. Eligible applicants addressing this priority must provide, for each IHE or IHE system, a letter of intent that—

(a) Commits the IHE or IHE system to participate with the consortium in the design and development of the consortium's final high school summative assessments in mathematics and English language arts in order to ensure that the assessments measure college readiness;

(b) Commits the IHE or IHE system to implement policies, once the final high school summative assessments are implemented, that exempt from remedial courses and place into credit-bearing college courses any student who meets the consortium-adopted

achievement standard (as defined in this notice) for each assessment and any other placement requirement established by the IHE or IHE system; and

(c) Is signed by the State's higher education executive officer (if the State has one) and the president or head of each participating IHE or IHE system.

All letters of intent must provide the total number of direct matriculation students (as defined in this notice) in the partner IHE or IHE system in the 2008–2009 school year. An eligible applicant must also provide the total number of direct matriculation students (as defined in this notice) in public IHEs in the consortium's member States.

The Department will award up to 20 competitive preference points based on the strength of commitment demonstrated in the letters of intent and on the percentage of direct matriculation students in public IHEs in the member States who are direct matriculation students in the partner IHEs or IHE systems. To receive full competitive preference points under this priority, eligible applicants must provide letters of intent that demonstrate strong commitment from each partner IHE or IHE system and that represent at least 30 percent of direct matriculation students in public IHEs in member States. No points will be awarded for letters of intent that represent fewer than 10 percent of direct matriculation students in public IHEs in member States.

Requirements: For the Comprehensive Assessment Systems grant category, we are establishing the following requirements for the FY 2010 grant competition only in accordance with section 437(d)(1) of GEPA, 20 U.S.C. 1232(d)(1).

Eligible Applicants: Eligible applicants are consortia of States.[3]

Eligibility Requirements:

To be eligible to receive an award under this category, an eligible applicant must—

1. Include a minimum of 15 States, of which at least 5 States must be governing States (as defined in this notice);

2. Identify in its application a proposed project management partner and provide an assurance that the proposed project management partner is not partnered with any other eligible applicant applying for an award under this category;[4] and

3. Submit assurances from each State in the consortium that, to remain in the consortium, the State will adopt a common set of college- and career-ready standards (as defined in this notice) no later than December 31, 2011, and common achievement standards (as defined in this notice) no later than the 2014–2015 school year.

Application Requirements:

An eligible applicant's application must—

1. Indicate, consistent with 34 CFR 75.128, whether—

(a) One member of the consortium is applying for a grant on behalf of the consortium; or

(b) The consortium has established itself as a separate eligible legal entity and is applying for a grant on its own behalf;

2. Be signed by—

(a) If one member of the consortium is applying for a grant on behalf of the consortium, the Governor, the State's chief school officer, and, if applicable, the president of the State board of education from that State; or

(b) If the consortium has established itself as a separate eligible legal entity and is applying for a grant on its own behalf, a representative of the consortium;

3. Include an assurance that—

(a) A competitive procurement process based on a "best value" selection [5] will be used for tasks related to assessment design and development; and

(b) All applicable Federal procurement requirements, including the requirements of 34 CFR 80.36, will be met;

4. Include, consistent with 34 CFR 75.128, for each State in the consortium, copies of all Memoranda of Understanding or other binding agreements. These binding agreements must—

(a) Detail the activities that members of the consortium will perform;

(b) Bind each member of the consortium to every statement and assurance made in the application;

(c) Include an assurance, signed by the State's chief procurement official (or designee), that the State has reviewed its applicable procurement rules and determined that it may participate in and make procurements through the consortium; and

(d) Be signed by the Governor, the State's chief school officer, and, if applicable, the president of the State board of education;

5. Include—

(a) An executive summary of the eligible applicant's proposed project;

(b) A theory of action that describes in detail the causal relationships between specific actions or strategies in the eligible applicant's proposed project and its desired outcomes for the proposed project, including improvements in student achievement and college- and career-readiness;

(c) A plan for designing and developing the proposed assessment system;

(d) A plan for research and evaluation of the proposed assessment system;

(e) A plan for implementing the proposed assessment system; and

(f) A project management plan (including a workplan and timeline); and

6. Include a budget that—

(a) Describes in detail how funds from this grant category and other resources will be used to design, develop, implement, and evaluate the proposed assessment system;

(b) Identifies Level 1 budget modules (as defined in this notice) that do not exceed $150 million in total; and

(c) Identifies any Level 2 budget modules (as defined in this notice) that do not exceed $10 million each.

Program Requirements

An eligible applicant awarded a grant under this category must—

1. Evaluate the validity, reliability, and fairness of the summative assessment components of the assessment system, and make available through formal mechanisms (*e.g.,* peer-reviewed journals) and informal mechanisms (*e.g.,* newsletters), and in print and electronically, the results of any evaluations it conducts;

2. Actively participate in any applicable technical assistance activities

[3] Consistent with section 14013 of the ARRA, the term "State" means each of the 50 States, the District of Columbia, and the Commonwealth of Puerto Rico.

[4] In selecting a proposed project management partner, an eligible applicant must comply with the requirements for procurement in 34 CFR 80.36. Due to the limited time period that eligible applicants have to select a proposed project management partner, we remind eligible applicants that they may, under 34 CFR 80.36, use informal procedures to select a proposed contractor for this purpose. For example, 34 CFR 80.36(d)(1) authorizes simple informal procedures to select contractors under the simplified acquisition threshold of $100,000; the regulations only require that the eligible applicant request offers from an adequate number of qualified sources. In addition, even if the eligible applicant expects that the proposed project management partner would cost more than $100,000, the regulations recognize special cases where a contractor must be selected within a very limited time period. Again, the eligible applicant must request proposals from an adequate number of qualified sources and select the contractor whose proposal is most advantageous to the program, considering price and other selection factors. In these situations, if informal solicitation does not result in an adequate number of proposals, the eligible applicant may select a single bidder so long as the eligible applicant documents the facts that formed the basis for its decision. 34 CFR 80.36(d)(1), (d)(3), and (d)(4).

[5] For example, section 2.101 of the Federal Acquisition Regulation (FAR) defines "best value" as the expected outcome of an acquisition that, in the Government's estimation, provides the greatest overall benefit in response to the requirement.

conducted or facilitated by the Department or its designees, including periodic expert reviews, collaboration with other consortia that receive funds under this program, and other activities as determined by the Department;

3. Work with the Department to develop a strategy to make student-level data that result from the assessment system available on an ongoing basis for research, including for prospective linking, validity, and program improvement studies; [6]

4. Ensure that the summative assessment components of the assessment system in both mathematics and English language arts are fully implemented statewide by each State in the consortium no later than the 2014–2015 school year;

5. Maximize the interoperability of assessments across technology platforms and the ability for States to switch their assessments from one technology platform to another by—

(a) Developing all assessment items to an industry-recognized open-licensed interoperability standard that is approved by the Department during the grant period, without non-standard extensions or additions;[7] and

(b) Producing all student-level data in a manner consistent with an industry-recognized open-licensed interoperability standard that is approved by the Department during the grant period;

6. Unless otherwise protected by law or agreement as proprietary information, make any assessment content (*i.e.,* assessments and assessment items) developed with funds from this grant category freely available to States, technology platform providers, and others that request it for purposes of administering assessments, provided they comply with consortium or State requirements for test or item security;

7. Use technology to the maximum extent appropriate to develop, administer, and score assessments and report assessment results;

8. Use funds from this grant category only for the design, development, and evaluation of the assessment system. An eligible applicant awarded a grant under this category may not use funds for the administration of operational assessments;

9. Comply with the requirements of 34 CFR 75.129, which specifies that—

(a) The applicant (*i.e.,* the State applying on behalf of the consortium, or the consortium if established as a separate legal entity and applying on its own behalf) is legally responsible for—

(i) The use of all grant funds;

(ii) Ensuring that the project is carried out by the consortium in accordance with Federal requirements; and

(iii) Ensuring that indirect cost funds are determined as required under 34 CFR 75.564(e); and

(b) Each member of the consortium is legally responsible to—

(i) Carry out the activities it agrees to perform; and

(ii) Use any grant funds it receives under the consortium's Memoranda of Understanding or other binding agreements in accordance with Federal requirements that apply to the grant;

10. Obtain approval from the Department of any third-party organization or entity that is responsible for managing funds received under this grant category; and

11. Identify any current assessment requirements in Title I of the ESEA that would need to be waived in order for member States to fully implement the proposed assessment system.

B. *High School Course Assessment Programs:*

Priorities: For the High School Course Assessment Programs grant category, we are establishing the following priorities for the FY 2010 grant competition only in accordance with section 437(d)(1) of GEPA, 20 U.S.C. 1232(d)(1).

Absolute Priority: This priority is an absolute priority. Under 34 CFR 75.105(c)(3), we consider only applications that meet this priority. An eligible applicant should address this priority throughout the application narrative.

The priority is:

High School Course Assessment Programs. Under this priority, the Department supports the development of new and adapted assessments for high school courses that will be used by multiple States and are valid, reliable, and fair for their intended purposes and students. To meet this absolute priority, an eligible applicant must demonstrate in its application that it will develop and implement a high school course assessment program that—

(a) For each course in the assessment program—

(i) Measures student knowledge and skills against standards from a common set of college- and career-ready standards (as defined in this notice) in subjects for which such a set of standards exists, or otherwise against State or other rigorous standards;

(ii) As appropriate, elicits complex student demonstrations or applications of knowledge and skills;

(iii) Produces student achievement data (as defined in this notice) and student growth data (as defined in this notice) over a full academic year or course that can be used to inform—

(*A*) Determinations of individual principal and teacher effectiveness and professional development and support needs; and

(*B*) Teaching, learning, and program improvement; and

(iv) Is designed to assess the broadest possible range of students, including English learners (as defined in this notice) and students with disabilities (as defined in this notice);

(b) Includes assessments for multiple courses that will be implemented in each member State at a scale that will enable significant improvements in student achievement outcomes statewide; and

(c) Includes a process for certifying the rigor of each assessment in the assessment program and for ensuring that assessments of courses covering similar content have common expectations of rigor.

Competitive Preference Priorities: These priorities are competitive preference priorities. Consistent with 34 CFR 75.105(c)(2)(i), we award additional points to an application as specified in these priorities.

The priorities are:

1. *Focus on Preparing Students for Study in STEM-Related Fields.* The Department gives 10 competitive preference points to applications that include a high-quality plan to develop, within the grant period and with input from one or more four-year degree-granting IHEs, assessments for high school courses that comprise a rigorous course of study that is designed to prepare high school students for postsecondary study and careers in the STEM fields, including technology and engineering. Any such course of study may include cross-cutting or interdisciplinary STEM courses (*e.g.,* computer science, information technology, bioengineering) and be designed to address the needs of underrepresented groups.

An eligible applicant addressing this priority must, in addition to addressing the priority throughout the application narrative, provide a separate plan that describes—

(a) The courses for which assessments will be developed;

(b) How the courses comprise a rigorous course of study that is designed to prepare high school students for

[6] Eligible applicants awarded a grant under this program must comply with the Family Educational Rights and Privacy Act (FERPA) and 34 CFR Part 99, as well as State and local requirements regarding privacy.

[7] We encourage grantees under this competition to work during the grant period with the Department and the entities that set interoperability standards to extend those standards in order to make them more functional for assessment materials.

postsecondary study and careers in the STEM fields; and

(c) How input from one or more four-year degree-granting IHEs will be obtained in developing assessments for the courses.

We will award points to eligible applicants addressing this priority on an "all or nothing" basis (*i.e.,* 10 points or zero points). An eligible applicant may not use the same course of study to address both this priority and Competitive Preference Priority 2 (Focus on Career Readiness and Placement).

2. *Focus on Career Readiness and Placement.* The Department gives 10 competitive preference points to applications that include a high-quality plan to develop, within the grant period and with relevant business community participation and support, assessments for high school courses that comprise a rigorous course of study in career and technical education that is designed to prepare high school students for success on technical certification examinations or for postsecondary education or employment.

An eligible applicant addressing this priority must, in addition to addressing the priority throughout the application narrative, provide a separate plan that describes—

(a) The courses for which assessments will be developed;

(b) How the courses comprise a rigorous course of study in career and technical education that is designed to prepare high school students for success on technical certification examinations or for postsecondary education or employment; and

(c) How relevant business community participation and support will be obtained in developing assessments for the courses.

We will award points to eligible applicants addressing this priority on an "all or nothing" basis (*i.e.,* 10 points or zero points). An eligible applicant may not use the same course of study to address both this priority and Competitive Preference Priority 1 (Focus on Preparing Students for Study and Careers in STEM-Related Fields).

Requirements: For the High School Course Assessment Programs grant category, we are establishing the following requirements for the FY 2010 grant competition only in accordance with section 437(d)(1) of GEPA, 20 U.S.C. 1232(d)(1).

Eligible Applicants: Eligible applicants are consortia of States.[8]

Eligibility Requirements:

To be eligible to receive an award under this category, an eligible applicant must—

1. Include a minimum of 5 governing States (as defined in this notice); and

2. Identify in its application a proposed project management partner and provide an assurance that the proposed project management partner is not partnered with any other eligible applicant applying for an award under this category.[9]

Application Requirements

An eligible applicant's application must—

1. Indicate, consistent with 34 CFR 75.128, whether—

(a) One member of the consortium is applying for a grant on behalf of the consortium; or

(b) The consortium has established itself as a separate eligible legal entity and is applying for a grant on its own behalf;

2. Be signed by—

(a) If one member of the consortium is applying for a grant on behalf of the consortium, the Governor, the State's chief school officer, and, if applicable, the president of the State board of education from that State; or

(b) If the consortium has established itself as a separate eligible legal entity and is applying for a grant on its own behalf, a representative of the consortium;

3. Include an assurance that—

(a) A competitive procurement process based on a "best value" selection [10] will be used for tasks related to assessment design and development; and

(b) All applicable Federal procurement requirements, including the requirements of 34 CFR 80.36, will be met;

4. Include, consistent with 34 CFR 75.128, for each State in the consortium, copies of all Memoranda of Understanding or other binding agreements. These binding agreements must—

(a) Detail the activities that members of the consortium will perform;

(b) Bind each member of the consortium to every statement and assurance made in the application;

(c) Include an assurance, signed by the State's chief procurement official (or designee), that the State has reviewed its applicable procurement rules and determined that it may participate in and make procurements through the consortium; and

(d) Be signed by the Governor, the State's chief school officer, and, if applicable, the president of the State board of education;

5. Include—

(a) An executive summary of the eligible applicant's proposed project;

(b) A theory of action that describes in detail the causal relationships between specific actions or strategies in the eligible applicant's proposed project and its desired outcomes for the proposed project, including improvements in student achievement and college- and career-readiness;

(c) A plan for designing and developing the proposed assessment program;

(d) A plan for research and evaluation of the proposed assessment program;

(e) A plan for implementing the proposed assessment program; and

(f) A project management plan (including a workplan and timeline); and

6. Include a budget that—

(a) Describes in detail how funds from this grant category and other resources will be used to design, develop, implement, and evaluate the proposed assessment program; and

(b) Does not exceed more than $30 million in funds from this grant category.

Program Requirements

An eligible applicant awarded a grant under this category must—

1. Evaluate the validity, reliability, and fairness of the assessments in its high school course assessment program;

2. Actively participate in any applicable technical assistance activities

[8] Consistent with section 14013 of the ARRA, the term "State" means each of the 50 States, the District of Columbia, and the Commonwealth of Puerto Rico.

[9] In selecting a proposed project management partner, an eligible applicant must comply with the requirements for procurement in 34 CFR 80.36. Due to the limited time period that eligible applicants have to select a proposed project management partner, we remind eligible applicants that they may, under 34 CFR 80.36, use informal procedures to select a proposed contractor for this purpose. For example, 34 CFR 80.36(d)(1) authorizes simple informal procedures to select contractors under the simplified acquisition threshold of $100,000; the regulations only require that the eligible applicant request offers from an adequate number of qualified sources. In addition, even if the eligible applicant expects that the proposed project management partner would cost more than $100,000, the regulations recognize special cases where a contractor must be selected within a very limited time period. Again, the eligible applicant must request proposals from an adequate number of qualified sources and select the contractor whose proposal is most advantageous to the program, considering price and other selection factors; in these situations, if informal solicitation does not result in an adequate number of proposals, the eligible applicant may select a single bidder so long as the eligible applicant documents the facts that formed the basis for its decision. 34 CFR 80.36(d)(1), (d)(3), and (d)(4).

[10] For example, section 2.101 of the FAR defines "best value" as the expected outcome of an acquisition that, in the Government's estimation, provides the greatest overall benefit in response to the requirement.

conducted or facilitated by the Department or its designees, including periodic expert reviews, collaboration with other consortia that receive funds under this program, and other activities as determined by the Department;

3. Work with the Department to develop a strategy to make student-level data that result from the assessment program available on an ongoing basis for research, including for prospective linking, validity, and program improvement studies; [11]

4. Ensure that at least one course assessment developed under the high school course assessment program will be implemented in each State in the consortium no later than the 2013–2014 school year and that all assessments in the assessment program will be operational no later than the 2014–2015 school year;

5. To the extent that technology is used, maximize the interoperability of assessments across technology platforms and the ability for States to switch their assessments from one technology platform to another by—

(a) Developing all assessment items to an industry-recognized open-licensed interoperability standard that is approved by the Department during the grant period, without non-standard extensions or additions; [12] and

(b) Producing all student-level data in a manner consistent with an industry-recognized open-licensed interoperability standard that is approved by the Department during the grant period;

6. Unless otherwise protected by law or agreement as proprietary information, make any assessment content (*i.e.,* assessments and assessment items) developed with funds from this grant category freely available to States, technology platform providers, and others that request it for purposes of administering assessments, provided they comply with consortium or State requirements for test or item security;

7. Use funds from this grant category only for the design, development, and evaluation of the assessment program. An eligible applicant awarded a grant under this category may not use funds for the administration of operational assessments;

8. Comply with the requirements of 34 CFR 75.129, which specifies that—

(a) The applicant (*i.e.,* the State applying on behalf of the consortium, or the consortium if established as a separate legal entity and applying on its own behalf) is legally responsible for—

(i) The use of all grant funds;

(ii) Ensuring that the project is carried out by the consortium in accordance with Federal requirements; and

(iii) Ensuring that indirect cost funds are determined as required under 34 CFR 75.564(e); and

(b) Each member of the consortium is legally responsible to—

(i) Carry out the activities it agrees to perform; and

(ii) Use any grant funds it receives under the consortium's Memoranda of Understanding or other binding agreements in accordance with Federal requirements that apply to the grant; and

9. Obtain approval from the Department of any third-party organization or entity that is responsible for managing funds received under this grant category.

C. *Definitions:* For the Comprehensive Assessment Systems and High School Course Assessment Programs grant categories, we are establishing the following definitions for the FY 2010 grant competition only in accordance with section 437(d)(1) of GEPA, 20 U.S.C. 1232(d)(1).

Accommodations means changes in the administration of an assessment, including but not limited to changes in assessment setting, scheduling, timing, presentation format, response mode, and combinations of these changes, that do not change the construct intended to be measured by the assessment or the meaning of the resulting scores. Accommodations must be used for equity in assessment and not provide advantage to students eligible to receive them.

Achievement standard means the level of student achievement on summative assessments that indicates that (a) for the final high school summative assessments in mathematics or English language arts, a student is college- and career-ready (as defined in this notice); or (b) for summative assessments in mathematics or English language arts at a grade level other than the final high school summative assessments, a student is on track to being college- and career-ready (as defined in this notice). An achievement standard must be determined using empirical evidence over time.

College- and career-ready (or readiness) means, with respect to a student, that the student is prepared for success, without remediation, in credit-bearing entry-level courses in an IHE (as defined in section 101(a) of the HEA), as demonstrated by an assessment score that meets or exceeds the achievement standard (as defined in this notice) for the final high school summative assessment in mathematics or English language arts.

Common set of college- and career-ready standards means a set of academic content standards for grades K–12 that (a) define what a student must know and be able to do at each grade level; (b) if mastered, would ensure that the student is college- and career-ready (as defined in this notice) by the time of high school graduation; and (c) are substantially identical across all States in a consortium. A State may supplement the common set of college- and career-ready standards with additional content standards, provided that the additional standards do not comprise more than 15 percent of the State's total standards for that content area.

Direct matriculation student means a student who entered college as a freshman within two years of graduating from high school.

English learner means a student who is an English learner as that term is defined by the consortium. The consortium must define the term in a manner that is uniform across member States and consistent with section 9101(25) of the ESEA.

Governing State means a State that (a) is a member of only one consortium applying for a grant in the competition category, (b) has an active role in policy decision-making for the consortium, and (c) is committed to using the assessment system or program developed by the consortium.

Level 1 budget module means a budget module for which an eligible applicant is seeking funds under the Comprehensive Assessment Systems grant category that (a) is necessary to delivering operational summative assessments in both mathematics and English language arts no later than school year 2014–2015, or (b) is otherwise necessary to the eligible applicant's proposed project and consistent with the eligible applicant's theory of action.

Level 2 budget module means any budget module for which an eligible applicant is seeking funds under the Comprehensive Assessment Systems grant category other than a Level 1 budget module. An eligible applicant must prioritize Level 2 budget modules in the order of importance to the implementation of the proposed project.

Moderation system means a system for ensuring that human scoring of complex item types, such as extended

[11] Eligible applicants awarded a grant under this program must comply with FERPA and 34 CFR Part 99, as well as State and local requirements regarding privacy.

[12] We encourage grantees under this competition to work during the grant period with the Department and the entities that set interoperability standards to extend those standards in order to make them more functional for assessment materials.

responses or performance tasks, is accurate, consistent across schools and States, and fair to all students.

On track to being college- and career-ready[13] means, with respect to a student, that the student is performing at or above grade level such that the student will be college- and career-ready (as defined in this notice) by the time of high school graduation, as demonstrated by an assessment score that meets or exceeds the achievement standard (as defined in this notice) for the student's grade level on a summative assessment in mathematics or English language arts.

Performance level descriptor means a statement or description of a set of knowledge and skills exemplifying a level of performance associated with a standard.

Student achievement data means data regarding an individual student's mastery of tested content standards. Student achievement data from summative assessment components must be reported in a way that can be reliably aggregated across multiple students at the subgroup,[14] classroom, school, LEA, and State levels.

Student growth data means data regarding the change in student achievement data (as defined in this notice) between two or more points in time. Student growth data from summative assessment components must be reported in a way that can be reliably aggregated across multiple students at the subgroup, classroom, school, LEA, and State levels and over a full academic year or course.

Student with a disability means, for purposes of this competition, a student who has been identified as a student with a disability under the Individuals with Disabilities Education Act, as amended (IDEA), except for a student with a disability who is eligible to participate in alternate assessments based on alternate academic achievement standards consistent with 34 CFR 200.6(a)(2).

Through-course summative assessment means an assessment system component or set of assessment system components that is administered periodically during the academic year. A student's results from through-course summative assessments must be combined to produce the student's total summative assessment score for that academic year.

Waiver of Proposed Rulemaking: Under the Administrative Procedure Act (5 U.S.C. 553), the Department generally offers interested parties the opportunity to comment on proposed priorities, requirements, definitions, and selection criteria. Section 437(d)(1) of GEPA, however, allows the Secretary to exempt from rulemaking requirements regulations governing the first grant competition under a new or substantially revised program authority. This is the first grant competition for the Race to the Top Assessment Program under section 14006 of the ARRA and therefore qualifies for this exemption. In order to ensure timely grant awards, the Secretary has decided to forego public comment on the priorities, requirements, definitions, and selection criteria under section 437(d)(1) of GEPA. (We note that, as discussed earlier, the design of this grant competition has benefited significantly from a series of public and expert input meetings held by the Department.) These priorities, requirements, definitions, and selection criteria will apply to the FY 2010 grant competition only.

Program Authority: American Recovery and Reinvestment Act of 2009, Division A, Section 14006, Public Law 111–5.

Applicable Regulations: The Education Department General Administrative Regulations (EDGAR) in 34 CFR parts 74, 75, 77, 79, 80, 81, 82, 84, 85, 86, 97, 98, and 99.

II. Award Information

Type of Award: Discretionary grants.

Estimated Available Funds: $350,000,000.

Estimated Size of Awards:

A. Comprehensive Assessment Systems: $160,000,000.

B. High School Course Assessment Programs: $30,000,000.

Estimated Number of Awards

A. *Comprehensive Assessment Systems:* 1–2 awards.

B. *High School Course Assessment Programs:* 1 award.

Note: The Department is not bound by any estimates in this notice. The Department will determine the number of awards to be made in each grant category based on the quality of applications received consistent with the selection criteria. It will also determine the size of an award made to an eligible applicant based on a review of the eligible applicant's budget. However, with respect to Comprehensive Assessment Systems grants, an eligible applicant may not submit Level 1 budget modules exceeding $150 million in total, and with respect to High School Course Assessment Programs grants, an eligible applicant may not submit a budget exceeding $30 million. Applications requesting budget amounts that exceed these maximum amounts will not be reviewed for funding. An eligible applicant awarded a Comprehensive Assessment Systems grant will receive funding for the Level 1 budget modules identified in its application, and may receive funding for one or more Level 2 budget modules identified in its application if those modules do not exceed the maximum amount of $10 million each and funds are available. The Department will rank and fund separately applications under each grant category. The Department may use any unused funds designated for this competition to make awards in Phase 2 of the Race to the Top Fund Program (CFDA Number 84.395A).

Project Period: Up to 48 months.

III. Application and Submission Information

A. *Address to Request Application Package:* Prospective applicants can obtain an application package for either grant category in this competition via the Internet or from the Education Publications Center (ED Pubs). To obtain a copy via the Internet, use the following address: *http://www2.ed.gov/programs/racetothetop-assessment/index.html.* To obtain a copy from ED Pubs, write, fax, or call the following: Education Publications Center, P.O. Box 1398, Jessup, MD 20794–1398. Telephone, toll free: 1–877–433–7827. FAX: (301) 470–1244. If you use a telecommunications device for the deaf (TDD), call, toll free: 1–877–576–7734.

Prospective applicants can also contact ED Pubs at its Web site: *http://www.ed.gov/pubs/edpubs.html* or at its e-mail address: *edpubs@inet.ed.gov.*

If requesting an application from ED Pubs, be sure to identify this competition as follows: CFDA Number 84.395B (Comprehensive Assessment Systems grants) or CFDA Number 84.395C (High School Course Assessment Programs grants).

Individuals with disabilities can obtain a copy of the application package in an accessible format (*e.g.,* braille, large print, audiotape, or computer diskette) by contacting the person listed under **FOR FURTHER INFORMATION CONTACT** in section VI of this notice.

B. *Content and Form of Application Submission:* Requirements concerning

[13] The term *on track to being college- and career-ready* is used in place of the term "proficiency" used in section 1111(b)(3) of the ESEA.

[14] Eligible applicants receiving funds under this competition must aggregate data using the student subgroups in section 1111(b)(3)(C)(xiii) of the ESEA (*i e.,* by gender, by each major racial and ethnic group, by English proficiency status, by migrant status, by students with disabilities as compared to nondisabled students, and by economically disadvantaged students as compared to students who are not economically disadvantaged, except that such aggregation is not required in a case in which the number of students in a subgroup is insufficient to yield statistically reliable information or the results would reveal personally identifiable information about an individual student). When using the term "subgroup" throughout this notice, we mean these student subgroups.

the content of an application, together with the forms an applicant must submit, are in the application package for each grant category in this competition.

Page Limit: The application narrative (Part I.G of the application for each grant category) is where the applicant addresses the selection criteria that reviewers use to evaluate applications. The Department recommends that applicants limit the application narrative for a Comprehensive Assessment Systems grant to no more than 60 total pages, and for a High School Course Assessment Programs grant to no more than 45 total pages, using the following standards:

- A page is 8.5″ × 11″, on one side only, with 1″ margins at the top, bottom, and both sides.
- Each page is numbered.
- Line spacing is set to 1.5 spacing, and the font used is 12 point Times New Roman font.

An applicant must limit the executive summary of its proposed project (Part I.D of the application for each grant category) to no more than two pages using the standards above. We will not read information on any pages that exceed this page limit.

C. *Submission Dates and Times:*

Applications Available: April 9, 2010.

Deadline for Notice of Intent to Apply: April 29, 2010.

The Department will be able to develop a more efficient process for reviewing grant applications if we have a better understanding of the number of applications we will receive. Therefore, we strongly encourage each prospective applicant to send an e-mail notice of its intent to apply for funding under a grant category in this competition to the e-mail address *racetothetop.assessment@ed.gov* by April 29, 2010. The notice of intent to apply is optional; an applicant may still submit an application if it has not notified us of its intention to apply.

Date of Technical Assistance Meeting for Prospective Applicants: April 22, 2010.

To assist prospective applicants in preparing an application and to respond to questions, the Department will host a Technical Assistance Meeting for Prospective Applicants on April 22, 2010. Detailed information about this meeting (including the meeting location) will be posted on the Department's Web site at *http://www.ed.gov/programs/racetothetop-assessment.* Attendance at the meeting is strongly encouraged. Announcements of any other technical assistance opportunities for prospective applicants will also be available at the Web site above.

Deadline for Transmittal of Applications: June 23, 2010.

An applicant must submit an original and one paper copy of its application for either grant category under this competition. An applicant may submit its application by mail or hand delivery. E-mailed applications will not be read. For more information about how to submit an application, please refer to the *Other Submission Requirements* later in this section.

The Department will not consider an application that does not comply with the deadline requirements.

Individuals with disabilities who need an accommodation or auxiliary aid in connection with the application process should contact the person listed under **FOR FURTHER INFORMATION CONTACT** in section VI of this notice. If the Department provides an accommodation or auxiliary aid to an individual with a disability in connection with the application process, the individual's application remains subject to all other requirements and limitations in this notice.

Deadline for Intergovernmental Review: August 23, 2010.

D. *Intergovernmental Review:* This program is subject to Executive Order 12372 and the regulations in 34 CFR part 79. Information about Intergovernmental Review of Federal Programs under Executive Order 12372 is in the application package for each grant category in this competition.

E. *Funding Restrictions:* We reference regulations outlining funding restrictions in the *Requirements* and *Applicable Regulations* in section I of this notice.

F. *Other Submission Requirements:* An applicant must submit an original and one paper copy of its application for either grant category under this competition. An applicant may submit its application by mail or hand delivery. E-mailed applications will not be read.

If an applicant's application includes content that cannot be presented in a paper copy, the applicant may submit that content separately in one or more electronic files on a CD–ROM or DVD–ROM. The application content must reside on the CD–ROM or DVD–ROM; the Department will not review material in external references or links. The files may be in any of the following formats: .DOC/.DOCX (Microsoft Word Document), .PDF (Adobe Portable Document Format), .PPT/.PPTX (Microsoft Powerpoint), .HTML (Hypertext Markup Language), .JPEG (Joint Photographic Experts Group Image), .GIF (Graphics Interchange Format), .PNG (Portable Network Graphics), .TIFF (Tagged Image Format), .XLS/.XLSX (Microsoft Excel), .XML/.XSD (Extensible Markup Language/XML Schema), .CSV (Comma Separated Values), .TXT (Text File), and .ZIP (Compressed Package). If an applicant is submitting data files, it should include in its application a description or schema of the data elements within the files. If an applicant submits a file type other than the types specified in this paragraph, the Department will not review that material. Applicants should not password-protect these files. Each electronic file name should clearly identify the part of the application to which the content is responding. The CD–ROM or DVD–ROM should be clearly labeled with the applicant's name and any other relevant information. An applicant must provide 10 copies of any CD–ROM or DVD–ROM it submits with the original and paper copy of its application.

The Department must receive all applications by 4:30 p.m., Washington, DC time, on the application deadline date. We will not accept an application for this competition after 4:30 p.m., Washington, DC time, on the application deadline date. Therefore, we strongly recommend that applicants arrange for mailing or hand delivery of their applications in advance of the application deadline date.

(1) *Submission of Applications by Mail.* An applicant for either grant category may submit its application (*i.e.,* the original and one paper copy of the application and, if necessary, 10 copies of an accompanying CD–ROM or DVD–ROM with any electronic files of application content that cannot be included in the original or paper copy of the application) by mail (either through the U.S. Postal Service or a commercial carrier). We must receive applications no later than 4:30 p.m., Washington, DC time, on the application deadline date. Therefore, to avoid delays, we strongly recommend sending applications via overnight mail. Mailed applications for Comprehensive Assessment Systems grants must be mailed to the Department at the following address: U.S. Department of Education, Application Control Center, Attention: (CFDA Number 84.395B), LBJ Basement Level 1, 400 Maryland Avenue, SW., Washington, DC 20202–4260. Mailed applications for High School Course Assessment Programs grants must be mailed to the Department at the following address: U.S. Department of Education, Application Control Center, Attention: (CFDA Number 84.395C), LBJ Basement Level

1, 400 Maryland Avenue, SW., Washington, DC 20202–4260.

If we receive an application after the application deadline, we will not consider that application.

(2) *Submission of Applications by Hand Delivery.* An applicant for either grant category may submit its application (*i.e.,* the original and one paper copy of the application and, if necessary, 10 copies of an accompanying CD–ROM or DVD–ROM with any electronic files of application content that cannot be included in the original or paper copy of the application) by hand delivery (including via a courier service). We must receive applications no later than 4:30 p.m., Washington, DC time, on the application deadline date. Hand-delivered applications for Comprehensive Assessment Systems grants must be received at the following address: U.S. Department of Education, Application Control Center, Attention: (CFDA Number 84.395B), 550 12th Street, SW., Room 7041, Potomac Center Plaza, Washington, DC 20202–4260. Hand-delivered applications for High School Course Assessment Programs grants must be received at the following address: U.S. Department of Education, Application Control Center, Attention: (CFDA Number 84.395C), 550 12th Street, SW., Room 7041, Potomac Center Plaza, Washington, DC 20202–4260. The Application Control Center accepts hand deliveries daily between 8 a.m. and 4:30 p.m., Washington, DC time, except Saturdays, Sundays, and Federal holidays.

If we receive an application after the application deadline, we will not consider that application.

(3) *Envelope Requirements and Receipt:* When an applicant submits its application, whether by mail or hand delivery—

(a) It must indicate on the envelope that the CFDA number of the competition under which it is submitting its application is 84.395B (for Comprehensive Assessment Systems grants) or 84.395C (for High School Course Assessment Programs grants); and

(b) The Application Control Center will mail to the applicant a notification of receipt of the grant application. If the applicant does not receive this notification, it should call Joyce Mays at the U.S. Department of Education Application Control Center at (202) 245–6288.

In accordance with 34 CFR 75.216(b) and (c), an application will not be evaluated for funding if the applicant does not comply with all of the procedural rules that govern the submission of the application or the application does not contain the information required under the program.

Paperwork Reduction Act of 1995

The requirements and selection criteria established in this notice require the collection of information that is subject to review by the Office of Management and Budget (OMB) under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3520). An emergency review has been requested in accordance with the Act (44 U.S.C. 3507(j)), since public harm is reasonably likely to result if normal clearance procedures are followed. Approval by OMB has been requested by April 5, 2010.

Burden Hour Estimates for Comprehensive Assessment Systems Grants: We estimate 4 applicants for Comprehensive Assessment Systems grants, and that each applicant would spend approximately 502.25 hours of staff time to address the application requirements and criteria, prepare the application, and obtain necessary clearances. The total number of hours for all applicants for Comprehensive Assessment Systems grants is an estimated 2,009 hours (4 applicants times 502.25 hours equals 2,009 hours).

Burden Hour Estimates for High School Course Assessment Programs Grants: We estimate 2 applicants for High School Course Assessment Programs grants, and that each applicant would spend approximately 363.25 hours of staff time to address the application requirements and criteria, prepare the application, and obtain necessary clearances. The total number of hours for all applicants for High School Course Assessment Programs grants is an estimated 726.5 hours (2 applicants times 363.25 hours equals 726.5 hours).

Total Cost Estimates: Across both grant categories, we estimate the average total cost per hour of the staff who carry out this work to be $30.00 an hour. The total estimated cost for all applicants under both grant categories would be $82,065 ($30.00 times 2,735.5 (2,009 + 726.5) hours equals $82,065).

IV. Application Review Information

A. *Comprehensive Assessment Systems:*

Selection Criteria: For the Comprehensive Assessment Systems category, we are establishing the following selection criteria for the FY 2010 grant competition only, in accordance with section 437(d)(1) of GEPA, 20 U.S.C. 1232(d)(1). Eligible applicants may receive up to 200 total points based on the extent to which their applications address these selection criteria. The number of points that may be awarded for each criterion is indicated in parentheses next to the criterion.

(A)(1) *Consortium Governance* (up to 20 points). The extent to which the consortium's proposed governance structure will enable the successful design, development, and implementation of the proposed assessment system. In determining the extent to which the consortium's proposed governance structure will enable the successful design, development, and implementation of the proposed assessment system, we will consider—

(a) The consortium's vision, goals, role, and key deliverables (*e.g.,* assessment components, scoring and moderation system, professional development activities), and the consistency of these with the consortium's theory of action;

(b) The consortium's structure and operations, including—

(i) The organizational structure of the consortium and the differentiated roles that a member State may hold (*e.g.,* lead State, governing State (as defined in this notice), advisory State);

(ii) For each differentiated role, the rights and responsibilities (including the level of commitment to adopting and implementing the assessment system) associated with the role;

(iii) The consortium's method and process (*e.g.,* consensus, majority) for making different types of decisions (*e.g.,* policy, operational);

(iv) The protocols by which the consortium will operate, including the protocols for member States to change roles or leave the consortium and for new member States to join the consortium;

(v) The consortium's plan, including the process and timeline, for setting key policies and definitions for the proposed assessment system, including a common set of college- and career-ready standards (as defined in this notice), a common set of performance level descriptors (as defined in this notice), a common set of achievement standards (as defined in this notice), common assessment administration procedures, common item release and test security policies, a common definition of "English learner," and a common set of policies and procedures for accommodations (as defined in this notice) and student participation; and

(vi) The consortium's plan for managing funds received under this grant category;

(c) The terms and conditions of the Memoranda of Understanding or other binding agreements executed by each member State, including—

(i) The consistency of the terms and conditions with the consortium's governance structure and the State's role in the consortium; and

(ii) The State's commitment to and plan for identifying any existing barriers in State law, statute, regulation, or policy to implementing the proposed assessment system and to addressing any such barriers prior to full implementation of the summative assessment components of the system; and

(d) The consortium's procurement process, and evidence of each member State's commitment to that process.

(A)(2) *Theory of Action* (up to 5 points). The extent to which the eligible applicant's theory of action is logical, coherent, and credible, and will result in improved student academic outcomes. In determining the extent to which the theory of action has these attributes, we will consider the description of, and rationale for—

(a) Each component of the proposed assessment system and the relationship of the component to other components in the system;

(b) How the assessment results produced by each component will be used;

(c) How the assessments and assessment results will be incorporated into a coherent educational system (*i.e.,* a system that includes standards, assessments, curriculum, instruction, and professional development); and

(d) How the educational system as a whole will improve student achievement and college- and career-readiness (as defined in this notice).

(A)(3) *Assessment System Design* (up to 55 points). The extent to which the design of the eligible applicant's proposed assessment system is innovative, feasible, and consistent with the theory of action. In determining the extent to which the design has these attributes, we will consider—

(a) The number and types of components (*e.g.,* through-course summative assessments (as defined in this notice), end-of-year summative assessments, formative assessments, interim assessments) in mathematics and in English language arts in the assessment system;

(b) For the assessment system as a whole—

(i) How the assessment system will measure student knowledge and skills against the full range of the college- and career-ready standards, including the standards against which student achievement has traditionally been difficult to measure; and provide an accurate measure of student achievement, including for high- and low-performing students, and an accurate measure of student growth over a full academic year or course;

(ii) How the assessment system will produce the required student performance data (*i.e.,* student achievement data and student growth data (both as defined in this notice) that can be used to determine whether individual students are college- and career-ready (as defined in this notice) or on track to being college- and career-ready (as defined in this notice));

(iii) How the assessment system will be accessible to all students, including English learners and students with disabilities, and include appropriate accommodations (as defined in this notice) for students with disabilities and English learners; and

(iv) How and when during the academic year different types of student data will be available to inform and guide instruction, interventions, and professional development; and

(c) For each component in mathematics and in English language arts in the assessment system—

(i) The types of data produced by the component, including student achievement data (as defined in this notice), student growth data (as defined in this notice), and other data;

(ii) The uses of the data produced by the component, including determining whether individual students are college- and career-ready (as defined in this notice) or on track to being college- and career-ready (as defined in this notice); informing determinations of school effectiveness for the purposes of accountability under Title I of the ESEA; informing determinations of individual principal and teacher effectiveness for the purposes of evaluation; informing determinations of principal and teacher professional development and support needs; informing teaching, learning, and program improvement; and other uses;

(iii) The frequency and timing of administration of the component, and the rationale for these;

(iv) The number and types of items (*e.g.,* performance tasks, selected responses, brief or extended constructed responses) and the distribution of item types within the component, including the extent to which the items will be varied and elicit complex student demonstrations or applications of knowledge and skills (descriptions should include a concrete example of each item type proposed); and the rationale for using these item types and their distributions;

(v) The component's administration mode (*e.g.,* paper-and-pencil, computer-based, or other electronic device), and the rationale for the mode;

(vi) The methods for scoring student performance on the component, the estimated turnaround times for scoring, and the rationale for these; and

(vii) The reports produced based on the component, and for each report, its intended use, target audience (*e.g.,* students, parents, teachers, administrators, policymakers), and the key data it presents.

(A)(4) *Assessment System Development* (up to 35 points). The extent to which the eligible applicant's plan for developing the proposed assessment system will ensure that the assessment system is ready for wide-scale administration in a manner that is timely, cost-effective, and consistent with the proposed design and incorporates a process for ongoing feedback and improvement. In determining the extent to which the development plan has these attributes, we will consider—

(a) The approaches for developing assessment items (*e.g.,* evidence centered design, universal design for learning [15]) and the rationale for using those approaches; the development phases and processes to be implemented consistent with the approaches; and the types of personnel involved in each development phase and process (*e.g.,* practitioners, content experts, assessment experts, experts in assessing English learners, experts in assessing students with disabilities, psychometricians, cognitive scientists, IHE representatives, career and technical education experts);

(b) The approach and strategy for designing and developing accommodations (as defined in this notice), accommodation policies, and methods for standardizing the use of those accommodations for—

(i) English learners; and

(ii) Students with disabilities;

(c) The approach and strategy for ensuring scalable, accurate, and consistent scoring of items, including the approach and moderation system (as defined in this notice) for any human-scored items that are part of the summative assessment components and the extent to which teachers are trained and involved in the scoring of assessments;

(d) The approach and strategy for developing the reporting system; and

(e) The overall approach to quality control; and the strategy for field testing

[15] "Universal design for learning" is used as that term is defined in section 103(24) of the HEA.

assessment items, accommodations, scoring systems, and reporting systems, including, with respect to assessment items and accommodations, the use of representative sampling of all types of student populations, taking into particular account high- and low-performing students and different types of English learners and students with disabilities.

(A)(5) *Research and Evaluation* (up to 30 points). The extent to which the eligible applicant's research and evaluation plan will ensure that the assessments developed are valid, reliable, and fair for their intended purposes and for all student subgroups. In determining the extent to which the research and evaluation plan has these attributes, we will consider—

(a) The plan for identifying and employing psychometric techniques suitable to verify, as appropriate to each assessment component, its construct, consequential, and predictive validity; external validity; reliability; fairness; precision across the full performance continuum; and comparability within and across grade levels; and

(b) The plan for determining whether the assessments are being implemented as designed and the theory of action is being realized, including whether the intended effects on individuals and institutions are being achieved.

(A)(6) *Professional Capacity and Outreach* (up to 15 points). The extent to which the eligible applicant's plan for implementing the proposed assessment system is feasible, cost-effective, and consistent with the theory of action. In determining the extent to which the implementation plan has these attributes, we will consider—

(a) The plan for supporting teachers and administrators in implementing the assessment system and for developing, in an ongoing manner, the professional capacity to use the assessments and results to inform and improve instructional practice; and

(b) The strategy and plan for informing the public and key stakeholders (including legislators and policymakers) in each member State about the assessment system and for building support for the system from the public and those stakeholders.

(A)(7) *Technology Approach* (up to 10 points). The extent to which the eligible applicant is using technology effectively to improve the quality, accessibility, cost-effectiveness, and efficiency of the proposed assessment system. In determining the extent to which the eligible applicant is using technology effectively, we will consider—

(a) The description of, and rationale for—

(i) The ways in which technology will be used in assessment design, development, administration, scoring, and reporting;

(ii) The types of technology to be used (including whether the technology is existing and commercially-available or is being newly developed); and

(iii) How other States or organizations can re-use in a cost-effective manner any technology platforms and technology components developed under this grant; and

(b) How technology-related implementation or deployment barriers will be addressed (*e.g.,* issues relating to local access to Internet-based assessments).

(A)(8) *Project Management* (up to 30 points). The extent to which the eligible applicant's project management plan will result in implementation of the proposed assessment system on time, within budget, and in a manner that is financially sustainable over time. In determining the extent to which the project management plan has these attributes, we will consider—

(a) The quality, qualifications, and role of the project management partner, as evidenced by its mission, date of founding, size, experience (including past success in implementing similar projects), and key personnel assigned to this project (including their names, curricula vitae, roles, percent of time dedicated to this project, and experience in managing similar projects);

(b) The project workplan and timeline, including, for each key deliverable (*e.g.,* assessment component, scoring and moderation system, professional development activities), the major milestones, deadlines, and entities responsible for execution; and the approach to identifying, managing, and mitigating risks associated with the project;

(c) The extent to which the eligible applicant's budget—

(i) Clearly identifies Level 1 budget modules (as defined in this notice) and any Level 2 budget modules (as defined in this notice);

(ii) Is adequate to support the development of an assessment system that meets the requirements of the absolute priority; and

(iii) Includes costs that are reasonable in relation to the objectives, design, and significance of the proposed project and the number of students to be served; and

(d) For each member State, the estimated costs for the ongoing administration, maintenance, and enhancement of operational assessments in the proposed assessment system and a plan for how the State will fund the assessment system over time (including by allocating to the assessment system funds for existing State or local assessments that will be replaced by assessments in the system).

B. *High School Course Assessment Programs:*

Selection Criteria: For the High School Course Assessment Programs category, we are establishing the following selection criteria for the FY 2010 grant competition only, in accordance with section 437(d)(1) of GEPA, 20 U.S.C. 1232(d)(1). Eligible applicants may receive up to 200 total points based on the extent to which their applications address these selection criteria. The total number of points that may be awarded for each criterion and the number of points that may be awarded for each factor within a criterion are indicated in parentheses next to the criterion or factor.

(B)(1) *Consortium Governance* (up to 30 points). The extent to which the consortium's proposed governance structure will enable the successful design, development, and implementation of the proposed high school course assessment program. In determining the extent to which the consortium's proposed governance structure will enable the successful design, development, and implementation of the proposed assessment program, we will consider—

(a) The consortium's vision, goals, role, and key deliverables (*e.g.,* assessments, scoring and moderation system, certification system, professional development activities), and the consistency of these with the consortium's theory of action;

(b) The consortium's structure and operations, including—

(i) The organizational structure of the consortium and the differentiated roles that a member State may hold (*e.g.,* lead State, governing State (as defined in this notice), advisory State);

(ii) For each differentiated role, the rights and responsibilities (including the level of commitment to adopting and implementing the assessment program) associated with the role;

(iii) The consortium's method and process (*e.g.,* consensus, majority) for making different types of decisions (*e.g.,* policy, operational);

(iv) The protocols by which the consortium will operate, including the protocols for member States to change roles or leave the consortium and for new member States to join the consortium;

(v) The key policies and definitions to which all member States will adhere, the rationale for choosing these policies and definitions, and the consortium's

plan (including the process and timeline) for developing them; and

(vi) The consortium's plan for managing funds received under this grant category;

(c) The terms and conditions of the Memoranda of Understanding or other binding agreements executed by each member State, including the consistency of the terms and conditions with the consortium's governance structure and the State's role in the consortium; and

(d) The consortium's procurement process, and evidence of each member State's commitment to that process.

(B)(2) *Theory of Action* (up to 5 points). The extent to which the eligible applicant's theory of action is logical, coherent, and credible, and will result in improved academic outcomes for high school students across the States in the consortium. In determining the extent to which the theory of action has these attributes, we will consider the description of and rationale for—

(a) How the proposed high school course assessment program will be incorporated into a coherent high school educational system (*i.e.*, a system that includes standards, assessments, curriculum, instruction, and professional development);

(b) How the assessment program's rigor will be demonstrated and maintained over time;

(c) How the assessment program will cover diverse course offerings that provide a variety of pathways to students; and

(d) How the assessment program will be implemented at a scale that, across the States in the consortium, increases access to rigorous courses for students who have not typically had such access, and broadly improves student achievement and college and career readiness (as defined in this notice).

(B)(3) *Course Assessment Program Design and Development* (up to 60 points). The extent to which the design and development of the eligible applicant's proposed high school assessment program is feasible, scalable, and consistent with the theory of action. In determining the extent to which the design has these attributes, we will consider—

(a) The high school courses for which the consortium will implement assessments; the rationale for selecting those courses, including a need to increase access to rigorous courses for students who have not typically had such access; and the processes by which new high school course assessments will be added to the assessment program over time and existing course assessments will be updated and refreshed;

(b) How the assessments will measure student knowledge and skills against standards from a common set of college- and career-ready standards (as defined in this notice) in subjects for which such a set of standards exists, or otherwise against State or other rigorous standards;

(c) How the consortium will certify the rigor of each assessment in the assessment program, whether the assessment is new or adapted; and how the consortium will maintain consistent and high levels of rigor over time; and

(d) The general design and development approach for course assessments, including—

(i) The number and types of components (*e.g.*, mid-term tests, through-course summative assessments (as defined in this notice), end-of-course assessments) in a high school course assessment;

(ii) The extent to which, and, where applicable, the approach for ensuring that, assessment items will be varied and elicit complex student demonstrations or applications of knowledge and skills;

(iii) How the assessments will produce student achievement data (as defined in this notice) and student growth data (as defined in this notice);

(iv) The approach and strategy for ensuring scalable, accurate, and consistent scoring of assessments, and the extent to which teachers are trained and involved in the scoring of assessments; and

(v) How the course assessments will be accessible to the broadest possible range of students, including English learners and students with disabilities, and include appropriate accommodations (as defined in this notice) for students with disabilities and English learners.

(B)(4) *Research and Evaluation* (up to 25 points). The extent to which the eligible applicant's research and evaluation plan will ensure that the assessments developed are valid, reliable, and fair for their intended purposes and for all students. In determining the extent to which the research and evaluation plan has these attributes, we will consider—

(a) The plan for verifying validity, reliability, and fairness; and

(b) The plan for determining whether the assessments are being implemented as designed and the theory of action is being realized, including whether the intended effects on students and schools are being achieved.

(B)(5) *Course Assessment Program Implementation* (up to 45 points). The extent to which the eligible applicant's plan for implementing the proposed high school course assessment program will result in increased student enrollment in courses in the assessment program (and therefore improved student academic outcomes) in each member State. In determining the extent to which the implementation plan has these attributes, we will consider—

(a) The approach to be used in each member State for promoting participation in the high school course assessment program by high schools, by teachers, and by students (*e.g.*, voluntary participation, mandatory participation, incentive programs); the plan for implementing the approach, including goals, major activities, timelines, and entities responsible for execution; and the expected participation levels in each member State and across the consortium overall, including—

(i) The number and percentage of high schools expected to implement at least one of the assessments in the high school course assessment program in each of five consecutive years beginning with the 2013–2014 school year;

(ii) For each assessment in the assessment program, the number and percentage of high schools expected to implement the assessment in each of five consecutive years beginning with the 2013–2014 school year; and

(iii) The unduplicated number and percentage of high school students expected to take at least one assessment in the assessment program in each of five consecutive years beginning with the 2013–2014 school year; and

(b) The plan for supporting teachers and administrators in implementing the high school course assessment program and for developing, in an ongoing manner, the professional capacity to use the assessments and results to inform and improve instructional practice.

(B)(6) *Project Management* (up to 35 points). The extent to which the eligible applicant's project management plan will result in implementation of the proposed high school course assessment program on time, within budget, and in a manner that is financially sustainable over time. In determining the extent to which the project management plan has these attributes, we will consider—

(a) The quality, qualifications, and role of the project management partner, as evidenced by its mission, date of founding, size, experience (including past success in implementing similar projects), and key personnel assigned to this project (including their names, curricula vitae, roles, percent of time dedicated to this project, and experience in managing similar projects);

(b) The project workplan and timeline, including, for each key

deliverable (*e.g.*, assessments, scoring and moderation system, certification system, professional development activities), the major milestones, deadlines, and entities responsible for execution;

(c) The extent to which the eligible applicant's budget—

(i) Is adequate to support the development of a high school assessment program that meets the requirements of the absolute priority;

(ii) Includes costs that are reasonable in relation to the objectives, design, and significance of the proposed project and the number of students to be served; and

(d) For each member State, the estimated costs for the ongoing administration, maintenance, and enhancement of operational assessments in the proposed assessment program and a plan for how the State will fund the assessment program over time (including by allocating to the assessment program funds for existing State or local assessments that will be replaced by assessments in the program).

C. *Review and Selection Process:* The Department will screen applications that are received in accordance with the requirements in this notice and determine which applications will be reviewed for funding based on whether the applicant has met the eligibility requirements for the grant category and has requested a budget amount that does not exceed the maximum amount for the grant category as discussed in the *Award Information* section of this notice (section II). Applications from applicants that do not meet the eligibility requirements for the grant category or that request a budget amount that exceeds the maximum amount for the grant category will not be reviewed for funding. Reviewers [16] will then review and score applications using the competitive preference priorities, selection criteria and points included in this notice, and determine whether applications meet the Absolute Priority for the grant category. Applications that do not meet the Absolute Priority will not be considered for funding. The reviewers' scores will be averaged for each application that meets the Absolute Priority for the grant category, and those applications will be rank ordered in each grant category. After the review process is complete, the Secretary will select, consistent with 34 CFR 75.217, the grantees for each grant category after considering the rank order of applications, the funding available, and any other relevant information.

[16] The Department intends to use a panel of expert, independent reviewers who have been chosen from a pool of qualified assessment and management experts. The Department will thoroughly screen all reviewers for conflicts of interest in order to ensure a fair and competitive review process.

V. Award Administration Information

A. *Award Notices:* If an application is successful, the Department will notify the applicant's U.S. Representative and U.S. Senators and send the applicant a Grant Award Notification (GAN). We may also notify the applicant informally.

If an application is not evaluated or not selected for funding, we will notify the applicant.

B. *Administrative and National Policy Requirements:* We identify administrative and national policy requirements in the application package and reference these and other requirements in the *Applicable Regulations* in section I of this notice.

We reference the regulations outlining the terms and conditions of an award in the *Applicable Regulations* in section I of this notice and include these and other specific conditions in the GAN. The GAN also incorporates the approved application as part of the applicant's binding commitments under the grant.

C. *Reporting:* Grantees (*i.e.*, applicants that receive an award) under this program must submit an annual performance report that provides the most current performance and financial expenditure information as directed by the Secretary under 34 CFR 75.118. The Secretary may require more frequent performance reports under 34 CFR 75.720(c). At the end of the project period, grantees must also submit a final performance report, including financial information, as directed by the Secretary.

Grantees under this program must also meet the reporting requirements that apply to all programs funded under the ARRA. Specifically, grantees must submit reports, within 10 days after the end of each calendar quarter, that contain the information required under section 1512(c) of the ARRA in accordance with any guidance issued by the Office of Management and Budget or the Department (ARRA Division A, Section 1512(c)).

In addition, for each year of the program, grantees must comply with the requirements of ARRA Division A, Section 14008, and other performance reporting that the Department may require.

The Department will monitor grantees' progress in meeting project goals, objectives, timelines, and budget requirements; and may require grantees to enter into a cooperative agreement with the Department.

D. *Performance Measures:* We are establishing the following Government Performance and Results Act of 1993 (GPRA) performance measures for the Race to the Top Assessment Program:

Comprehensive Assessment Systems Grants

The performance measures for Comprehensive Assessment Systems grants are:

1. Number of States that have formally adopted a common set of college- and career-ready standards in mathematics and English language arts;

2. Number of States that have fully implemented the summative assessment components of the assessment systems;

3. Number of IHEs that are working with grantees to design and develop the final high school summative assessments in mathematics and English language arts;

4. Number of IHEs that have implemented policies that exempt from remedial courses and place into credit-bearing college courses students who meet the achievement standard for the final high school summative assessments in mathematics and English language arts and any other placement requirements; and

5. Percentage of direct matriculation students (as defined in this notice) in public IHEs who are enrolled in IHEs that are working with grantees to design and develop the final high school summative assessments in mathematics and English language arts and/or have implemented policies that exempt from remedial courses and place into credit-bearing college courses students who meet the achievement standard for the final high school summative assessments in mathematics and English language arts.

High School Course Assessment Programs Grants

The performance measures for High School Course Assessment Programs grants are:

1. Number of courses for which assessments have been developed under the high school assessment programs;

2. Number of States implementing the high school course assessment programs;

3. Percentage of LEAs in each State implementing at least one assessment in the high school course assessment programs;

4. Percentage of high schools in each State implementing at least one assessment in the high school course assessment programs;

5. For each assessment in the high school course assessment programs,

percentage of high schools in each State implementing the assessment;

6. Percentage of students in each State taking at least one assessment in the high school course assessment programs; and

7. Percentage of high schools in each State that incorporate courses in the high school course assessment programs into requirements for high school diplomas or certificates.

VI. Agency Contacts

For Further Information Contact: James Butler, U.S. Department of Education, 400 Maryland Avenue, SW., room 3C108, Washington, DC 20202–6400. Telephone: (202) 453–7246 or by e-mail: *racetothetop.assessment@ed.gov.*

If you use a TDD, call the FRS, toll free, at 1–800–877–8339.

VII. Other Information

Accessible Format: Individuals with disabilities can obtain this document and a copy of the application package in an accessible format (*e.g.,* braille, large print, audiotape, or computer diskette) on request to the program contact person listed under *For Further Information Contact* in section VI of this notice.

Electronic Access to This Document: You can view this document, as well as all other documents of this Department published in the **Federal Register**, in text or Adobe Portable Document Format (PDF) on the Internet at the following site: *http://www.ed.gov/news/fedregister.* To use PDF you must have Adobe Acrobat Reader, which is available free at this site.

Note: The official version of this document is the document published in the **Federal Register**. Free Internet access to the official edition of the **Federal Register** and the Code of Federal Regulations is available on GPO Access at: *http://www.gpoaccess.gov/nara/index.html.*

Dated: April 6, 2010.

Arne Duncan,

Secretary of Education.

[FR Doc. 2010–8176 Filed 4–8–10; 8:45 am]

BILLING CODE 4000–01–P

DEPARTMENT OF EDUCATION

National Institute on Disability and Rehabilitation Research (NIDRR)—Disability and Rehabilitation Research Projects and Centers Program—Rehabilitation Engineering Research Centers (RERCs)

Catalog of Federal Domestic Assistance (CFDA) Number: 84.133E–1 and 84.133E–3.

AGENCY: Office of Special Education and Rehabilitative Services, Department of Education.

ACTION: Notice of proposed priorities for two RERCs.

SUMMARY: The Assistant Secretary for Special Education and Rehabilitative Services proposes two priorities for the Disability and Rehabilitation Research Projects and Centers Program administered by NIDRR. Specifically, this notice proposes two priorities for RERCs: Universal Design in the Built Environment and Technologies for Children with Orthopedic Disabilities. The Assistant Secretary may use these priorities for competitions in fiscal year (FY) 2010 and later years. We take this action to focus research attention on areas of national need. We intend these priorities to improve rehabilitation services and outcomes for individuals with disabilities.

DATES: We must receive your comments on or before May 10, 2010.

ADDRESSES: Address all comments about this notice to Donna Nangle, U.S. Department of Education, 400 Maryland Avenue, SW., room 5142, Potomac Center Plaza, Washington, DC 20202–2700.

If you prefer to send your comments by e-mail, use the following address: *donna.nangle@ed.gov.* You must include the term "Proposed Priorities for RERCs" and the priority title in the subject line of your electronic message.

FOR FURTHER INFORMATION CONTACT: Donna Nangle. Telephone: (202) 245–7462 or by e-mail: *donna.nangle@ed.gov.*

If you use a telecommunications device for the deaf (TDD), call the Federal Relay Service (FRS), toll free, at 1–800–877–8339.

SUPPLEMENTARY INFORMATION:

This notice of proposed priorities is in concert with NIDRR's Final Long-Range Plan for FY 2005–2009 (Plan). The Plan, which was published in the **Federal Register** on February 15, 2006 (71 FR 8165), can be accessed on the Internet at the following site: *http://www.ed.gov/about/offices/list/osers/nidrr/policy.html.*

Through the implementation of the Plan, NIDRR seeks to: (1) Improve the quality and utility of disability and rehabilitation research; (2) foster an exchange of expertise, information, and training to facilitate the advancement of knowledge and understanding of the unique needs of traditionally underserved populations; (3) determine best strategies and programs to improve rehabilitation outcomes for underserved populations; (4) identify research gaps; (5) identify mechanisms of integrating research and practice; and (6) disseminate findings. This notice proposes two priorities that NIDRR intends to use for RERC competitions in FY 2010 and possibly later years. However, nothing precludes NIDRR from publishing additional priorities, if needed.

Furthermore, NIDRR is under no obligation to make awards for these priorities. The decision to make an award will be based on the quality of applications received and available funding.

Invitation to Comment: We invite you to submit comments regarding this notice. To ensure that your comments have maximum effect in developing the notice of final priorities, we urge you to identify clearly the specific proposed priority that each comment addresses.

We invite you to assist us in complying with the specific requirements of Executive Order 12866 and its overall requirement of reducing regulatory burden that might result from these proposed priorities. Please let us know of any further ways we could reduce potential costs or increase potential benefits while preserving the effective and efficient administration of the program.

During and after the comment period, you may inspect all public comments about this notice in room 6030, 550 12th Street, SW., Potomac Center Plaza, Washington, DC, between the hours of 8:30 a.m. and 4:00 p.m., Washington, DC time, Monday through Friday of each week except Federal holidays.

Assistance to Individuals with Disabilities in Reviewing the Rulemaking Record: On request we will provide an appropriate accommodation or auxiliary aid to an individual with a disability who needs assistance to review the comments or other documents in the public rulemaking record for this notice. If you want to schedule an appointment for this type of accommodation or auxiliary aid, please contact the person listed under **FOR FURTHER INFORMATION CONTACT**.

Purpose of Program: The purpose of the Disability and Rehabilitation Research Projects and Centers Program is to plan and conduct research, demonstration projects, training, and related activities, including international activities; to develop methods, procedures, and rehabilitation technology that maximize the full inclusion and integration into society, employment, independent living, family support, and economic and social self-sufficiency of individuals with disabilities, especially individuals with the most severe disabilities; and to

MEMORANDUM OF UNDERSTANDING AND AGREEMENT

This Memorandum of Understanding and Agreement (this "**MOU**") is entered into by and between the entity (or authorized agency or division thereof) identified as "Member" by the parties' signatures below ("**Member**"), and The Regents of the University of California ("**UC**"), a public entity with full powers of self governance under Article IX, Section 9 of the California Constitution, as represented by the University of California at Los Angeles and its National Center for Research on Evaluation, Standards and Student Testing ("**CRESST**"), which is located in UCLA's Graduate School of Education and Information Studies (collectively, "**UCLA/CRESST**"), as of the latest date set out by the parties' signatures below (the "**Execution Date**"), with reference to the following:

A. The Smarter Balanced Assessment Consortium (the "**Consortium**") is currently a state-led enterprise intended to provide world-class leadership and resources to improve teaching and learning by creating and maintaining a balanced suite of formative, interim and summative assessment tools aligned to the Common Core State Standards in mathematics and English Language Arts/Literacy. The Consortium is not an independent legal entity and thus, the State of Washington currently acts as the Consortium's fiscal agent (the "**Fiscal Agent**") and oversees all fiscal, administrative and operational responsibilities on behalf of the Consortium.

B. UCLA/CRESST has as its mission the promotion of research, development, applications and training designed to raise the learning of students and the abilities of teachers, and to improve educational institutions through the creation of knowledge, models and tools.

C. The Consortium's projects are currently funded primarily through a grant from the U.S. Department of Education, but this grant will end in 2014, and the intent of this MOU is to enable the work of the Consortium to continue at UCLA/CRESST, with UC assuming those current or anticipated liabilities of the Consortium or the State of Washington in its capacity as the Fiscal Agent as may be expressly set forth in one or more written agreements between UC and the Fiscal Agent.

D. As the Fiscal Agent, the State of Washington has entered into contracts and undertaken obligations on behalf of the Consortium and its members, and Member understands and expects that the work of the Consortium will be transitioned to UCLA in a manner that allows UC to succeed to the fiscal, administrative and operational responsibilities currently carried out by the Fiscal Agent.

E. Schedule 1 attached hereto contains a list of current contracts to which the Fiscal Agent is a party on behalf of the Consortium that will be assigned to UC (the "**Consortium Contracts**"), together with a list of those other Consortium assets currently owned by or otherwise in the possession of the Fiscal Agent that will be assigned to UC (the "**Consortium Assets**"), and pursuant to a separate written agreement the Fiscal Agent will assign or otherwise transfer to UC the Consortium Assets and the Consortium Contracts.

F. Beginning with UC's 2014-2015 fiscal year (which begins on July 1, 2014), Smarter Balanced ("**SB**") will exist under and operate as a part of The UCLA Graduate School of Education and Information Studies, subject to the direction of the Governing Board, to be funded by members paying annual fees to UC, in order to allow the Consortium's work to continue for those members that execute this MOU.

NOW THEREFORE, for good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, Member and UC agree as follows:

1. **Definitions.**

1.1. "**Annual Fees**" means those amounts that Member pays for its participation in SB pursuant to this MOU, including any late fees charged pursuant to Section 5.1(d) below. Member's initial Annual Fees, which are calculated on a projected per-student basis (as described in Section 5.6(c) below) are set forth on Exhibit A, and Exhibit C attached hereto provides the calculations on which the Annual Fees will be based during the Term

EXHIBIT A TO MOU

Member Information

Member Information

Member Name: South Dakota Department of Education

Member Address for Notice Purposes

Any notices required under Section 9.5 of the Memorandum of Understanding to which this Exhibit A is attached (the "**MOU**") will be delivered to Member at the following address:

South Dakota Department of Education

800 Governors Drive
Pierre, SD 57501

Member Contacts:

State Lead: Jan Martin Office of Assessment Administrator

605-773-3246 jan.martin@state.sd.us
Name, Title, Phone Number and Email Address

Member Representative: Abby Javeruk-Humig Director – Division of Assessment and Accountability

605-773-4708 abby.javurek-humig@state.sd.us
Name, Title, Phone Number and Email Address

Project Manager: Jan Martin Office of Assessment Administrator

605-773-3246 jan.martin@state.sd.us
Name, Title, Phone Number and Email Address

Member Vendor(s):

Member has chosen the following vendor(s) for the implementation, operation and delivery of the Assessment System (list each vendor's name, and include name, title, phone and email information for at least one contact at each vendor):

AIR

Jon Cohen , President, AIR Assessment

jcohen@air.org (202) 403-5420

EXHIBIT A TO MOU (continued)

Annual Fees

Member's Annual Fees have been calculated on Exhibit C to the Agreement, and the total amount of Member's Annual Fees for the fiscal year to which this Exhibit A applies (subject to any adjustment required under Section 5.1(b) of the MOU) is as follows: $__680,628.50_____

Payments of Annual Fees must be made by check or by Electronic Funds Transfer and in strict accordance with UCLA's payment instructions, which are available upon request.

Initial Payment and Monthly Fee Amount

At the beginning of each fiscal year during the Term (i.e., by no later than July 1), as described in Section 5.1, Member will make an initial payment equal to two times the Monthly Fee Amount (the "**Initial Payment**"); provided, that if the Execution Date for the MOU occurs after July 31, then in addition to the Initial Payment, Member will also be required to pay the Monthly Fee Amount for the first day of each additional calendar month after July 1 that occurred prior to the Execution Date. By way of example, if the Execution Date of this MOU is September 2, then Member's first payment will equal four times the Monthly Fee Amount – the Initial Payment (equal to two times the Monthly Fee Amount) plus an additional Monthly Fee Amount for each of August and September.

Fee Discount

For fiscal year 2014-2015 only:

If Member's Execution Date is on or before July 31, 2014, then Member will receive a 1% discount on Member's Initial Payment (i.e., two times the Monthly Fee Amount, or 1/6 of Member's Annual Fee). Member's other payments for the 2014-2015 fiscal year will not be affected.

Invoice Information for Member:

The following information must be on any Invoices UC provides to Member under this MOU:

Name /Address of Vendor____

Specific date(s) of services being billed
Current billing amount
Amount previously billed
Agreement balance

EXHIBIT B TO MOU

Products and Services; Additional Member Benefits

The Products and Services (as defined in the Memorandum of Understanding to which this Exhibit B is attached) available to Member for fiscal year 2014-2015 consist of the following, in addition to those obligations of UC described in the MOU. Any capitalized terms used but not defined in this Exhibit B will have the meanings given to them in the MOU.

Assessment Packages

Basic: SB's "basic" assessment package includes summative assessments only, and does not include any interim or formative assessments.

Complete: SB offers two versions of its "complete" assessment package, as follows:

Only Gr. 3-8 Tested: this version of the "complete" package includes summative assessments for grades 3 – 8, and formative and interim assessments for grades K – 12.

All Grades Tested: this version of the "complete" package includes summative assessments for grades 3 – 8 and grade 11, and formative and interim assessments for grades K – 12.

General Operations and Membership Services

- SB will provide oversight of the maintenance and operations of the Assessment System.
- SB will provide technical support services for the Assessment System.
- SB will provide project management, including detailed project timelines, for the delivery of the Assessment System and the Products and Services described herein.
- SB will provide general communication tools and templates and communication materials translated into additional languages supported by the Assessment System.
- SB will establish, operate, maintain and update the SB Website.
- SB will provide "Tier-1" help desk support for State Assessment Directors and Chiefs or their designees.

Assessment and Item Design

- SB will maintain and enhance the assessment design by facilitating expert reviews consistent with the Association of Test Publishers (ATP)/Council of Chief State School Officers (CCSSO) best practices and the joint National Council on Measurement in Education (NCME), the American Educational Research Association (AERA) and the American Psychological Association (APA) standards for educational testing.
- SB will compile, submit and revise as necessary, for the standard SB products and services, documentation sufficient to address the requirements of the U.S. Department of Education standards and assessment peer review or equivalent large-scale assessment technical review.
- SB will design and conduct validity studies based on the priority order established by the Governing Board.
- SB will maintain and facilitate approved changes to test blueprints that describe the attributes of the assessment for each grade and content area.
- SB will maintain documentation regarding the item development process, including but not limited to, an external, independent review of item specifications, and external, independent reviews of items including content, sensitivity and bias, and accessibility reviews.

- SB will obtain and maintain permissions and copyrights for passages, written materials, graphics, photos, and other related stimuli.
- SB will maintain a research-based list of accommodations and publish annually a set of accommodations guidelines that support valid test results for all students including students with disabilities and English language learners.
- For fiscal years 2014-2015, 2015-2016 and 2016-2017, SB will develop blueline test booklets in accordance with specifications provided by the Governing Board. These blueline forms will be available for each of the grades 3-8 and grade 11 summative assessments in English language arts/literacy and Mathematics, as follows:
    - For English language arts/literacy, the forms will be available in English; and
    - For Mathematics, the forms will be available in English and also in an English/Spanish side-by-side format.
- SB will maintain specifications for an adaptive algorithm.

Interoperability and Certification Assistance

- SB will maintain interoperability standards for items, test registration, and student results for the Assessment System.
- SB will provide a certification process and implementation of certification services to verify each Member State has followed the processes for administering and processing the assessments as established by SB.
- SB will provide a certification process to affirm that Members have followed SB procedures.

Applications Development and Maintenance

- SB will maintain an item banking/item authoring tool, test administration application, digital library and data warehouse/reporting application.
- SB will facilitate an annual membership review of applications to prioritize enhancements.
- SB will sponsor application enhancements based on Members' priorities.
- SB will provide expert consultation to Members regarding the assessment delivery application.

Reporting Services

- SB will produce standardized reports for assessment results.
- SB will provide aggregate reporting at the SB, local education agency, school, and grade level, disaggregated by standard categories.
- SB will publish an annual technical report regarding the Assessment System on a state-by-state basis.

Optional Services

- SB will offer hosting for a digital library that supports formative assessment practices and tools.
- SB will offer access to an interim assessment item bank developed using procedures approved by SB.

Additional Member Benefits

In addition to the Products and Services described above, Member's payment of Annual Fees will entitle Member to the following:

- SB will pay the travel expenses for Member's State Lead and another representative of Member's state to attend up to two collaboration conferences per fiscal year, such payment to be made consistent with the applicable travel and expense policies of Member's state and of UC.

- SB will support the Governing Board and Member's participation thereon with appropriate infrastructure (e.g., conference lines, web conferencing, and meeting management services)

Exhibit C to MOU:

Member Annual Fee Worksheet for 2014-15

1. Provide the "Projected Number of Students to be Tested" in Grades 3-8 and in Grade 11...

A:	How many students in **GRADES 3-8** will take the **SUMMATIVE** test in 2014-15? Enter the number on Line 1	Line 1 61,600
B:	How many students in **GRADE 11** will take the **SUMMATIVE** test in 2014-15? Enter the number on Line 2	Line 2 9,670
C:	Enter the **SUM** of Line 1 and Line 2 on Line 3	Line 3 71,270
D:	"**Billable Students**" If Line 3 is LESS THAN OR EQUAL TO ONE MILLION students, enter the number from Line 3 on Line 4; If Line 3 is GREATER THAN ONE MILLION, enter 1,000,000 on Line 4	Line 4 71,270

2. Select the Assessment Package you wish to use and calculate your fee...

Check ONLY ONE below

[X]	**Complete -- All Grades Tested** ✓ Must have student counts in both Line 1 and Line 2 ✓ includes **SUMMATIVE (Gr.3-8 & 11)** ✓ includes **INTERIM (Grades K thru 12)** ✓ includes **FORMATIVE (Grades K thru 12)**	Multiply the number from Line 4 by **$9.55**. Enter the result on Line 5
[ ]	**Complete -- Only Gr. 3-8 Tested** ✓ Must have student counts in Line 1 but not in Line 2 ✓ includes **SUMMATIVE (Gr.3-8)** ✓ includes **INTERIM Grades (K thru 12)** ✓ includes **FORMATIVE (Grades K thru 12)**	Multiply the number from Line 4 by **$10.10**. Enter the result on Line 5
[ ]	**Basic** ✓ **SUMMATIVE Only** ✓ No **INTERIM (K thru 12)** ✓ No **FORMATIVE (K thru 12)**	Multiply the number from Line 4 by **$6.20**. Enter the result on Line 5

Line 5 (Fee for 3-8 & 11 Testing): $680,628.50

E:	Will you use the secure item pool for additional tests your state will give to students in **grades 9, 10, 11 and/or 12?**	[X] NO. **STOP**. Your TOTAL FEE is shown on line 5 [ ] YES. Continue to Step F

Complete this worksheet and insert as page 27 of the MOU

Exhibit C to MOU:

Member Annual Fee Worksheet for 2014-15

3. (Optional) Calculate fee for additional high school testing...

F:	Enter the **TOTAL TEST EVENTS** for **English language arts/Literacy** you expect for **Grades 9 through 12** on Line 6a.	Line 6a _____
	Enter the **TOTAL TEST EVENTS** for **Mathematics** you expect for **Grades 9 through 12** on Line 6b.	Line 6b _____
G:	Multiply Line 6a by $3.10 and enter the amount on Line 7a	Line 7a _____
	Multiply Line 6b by $3.10 and enter the amount on Line 7b	Line 7b _____
H:	Enter the sum of Lines 7a, and 7b on Line 8. This is the fee for your additional HS testing.	(Fee for Additional HS Testing) Line 8 -0-
I:	Enter the sum of Lines 5 and 8 on Line 9. This is your TOTAL FEE.	(Total Fee) Line 9 $680,628.50

Fee Worksheet-1.4 (7-1-14)

Complete this worksheet and insert as page 27 of the MOU

SCHEDULE 1 TO MOU

CONSORTIUM CONTRACTS AND CONSORTIUM ASSETS

[TO BE FINALIZED FOLLOWING REVIEW OF AGREEMENTS WITH FISCAL AGENT]

Consortium Contracts
[None]

Consortium Assets
The Consortium assets currently owned by or otherwise in the possession of the Fiscal Agent consist of the following categories of materials (a detailed list of Consortium Assets will be provided upon request):

Items
Psychometric attributes of items
Test administration and training materials
Item development specifications and guidelines
Permissions contracts for stimuli
Commissioned passages and stimuli
Responsibility for the sponsorship of open source applications developed under the grant
SB Marks, comprising the Smarter Balanced name and the logos included below

of this MOU. Exhibit C may be updated from time to time during the Term at the direction of the Governing Board to reflect any changes to the way the Annual Fees are calculated, and Exhibit A will be updated at least yearly at the direction of the Governing Board to reflect the Annual Fees for each subsequent fiscal year during the Term.

1.2. "**Annual Operating Expenses**" means the annual operating expenses for SB, as measured on a fiscal year basis, as approved by the Governing Board, and as described in more detail in Section 5.2 below. Consistent with UC's goal of operating SB on a "revenue neutral" basis, the Annual Operating Expenses will be determined by reference to the total number of Members entering into memoranda of understanding with UC for participation in SB and the total fees the Members will pay annually.

1.3. "**Assessment System**" means the services, tools, applications, and resources, developed initially by the Consortium, which will be managed by SB from and after the Effective Date, and which includes, but is not necessarily limited to, the SB Materials and the UC Materials.

1.4. "**Confidential Information**" means any nonpublic information of Member that is disclosed to or otherwise shared with SB and UC, and any nonpublic information of SB that is disclosed to or otherwise shared with Member. Confidential Information will be identified at the time of disclosure as "confidential." Confidential Information will further include any information that the Governing Board Procedures designate for confidential treatment.

1.5. "**Consortium Assets**" has the meaning ascribed to it in the recitals, above. For the avoidance of doubt, the Consortium Assets include the SB Marks and will further include any Enhancements to the Consortium Assets, including (without limitation) any such Enhancements developed during the Term of this MOU.

1.6. "**Consortium Governance Structure Document**" means the Smarter Balanced Assessment Consortium Governance Structure Document dated July 1, 2010 (as amended by the Consortium from time to time), which is available on the "Governance" page of the Consortium's website, http://www.smarterbalanced.org/about/governance/, under "Publications and Resources."

1.7. "**Effective Date**" means July 1, 2014.

1.8. "**Enhancements**" means any enhancements, improvements, modifications or alterations to any works of authorship or other materials that embody any intellectual property rights that are conceived or otherwise developed by a party, alone or with others, or by the parties jointly, under or in connection with their performance of this MOU.

1.9. "**Executive Committee**" means the set of representatives elected by the Governing Board, together with at least one ex officio representative of UC. The Executive Committee will have primary responsibility for interfacing with SB on behalf of the Governing Board and the Members.

1.10. "**Governing Board**" means a board that consists of one representative from each Member, and to which Member will be entitled to appoint its Member Representative, who will serve during the Term of this MOU. The Governing Board will meet on a regular basis and will be responsible for providing SB with Member input and direction on operational and financial issues for SB.

1.11. "**Governing Board Procedures**" means the set of rules, policies, and procedures that will govern the operations of the Governing Board and the Executive Committee. The Governing Board Procedures will be created, adopted and amended pursuant to the terms of Section 3.3 below; provided, that until such time as the Governing Board Procedures have been adopted as set forth herein, the Governing Board will continue to operate in accordance with the Consortium Governance Structure Document. In addition, in the

event of any conflict between the Governing Board Procedures and this MOU concerning the allocation of authority between the Governing Board and the Executive Committee, the Governing Board Procedures will take precedence, and any references in this MOU to "Governing Board" or "Executive Committee" will be understood as referring to the body that has been allocated the applicable authority under the then-current Governing Board Procedures. For avoidance of doubt, the foregoing refers only to the allocation of authority between the Governing Board and the Executive Committee, and the Governing Board Procedures and actions of the Governing Board will at all times be subject to the provisions of Sections 3.2 and 3.3 below.

1.12. "**Governing Board Representative**" means an individual designated by the Governing Board who will be the single point of contact between the Governing Board and UC and between the Governing Board and each Member. At or promptly following its first meeting, the Governing Board will designate the Governing Board Representative. The Governing Board Procedures will specify the means by which the Governing Board can change the Governing Board Representative and the notice required to be given to Members and UC upon any such change.

1.13. "**Invoice**" means an invoice sent by UC to Member that includes the information (if any) that Member has identified on Exhibit A as required to be included on invoices submitted to Member.

1.14. "**Member Materials**" means any and all services, tools, applications, resources, documentation, reports, works of authorship, specifications, know-how, trade secrets, ideas, discoveries, improvements, and other works protected by intellectual property rights that are independently developed by Member during the Term of this MOU and that are not Consortium Assets, SB Materials, or UC Materials. The Member Materials will further include any Enhancements to the Member Materials, including (without limitation) any such Enhancements developed during the Term of this MOU, as long as such Enhancements are independently developed by Member.

1.15. "**Member Representative**" is the individual appointed by Member to serve as Member's representative to the Governing Board. Member's initial Member Representative is identified on Exhibit A attached hereto. Member will give UC and the Governing Board at least 15 days prior written notice of any change to its Member Representative.

1.16. "**Members**" means, collectively, every state, commonwealth or United States territory that enters into a memorandum of understanding and agreement with UC for participation in SB, as well as any other entities that the Governing Board determines to provide with voting rights in SB equal to the rights enjoyed by Member under this MOU. By way of example, if upon approval of the Governing Board the Bureau of Indian Education or the Department of Defense should enter into a memorandum of understanding and agreement with UC for participation in SB, then such entity would be included in the definition of Members hereunder. The term "**Other Member**" is used to refer to Members other than Member in the singular.

1.17. "**Monthly Fee Amount**" means one twelfth ($1/12^{th}$) of Member's Annual Fee.

1.18. "**Most Favored Nations Provisions**" means the terms of the following sections of this MOU: Section 2 ("Term and Termination"); Section 5.1 ("Fees"); Section 5.4 ("Confidentiality"); Section 5.5 ("Obligations of UC"); Section 5.6 ("Obligations of Member"); and Section 6.2 ("Representations and Warranties by UC"). The Most Favored Nations Provisions also include Exhibit B and Exhibit C attached hereto.

1.19. "**Non-routine Services**" means any administrative or support services such as legal, contracting, accounting, or purchasing, that are beyond the scope of the Support Services to be provided by UC to SB pursuant to Section 5.5(e).

1.20. "**Planning Documents**" means, with respect to SB, the annual budget (including the Annual Operating Expenses for each fiscal year), staffing plans, project schedules, descriptions of Products and Services to be offered to Members, and such other planning and management documentation as the Governing Board determines for each fiscal year.

1.21. "**Products and Services**" means those products and services that Member obtains from UC pursuant to this MOU, which will include (without limitation): general operational support; assessment and item design; interoperability and certification assistance; applications development and maintenance pursuant to agreed upon milestones and service levels; access to and use of the SB Website; reporting services; and, to the extent included in or otherwise relevant to the foregoing, the Consortium Assets, the SB Materials, and the UC Materials. The specific Products and Services available to Member at the Effective Date are set forth in Exhibit B. The Products and Services are subject to change from time to time as set forth in Section 5.5(a) below. Section 5.5(a) also sets forth the process by which Member will identify Products and Services for purchase under this MOU.

1.22. "**Project Manager**" means, with respect to each party, that individual who is designated as its principal point of contact for day to day operational communications with the other party under this MOU. Member's initial Project Manager will be Member's State Lead, as identified on Exhibit A attached hereto, unless a different person is identified on Exhibit A as the Project Manager. Member will give UC at least 15 days prior written notice of any change to its Project Manager. UC's initial Project Manager will be Noelle Griffin; provided, UC's Project Manager and his or her responsibilities are subject to change from time to time as set forth in Section 5.5(b) below.

1.23. "**Reserve Account**" has the meaning given to it in Section 5.3(a) below.

1.24. "**SB Marks**" means, collectively, the Smarter Balanced name and those Smarter Balanced logos identified on Schedule 1 to this MOU, as well as any derivation thereof that would reasonably be understood to be referring to Smarter Balanced; provided, however, that the Governing Board must approve in advance any proposed combination of any SB Mark with any UC Mark, and any combined mark approved by the Governing Board will remain subject to all applicable terms and restrictions set forth or referenced herein regarding use of UC Marks.

1.25. "**SB Materials**" means any and all services, tools, applications, resources, documentation, reports, works of authorship, specifications, know-how, trade secrets, ideas, discoveries, improvements and other works protected by intellectual property rights that may be developed from time to time by SB, or by other UC resources or third parties acting at the direction of SB or UC, and that are paid for by Annual Fees from Members. The SB Materials are expected to include, without limitation, assessment items and revisions thereto, as well as other materials created for use in the administration of assessments to students. The SB Materials will further include any Enhancements to the SB Materials, including (without limitation) any such Enhancements developed during the Term of this MOU. For avoidance of doubt, the SB Materials specifically exclude any items that constitute existing Consortium Assets, Member Materials or UC Materials. Regardless of who holds title to the SB Materials, all ownership rights and interests in the SB Materials will be directed and controlled by the Governing Board so that such rights and interests inure to the benefit of the Members.

1.26. "**SB Personnel**" means those employees and contractors that UC hires as SB employees or otherwise engages as contractors to provide services to SB (including but not limited to employees with career appointments, temporary employees, and contract employees).

1.27. "**SB Website**" will be the website established, operated and maintained by SB as part of the products and services provided to Members.

1.28. "**Shortfall**" has the meaning given to it in Section 5.3 below.

1.29. "**State Lead**" means Member's principal point of contact under this MOU for high-level communications. Member's initial State Lead is identified on Exhibit A attached hereto. Member will give UC at least 15 days prior written notice of any change to its State Lead.

1.30. "**STIP Rate**" means the most recently available rate of return earned by UC's Short-Term Investment Pool, as calculated and published by the General Accounting Office in UC's Office of the President.

1.31. "**Support Services**" has the meaning given to it in Section 5.5(e) below.

1.32. "**Term**" has the meaning given to it in Section 2.1 below.

1.33. "**UC Marks**" means, collectively, the University of California name (including abbreviations of any University of California name), trade names, logos, seals and other trademarks and identifying names or graphics, as well as any derivation thereof that would reasonably be understood to be referring to the University of California or any campus, center, division or representative thereof. The UC Marks will further include any Enhancements to the UC Marks, including (without limitation) any such Enhancements developed during the Term of this MOU.

1.34. "**UC Materials**" means any and all services, tools, applications, resources, documentation, reports, works of authorship, specifications, know-how, trade secrets, ideas, discoveries, improvements, and other works protected by intellectual property rights that are independently developed by UCLA/CRESST, or by any other UC resources, that were not developed using any Annual Fees. The UC Materials are expected to include, without limitation, analytical tools, statistical models, and intellectual property related to assessment design and analysis. The UC Materials will further include any Enhancements to the UC Materials, including (without limitation) any such Enhancements developed during the Term of this MOU.

1.35. "**Vendor Specification Package**" means the set of requirements, analyses, specifications, and other materials that SB provides to Member for the purpose of facilitating Member's use of one or more vendors for the implementation, operation, and delivery of the Assessment System.

2. Term and Termination.

2.1. Term. This MOU will have an initial term of three years, commencing on the Effective Date. Upon expiration of the initial term, this MOU will automatically renew for successive one-year periods, unless earlier terminated as set forth herein; provided, that after the initial three-year term, Member may provide UC with written notice of non-renewal between July 1 and October 1 of any calendar year, and this MOU will terminate at the end of the then-current term. As used in this MOU, "**Term**" refers to the initial term and any and all renewal terms.

2.2. Termination of MOU.

(a) Termination for Breach. Either party may terminate this MOU if the other party fails to cure a material default of the terms hereof within 30 days after receiving written notice of the default.

(b) Termination for Violation of State Law. Member may terminate this MOU on thirty (30) days' prior written notice in the event that the Governing Board should take any action that violates Member's state laws applicable to Member's performance of this MOU, unless the Governing Board cures the violation within the 30-day period after receiving Member's notice. In order to exercise its termination right under this paragraph, Member's written notice to UC and the Governing Board Representative must include a written opinion of Member's legal counsel that identifies in

reasonable detail the applicable state law or laws violated and the specific action or actions of the Governing Board in violation of such law or laws. Notice that does not include an opinion of counsel will not be an effective notice of termination for purposes of this paragraph.

(c) Termination for Convenience. During the Term, either party may terminate this MOU effective as of June 30 of any year (that is, at the end of any fiscal year during the Term) by providing the other party with written notice of its intent to terminate on or before the preceding October 1. By way of illustration, if a Member wished to terminate for convenience effective as of June 30, 2016, Member would need to notify UC no later than October 1, 2015.

(d) Termination for Withdrawal of Authority or Non-Appropriation of Funds. Member may terminate this MOU on reasonable prior written notice if (i) Member's state withdraws, or materially reduces or limits the Member's ability to perform Member's duties under this MOU, or (ii) Member's state fails to appropriate the funds necessary for Member's Annual Fee; provided, that Member must immediately notify UC upon Member's learning of any withdrawal of authority or non-appropriation of funds, and Member will exercise reasonable efforts to provide UC with at least sixty (60) days advance notice of termination under this paragraph (but, for avoidance of doubt, Member is only obligated to provide such advance notice as is reasonably possible in light of the circumstances leading to a withdrawal of authority or non-appropriation of funds). For clarity, this Section 2.2(d) is not intended to provide Member with an expedited alternative to termination under Section 2.2(c) above, and Member acknowledges and agrees that it will exercise its rights under this Section 2.2(d) in good faith and in connection with a bona fide withdrawal of authority or non-appropriation of funds.

2.3. Termination as to All Members.

(a) All Members may vote (in accordance with the then-current Governing Board Procedures) to collectively withdraw from SB and their association with UC effective as of June 30 of any year (that is, at the end of any fiscal year during the Term) by having the Governing Board provide UC with written notice on or before the preceding October 1. By way of illustration, if all Members wished to collectively withdraw from SB effective as of June 30, 2016, the Governing Board would need to notify UC no later than October 1, 2015.

(b) UC may terminate its association with all Members, effective as of June 30 of any year (that is, at the end of any fiscal year during the Term), by providing the Governing Board and all Members with written notice on or before the preceding October 1. By way of illustration, if UC wished to terminate its involvement with all Members effective as of June 30, 2016, UC would need to notify all Members no later than October 1, 2015.

2.4. Effect of Termination.

(a) By Member. After the effective date of any termination of this MOU, Member will no longer be entitled to continue to use any of the Products and Services, except to the extent permitted by, and subject to Member's compliance with, any terms and conditions determined by the Governing Board in accordance with the Governing Board Procedures.

(b) As to All Members. In the event of any termination of this MOU under Section 2.3 above or any other termination that results in SB having no Members paying fees for access to Products and Services:

(i) The Governing Board Representative will work with the UC Project Manager to address transition and closing issues and to develop a transition plan in order to carry out the other requirements of this Section 2.4(b);

(ii) It is the intention of the parties, but not a legal obligation, to cooperate and endeavor to coordinate the content and timing of any press release, statement or other public announcement regarding the termination (whether by UC, by Member individually or by the Governing Board or any other representative acting on behalf of Member and other Members);

(iii) If not previously designated, the Governing Board will promptly identify a third party or third parties that will be responsible for taking title to and possession of the Consortium Assets and for taking ownership and possession of the SB Materials (as well as any third-party software, tools or applications related to the Consortium Assets or the SB Materials) and for continuing to provide the Consortium Assets and SB Materials for the benefit of any and all Members entitled to continued access and use thereof, and the Consortium Assets, SB Materials and related third-party materials will be delivered to the designated third party or parties in accordance with the transition plan developed under Section 2.4(b)(i) above;

(iv) Only if and to the extent necessary in order to carry out the transition plan, UC agrees to negotiate in good faith with the Governing Board Representative regarding the manner in which SB Materials and any related third-party materials would be transferred under this Section 2.4(b), and regarding responsibility for any actual transfer expenses or other payments required for such transfer (which, for avoidance of doubt, will be limited to any out-of-pocket expenses or other cost reimbursement actually required to effect such transfer);

(v) In connection with the transfer of the Consortium Assets and SB Materials under this Section 2.4(b), UC will execute any assignment, quit claim or other documentation reasonably requested to facilitate the transition requested by the Governing Board, and take any and all such other actions as may be reasonably necessary to give effect to and carry out the transition plan and transfer of Consortium Assets and SB Materials hereunder; and

(vi) Member will have a perpetual, worldwide, nonexclusive, fully-paid and royalty-free right and license to continue to use, at no additional cost and with no further obligations to UC, any UC Materials comprising software that was in use by Member at the time that this MOU was terminated; provided, that use of any and all such software will be limited to the version in use by Member at the time of termination and will be at Member's sole discretion and without any warranty, obligation of support, or liability of any kind on the part of UC.

3. Governing Board and Member Authority

3.1. Role of Governing Board Generally. The Governing Board will provide direction and oversight with respect to Products and Services to be provided by SB to the Members. The Governing Board will be responsible for approving the Planning Documents annually and otherwise as required by this MOU or by the Governing Board Procedures. The Governing Board will be the principal means by which the Members communicate with SB on matters requiring the input of Members. By entering into this MOU, Member is agreeing to participate in the Governing Board in accordance with the terms hereof, and is further agreeing to be bound by the Governing Board Procedures and by all other decisions and actions of the Governing Board that are intended by the terms of this MOU to bind Member.

3.2. Governing Board Direction. SB and UC will take actions based on the direction of the Governing Board as contemplated herein. In the event that any action directed by the

Governing Board would conflict with UC or UCLA policies or procedures, or where UC determines that the action is not operationally feasible or could expose UC or SB to undue or unreasonable risk, UC and the Governing Board Representative will negotiate in good faith to find a resolution acceptable to the parties.

3.3. Governing Board Procedures and Operations. The Governing Board will be responsible for organizing and supervising such committees and subcommittees as the Governing Board shall form from time to time. In addition, the Governing Board will adopt a process and timeline for preparation of the Governing Board Procedures, and may determine to seek input from UC in connection with such preparation; provided, that UC will have no formal input regarding, and no responsibility or other liability for (and UC expressly disclaims any and all such responsibility or liability), the Governing Board Procedures or their implementation. In addition, for avoidance of doubt, UC will not be a party to the Governing Board Procedures and will not be bound in any way by the Governing Board Procedures, and under no circumstances will the Governing Board Procedures effect any modification to this MOU or to the respective obligations of Member and UC to one another hereunder. The Executive Committee will be responsible for interpreting the Governing Board Procedures consistent with the terms of this MOU.

3.4. Executive Committee. The Governing Board will establish an Executive Committee in the manner described by the Governing Board Procedures. The Executive Committee will be authorized to act on behalf of the Governing Board consistent with the constraints described in the Governing Board Procedures and subject to all applicable provisions of this MOU (including, without limitation, those provisions hereunder providing for appointment of and communications through a Governing Board Representative). The Executive Committee may approve changes to the Planning Documents, unless those changes require Governing Board approval under Section 3.5 or under the Governing Board Procedures.

3.5. Decisions Requiring Governing Board Input. Without limiting the general authority of the Governing Board as described above and elsewhere in this MOU, the Executive Committee will determine when a request for approval or other action needs to be presented to the Governing Board; provided, however, that the following decisions and actions will only be made or taken by UC after the Governing Board has been notified and has been given the opportunity to meet and thereafter provide its input to UC (and, for avoidance of doubt, after Member and other Members have been given the opportunity to participate in and provide input at any and all such Governing Board meetings):

(a) Hiring or termination of key SB employees;

(b) Approval of the annual SB budget, to be proposed by SB, approval of other annual Planning Documents, and approval of changes to the Planning Documents as required by the Governing Board Procedures;

(c) Approval of Annual Fees; and

(d) Any modification to the Products and Services proposed to be offered to all Members.

3.6. Member Representative. During the Term of this MOU, Member will be entitled to designate one individual (who may be, but need not be, Member's State Lead or Project Manager) as its Member Representative.

3.7. Relationship of the Parties. UC's employees and agents performing under this MOU are not, and will not be construed to be, employees or agents of Member or of the Governing Board. No employee or agent of UC will hold itself out as or claim to be an officer, employee or agent of Member by reason hereof, nor will UC make any claim for any right, privilege, or benefit which would accrue to such employee or agent under law.

Member and its employees and agents performing under this MOU are not, and will not be construed to be, employees or agents of UC. No employee or agent of Member will hold itself out as or claim to be an officer, employee or agent of UC by reason hereof, nor will Member make any claim for any right, privilege, or benefit which would accrue to such officer, employee or agent under law.

4. Intellectual Property Rights

4.1. Ownership of Intellectual Property Rights.

(a) UC Marks and UC Materials. UC owns and will retain all right, title and interest in and to the UC Marks and the UC Materials and any Enhancements thereto that may be created under or in connection with this MOU.

(b) SB Materials and SB Marks. Subject to any contrary agreement between UC and Member, and further subject to the terms of Section 2.4(b)(iv), and except as UC may otherwise agree with respect to all Members, UC will own all worldwide intellectual property rights (including rights under patents, patent applications, trademark laws, trade secret laws, and copyright laws) in the SB Materials. UC will only use the SB Materials and the SB Marks in connection with the operation of, and in furtherance of the objectives of, SB and its Members. UC's ownership of the SB Materials will be undertaken on behalf of and solely for the benefit of the Members, and following delivery of SB Materials in accordance with the terms of Section 2.4(b) above, UC will have no further right, title or interest in, right to possess or right to make use of any SB Materials.

(c) Member Materials. Subject to any contrary agreement between UC and Member, Member will own all worldwide intellectual property rights (including rights under patents, patent applications, trademark laws, trade secret laws, and copyright laws) in the Member Materials, as well as any Enhancements thereto developed by Member independent of the parties' performance of this MOU.

(d) Consortium Assets. UC acknowledges that nothing in this MOU will provide or will be construed to provide UC with ownership rights in or to any Consortium Assets, and to the extent that UC takes title or possession of or is otherwise involved in use or the delivery of any Consortium Assets to Members in connection with UC's operation of SB, such title, possession or delivery will be undertaken on behalf of and solely for the benefit of the Members, and following delivery of Consortium Assets in accordance with the terms of Section 2.4(b) above, UC will have no further right to possess or make use of such Consortium Assets.

4.2. License Grants.

(a) Assessment System. During the Term of this MOU, and contingent upon Member's timely payment of all Annual Fees when due hereunder, UC grants to Member the nonexclusive, fully-paid, royalty-free right and license to use the Assessment System and any Enhancements thereto that are made generally available to Members, only for supporting educational purposes related to Member's students and Member (and not for commercial exploitation, resale, or use in any manner not reasonably related to the administration of assessments to Member's students), and subject to any reasonable restrictions on reproduction, distribution or use that may apply to the Assessment System or certain of the SB Materials, Consortium Assets or UC Materials included therein. Member will faithfully reproduce, and will not under any circumstances remove, alter, obscure or deface any SB Marks or UC Marks that appear in any Assessment System materials.

(b) SB Marks. Until such time as the Consortium Assets are transferred in accordance with the terms of Section 2.4(b) above, UC will have the right to use the SB Marks in

order to identify SB and to designate SB as the source of the Products and Services, and Member will be entitled to make such use of the SB Marks as may be permitted under the Governing Board Procedures.

(c) Member Materials. Member hereby grants and agrees to grant to UC the nonexclusive, fully-paid, royalty-free right and license (with right of sublicense) to use any Member Materials that Member contributes to SB or otherwise makes available to UC; provided, that any such use will only be in support of SB's obligations to Member under this MOU, and SB will not incorporate any Member Materials into the Assessment System, distribute any Member Materials to other Members or to non-member third-parties, or otherwise make use of the Member Materials without Member's prior written consent.

4.3. Action on Claim of Infringement. Should any part of the Assessment System that is generally used by all or substantially all Members become, or in UC's opinion be likely to become, the subject of a claim of infringement, UC will provide written notice to the Governing Board Representative of the circumstances giving rise to such claim or likely claim of infringement. In the event that Member receives notice of a claim of infringement, or is made a party to or is threatened with being made a party to any claim of infringement related to the Assessment System or Member's participation in SB, Member will provide notice of such claim or threat to UC's Project Manager and to the Governing Board Representative. Following receipt of such notice by the Governing Board Representative, except as UC and the Governing Board Representative may otherwise agree in writing, UC will either (at UC's sole election) (a) procure for Members the right to continue to use the affected portion of the Assessment System, or (b) replace, or otherwise modify, the affected portion of the Assessment System to make it noninfringing, or obtain a reasonable substitute product for the affected portion of the Assessment System, provided that any replacement, modification or substitution under this paragraph does not effect a material change in the functionality of the Assessment System. If none of the foregoing options is reasonably available to UC, then UC will so notify Member and the Governing Board Representative in writing, and Member will cease all use of the affected portion of the Assessment System promptly upon receipt of UC's notice.

4.4. Use of UC Marks. Member will not use the UC Marks, in any form or manner, in advertisements, reports, or other information released to the public, and Member will not place any UC Marks on any consumer goods, products, or services for sale or distribution to the public, without UC's prior written approval, to be given or withheld in UC's sole discretion. Member is hereby charged with notice of, and agrees to comply at all times with California Education Code Section 92000 et seq.

5. Obligations of the Parties

5.1. Fees.

(a) Annual Fees; Student Testing Projections. Member's Annual Fees are calculated (using Member's projections regarding the anticipated number of students to be tested, which Member will make in good faith and in reliance on all resources available to Member) on a fiscal year basis, and the fiscal year for SB begins on each July 1. Annual Fees under this MOU are generally payable in arrears, on a monthly basis, except that Member is obligated to make a payment at the start of each fiscal year, in order to fund certain expenses that SB will incur at the beginning of each fiscal year. Accordingly, for as long as this MOU remains in effect and Member remains a participant in SB as one of its Members, Member will be obligated to make an initial payment (with respect to each fiscal year during the Term hereof, the "**Initial Payment**") equal to two times the Monthly Fee Amount for the applicable

fiscal year, to be invoiced and paid as set forth in Section 5.1(c) below) with the remaining portion of Member's Annual Fees invoiced and paid monthly as described in more detail below. Member will provide UC with the anticipated number of students to be tested for an upcoming fiscal year at least one hundred twenty (120) days prior to the start of the fiscal year immediately preceding the fiscal year in which testing is to occur, and UC will calculate and provide Member with notice of Member's Annual Fees within thirty (30) days after receipt of Member's anticipated number of students to be tested.

(b) Fee Adjustments. Because Member's Annual Fees are calculated based on projected student testing numbers, adjustments to Member's Annual Fees may be required once the actual number of tested students is known. The necessity for any such adjustments (referred to herein as "**Fee Adjustments**") will be determined, and where necessary Fee Adjustments will be made, as follows:

(i) SB will endeavor to determine Member's actual number of tested students for a fiscal year by June 15 of that fiscal year, and will in any event determine such numbers as soon as reasonably possible after all records necessary for such determination have been received by SB, and will thereafter notify Member of actual student testing numbers for that fiscal year, together with a calculation of Member's Annual Fee for that fiscal year based on the actual student testing numbers (the "**Final Fee Amount**");

(ii) Where the Final Fee is more than $15,000 higher than the Annual Fees paid by Member for that fiscal year (an "**Underpayment**"), then Member will pay the amount of the Underpayment within 30 days after receiving an Invoice therefor, which Invoice will be provided together with SB's Final Fee Amount notice under Section 5.1(b)(i) above; and

(iii) Where the Final Fee is more than $15,000 lower than the Annual Fees paid by Member for that fiscal year (an "**Overpayment**"), then Member will receive a credit for the amount of the Overpayment, to be applied against (and reflected on the Invoice for) Member's first payment of Annual Fees for the next fiscal year; provided, if this MOU terminates at the end of the fiscal year in which there was an Overpayment, Member will instead receive a refund in the amount of the Overpayment, which refund will be provided to Member within sixty (60) days after Member receives SB's Final Fee Amount notice.

(iv) In the event that SB determines that any Fee Adjustment required pursuant to this Section 5.1(b) (or the operation of this Section 5.1(b) in general) poses a financial risk to SB or is otherwise not operationally feasible, SB will either request a review of this Section 5.1(b) by the Governing Board, or SB will negotiate in good faith with Member (and any other affected Members) in order to find a resolution acceptable to the affected parties.

(c) Payment Terms. Subject to the final sentence of Section 5.1(d) below, and subject to Member's receipt of a timely Invoice therefor, Member must make timely payment of the applicable Initial Payment prior to the start of each fiscal year (i.e., on or before July 1). The remaining portion of Member's Annual Fees will be paid in 10 equal monthly installments, each equal to the Monthly Fee Amount, with the first installment due not later than August 1 of the applicable fiscal year, and each subsequent installment due on the first day of the next nine calendar months (and with no Monthly Fee Amount due on June 1, all Annual Fees having been due prior to that time); provided, that if the Execution Date for this MOU occurs after July 31, then Member's Monthly Fee Amount payments will be due as set forth on Exhibit A. UC will provide Member with an Invoice at least thirty (30) days prior to the due date for each Initial Payment and Monthly Fee Amount.

(d) Late Fees. Each Initial Payment and Monthly Fee Amount will be due on the first day of the month, as specified above in Section 5.1(c), but payments will not be considered late for purposes of this Section 5.1(d) until the tenth day of the month in which the applicable payment is due. An Initial Payment or Monthly Fee Amount that is not paid by the tenth day of the month in which is due will accrue monthly interest at the STIP Rate until paid; provided, however, that before any late fee is assessed, UC will first obtain the approval of the Executive Committee, pursuant to a process established by the Governing Board and included in the Governing Board Procedures. These late fees will be without prejudice to UC's right to suspend Member's membership and access under Section 5.1(e) below for Member's failure to timely make payments when due. The foregoing notwithstanding, for the 2014-2015 fiscal year, Member's Initial Payment will not be deemed late and will not be subject to a late fee as long as that Initial Payment is received by UC within thirty (30) days after Member's receipt of an Invoice therefor, which will be provided on or after the Execution Date.

(e) Suspension of Membership. Any failure of Member to timely pay an Invoice when due may result in late fees being charged (as set forth in Section 5.1(d)) and may result in suspension of Member's membership and access to the Assessment System until UC receives Member's payment of all amounts due; provided, however, that before suspending Member's membership and access to the Assessment System, UC will obtain the approval of the Executive Committee, pursuant to procedures established by the Governing Board. During the period of any suspension, Member will not be entitled to enjoy any of the privileges of membership in SB, nor will Member be entitled to receive any of the Products and Services. Member may prepay all or a portion of its Annual Fees at any time, and Member's unpaid Monthly Fee Amounts will be reduced pro rata by the amount of any such prepayment.

5.2. Governing Board Review of Operating Expenses. On a year-to-year basis beginning after the end of the 2014-2015 fiscal year, UC will consult with the Governing Board about and obtain the Governing Board's approval of the Annual Operating Expenses, with the goal of operating SB on a "revenue-neutral" basis; provided, that Annual Operating Expenses will initially consist of the following:

(a) Personnel Costs and Related Operating Expenses. Actual costs of SB Personnel salaries, fringe benefits, and related expenses such as technology infrastructure fees, and actual cost of Support Services.

(b) Standard Costs. Calculated based on SB expenditures, and consisting of an annual administrative fee (which is currently 1.5%) to UCLA's Graduate School of Education, and an annual administrative fee (which is currently 1.23%) to UC's Office of the President.

(c) Support Services. Currently estimated at approximately $1 million per year.

(d) CRESST Expenses. Currently anticipated to be $3.5 million per year for psychometric and validity analysis services.

(e) Pass-Through Costs. Actual costs of goods or services that UC procures for SB through the purchasing support provided under Section 5.5(e) below.

(f) Capital Expenditures. Actual costs of capital improvements and other projects undertaken by SB based upon recommendations and other input from UC and the Governing Board regarding the needs of SB and the Members, such as systems upgrades, software revisions and other improvements to SB's systems and resources.

(g) Non-routine Services. Actual costs of any Non-routine Services that UC determines are needed to provide the Products and Services.

5.3. Reserve Account; Recoupment of Shortfall.

(a) Reserve Account. Consistent with UC policies and procedures, UC will establish and maintain a means of holding any Annual Fees that are not expended on Annual Operating Expenses (a "**Reserve Account**"), such that funds in the Reserve Account are available for SB use in subsequent years, subject to the provisions of Section 5.3(b). To the extent permitted by UC policies and procedures, amounts held in the Reserve Account will accrue monthly interest at the STIP Rate.

(b) Recoupment of Shortfall In the event that, for any fiscal year, the total revenue that UC receives for SB is less than the Annual Operating Expenses, then UC may advance the amount of such shortfall (to the extent not covered by the Reserve Account, the "**Shortfall**") to SB. The Shortfall will accrue interest monthly at the STIP Rate until recouped. Interest will begin to accrue on the last day of the calendar month in which the Shortfall occurs, and UC will be entitled to recoup the Shortfall plus accrued interest either from any positive Reserve Account balance, or directly from SB revenue in any subsequent fiscal year(s) in which such revenue exceeds the Annual Operating Expenses.

5.4. Confidentiality.

(a) Protection of Confidential Information of Member. To the extent that UC receives or is provided with access under this MOU to any Confidential Information of Member: UC will not disclose such information to any unauthorized third party without Member's consent; UC will make no use of such Confidential Information except to the extent required for UC to perform this MOU and to comply with any applicable Governing Board Procedures; and (subject to any requirements or limitations that may be imposed by applicable laws) UC will only make such Confidential Information available to its employees, subcontractors and agents that have a need to know such Confidential Information and that are bound by obligations of confidentiality at least as restrictive as those set forth in this Section 5.4(a).

(b) Protection of Confidential Information of SB. To the extent that Member receives or is provided with access to any Confidential Information of SB: Member will not disclose such information to any unauthorized third party without the Governing Board's consent; Member will make no use of such Confidential Information except to the extent required for Member to perform this MOU, to participate in SB, or to administer assessments consistent with the Assessment System and any applicable Governing Board Procedures; and Member will only make such Confidential Information available to its employees and contractors that have a need to know such Confidential Information and that are bound by obligations of confidentiality at least as restrictive as those set forth in this Section 5.4(b).

(c) Exceptions. The obligations of a party that receives Confidential Information (a "receiving party") from the other party (the "disclosing party") under this MOU will not apply to any information that the receiving party can demonstrate (i) was developed by the receiving party independently of the disclosing party and of this MOU and without reference to Confidential Information of the disclosing party, (ii) was rightfully obtained without restriction by the receiving party from a third party not having any obligation of confidentiality, (iii) was or became publicly available other than through the fault or negligence of the receiving party, or (iv) was released without restriction by the disclosing party. In addition, a receiving party's obligations under this Section 5.4 are expressly limited by applicable public records laws, such as (by way of example only) the California Public Records Act.

(d) Personally Identifiable Information. The protections and other terms of this Section 5.4 notwithstanding, no confidential student information, student-level data, or other

personally identifiable information will be disclosed by either party or otherwise shared under this MOU.

(e) Data Management and Data Security. UC will comply with any reasonable data management and data security provisions adopted by the Governing Board from time-to-time, subject to Sections 3.2 and 3.3 above.

5.5. Obligations of UC. In establishing SB at UCLA/CRESST to continue the work of the Consortium, and in addition to the parties' obligations set forth elsewhere in this Section 5, UC will have the following obligations, to be performed in accordance with the Governing Board Procedures and in compliance with all applicable law:

(a) Products and Services. Provided that Member timely pays its Annual Fees when due, UC will provide Member with Products and Services as determined by the Governing Board and as described on Exhibit B. Exhibit B attached hereto describes the Products and Services available as of the Effective Date. Exhibit B and the specific Products and Services set forth therein may be amended by UC for any upcoming fiscal year during the Term of this MOU as long as the Governing Board has approved the amendments, and UC provides Member with at least ninety (90) days prior written notice of such amendments, which written notice may be provided by sending Member an updated Exhibit B. In addition, any time the Governing Board should approve a material change in the Products and Services made available by SB, UC will send Member an updated Exhibit B that reflects such approved change in the Products and Services, which Exhibit B will supersede and replace the then-current Exhibit B at the date specified in the updated Exhibit B. Member may also refer to the SB Website at any time in order to review all Products and Services then available from UC, as well as information on the fees charged by SB to its Members.

(b) Project Management. SB will prepare and present drafts of all annual and amended Planning Documents to the Governing Board or the Executive Committee (as required by the Governing Board Procedures) for approval, and UC will manage SB in compliance with the approved Planning Documents. UC's Project Manager will have primary responsibility for day-to-day communications between UC and Member on operational matters related to this MOU, and on such other matters as UC may assign to its Project Manager from time to time. UC may notify Member and other Members of any change to UC's Project Manager and/or the operational matters for which the Project Manager is responsible by posting such information on the SB Website.

(c) Fiscal Responsibility. UC will be responsible for collecting fees from Members, for expending those fees on the Annual Operating Expenses and, if applicable, allocating any excess amounts to the Reserve Account, for supporting SB in identifying vendors and subcontractors (including, where necessary, via a competitive bidding or other selection process) and in negotiating and entering into contractual relationships with selected vendors and subcontractors, for providing SB with accounting, auditing and financial reporting support, for assisting SB with routine legal advice regarding UCLA, California and Federal regulations, polices, and laws related to SB and its finances, and for supporting the administrative, human resources, and operational needs of SB as required by the laws of the State of California and the policies and procedures of UC.

(d) SB Staffing. UC will seek input and evaluate recommendations from the Executive Committee regarding the recruitment and hiring of key employees, and will make offers of employment or otherwise engage such individuals on such terms as UC determines to be appropriate in light of all relevant circumstances, and in a manner consistent with applicable Governing Board Procedures and with how UC hires employees in comparable UC divisions or units.

(e) Support Services. UC will support the SB Personnel by providing the following day-to-day administrative and other support services (the "**Support Services**"), in a manner consistent with how such support is provided to comparable UC divisions or units (in terms of budget, number of personnel, and other considerations deemed relevant by UC); provided, however, that administrative or other support services outside the scope of the following will be made available as Non-routine Services:

(i) Administrative services, including IT and information practices, and financial and legal support;

(ii) Payroll;

(iii) Office space appropriate for SB's operations and research;

(iv) Accounts payable services;

(v) Travel accounting services;

(vi) Purchasing support, as needed, for purchasing goods and services;

(vii) Human resources support;

(viii) Advice and consultation regarding logistical, measurement and development issues; and

(ix) Basic compliance support, including standard monitoring of compliance with legislative policies and monitoring of legislative and legal developments.

(f) Financial Information. Within a reasonable time after the end of each calendar quarter during the Term, UC will provide Member with a quarterly financial report that is consistent with the form and content of financial reports that the Consortium provided to its members. For clarity, Members will receive the same quarterly report; reports will not be customized or otherwise targeted in any way to Member or to any Other Member.

5.6. Obligations of Member. As a participant in SB, Member will have the following obligations to UC and to the other Members, in addition to the parties' obligations set forth elsewhere in this Section 5, and together with such other obligations as UC and Member may agree in writing from time to time:

(a) State Lead. Member's State Lead will serve as its principal point of contact for high-level communications with UC under this MOU, and will also be responsible for managing communications between the Governing Board and Member's state.

(b) Communication Regarding Needs. Member will provide SB with meaningful input and consultation on Member's specific product and services needs under this MOU, so that SB (in consultation with the Governing Board) can accurately set Member's Fees.

(c) Projected Testing Numbers for Fees Calculation. Member will indicate on Exhibit A attached hereto (i) the student grade levels to which the Assessment System will be applied during the initial fiscal year of the Term, (ii) for each such student grade level, whether Member desires a "basic" or a "complete" package (as described in more detail on Exhibit B), and (iii) the projected number of students to be tested for each such grade level, and Member will use this information and Exhibit C attached hereto to calculate Member's Annual Fees. Thereafter, Member will continue to provide its selection of grade levels, election of Assessment System packages, and identification of projected student testing numbers by submitting an updated Exhibit A for subsequent fiscal years during the Term. Any Member-requested change to student grade levels or package selection at any time other than the start of a fiscal year will only be made if and to the extent permitted by the Governing Board

Procedures; actual student testing numbers, together with any required adjustment to Annual Fees, will be determined as set forth in Section 5.1(b) above.

(d) Vendor Selection. SB will provide Member with a Vendor Specification Package, which Member may use to ensure that each vendor selected by Member is able to implement, operate, and/or deliver (as applicable) the Assessment System for Member. Member will indicate on Exhibit A attached hereto its chosen vendor(s) for the implementation, operation and delivery of the Assessment System, and Exhibit A will be updated and amended as necessary to reflect any addition of or other changes to Member's chosen vendors. Member understands and agrees that SB will not interact with any vendor on behalf of Member unless and until such vendor has been identified on Exhibit A.

(e) Payment of Fees. Member will make timely payment of all Annual Fees due under this MOU, and will promptly notify UC of any expected delay or other difficulty in making payments when due hereunder.

(f) Governing Board Participation. Member will appoint an individual to serve as its Member Representative and will at all times during the Term uphold its obligations to the Governing Board and to any committees or subcommittees thereof on which Member agrees or is appointed to participate. As provided hereunder, Member will notify UC of any changes to its Member Representative, State Lead, and/or Project Manager.

(g) Coordination with State Agencies. Member will coordinate with its state and local education agencies in order to ensure that materials developed and provided to Member under this MOU are being properly delivered, administered, scored, reported and otherwise used by users in Member's state.

(h) Participation in Field Testing. Member will participate in field tests embedded in the Computer Adaptive Test, and will consider in good faith participating in additional field testing of assessment items and tasks for the purpose of maintaining and improving Member's Products and Services, as approved by Member. Consistent with applicable state and federal laws, and with each party's confidentiality obligations under Section 5.4, Member will allow SB to use the data collected from such field testing to:

(i) Conduct technical studies as required to improve the Products and Services that SB offers to Members;

(ii) Ensure consistent scoring of constructed responses across all Members; provided, that any data used across all Members in this way will be used only on an anonymous, non-personally-identifiable basis, stripped of any and all state, district, school, or student identifiers, and of any names, dates of birth or other information that could potentially allow data to be traced to a specific student or otherwise lead to the discovery of a student's identity; and

(iii) Develop templates and exemplars for use in connection with parent education and teacher training and professional development.

Other than as expressly set forth on Exhibit B or as approved by the Governing Board, UC and SB will make no use for research purposes of any testing data received from Member or otherwise obtained by UC or SB as a result of Member's participation in SB under this MOU, including, without limitation, for any publication.

6. **Representations and Warranties.** Each party represents, warrants and covenants to the other party hereto as follows:

6.1. By Member. Member has full power and authority to enter into this MOU and to perform its obligations hereunder; Member's entry into this MOU is permissible under the laws of Member's state and has been authorized by all necessary legislative, administrative or other governmental authority; the person signing this MOU on behalf of Member is authorized to do so, and has the power and authority to bind Member to all of the terms hereof; Member's entry into and performance of this MOU do not and will not violate any other agreements to which Member is a party or under which Member is otherwise bound, and Member will not enter into any agreements that violate this MOU during the Term; and there are no claims or lawsuits pending or, to Member's knowledge, threatened against Member, Member's state or the Consortium related to or arising out of any of the products and services that the Consortium has provided to its member states.

6.2. By UC. UC has full power and authority to enter into this MOU and to perform its obligations hereunder; UC's entry into this MOU has been authorized by The Regents of the University of California (as such authority has been delegated to the President and her designees); and, the person signing this MOU on behalf of UC is authorized to do so, and has the power and authority to bind UC to all of the terms hereof.

7. **Disclaimer and Limitation of Liability.**

7.1. Disclaimer of Warranties. EXCEPT AS EXPRESSLY PROVIDED IN THIS MOU OR AS UC MAY EXPRESSLY AGREE IN WRITING, AND ONLY TO THE EXTENT PERMITTED BY LAW, UC AND SB DISCLAIM ANY AND ALL WARRANTIES (EXPRESS OR IMPLIED) REGARDING THE PRODUCTS AND SERVICES, INCLUDING, WITHOUT LIMITATION, ANY IMPLIED WARRANTIES OF MERCHANTABILITY, FITNESS FOR A PARTICULAR PURPOSE OR NON-INFRINGEMENT.

7.2. Limitation of Liability. TO THE MAXIMUM EXTENT PERMITTED BY LAW, NEITHER PARTY WILL BE LIABLE FOR ANY INDIRECT, EXEMPLARY, PUNITIVE, SPECIAL, OR CONSEQUENTIAL DAMAGES ARISING OUT OF THIS MOU OR THE TRANSACTIONS IT CONTEMPLATES, INCLUDING BUT NOT LIMITED TO DAMAGES FOR LOSS OF PROFITS, DATA OR OTHER INTANGIBLE LOSSES (EVEN IF SUCH PARTY HAS BEEN ADVISED OF THE POSSIBILITY OF SUCH DAMAGES). IN ADDITION, IN NO EVENT WILL EITHER PARTY'S LIABILITY TO THE OTHER PARTY UNDER THIS MOU EXCEED THE AGGREGATE OF (A) THE ANNUAL FEES PAID OR PAYABLE BY MEMBER FOR THE FISCAL YEAR IN WHICH THE CLAIM GIVING RISE TO THE LIABILITY OCCURRED, AND (B) THE PROCEEDS RECEIVED FROM ANY INSURANCE COVERAGE THAT APPLIES TO THE LIABILITY INCURRED. Notwithstanding anything to the contrary in this MOU, this Section 7.2 will not apply to damages arising out of or relating to any breach by a party of its confidentiality obligations under Section 5.4.

7.3. State Law Conflicts. To the extent that any laws of Member's state expressly prohibit or limit the enforcement of this Section 7 or its application to Member, this Section 7 will be applied and enforced only to the extent permissible under the laws of Member's state.

8. **Audit Right.**

8.1. Audit Request. UC will maintain, and Member will have the right to examine and audit those books and records of UC and SB containing financial information relevant to UC's operation of SB and SB's use of the Fees collected from Members, as follows:

(a) Member will make any request for an audit under this Section 8 in writing and will deliver such request to UC's Project Manager and the Governing Board Representative.

(b) Following receipt of Member's request for an audit, the Governing Board Representative will notify the Governing Board and all other Members of the request, and other Members will have the option to participate in the audit, by notifying UC's Project Manager and the Governing Board Representative within 10 days after receiving notice of Member's audit request from the Governing Board Representative.

(c) The expense of the audit will be shared equally by all Members participating in the audit, and once an audit request has been made in accordance with this MOU (whether by Member or by any Other Member, and whether or not Member participates in the audit), Member will not be entitled to request an audit under this Section 8 until six months after the date that the requested audit concludes.

8.2. Audit Process. UC will make the books and records described above available to the audit participant(s) for review at SB's office or another UC location agreed upon by UC and the audit participant(s) within a reasonable time after the expiration of the 10-day notice period described in Section 8.1(b) above. In the event that any audit participant identifies any discrepancies or other concerns with books and records audited under this Section 8, such the audit participant will so notify UC in writing, UC will respond to such questions or concerns within 30 days after receipt of such notice.

8.3. Record Retention. UC will keep and preserve all books and records of UC and SB containing financial information relevant to UC's operation of SB and SB's use of the Fees collected from Members for a period of at least five years, including after termination of this MOU, subject to any different requirements that may be imposed by UC's record retention policies or by applicable law.

9. Miscellaneous Terms

9.1. Entire Agreement. This MOU (including its exhibits and any other attachments identified for inclusion here, and further including the Products and Services, UC Project Manager, and addresses for notices to UC hereunder, as the foregoing are identified from time to time on the SB Website) constitutes the entire understanding and agreement between Member and UC concerning the subject matter set forth herein and supersedes all prior and contemporaneous agreements, understandings, negotiations and discussions, whether oral or written, of the parties pertaining to the subject matter hereof. This MOU may be executed in multiple counterparts, each of which will constitute an original and all of which together will constitute one instrument.

9.2. "Most Favored Nations."

(a) Right to Request Inclusion of More Favorable Provisions. Subject to Section 9.2(c) below, in the event that any Other Member should, subsequent to the date that Member executes this MOU, execute a version of this MOU having any Most Favored Nations Provisions that are more favorable than the Most Favored Nations Provisions of this MOU, then UC will provide Member with written notice of such more favorable Most Favored Nations Provisions, and Member will have the right (but not the obligation) to request inclusion of such Most Favored Nations Provisions in this MOU.

(b) Request for Inclusion. Member will have thirty (30) days after receipt of written notice from UC under Section 9.2(a) above to notify UC in writing that it wants such Most Favored Nations Provisions included in this MOU, which inclusion will be automatic upon UC's receipt of timely notice from Member as set forth herein;

provided, that upon Member's written request to UC during such 30-day period for an extension under this Section 9.2(b), Member will automatically receive a further thirty (30) days in request inclusion of such Most Favored Nations Provisions in this MOU. After expiration of the aforementioned 30-day period (or 60-day period, if Member has timely requested an extension hereunder), Member will no longer have the right to request inclusion of such Most Favored Nations Provisions in this MOU; provided, that the process set forth in this paragraph will be repeated any time any Other Member executes an MOU containing more favorable Most Favored Nations Provisions.

(c) Limitations. For avoidance of doubt, any Other Member that exercises its right under the "Most Favored Nations" clause in its MOU will not be deemed to have "obtained more favorable Most Favored Nations Provisions" or "executed an MOU containing more favorable Most Favored Nations Provisions" for purposes of Member's rights to request inclusion under this Section 9.2. In addition, UC will not be obligated to provide notice of, or offer Member the right to include, any change made to an Most Favored Nations Provision for any Other Member that was made in order to accommodate the specific requirements of that Other Member's state laws.

9.3. Severability. If any provision of this MOU is determined or adjudicated to be invalid or unenforceable, such provision will be interpreted to the maximum extent to which it is valid and enforceable, and the remaining provisions of this MOU will, nevertheless, continue in full force and effect without being impaired or invalidated in any way.

9.4. No Waiver. No terms or provisions of this MOU will be deemed waived and no breach excused, unless such waiver or consent will be in writing and signed by the party claimed to have waived or consented. Any consent by any party to, or waiver of, a breach by the other, whether express or implied, will not constitute a consent to, waiver of, or excuse for any other different or subsequent breach. The failure by any party to execute any right provided for under this MOU will not be deemed a waiver of that right or of any other right hereunder.

9.5. Notices. All notices required or permitted hereunder will be in writing and addressed, if to Member, to its address at set forth on Exhibit A (or such other address as Member may specify by notice given pursuant to this Section 9.5), and if to UC, to its address as set forth on the SB Website (as such address may be updated on the SB Website from time to time). Notices hereunder will be deemed effectively given: (a) upon personal delivery to the party to be notified; (b) five business days after having been sent by registered or certified mail, return receipt requested, postage prepaid; or (c) one business day after deposit with a nationally recognized overnight courier, specifying next day delivery, with written verification of receipt.

9.6. Section Headings, Days. The descriptive headings in this MOU are intended for reference only and will not affect the construction or interpretation of this MOU. As used in this MOU, "days" refers to calendar days, unless otherwise specified as business days. "Business days" means all weekdays, except for Saturdays, Sundays, and any holidays as defined by California Code of Civil Procedure Sections 12a and 12b.

9.7. Modifications and Amendments. This MOU may be amended or modified only in a writing agreed to and signed by authorized representatives of Member and UC.

9.8. Non-Exclusive Remedies. The remedies provided for in this MOU will not be exclusive but are in addition to all other remedies available under law.

9.9. Authority to Bind. The signatories to this MOU represent that they have the authority to bind their respective organizations to this MOU.

[SIGNATURE PAGE FOLLOWS]

In Witness Whereof, the parties are executing this MOU as of the Execution Date, with the intention of having it take effect as of the Effective Date.

"MEMBER"	"UC"
Member Name (i.e., name of state, commonwealth, territory, etc.)	**The Regents of the University of California**
Dr. Melody Schopp Signature	Signature
Melody Schopp, Sec of Ed Print Name and Title	Steven A. Olsen, CFO Print Name and Title
7-31-14 Date	9/30/14 Date

Smarter Balanced Assessment Consortium

Smarter Balanced Assessment Governing Board Procedures

Revised January 30, 2015

I. Purpose

This document shall be known as the "Governing Board Procedures." These Governing Board Procedures establish a governance structure for the orderly operation and decision making of Smarter Balanced at the University of California, Los Angeles ("Smarter Balanced"), comprising all states (which may include the District of Columbia), US territories, US commonwealths, the Department of Defense Education Activity and the Bureau of Indian Education that are members of Smarter Balanced.

These Governing Board Procedures memorialize the authority of Members of Smarter Balanced to act with common purpose in support of the operation and betterment of Smarter Balanced. The governance structure of Smarter Balanced is hereby set forth in this document and shall guide the specific governance structure provisions set forth in a Memorandum of Understanding ("MOU") between a Member of Smarter Balanced ("Member") and The Regents of the University of California ("UC"). Upon adoption (or future amendment), a copy of this document shall be provided to each Member.

II. The Smarter Balanced Assessment System

A. Priorities of Smarter Balanced

Smarter Balanced priorities for a next-generation K-12 assessment system are memorialized in the Smarter Balanced Theory of Action. These priorities are rooted in a commitment to develop and maintain valid, reliable, and fair assessments of the deep disciplinary understanding and higher-order thinking skills that are increasingly demanded by a knowledge-based economy. These priorities are also rooted in a belief that assessments must support ongoing improvements in instruction and learning, and must be useful for all members of the educational enterprise: students, parents, teachers, school administrators, members of the public, and policymakers.

Smarter Balanced will maintain and continuously improve a system of assessment tools and services for its Members based upon the Common Core State Standards in English language arts/Literacy and mathematics with the intent that all students across Smarter Balanced will know their progress toward college and career readiness.

Smarter Balanced recognizes the need for a system of formative assessment practices and strategies as well as interim, and summative assessments, aligned to the Common Core State Standards, that support high-quality learning and the demands of accountability, and that balance concerns for innovative assessment with the need for a fiscally sustainable system that is feasible to implement. The efforts of Smarter Balanced are organized to accomplish these goals.

B. Principles

The comprehensive assessment system developed by Smarter Balanced and used by Members of Smarter Balanced includes the following key elements and principles:

1. Improving Decisions about Student Learning

A comprehensive system of assessment services and tools that is grounded in a thoughtfully integrated learning system of standards, curriculum, assessment, instruction, and teacher development can inform better decision-making at the classroom, school, district, state and policy levels.

2. Assessing Deeper Learning

The assessment system is designed to measure the full range of the Common Core State Standards including those that measure higher-order skills and shall inform progress toward and achievement of readiness for higher education and multiple work domains. The system emphasizes deep knowledge of core concepts within and across the disciplines, problem solving, analysis, synthesis, and critical thinking.

3. Teacher Involvement

Smarter Balanced places high value on the involvement of teachers in the design, development, and scoring of assessment items and tasks.

4. Use of Technology

Smarter Balanced strives to use and advance technologies to:

- Enable adaptive techniques and strategies;
- Better measure student abilities across the full spectrum of student performance and evaluate growth in learning;
- Support online simulation tasks that test higher-order abilities;
- Score student responses; and
- Deliver the responses to trained scorers/teachers to access from an electronic platform.

Technology applications are designed and constantly updated to maximize interoperability across user platforms, which is enhanced by Smarter Balanced's commitment to utilize open-source development to the greatest extent possible.

5. Measuring Performance and Growth
Through the application of sophisticated measurement models, Smarter Balanced summative assessments are designed to yield scores that can be used to support evaluations of student performance and growth, as well as school, teacher, and principal effectiveness in an efficient and fair manner.

6. Availability of Interim Assessments
Smarter Balanced provides its members with optional on-demand assessments that will continue to be enhanced over time. The purpose of these interim assessments is to allow teachers to see where students are on multiple dimensions of learning and to strategically support their progress.

7. Availability of Tools That Support Formative Practices
Smarter Balanced provides its members with optional tools and services to enhance the capacity of current and prospective teachers and administrators to design and use effective classroom-based assessment strategies and practices.

8. Maximizing Access to the Assessments
All components of the system incorporate principles of Universal Design that seek to remove construct-irrelevant aspects of tasks that could increase barriers for non-native English speakers and students with other specific learning needs.

9. Linkage to College and Career Readiness
Summative results in the 11th grade results are intended to help all students prepare to enter college-level courses or the workplace without the need for remedial work in English language arts and math. Representatives from higher education and employers/business leaders are involved in the work of the Smarter Balanced Assessment System in order to develop and link the design and scoring of the assessments to evidence of college and career readiness, and to sustain these linkages over time.

III. Membership

A. Definition

There are two categories of membership in Smarter Balanced – Governing Members and Affiliate Members, which are referred to collectively as "Members."

A Governing Member is defined as a state, the District of Columbia, a US territory, a US commonwealth, or other educational entity (including but not limited to the Department of Defense Education Activity (DoDEA) and the federal Bureau of Indian Education (BIE)) that has an active MOU with UC for the purpose of access to Smarter Balanced summative assessments. Membership as a Governing Member is initiated when both parties have signed the MOU and expires upon termination of the MOU. The Governing Board may establish conditions for suspension or reinstatement of a Governing Member. The chief school officer of a Governing Member shall identify a K-12 Lead and a Higher Education Lead, as defined in IV.B and IV.C, below.

An Affiliate Member is defined as a state, the District of Columbia, a US territory, a US Commonwealth or other educational entity that does not have an MOU with UCLA. States may become Affiliate Members by submitting a letter requesting membership to the Executive Committee. Affiliate Members may participate in activities available to Governing Members, but do not pay Annual Fees to UCLA and cannot access Consortium assessments and professional development or receive Consortium services. The chief school officer of an Affiliate Member shall identify a K-12 Lead and a Higher Education Lead, as defined in IV.B and IV.C, below. The Governing Board may establish conditions for suspension or reinstatement of an Affiliate Member.

B. Conditions of Membership

A Governing Member agrees to:

1. Actively engage in Smarter Balanced discussion and activities;
2. Use the achievement standards and reporting scales initially adopted by Smarter Balanced in November 2014 as the basis for federal accountability reporting;
3. Abide by security and administration procedures adopted by the Governing Board;
4. Adhere to the policies and principles detailed in these Governing Board Procedures as adopted and amended;
5. Engage in and support the decisions made by the Governing Board; and
6. Abide by the terms of the MOU.

An Affiliate Member agrees to:

1. Actively engage in Smarter Balanced discussion and activities;
2. Adhere to the policies and principles detailed in these Governing Board Procedures as adopted and amended; and
3. Engage in and support the decisions made by the Governing Board.

C. Opportunities for Engagement by Non-members

A state, the District of Columbia, a US territory, a US commonwealth, or other educational entity (including but not limited to the Department of Defense Education Activity (DoDEA) and the federal Bureau of Indian Education (BIE)) may, pursuant to guidelines set by the Executive Committee, enter into a customized memorandum of understanding with UC as a non-member customer ("Customer"). The customized memorandum of understanding is subject to a Customer-specific determination of services, access to intellectual property, terms and conditions, and associated fees. The Governing Board may establish conditions for suspension or reinstatement of a Customer.

IV. Organizational Structure

A. Governing Board

1. Definition

The Governing Board consists of the chief state school officers ("State Chief") of all Governing Members ("Governing Board".) Each Governing Board member has one vote.

2. Meetings

The Governing Board shall hold a minimum of two (2) in-person meetings each year, and may meet by conference call as necessary. Meetings of the Governing Board are conducted by the Executive Committee Chair, who is a non-voting participant unless designated as a voting member by his/her State Chief.

3. Matters Requiring Governing Board Approval

The Governing Board shall vote on all policies and other matters of significant importance that come before it. Topics that require Governing Board approval are:

a. Approval of the annual Smarter Balanced budget, to be proposed by Smarter Balanced, approval of other annual Planning Documents, and approval of changes to the Planning Documents;
b. Approval of Annual Fees;
c. Modification to the products and services proposed to be offered to Members.
d. Budget line item changes that are greater than $100,000;
e. Regularly scheduled fiscal reviews and budget adjustments;
f. Amendments to this Governing Board Procedures document;
g. Petitions from a non-member entity requesting to become either an Affiliate Member or a Customer;
h. Hiring or dismissal of key Smarter Balanced employees, including the Executive Director,
i. At any time, designating a Governing Board Representative (as defined in the MOU) who is not the current Executive Committee Chair. Otherwise, the role of Governing Board Representative is assigned to the Executive Committee Chair, and
j. Other matters brought to the Governing Board by the Executive Committee.

4. Governing Board Decision Process

Consensus will be the goal of all decisions. The Executive Committee will bring issues to the Governing Board with a request for consideration and approval. Decisions of the Governing Board shall be binding on all Members.

In cases where the Executive Committee has identified an issue that requires consensus between K-12 and higher education (or another key stakeholder), each State Chief (or designee) casting a vote is responsible for ensuring that he/she has consulted with the appropriate non-K-12 individuals to develop a mutually agreeable position on that issue. If a mutually agreeable position cannot be reached, the State Chief or designee shall abstain from voting. The Executive Director should confirm with the affected parties, when necessary, that such agreement has been achieved.

Process for Governing Board decisions that require a vote:

Step 1: Smarter Balanced shall provide Governing Board members with information on the decision or issue at least five (5) working days in advance of a scheduled discussion.
Step 2: Governing Board members shall have an opportunity to discuss the decision or issue at a time scheduled.
Step 3: A vote is conducted on the issue or decision. Votes may be conducted orally

during a scheduled meeting of the Governing Board. They may also be conducted over email with an attached ballot, or virtually on an internal Smarter Balanced Web site, with a published deadline for voting at least five (5) business days after balloting has opened. For voting to be valid, a quorum of half the Governing Board (or designees) plus one must vote. Members not voting shall be counted as abstaining. Abstentions do not count in tallying the vote negatively or positively and do not contribute to the quorum. If a unanimous decision is reached, the issue or decision is resolved. If unanimity is not reached, the process shall proceed to Steps 4 and 5, below.

Step 4: Smarter Balanced staff will coordinate discussions, as needed, to review, evaluate, and attempt to resolve any Member concerns. As appropriate, staff will provide all Governing Members with additional information regarding the issue, which may include alternative options to resolve issues.

Step 5: A second vote is conducted on the decision or issue. For votes taken in a face-to-face meeting, the second vote can occur in close proximity to the first vote; for votes taken remotely, at least five (5) business days must separate the first vote from the second vote. For voting to be valid, a quorum of half of the Governing Member chiefs (or their designees) plus one must vote. States not voting shall be counted as abstaining. Abstentions do not count in tallying the vote negatively or positively and do not contribute to the quorum.

- If the vote is equal to or greater than a two-thirds majority of the quorum, the decision is considered approved.
- If the vote is less than a two-thirds majority of the quorum, the decision is not approved.

For decisions that are not approved, the Executive Committee may deliberate and consider concerns, and then re-submit a request to the Governing Board.

G. K-12 Leads

1. Definition and Qualifications

Each Governing Member and Affiliate Member shall designate an individual to serve in the role of K-12 Lead. The State Chief for each Member of Smarter Balanced shall appoint the K-12 Lead. The State Chief may serve in this role.

A K-12 Lead must meet the following criteria:

a. Be an employee of the Member's education agency;
b. Have prior experience in either the design or implementation of curriculum and/or assessment systems at the policy or implementation level; and
c. Be able and willing to serve as the liaison between Smarter Balanced and the Member's education community.

2. Responsibilities

The responsibilities for a K-12 Lead include:

a. Provide regular updates to the State Chief regarding short-term and long-term planning, developments, and implementation of Smarter Balanced activities;
b. In consultation with appropriate Member stakeholders (State Chief, higher education

lead, policy leaders, LEAs, etc.), assist Smarter Balanced in the development of positions on matters related to the assessment system;
c. Brief the State Chief on topics pertaining to upcoming decisions needed from the Governing Board, and assist in the formulation of the Member's position;
d. Based on these positions and if called upon to do so, vote on behalf of the Member in decisions presented to the pertaining to the assessment system;
e. Review and approve requests for proposals;
f. Be the primary point of contact between the Member and Smarter Balanced;
g. Facilitate communications between the Member's educational network and Smarter Balanced staff;
h. Attend regularly scheduled Smarter Balanced meetings, and serve as a representative of the Member, as necessary.

H. Higher Education Leads

1. Definition and Qualifications

The State Chief for each Member shall coordinate with the State Higher Education Executive Officer (SHEEO) – or equivalent(s) – to identify a Higher Education Lead for the Member. The Higher Education Lead should be selected through collaboration and mutual agreement with the post-secondary educational system(s) within the state or entity.

Higher Education Leads must meet the following criteria:

a. Be an employee of an institution of higher education or higher education agency in the Member's jurisdiction;
b. Have substantial knowledge and experience about the purposes, development and use of postsecondary placement and admissions policies at the state, system or institutional level and experience in either the design or implementation of placement or admissions procedures at the policy or implementation level; and
c. Be willing to serve as the liaison between Smarter Balanced and the Member's higher education community and promote the use of Smarter Balanced in their state as a measurement of college and career readiness.

2. Responsibilities

The responsibilities for a Higher Education Lead include:

a. Meet on a regular basis with the State Chief and/or the K-12 lead to become informed on updates regarding short-term and long-term planning, developments, and implementation of Smarter Balanced activities;
b. In consultation with appropriate higher education state stakeholders assist Smarter Balanced in the development of positions on matters related to the assessment system;
c. Brief higher education leadership on topics pertaining to upcoming decisions coming before the Governing Board, and, when necessary, assist in the formulation of the Member's higher education position;
d. Facilitate communications between the Member's higher education networks and Smarter Balanced staff;
e. Attend regularly scheduled Smarter Balanced meetings, as necessary.

I. Executive Committee

1. Definition

An Executive Committee comprising ten (10) elected officers shall provide Member perspectives for planning and development needs and shall conduct business with UC on behalf of Smarter Balanced as necessary. The Executive Committee identifies and frames policy decisions in advance of their being forwarded to the Governing Board for action.

2. Composition

The Executive Committee is composed of ten (10) positions, as follows: Chair, Chair-Elect, Past-Chair, four (4) At-Large K-12 positions, two (2) Higher Education positions, and a Post-Secondary Careers position. Both the Executive Director and an appointee from UC are non-voting members of the Executive Committee.

3. Responsibilities of the Executive Committee Members

The responsibilities of the Executive Committee include the following:

a. Identify and frame policy decisions to be forwarded to the Governing Board for action;
b. Evaluate the Executive Director annually;
c. Forward to the Governing Board a recommended candidate(s) to be recommended to UC as Executive Director;
d. Approve the organizational structure of the Smarter Balanced program;
e. Oversee development and sustainability of the Smarter Balanced Comprehensive Assessment System;
f. Provide oversight of the services provided by UC;
g. Appoint members to and provide oversight of working groups, task forces, and advisory panels;
h. Appoint and oversee a Technical Advisory Committee, a Policy and Content Advisory Committee, a Finance Committee, and a Performance Audit Committee. Identify and forward to the Governing Board for approval the charge and members of other non-standing advisory committees, as necessary;
i. Oversee the development of contract proposals and provide UC with input regarding Requests for Proposals that UC will be releasing on behalf of Smarter Balanced;
j. Provide UC with input regarding contract proposals being considered for Smarter Balanced;
k. Identify issues that require Governing Members to develop mutually agreeable policy positions; and
l. Receive and act upon special and regular reports from UC or senior Smarter Balanced staff.

In addition to the Committee-level responsibilities listed above, each individual Executive Committee member is responsible to:

a. Be available to serve as the liaison to a working group, task force, advisory panel, or other committee authorized by the Executive Committee; and
b. Diligently prepare for and regularly attend Executive Committee meetings.

4. Responsibilities of the Chair, Chair-Elect, and Past-Chair
In addition to the responsibilities of Executive Committee members, responsibilities of the Chair, Chair-Elect, and Past Chair are as follows.

Chair
Responsibilities of the Chair of the Executive Committee include:

a. Serve as the Executive Committee's Governing Board Representative (as defined in the MOU, the single point of contact between the Governing Board and UC and between the Governing Board and each Member), unless the Governing Board designates a different person to fill that role;
b. Attend meetings of both the Executive Committee and the Governing Board;
c. Approve agendas for and chair meetings of Smarter Balanced Members and the Executive Committee;
d. Approve agendas for and act as chair for meetings of the Governing Board at which votes will be taken;
e. Attend meetings of the Technical Advisory Committee and the Policy and Content Advisory Committee;
f. Coordinate with the Executive Committee to provide oversight of Smarter Balanced;
g. Coordinate the selection and evaluation of the Executive Director;
h. Oversee the work of the Executive Committee;
i. Monitor the extent to which Smarter Balanced leadership, including Executive Committee members, K-12 Leads, and Higher Education Leads, follow through with their assigned responsibilities, and intervene as necessary;
j. Provide guidance to the Chair-Elect to ensure that the transition of authority and responsibilities is smooth and orderly; and
k. As necessary, represent Smarter Balanced to internal and external stakeholders.

Chair-Elect
The responsibilities of the Chair-Elect of the Executive Committee include:

a. Act in capacity of designee for the Chair whenever the Chair is unable to carry out his/her duties;
b. Attend meetings of both the Executive Committee and the Governing Board;
c. Attend meetings of the Technical Advisory Committee and the Policy and Content Advisory Committee;
d. Be a sitting member of both the Finance Committee and the Performance Audit Committee, and act as liaison between the Executive Committee and these two standing committees; and
e. As necessary, represent Smarter Balanced to internal and external stakeholders.

Past-Chair
The responsibilities of the Past-Chair of the Executive Committee include:

a. Act in capacity of designee for the Chair whenever the Chair and Chair-Elect are unable to carry out their duties;
b. Attend all meetings of both the Executive Committee and the Governing Board;
c. Establish and lead a program committee for the Smarter Balanced Collaboration Conference to be held in the fall/winter following the expiration of the Past-Chair's

one-year term; and

d. As necessary, represent Smarter Balanced to internal and external stakeholders.

5. Executive Committee Decision Making

a. The Executive Director or the Chair may schedule a meeting of the Executive Committee only if Executive Committee members are provided with at least five (5) calendar days' advanced notice or all Executive Committee members waive the five-day notice requirement.

b. The Executive Committee may conduct business and take action only in the presence of a quorum of at least fifty (50) percent plus one of the sitting members of the Executive Committee.

c. An affirmative vote by a majority of at least fifty (50) percent plus one of the entire Executive Committee is required for a motion to pass.

d. The individual vote of each voting Executive Committee member is recorded for the record by the Executive Director, or designee.

e. In the case of a tie vote of the Executive Committee, the motion will fail.

6. Qualifications of Candidates for the Executive Committee

a. Candidates may be self-nominated or may be nominated by a third party. Nominations submitted by a third party must include confirmation that the nominee would accept the nomination.

b. The Executive Director shall determine that a nominee is a qualified candidate for a position, after receipt of:

- Approval of the nomination by the State Chief of the nominee's state of residence, which must be from among the Governing Members. Approval should be a letter or email from the Chief confirming the nomination.
- Confirmation of a willingness to fulfill the responsibilities of the position and acknowledgement of the likely time commitment required of Executive Committee members;
- A commitment to act toward the common benefit of the Members, and not merely as a representative of a particular Member; and
- A brief biographical narrative, not to exceed 300 words, describing the candidate's applicable experience and interest in serving on the Executive Committee.
- Confirmation that the slate of candidates for the Chair-Elect or for the At-Large K-12 positions does not present the possibility of two (or more) individuals from the same Member serving at the same time. (For clarity: the three Chair positions must be three individuals from three distinct Governing Members; likewise, the four K-12 At-Large positions must represent four distinct Governing Members. However, one (or more) of the At-Large positions may be from the same Governing Member as one (or more) of the Chair positions.)

7. Elections and Terms of Office

a. Regularly scheduled elections of the Chair, Chair-Elect, and Past-Chair shall take place annually prior to installation of newly elected officers on the first workday in September.

b. A special election to fill a vacancy on the Executive Committee is authorized if there are more than six (6) months remaining in the office-holder's term. If there are less than six

(6) months remaining in the term, the vacancy shall be filled at the next regularly scheduled election.

c. All elections shall be conducted by the Executive Director, and shall be certified by the Chair and the Chair-Elect in office at the time of the election.

d. At each year's regularly scheduled election, the following positions shall be filled:
   - A Chair-Elect shall be elected to a one-year term. Upon being installed in September, the previous year's Chair-Elect shall begin a one-year term as the Chair, and the previous year's Chair shall begin a one-year term as the Past-Chair.
   - Two of the four At-Large positions shall be elected to two-year terms, with the other two At-Large positions being elected in the following year.

e. At each annual election, either the Higher Education position or the Post-Secondary Careers position shall be elected to a two-year term, with the other of these two positions being elected in the following year.

f. For the election of members of the Executive Committee, Governing Members shall vote as follows:
   - For the Chair-elect and At-Large positions (and for the Chair and Past-Chair positions, should there be the need to fill a vacancy), the K-12 Lead from each Governing Member may cast a single vote for each vacant position;
   - For the Higher Education positions, the Higher Education Leads from each Governing Member may cast a single vote.
   - For the Post-Secondary Careers position, each Governing Member may cast two votes: one cast by the K-12 Lead, and one cast by the Higher Education Lead.

g. Balloting shall be open for five (5) business days.

h. Executive Committee positions are not term-limited. Executive Committee members may serve consecutive terms.

i. For elections to all Executive Committee positions, a tie between two or more candidates shall be resolved in the following manner.
   - The Executive Director will prepare a runoff ballot that includes only those candidates whose election, by virtue of the tie(s), is unresolved.
   - Governing Members will cast votes for the number of unresolved positions, in accordance with the voting procedures described in *Paragraphs f* and *g*, immediately above.
   - If the tie(s) is unresolvable after the runoff, the Executive Committee shall cast the tie-breaking vote(s), consistent with its decision-making procedures.

8. Special Initial Elections in 2015

Transition to a newly formed Executive Committee from the Executive Committee in existence prior to adoption of these Governing Board Procedures can be summarized as follows:

- Upon adoption of these Governing Board Procedures, the following five members of the current Executive Committee will transition to the newly formed Executive Committee:
  - The current Co-Chair who was most recently elected will occupy the position of Chair of the Executive Committee, and will rotate to Past-Chair in September 2015;
  - The other current Co-Chair will occupy the position of Past-Chair of the Executive Committee, and will rotate off of that position in September 2015;

- The two K-12 At-Large Executive Committee members who were most recently elected, with terms that expire in September 2015;
- The Higher Education Executive Committee member who was most recently elected, with a term that will expire in September 2015;

- At the earliest convenience, the Executive Director will organize an election to fill the following vacancies:
  - The Chair-Elect, with the individual serving as Chair-Elect until September 2015, at which time he/she will rotate into the position of Chair;
  - Two of the four K-12 At-Large positions, with the individuals serving two-year terms ending in September 2016; and
  - The Higher Education and Post-Secondary Career positions, with individuals serving a two-year terms ending in September 2016.
  - Any Executive Committee vacancies that arise due to the current incumbent's inability to serve will be filled by election.

E. Executive Director and Staff

1. Executive Director

The Executive Director, an employee of UC, reports jointly to the Chair of the Executive Committee and the Dean of the Graduate School of Education and Information Studies. The Executive Director directs the staff of Smarter Balanced, and is responsible for the day-to-day operation of Smarter Balanced and for the implementation of policies and procedures established by the Governing Members and the Executive Committee. His or her responsibilities include:

a. Serve as an ex-officio member of the Executive Committee;
b. Provide strategic leadership to the Executive Committee, Governing Members and Affiliate Members;
c. Monitor the performance of UC in providing necessary services to Governing Members and Customers;
d. Annually submit a proposed budget for the following year for approval by the Governing Board;
e. Serve as spokesperson for Smarter Balanced;
f. Propose agendas for the Executive Committee meetings;
g. Propose agendas for the Governing Board meetings;
h. Chair meetings of the Technical Advisory Committee and the Policy and Content Advisory Committee;
i. Facilitate meetings of the Finance Committee and the Performance Audit Committee;
j. Establish and maintain documentation of Smarter Balanced policies and procedures;
k. Supervise the performance of Smarter Balanced staff; and
l. Perform any other such duties as assigned by the Executive Committee.
a. The Executive Director will receive a formal evaluation by the Executive Committee annually.

2. Other Staff

In conjunction with requirements of UC, the Executive Director shall maintain an

organization chart of staff and reporting relationships. The Executive Director is authorized to hire and dismiss staff, consistent with personnel requirements of UC.

F. Standing Advisory Committees

Smarter Balanced will be advised by four standing advisory panels, which shall be advisory to the Executive Committee and Smarter Balanced staff.

1. Technical Advisory Committee (TAC)

Smarter Balanced will maintain a TAC whose members include national measurement and assessment policy and content experts who will contribute their knowledge and expertise regarding validation, design, item writing and scoring, psychometrics, accessibility for English Language Learners and Students with Disabilities, standard setting, instructional strategies and other technical and best practices matters.

TAC members are appointed by the Executive Committee, and are compensated for their work at a rate as recommended by the Executive Committee. The TAC shall be convened to meet regularly throughout the year, both in-person and virtually. The structure of the TAC shall be determined by the Executive Committee, and may include the establishment of subcommittees to focus on distinct areas of technical advice/expertise.

TAC meetings are not public meetings, but are open to K-12 Leads and Higher Education Leads to attend in person, and are remotely available to Member representatives, which are encouraged to involve their own technical advisors in reviewing the work of continuing assessment development being conducted by Smarter Balanced. The Policy and Content Advisory Committee is a subcommittee of the TAC.

2. Finance Committee

A Finance Committee shall be established by the Executive Director, with membership approved by the Executive Committee. Finance Committee members are appointed annually after newly elected members of the Executive Committee have been seated. Individuals may serve for more than one year on the Finance Committee. The Finance Committee shall annually elect a Chair from among its membership. Meetings of the Committee shall be scheduled and facilitated by the Executive Director, or his/her designee.

The charge to the Finance Committee is to regularly monitor the fiscal status of Smarter Balanced. Further, each year, no later than April 1, the Finance Committee shall work with the Executive Director to submit a proposed budget to the Executive Committee for the next fiscal year, which the Executive Committee shall review and forward to the Governing Board.

3. Performance Audit Committee

A Performance Audit Committee shall be established by the Executive Director, with membership approved by the Executive Committee. The Performance Audit Committee members are appointed annually after newly elected members of the Executive Committee have been seated. Individuals may serve for more than one year on the Performance Audit

Committee. The Performance Audit Committee shall annually elect a Chair from among its membership. Meetings of the Performance Audit Committee shall be scheduled and facilitated by the Executive Director, or his/her designee.

The charge to the Performance Audit Committee is to regularly monitor the performance status of Smarter Balanced business activities. Further, each year, no later than March 1, the Performance Audit Committee shall submit a report to the Executive Committee regarding the performance of Smarter Balanced business activities.

4. Other Advisory Committees

Other advisory non-standing committees may be established by the Executive Committee, for the purpose of providing ongoing advice and guidance to Smarter Balanced on topics and issues that may have significant operational and/or policy implications. The length of service and membership of advisory committees will be established by the Executive Committee, with the consent of the Governing Board.

Computer Adaptive Testing

The Smarter Balanced assessment system will capitalize on the precision and efficien*cy* of computer adaptive testing (CAT) for both the mandator*y* summative assessment and the optional interim assessments.

Based on student responses, the computer program adjusts the difficulty of questions throughout the assessment. For example, a student who answers a question correctly will receive a more challenging item, while an incorrect answer generates an easier question. By adapting to the student as the assessment is taking place, these assessments present an individually tailored set of questions to each student and can quickly identify which skills students have mastered. This approach represents a significant improvement over traditional paper-and-pencil assessments used in many states today, providing more accurate scores for all students across the full range of the achievement continuum.

Better information for teachers: Optional computer adaptive interim assessments will provide a more detailed picture of where students excel or need additional support, helping teachers to differentiate instruction. The interim assessments will be reported on the same scale as the summative assessment, and schools will have the flexibility to assess small elements of content or the full breadth of the Common Core State Standards at locally-determined times throughout the year.

More efficien**t** and more secure: Computer adaptive tests are typically shorter than paper-and-pencil assessments because fewer questions are required to accurately determine each student's achievement level. The assessments draw from a large bank of questions, and since students receive different questions based on their responses, test items are more secure and can be used for a longer period of time.

More accurate: CAT offers teachers and schools a more accurate way to evaluate student achievement, readiness for college and careers, and to measure growth over time.

Computerized assessments allow teachers, principals, and parents to receive results in weeks, not months. Faster results mean that teachers can use the information from optional interim assessments throughout the school year to differentiate instruction and better meet the unique needs of their students.

For More Information

Watch the Computer Adaptive Testing webinar

Visit the Technology page

Download the CAT Factsheet (PDF) (DocX) **Please note, this document has been made available in Microsoft Word format to facilitate use with screen readers and other assistive technologies. Please do not modify this document. The Portable Document Format (PDF) version that is also posted displays fonts and images in a consistent manner across devices and is the* recommended *version for most purposes.*

CREATING A COMPUTER ADAPTIVE TEST

The Smarter Balanced Assessment System includes computer adaptive tests that are customized to each student. During the test, the difficulty of questions changes based on student responses. In this way, adaptive tests provide more precise information about student achievement in less time than a "fixed-form" test in which all students see the same set of questions.

Two ingredients are required to create an effective computer adaptive test:

- The **test blueprint** describes the content that will be covered on the assessment. The Smarter Balanced test blueprint ensures that the full range of knowledge and skills in the Common Core State Standards will be assessed. In addition, the test blueprint specifies the number and types of questions associated with each section of the assessment.
- The **adaptive software** is a set of rules that determine which questions a student will be given during the assessment. Drawing on a large pool of questions, the software ensures that each student's test fulfills the test blueprint—meaning that all content areas are covered with sufficient detail to provide an accurate score—and it adjusts the level of difficulty of questions based on student responses to accurately assess the strengths and weaknesses of each student.

Test Blueprint

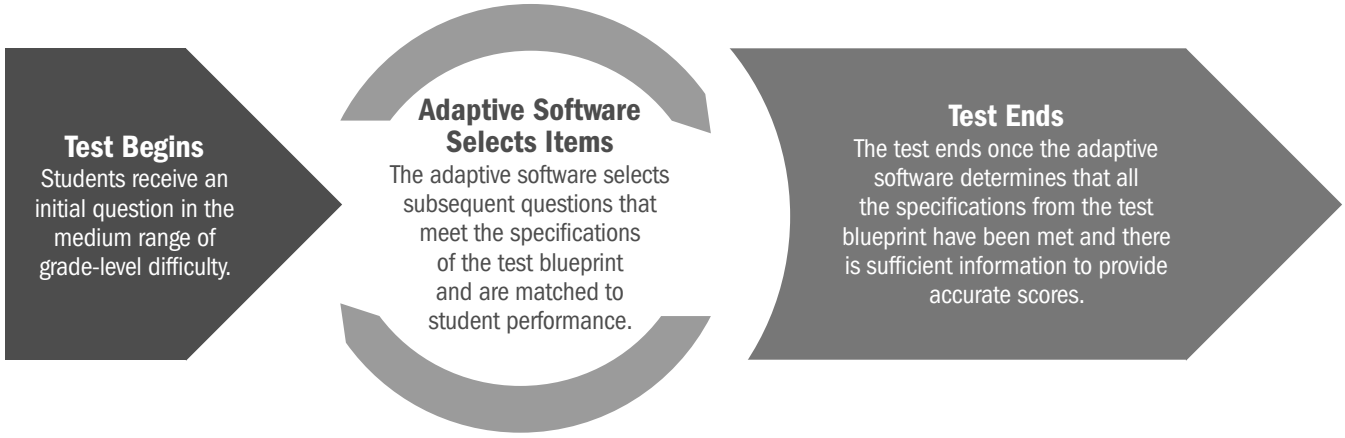
- ✓ Covers the full range of Common Core English and math standards
- ✓ Specifies number of items, score points, and depth of knowledge
- ✓ Available online at: http://www.smarterbalanced.org/smarter-balanced-assessments/

Adaptive Software

- ✓ Builds the best test for each student by selecting questions that satisfy the test blueprint and match student performance
- ✓ Open source program available to states and assessment providers
- ✓ More information available online at: http://www.smarterapp.org/documents/AdaptiveAlgorithm-Preview-v3.pdf

How the Smarter Balanced Adaptive Software Works

The adaptive software runs in the background while students complete the assessment. After each response, it selects the next question based on a number of criteria, including: the specifications from the test blueprint; the number of times a question is likely to be used (to prevent overexposure of questions); and previous responses from the student.



A Better Picture of Student Achievement

All assessments provide estimates of student achievement. Since adaptive tests are customized to each student, the results have smaller margins of error. This allows schools to more reliably measure student growth over time. It also means that as students advance from one grade to the next, teachers and parents can be confident that higher scores reflect real learning gains.

Adaptive testing is also more accurate across the range of students—from those who are most advanced to those who are struggling. The Smarter Balanced adaptive software is configured to select only from grade-level questions for approximately the first two-thirds of the test. At that point, if the estimate of the student's achievement level is clearly at the lowest (or highest) level, the question pool is expanded to include (as needed) questions either from below (or above) the student's grade level. Before being used, out-of-grade questions are screened to make sure they are instructionally and developmentally appropriate. Expanding the question pool to include out-of-grade questions can help create a more complete picture of each student's knowledge and skills.

QUESTIONS

Common Questions about Adaptive Testing

If students are asked different questions, how can we compare their results?
Each student's test must meet the requirements of the test blueprint. The blueprint specifies the content areas and types of questions that will appear on the test. For example, if the test blueprint requires that each student receive two questions about adding fractions, the adaptive software will select two questions from a group of perhaps a dozen that assess the ability to add fractions.

If an advanced student correctly answers many challenging questions, will he or she receive the same score as a struggling student who correctly answers the same number of easier questions?
No. Each question is placed on a scale of difficulty. Students who answer many challenging questions correctly will receive higher scores, which will correspond to higher achievement levels.

What about students with special needs who are advanced in some areas and much weaker in others?
The English and math assessments each include several content areas in which students will be assessed. In English, students will be assessed on reading, writing, listening, and research. In math, questions will focus on concepts and procedures, problem solving and modeling/data analysis, and communicating reasoning. A student with strong skills in one area will be able to demonstrate them because the adaptive software will give the student the opportunity to respond to each content area.

Can students review and change their answers?
Yes. Students may go back and modify their responses within a test segment. The adaptive software continually works to tailor the test to each student, so a modified response will simply generate a new question that satisfies the test blueprint and matches student performance.

How does the adaptive software handle questions that cannot be automatically scored?
The adaptive portion of the assessments include some "constructed response" questions that must be scored by human readers. Student responses to these questions and to questions in the performance tasks will be combined with the machine-scored questions into a single score report.

IN THE SUPREME COURT
STATE OF SOUTH DAKOTA

No. 27931

AMBER MAURICIO and SHELLI GRINAGER,

Plaintiffs and Appellants

v.

DENNIS M. DAUGAARD; THE STATE OF SOUTH DAKOTA; DR. MELODY SCHOPP; RICHARD L. SATTGAST; THE SOUTH DAKOTA DEPARTMENT OF EDUCATION; THE SOUTH DAKOTA BOARD OF EDUCATION; AND THE OFFICE OF THE STATE TREASURER OF SOUTH DAKOTA.

Defendants and Appellees.

APPEAL FROM THE CIRCUIT COURT
SIXTH JUDICIAL CIRCUIT
HUGHES COUNTY, SOUTH DAKOTA

THE HONORABLE MARK BARNETT
Circuit Court Judge

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Notice of Appeal filed July 12, 2016

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Plaintiffs and Appellants,

v.

DENNIS M. DAUGAARD; THE STATE OF SOUTH DAKOTA; DR. MELODY SCHOPP; RICHARD L. SATTGAST; THE SOUTH DAKOTA DEPARTMENT OF EDUCATION; THE SOUTH DAKOTA BOARD OF EDUCATION; AND THE OFFICE OF THE STATE TREASURER OF SOUTH DAKOTA.

Defendants and Appellees.

PRELIMINARY STATEMENT

Throughout this brief, Plaintiffs and Appellants, Amber Mauricio and Shellie Grinager, will be referred to as "Plaintiffs." Defendants, and Appellees, Dennis M. Daugaard, et al. will be referred to as "State." All other individuals will be referred to by name. The settled record in the underlying civil case, *Amber Mauricio and Shelli Grinager. v. Daugaard et al.,* Hughes County Civil File No. 15-292, will be referred to as "SR." Any reference to Plaintiffs' brief will be designated as "PB." All references will be followed by the appropriate page number.

JURISDICTIONAL STATEMENT

The State does not dispute Plaintiffs' Jurisdictional Statement.

STATEMENT OF LEGAL ISSUES AND AUTHORITIES

I.

WHETHER THE AGREEMENT ENTERED INTO BETWEEN THE SOUTH DAKOTA DEPARTMENT OF EDUCATION AND THE BOARD OF REGENTS OF THE UNIVERSITY OF CALIFORNIA IS AN INTERSTATE COMPACT.

The circuit court held that the agreement was an intestate compact.[1]

Northeast Bancorp v. Bd. of Governors of Fed. Reserve Sys., 472 U.S. 159 (1985)

United States Steel Corp. v. Multistate Tax Comm'n, 434 U.S. 452 (1978)

U.S. Const. Art. I, § 10, cl. 3.

II.

WHETHER THE AGREEMENT BETWEEN THE SOUTH DAKOTA DEPARTMENT EDUCATION AND THE BOARD OF REGENTS OF THE UNIVERSITY OF CALIFORNIA REQUIRES CONGRESSIONAL APPROVAL TO BE VALID.

The circuit court held that the agreement did not need congressional approval to be valid.

Northeast Bancorp v. Bd. of Governors of Fed. Reserve Sys., 472 U.S. 159 (1985)

United States Steel Corp. v. Multistate Tax Comm'n, 434 U.S. 452 (1978)

Virginia v. Tennessee, 148 U.S. 503 (1893)

Gray v. North Dakota Game and Fish Dept., 706 N.W.2d 614 (N.D. 2005)

U.S. Const. Art. I, § 10, cl. 3.

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[1] This issue is raised by means of a Notice of Review filed by the State on July 26, 2016.

III.

WHETHER THE SMARTER BALANCED ASSESSMENT VIOLATES SDCL 13-3-55.

The circuit could held that the assessment was not in violation of SDCL § 13-3-55.

Klein v. Sanford USD Medical Center, 2015 S.D. 95, 872 N.W.2d 802

Save Our Neighborhood--Sioux Falls v. City of Sioux Falls, 2014 S.D. 35, 849 N.W.2d 265

SDCL 13-3-55

STATEMENT OF THE CASE

Plaintiffs filed a Complaint on November 11, 2015, alleging that an agreement entered into between the South Dakota Department of Education and the Regents of the University of California (UC) for the provision of educational assessment products and services operated in violation of the Compact Clause of the United States Constitution. SR 1. The parties filed cross motions for summary judgment. A hearing on the motions was held before the Honorable Mark Barnett, Circuit Court Judge, Sixth Circuit, on April 4, 2016. SR 766.

On June 13, 2016, the court entered a Memorandum Decision and Order. SR 680; 701. The court held that the agreement was a compact subject to Compact Clause analysis, but that the compact did not require Congressional approval in order to be valid. The court further found that the adaptive assessment provided through this compact did not violate

SDCL 13-3-55, which requires the same assessment be provided. Notice of Entry of the Order was provided on June 20, 2016. Plaintiffs timely filed a Notice of Appeal on July 12, 2016. Thereafter, on July 26, 2016, the State timely filed a Notice of Review. The Notice of Review asks this Court to find that the circuit court erred in holding that the agreement was an interstate compact subject to a Compact Clause analysis.

STATEMENT OF FACTS

The Secretary of the South Dakota Department of Education (SD DOE) is required to prepare and submit, to the South Dakota Board of Education, academic content standards for kindergarten through grade twelve. SR 558 ¶ 4; SDCL 13-3-48. Generally, content standards specify what should be learned, and curriculum involves the means and methods of instruction. SR 558 ¶ 5. In order to measure student achievement within these content standards, certain academic assessments and reporting requirements were implemented. SR 558 ¶ 6; s*ee also* SDCL ch. 13-3. To aid the development of an assessment system which would correspond to the academic content standards in English language arts and mathematics, in a more economically efficient and effective manner than the State could do alone, from 2010 to 2014, State officials entered into various agreements for those services and created the Smarter Balanced Assessment Consortium (SBAC). SR 558 ¶ 7.

SBAC, through Washington State acting as fiscal agent, participated in the "Race to the Top Fund Assessment Program: Comprehensive Assessment Systems Grant Application," in accordance with the Notice Inviting Applications (NIA) for the Race to the Top Fund (RTTT) Assessment Program for the Comprehensive Assessment Systems Grant Application, published in the Federal Register on April 9, 2010 (75 Fed. Reg. 18171-18185). SR 558-59. The NIA offered federal funding to support a limited number of grant projects to develop, but not implement, a new generation of appropriately valid and reliable assessments that would be understood as measuring student progress, leading to college and career readiness. The SBAC received the grant and used the federal funds to begin developing educational assessments on behalf of the member states. No State funds were contributed. *Id.*

In 2014, the RTTT grant funding was due to expire. SR 559 ¶ 12. In order to continue receiving services regarding the creation and implementation of assessment tools, Dr. Melody Schopp, Secretary of the SD DOE, signed a Memorandum of Understanding (MOU) with the Regents of the University of California (UC-MOU), and agreed to pay an annual fee. *Id.* In exchange, the University of California-Los Angeles (UCLA) agreed to provide assessment Products and Services to SD DOE under the moniker "Smarter Balanced." SR 559 ¶ 12. Through this process, the services once provided by SBAC transitioned to UCLA. SR 560 ¶ 14. Under the terms of the UC-MOU, UCLA succeeded the

state of Washington as fiscal agent and assumed the assets and contracts held by SBAC. SR 334 ¶¶ A-C.

Pursuant to the UC-MOU, states signing similar MOUs became members of a Governing Board. The Governing Board's function is to provide administrative support and guidance to UC regarding the creation of the educational assessments and tools produced by UC and provided to the individual states. SR 348-49. Governing Board Procedures have been adopted to inform UC regarding policy and administrative procedures. SR 363. UC is not a member of the Governing Board and in no event can UC be bound by the Governing Board Procedures. SR 349 ¶ 3.3. The Governing Board Procedures cannot modify the UC-MOU or the obligations between the individual states signing similar MOUs and UC. *Id.*

The Smarter Balanced assessment itself is a test which is administered electronically once per year, in the spring, to students in grades three through eight and eleven. It is aligned to South Dakota's content standards in English language arts and mathematics, but it does not dictate the means and methods of instruction of the standards. SR 561. The assessment follows an overall test blueprint which specifies the number of and types of questions associated with each section of the assessment. Within this overall blueprint, part of the assessment is computer adaptive, with the difficulty of questions changing based on student responses to measure the academic progress of each student.

Id. SD DOE has a separate contract with American Institutes for Research (AIR) to deliver the assessments, score the assessments, and report student results for the state. SR 562 ¶ 24.

ARGUMENT

The State respectfully asserts that the UC-MOU is not a compact subject to a Compact Clause analysis and even if it were, it would not require congressional approval. Additionally, the Smarter Balanced assessment does not violate SDCL 13-3-55.

A. Standard of Review on Summary Judgment

The Summary Judgment Standard is well-settled.

> Summary judgment is authorized "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact, and that the moving party is entitled to judgment as a matter of law." … All reasonable inferences drawn from the facts must be viewed in favor of the non-moving party. The burden is on the moving party to clearly show an absence of any genuine issue of material fact and an entitlement to judgment as a matter of law.

Discover Bank v. Stanley, 2008 S.D. 111, ¶ 16, 757 N.W.2d 756, 761-62 (*quoting Mueller v. Cedar Shore Resort, Inc.*, 2002 S.D. 38, ¶ 10, 643 N.W.2d 56, 62). "There must be no material facts at issue, and there must 'be no genuine issue on the inferences to be drawn from those facts.'" *Id.* (*quoting A-G-E Corp. v State*, 2006 S.D. 66, ¶ 17, 719 N.W.2d 780, 786). "Entry of summary judgment is mandated against a party who fails to make a showing sufficient to establish the existence of an

element essential to that party's case, and on which that party will bear the burden of proof at trial." *Zephier v. Catholic Diocese of Sioux Falls*, 2008 S.D. 56, ¶ 6, 752 N.W.2d 658, 662-63 (*citing Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23, 106 S.Ct. 2548, 2552, 91 L.Ed.2d 265, 273 (1986)). This Court has stated that it will affirm the circuit court on summary judgment if it is correct for any reason. *Westfield Ins. Co., Inc. v. Rowe*, 2001 S.D. 87, ¶ 4, 631 N.W.2d 175, 176 (*citing Estate of Juhnke v. Marquardt*, 2001 S.D. 26, ¶ 5, 623 N.W.2d 731, 732).

B. Standard of Review Regarding Compatibility with United States Constitution

In considering the validity of a new form of relationship between the states, the United States Supreme Court has stated: ". . . the search is not for a specific constitutional authorization for it. Rather, according the statute the full benefit of the presumption of constitutionality which is the postulate of constitutional adjudication, we must find clear incompatibility with the United States Constitution." *New York v. O'Neil*, 359 U.S. 1, 6 (1959).

C. Overview

In arguing that the 2014 UC-MOU is in violation of the Compact Clause, Plaintiffs' briefing contains references to the 2010 MOU, and its amendments, which created SBAC. Plaintiffs also seem to imply that the RTTT federal grant funding received under the 2010 MOU draws into question the legality of 2014 UC-MOU. As both parties agree, the 2010

MOU, its amendments, and funding source are no longer at issue. SR 769. Plaintiffs additionally agree that no remedy is being sought with regard to the previous MOU or its federal grant funding. SR 770. Since 2014, the only agreement through which SD DOE receives Smarter Balanced assessments is the UC-MOU. Moreover, because the federal RTTT grant expired, product development under the UC-MOU is funded by the member states themselves. Accordingly, the focus of the Compact Clause argument is narrow – whether the state-funded 2014 UC-MOU is a compact that is subject to congressional approval under the Compact Clause of the United States Constitution.

D. The Compact Clause

At the heart of this case is the "Compact Clause" of the United States Constitution, which states in relevant part that, "No State shall, without the Consent of Congress…enter into any Agreement or Compact with another state." U.S. Const., Art. 1, § 10, cl. 3. Despite this broad language, the United States Supreme Court has made it abundantly clear that "not all agreements between States are subject to the strictures of the Compact Clause." *United States Steel Corp. v. Multistate Tax Comm'n*, 434 U.S. 452, 469 (1978). Multistate agreements require congressional approval only if they tend to increase political power in the states in a manner that encroaches on the supremacy of the United States. *Id.*; *New Hampshire v. Maine,* 426 U.S. 363 (1976); *Virginia v. Tennessee,* 148 U.S. 503, 519 (1893). "[*T]he test is whether the Compact*

enhances state power quoad the National Government." *United States Steel Corp.*, 434 U.S. at 472-73. (emphasis added). [2]

In *United States Steel Corporation*, the Court examined whether a multi-state tax compact required the approval of Congress in order to be valid. The compact in question created the Multistate Tax Commission composed of tax administrators from the member states. *United States Steel Corp.*, 434 U.S. at 456-57. The Commission created advisory uniform provisions that had no force in the member states until adopted by statue in each state according to its own law. *Id.* If Article VIII of the Compact was adopted, a member state, or its subdivision, could request that the Commission perform an audit on its behalf. In furtherance of its auditing role, the Commission could seek compulsory process in each adopting state as a means of compelling the attendance of witness for examination. Individual states retained the ability to control legislation affecting the tax rate, allocation, and collection. *Id.* Under Article X, the Compact became effective after seven states adopted it. *Id.* at 454-55. By the time the case was litigated, twenty-one states had become members. *Id.* A party to the Compact was allowed to withdraw by

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[2] Plaintiffs' historical review of the Compact Clause would seemingly advocate for a stricter interpretation. Nonetheless, Plaintiff concedes that such an interpretation has been replaced by a more modern analysis such as the discussion found in *United States Steel Corp. v. Multistate Tax Comm'n*, 434 U.S. 452 (1978). SR 810.

enacting a repealing statute. *Id.* at 457.[3] The court concluded that the Multistate Tax Compact did not need Congressional approval to be valid.

The court's review of the Multistate Tax Compact recognized that "not all agreements between the States are subject to the strictures of the Compact Clause." *Id.* at 469. Rather, the proper balance between federal and state power under the Compact Clause is ". . . limited to agreements that are 'direct to the formation of any combination tending to the increase of political power in the States, which may encroach upon or interfere with the just supremacy of the United States.'" *Id.* at 471. "There are many matters upon which different states may agree that can in no respect concern the United States." *Virginia v. Tennessee*, 148 U.S. at 518. Because, as Plaintiffs concede, education is a matter left to the states, the state's agreement with UC to create educational assessment tools cannot encroach on federal supremacy. PB 15. As argued further below, the UC-MOU leaves all salient regulation and power with each individual state, and therefore should not be considered a compact subject to review under the Compact Clause.

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[3] The Original Model Multistate Tax Compact can be found at http://www.mtc.gov/getattachment/The-Commission/Multistate-Tax-Compact/Original-Model-Multistate-Tax-Compact.pdf.aspx and attached as APP. 1-14.

I.

THE CIRCUIT COURT ERRED IN HOLDING THAT THE UC-MOU WAS AN INTERSTATE COMPACT.

A necessary prerequisite to a Compact Clause analysis is the existence of an interstate compact. Not every arrangement between or among states should be termed a compact subject to congressional approval. *Northeast Bancorp v. Bd. of Governors of Fed. Reserve Sys.*, 472 U.S. 159, 175 (1985). In *Northeast Bancorp*, the court identified "the classic indicia of a compact": (1) "a joint organization or body established to regulate" a particular multistate function; (2) a state statute that is conditioned on action by another state or states; (3) a state statute that prevents states from modifying or repealing their own laws unilaterally; and (4) a state statute that requires reciprocation of the agreement. *Id.* The UC-MOU at issue in this case lacks these characteristics of a compact and, therefore, cannot serve as a basis for a Compact Clause claim.

1. <u>The UC-MOU is not a joint organization or body established to regulate a particular multistate function.</u>

The UC-MOU is an agreement *not* between states collectively but between individual states and UC.[4] The Governing Board Procedures, which the members agree to follow, are to ". . . maintain and

[4] As the UC-MOU indicates, Smarter Balanced is not an independent legal entity, but a part of the UCLA Graduate School of Education and Information Studies. SR 334 ¶ F.

continuously improve a system of assessment tools and service for its Members based upon Common Core State Standards in English language arts/Literacy and mathematics. . ." SR 364 (Governing Board Procedures); *See also*, SR 355-56 (UC-MOU obligations of UC). The Governing Board merely operates to achieve consensus regarding administrative matters necessary to produce a product that can be "offered to Members." SR 367 (3(c)). Although the states have come together by means of individual agreements with UC in order to produce the assessment, they each individually have the same power to create the assessment on their own or contract with another entity for the creation of the assessment. The UC-MOU does not enhance that authority. Each member state must continue to act within the confines of its own state law as determined by their individual Legislatures. *See* SR 346-47 (allowing termination if the actions of the Governing Board run contrary to state law).

Unlike the Multistate Tax Commission created in *United States Steel Corp.,* which could act as a State's auditing agent and seek compulsory process in the State courts, the Governing Board has no authority to act independently on any State's behalf nor may it call upon the court to exercise any power. *United States Steel Corp.*, 434 U.S. at 457. Moreover, the Governing Board cannot regulate any State's authority over procuring and administering assessments to students. The rights of the individual states are defined and delimited by the

agreement between UC and each individual member state. The UC-MOU clearly recognizes that the authority to contract for educational assessment tools and the funds necessary to purchase those tools remains with the contracting state. SR 346-47 (illustrating *inter alia*, ability to terminate for violation of state law, loss of state authority, and lack of state funding).

Further, the UC-MOU does not dictate state educational policy by requiring the member states to give the Smarter Balanced Assessment. Neither the terms of the UC-MOU or the Governing Board Procedures require a state to give the assessment created. "[I]n order to ascertain the terms and conditions of a contract, we examine the contract as a whole and give words their 'plain and ordinary meaning.'" *Nygaard v. Sioux Valley Hosps. & Health Sys.,* 2007 S.D. 34, ¶ 13, 731 N.W.2d 184, 191 (citations omitted). Here, the agreement provides that the products are "offered to members." SR 367 (3(c)). The payment of fees by the State to UC grants the State a license to *use* the Assessment System and Enhancements thereto.[5] SR 515-16 ¶ 4.2 (emphasis added). As with any software or product license, the license to use the product is not a mandate that the product be used. Under their plain and ordinary meanings, had the contract intended the use of the product to be

[5] Likewise, under the ESEA, the State was not required to participate in a consortium for the creation of a particular assessment. Instead, the State was given three options for the implementation of assessments: participate in a consortia, develop assessments that are aligned to state college and career ready standards, or already have those assessments in place. SR 555 ¶ 25.

mandated, it would not have used permissive terms such as "offered to members" or "license to use" the product. The agreement would have simply stated that a Member "shall use" the Assessment System created by UC. It did not.

It's axiomatic that the use of the Smarter Balanced "achievement *and* reporting" scales will be used only if the Smarter Balanced Assessment is actually provided to the students. SR 366 ¶ B (emphasis added). It would be an absurd result to require the use of the achievement and reporting scales for an assessment that was not provided – the corresponding assessment must first be given. *Nelson v. Schellpfeffer*, 2003 S.D. 7, ¶ 12, 656 N.W.2d 740, 743 ("An absurd result is one that is 'ridiculously incongruous or unreasonable.'") Furthermore, to read the contract as requiring the Smarter Balanced Assessment to first be administered to the students, terms would have to be added to the agreement that don't currently appear. As this Court has previously stated, "…we may neither rewrite the parties' contract nor add to its language." *Culhane v. W. Nat. Mut. Ins. Co.*, 2005 S.D. 97, ¶ 27, 704 N.W.2d 287, 297 (citations omitted). Likewise, Plaintiffs are not free to re-write the agreement to fit their legal argument.

Under this factor, there is simply no multistate function regulated by UC-MOU or Governing Board Procedure.

2. The implementation of an assessment system agreed to by one state is not conditioned on action by another state.

The UC-MOU is an agreement between individual member states and UC. The provision of assessment products and services under the agreement by UC is not conditioned upon the actions of other contracting states. In *Gray v. North Dakota Game and Fish Dept.*, the compact at issue "related to managing wildlife resources whereby participating states agree to honor other participating state's wildlife license suspensions of those who violate game and fish laws." 706 N.W.2d 614, 618 (N.D. 2005). A similar agreement for driver's licensing was examined in *Koterba v. Commonwealth*, 736 A.2d 761 (Pa.Commw. Ct. 1999). In neither case was the compact found to need the approval of congress. Moreover, and focusing on this factor, states entering those agreements agreed to recognize suspensions of privileges from other participating states.

There is no such agreement between the states with regard to the UC-MOU or attendant Governing Board procedures. Whether the assessment is given in one state has no bearing on the responsibilities of another member state. Unlike the compacts discussed in *Gray* and *Koterba*, the agreement carries no obligation outside the individual member state's borders. There is no external obligation of a member state to recognize the giving of the assessment in another state. The giving of the assessment in one state carries no benefit or burden that another state is required to agree to or adopt. Moreover, the ability of

one state to give or not give an assessment does not rest on the decisions of other members states. Furthermore, the termination of an MOU by one state in no way affects other member states. Pursuant to the terms of the UC-MOU, each state's obligations are tied only to its own actions (including legislative) and are not linked to the actions of other states. *See generally* UC-MOU at SR 334 and the termination provisions at SR 346-47 which defer to each member state's law.

3. There is no requirement preventing states from modifying or repealing their own laws unilaterally.

As discussed further below, each State's Legislature continues to control funding and educational policy in the individual state by the power of the purse and through enactment of specific legislation regarding curriculum and assessment tools. In the event the actions of the Governing Board or terms of the MOU conflict with state law, a contacting state is free to divest itself of the obligations imposed by the MOU without repercussion. SR 346-47. Given the continued power held by individual State Legislatures, and the language in the UC-MOU recognizing the same, the MOUs signed by the other member in no way prevent any member state from modifying or repealing its own laws unilaterally.

4. There is no required reciprocation of the agreement.

As discussed above, the individual agreements entered into by the states with UC impose no requirement on a contracting state to implement a particular assessment tool. Each member state is free to

implement the assessment tool it wishes. No State is required to contract with UC. And unlike the compact discussed in *U.S. Steel Corp.*, which required seven states to agree, the UC-MOU contains no such requirement. *See United States Steel Corp.*, 434 U.S. at 454-55. And it need not. It merely provides a product to the contracting state for the assessment of its own students aligned to the content standards established by each State's Legislature. There are no reciprocal obligations between states and thus no need for a certain number of states to agree.

Through participation on the Governing Board, Members that enter into an agreement with UC to provide assessment tools will have more input on the end product than states purchasing an off-the-shelf assessment, but any obligation under the agreement ends at the contracting state's borders. The same is true for any contract for the purchase of products or services. UC-MOU is not an agreement subject to analysis under the Compact Clause, and therefore continues to be valid without receiving Congressional approval.

II.

EVEN IF THE UC-MOU WAS AN INTERSTATE COMPACT, THE CIRCUIT COURT CORRECTLY HELD THAT IT DOES NOT REQUIRE CONGRESSIONAL APPROVAL TO BE VALID.

If this Court considers the UC-MOU a compact which requires further analysis under the Compact Clause, several factors must be examined to determine whether Congressional approval of the agreement

is necessary. The contract must enhance state power at the expense of federal supremacy, and the infringement must be "directed to the formation of any combination tending to increase the political power in the States which may encroach upon on interfere with the just supremacy of the United States." *United States Steel Corp.*, 434 U.S. at 471. In considering whether the federal structure was implicated, the court in *United States Steel Corp.*, considered two main factors: 1) whether the agreement "authorize[d] member States to exercise any powers they could not exercise in its absence" and 2) whether the agreement operated to delegate the states "sovereign power." *Id.* at 473. The court in *United States Steel Corp.*, also found that the ability to enact "a repealing statute" allowed withdrawal at any time and weighed against a finding that congressional approval was necessary. *Id.* at 473. The court further considered whether the compact threatened the sovereignty of non-member states.

1. The UC-MOU does not encroach upon the supremacy of the United States.

Multistate agreements require congressional approval only if they tend to increase political power in the states in a manner that encroaches on the supremacy of the United States. *United States Steel Corp.*, 434 U.S. at 469; *New Hampshire v. Maine,* 426 U.S. 363 (1976); *Virginia v. Tennessee,* 148 U.S. at 519. "[T]he test is whether the compact enhances state power *quoad* the National Government." *United*

States Steel Corp., 434 U.S. at 472-73. The Compact Clause "is not to be construed to limit the variety of arrangements which are possible through the voluntary and cooperative actions of individual States with a view to increasing harmony within the federalism created by the Constitution." *New York v. O'Neill*, 359 U.S. 1, 6 (1959). Governing has become an increasingly complicated task that requires collaboration and creativity. *Id.* (The Constitution did not purport to exhaust imagination and resourcefulness in devising fruitful interstate relationships). Instead, "[C]ourts have routinely found congressional consent to be unnecessary where the subject matter of the agreement is one over which states have historically exercised control." *Koterba*, 736 A.2d at 765 (citing compacts such as the Uniform Law to Secure the Attendance of Witnesses, Interstate Compact on the Placement of Children, and the Uniform Reciprocal Enforcement of Child Support).

Education is a matter historically controlled by each state. Nonetheless, Plaintiffs allege the UC-MOU encroaches on federal supremacy because the United States Department of Education (US DOE) has allegedly enlisted states to violate federal statutes. PB 15. All the alleged actions at issue are those of the US DOE, not the states.

The rub, of course, is that US DOE is not a Defendant in this action, nor is it a party to the UC-MOU. Plaintiffs have not sued the US DOE because they, by their own admission, lack Article III standing to bring suit in federal court. SR 807. Plaintiffs are not asking for a

remedy with regard to previous agreements or the return of money to the federal government. SR 770. At its heart, Plaintiffs' argument is nothing more than a political red herring, with Plaintiffs attempting to do indirectly what they clearly cannot do directly.

Even if the Court were to consider Plaintiffs' argument, it is based on the faulty premise that the US DOE forced states to adopt a national curriculum. As factual support for this argument, Plaintiffs cite not to the record, but to various articles on education policy. PB 18-19. The only federal court[6] to consider this issue rejected the same arguments raised by different plaintiffs. *See Jindal v. US DOE*, 2015 WL 5474290 (M.D. La Sept. 16, 2015). Unlike this case, however, those plaintiffs sued the real defendant (the US DOE) in the proper forum (federal court).

Therefore, the Court should decline to follow Plaintiffs down that rabbit trail. As Plaintiffs strenuously argue, "educational policy is an area of core state competence and concern that is not delegated to the federal government under the Constitution and our system of federalism." SR 4-6 ¶¶ 18-25. The Compact Clause, therefore, is not implicated because the implementation of assessment tools by individual states "in no respect concern[s] the United States." *Virginia v. Tennessee*, 148 U.S. at 518. Plaintiffs' argument that the states are

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[6] A North Dakota trial court also recently rejected these arguments and dismissed an identical constitutional challenge, with citation to the circuit court order and opinion which is the subject of this appeal. *Cates v. Baesler,* Burleigh County District Court 08-2015-CV-1350 (September 12, 2016); APP. 15-26

prevented from adopting educational assessments because the US DOE is subject to certain restrictions is contrary to the authority over educational matters provided to the states. PB 18. The prohibitions leveled at the US DOE by Congress do not prohibit the states from implementing educational policy within their states.

The distinction is even clearer when applied to the UC-MOU in question. As noted above, under the UC-MOU, states no longer receive grant money from the federal government in order to create the assessment. As such, the formation and conditions of the UC-MOU are not tied to requirements set forth by the US DOE in order to receive RTTT funding, as argued by Plaintiffs. PB 20.[7] Plaintiffs' faulty legal argument that the US DOE "enlists State officials to aid in the evasion and violation" of the just supremacy of the United States is also factually inaccurate as applied to the UC-MOU. PB 18. Simply put, the states cannot unconstitutionally invade an area of concern for which Congress has given them primary responsibility.

2. The UC-MOU does not authorize member states to exercise any power they could not exercise in its absence.

A key element in the Supreme Court's analysis in *United States Steel Corporation* was that the states did no more than they were

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[7] Even in instances where "the United States is not concerned with, and has no power to regulate [activities of state officials]", the Supreme Court has upheld the federal government's ability "to further broad policy objectives by conditioning receipt of federal moneys upon compliance by the recipient with federal statutory and administrative directives." *South Dakota v. Dole*, 483 U.S. 203, 206-07, 210 (1987) (citations omitted).

empowered to do under the Constitution. As discussed above, the function of the UC-MOU, which is to assist SD DOE in creating and implementing educational assessment tools to be used within the State, is a State function which does not run afoul of Congressional prohibitions and does not encroach upon the Supremacy of the United States. The UC-MOU does not grant SD DOE (or states signing similar agreements) any authority it did not already possess. The UC-MOU merely aids the State in creating testing assessments – an obligation of the SD DOE imposed by the South Dakota Legislature. As addressed under Issue I, the obligations under the UC-MOU do not transcend the contracting State's borders. Furthermore, because Plaintiffs do not contest the right of each state to adopt assessment tools separately, "they cannot be heard to complain that a threat to federal supremacy arises" from the adoption of similar standards by multiple states. *United States Steel Corp.*, 434 U.S. at 474.

3. The UC-MOU does not threaten State sovereignty.

One factor in determining whether a state has ceded its sovereign powers by entering into a multistate agreement is the state's ability to withdraw from the agreement. *United States Steel Corp.*, 434 U.S. at 473. In *United States Steel Corporation*, the Multistate Tax Compact at issue permitted a party to withdraw from the Compact *by enacting a repealing statute*. *United States Steel Corp.*, 434 U.S. at 457 (emphasis added). Even when *legislation* was necessary to withdraw, the Supreme

Court found that each state was "free to withdraw [from the compact] at any time." *Id.* at 473; *see also Alabama v. North Carolina*, 560 U.S. 330, 352 (2010) (stating a compact which requires a state enact a law repealing the compact "imposes no limitation" on the state's "exercise of its statutory right to withdraw"); *State v. Kurt*, 802 S.W.2d 954, 955 (Mo. 1991) (holding a compact does not transgress the Compact Clause when a "statute permits the state to withdraw from the compact at will").

Here, the burden of withdrawal is even less than that seen in *United States Steel Corporation* because the State may withdraw from the agreement without legislative action. The UC-MOU outlines an orderly procedure for withdrawal from the agreement that does not require legislative authority. Paragraph 2.1 of the UC-MOU specifies that the UC-MOU has "an initial term of three years." SR 346. Though it "will automatically renew for successive one-year periods," each member "may provide [the University of California] with written notice of nonrenewal between July 1 and October 1 of any calendar year, and this MOU will terminate at the end of the then-current term." *Id.* Other than timing, Paragraph 2.1 imposes no restrictions on the state's ability to withdraw. *Id.*

Paragraph 2.2(a) additionally permits a state to terminate the UC-MOU for breach. SR 246. Under paragraph 2.2(c), a state may terminate the UC-MOU for convenience by providing written notice of its intent to do so on or before the proceeding October 1. SR 347. The

paragraph does not require any justification for the termination, meaning the state could leave the UC-MOU for any reason, subject only to the noted timing restriction. In addition, the state may also terminate the UC-MOU if actions of the Governing Board violate state statute. SR 346.

None of the conditions for withdrawal create an unreasonable barrier to terminating the State's involvement with the UC-MOU. Rather, they ensure UCLA and states have appropriate notice of changes so that sound logistical and fiscal decisions can be made. The State's withdrawal from the UC-MOU does not require the enactment of legislation and is therefore less binding than the compact in *United States Steel Corporation* which, as the U.S. Supreme Court found, did not need congressional approval.

Moreover, the UC-MOU recognizes that the State's sovereign authority continues to reside within the Legislature. Unlike many interstate compacts, the UC-MOU was not codified by act of the Legislature.[8] Rather than being transformed into State law, the UC-MOU is nothing more than a contract between SD DOE and UC. South Dakota Const. Art. III § 1 provides that the legislative power of the State shall be vested in our Legislature. Without legislative approval, the

[8] The State has entered into a number of interstate compacts by legislation or through specific authority granted by the Legislature. *See* e.g. SDCL ch. 26-13 "Interstate Compact on Placement of Children"; SDCL ch. 25-6A "Interstate Compact on Adoption and Medical Assistance."; SDCL ch. 26-12 "Interstate Compact on Juveniles."; SDCL ch. 13-53E "Interstate Compact on Educational Opportunity for Military Children."

Secretary of the South Dakota Department of Education is without authority to cede State sovereignty.

Through promulgation of statutes throughout Title 13 of the South Dakota Codified Laws, the Legislature continues to have authority over educational curriculum and assessment. The Legislature also maintains authority to fund or not fund any agency or agreement. As stated in *Kanaly v. State By & Through Janklow*, 368 N.W.2d 819, 825 (S.D. 1985), "[t]he legislature has the power to create schools, to fund them as it has the power of the purse, and to establish state educational policy." This authority is not diminished by the UC-MOU nor could it be without the consent of the Legislature. In fact, the State's sovereign authority is specifically preserved in the termination provisions of the UC-MOU. The UC-MOU specifically recognizes the South Dakota Legislature's continued ability to control SD DOE's participation. According to the UC-MOU, the State may terminate the agreement if:

> (i) Member's state withdraws, or materially reduces or limits the Member's ability to perform Member's duties under this MOU, or (ii) Member's state fails to appropriate the funds necessary for Member's Annual Fee…

SR 347 at § 2.2(d). The only obligation on the part of the State in such instances is "to provide such advance notice as it is reasonably possible in light of the circumstances leading to the withdrawal of authority or non-appropriation of funds." *Id.*

The termination provision is not diminished by the Governing Board Procedures. While the Governing Board Procedures may "guide the specific *governance structure* provisions set forth in the [MOU] between a Member of Smarter Balanced ("Member") and [UC]," they do not control the *termination* provisions. SR 363. The ability of SD DOE to terminate the agreement with UC continues to be controlled by the UC-MOU. Specifically, the UC-MOU provides:

> In addition, for avoidance of doubt, UC will not be a party to the Governing Board Procedures and will not be bound in any way by the Governing Board Procedures, and under no circumstances will the Governing Board Procedures effect any modification of this MOU or to the respective obligations of the Member and UC to one another hereunder. The Executive Committee will be responsible for interpreting the Governing Board Procedures consistent with the terms of this MOU.

SR 349 at § 3.3 (emphasis added).

The application of the above § 2.2(d) of the UC-MOU eviscerates Plaintiffs' argument that State sovereignty has been contracted away through the UC-MOU and Governance Structure Document. PB 25-25. Like any contract, § 2.2(c) of the UC-MOU imposes some reasonable timing and notice restrictions on withdrawal from the UC-MOU which, as described previously, do not amount to a Compact Clause violation. SR 346-347. With regard to State sovereignty specifically, § 2.2(d) acknowledges, and incorporates into the UC-MOU, the Legislature's ability to terminate the contract at any time. *Id.* It is clear that the

State's sovereignty regarding educational standards, assessment, and funding remain with the South Dakota Legislature.

Moreover, although the UC-MOU, § 3.1 provides that members will be bound by the Governing Board Procedures and decisions of the Governing Board, those decisions only relate to the direction and oversight given to UC regarding the products and services to be *offered* by UC to the separate states under their individual agreements. SR 367 (3(c)). No provision of the UC-MOU requires SD DOE to utilize any product or service produced by UC. In practice, states that are members of the Governing Board contract with a separate vendor for the delivery of the assessment to their students. As in *United States Steel Corporation*, where the states were free to reject the rules and regulations of the multistate tax commission prior to formal adoption by their respective legislatures, states contracting with UC are free to choose not to implement the assessment produced by UC. *U.S. Steel Corp.*, 434 U.S. at 473. South Dakota's sovereignty is not threatened by agreeing to the UC-MOU and, for the same reasons, neither is the sovereignty of other states signing similar MOUs.

4. <u>The UC-MOU does not threaten the sovereignty of non-member states.</u>

In *U.S. Steel Corp.*, Plaintiffs' argument that the compact impaired the "sovereign rights of nonmember states" failed at the outset because Plaintiffs failed to identify how the agreement created an "affront to the

sovereignty of nonmember States." *United States Steel Corp., 434 U.S.* at 478. Likewise, Plaintiffs in this case have not identified how the existence of the UC-MOU implicates constitutional strictures.

The UC-MOU has not diminished the political power of the non-contracting states. The political power of the states remains the same today as it was before. They are able to do everything they could do before the UC-MOU was signed. As to the development of assessment tools, every non-contracting state is still able to decide whether to have assessments and, if so, whether to develop them itself, jointly with one or more other states, or with other governmental or even nongovernmental organizations.

Even if there is an incentive to sign an agreement with UC, incentives are not directives; incentives do not deprive states of their freedom to choose how they exercise their sovereignty. Assuming that a current non-contracting state has decided to use the Common Core State Standards, and assuming that it needs assessment tools that conform to those standards, that state can choose to develop assessment tools on its own or contract with UC—or some other vendor designing assessments—to obtain the same economic advantages the contracting states have obtained or expect to obtain.

Regardless of how a non-contracting state chooses to exercise its sovereignty, the economies of scale achieved by contracting states is not a political advantage; it neither enhances the political power of the

member states nor diminishes the political power of the states. Even if the Court considers the actions of other states in signing similar MOUs and participating in the Governing Board Procedures, the fact that other states have entered similar agreements does not create a constitutional violation. *United States Steel Corp.*, 434 U.S. at 472 ("The number of parties to an agreement is irrelevant if it does not impermissibly enhance state power at the expense of federal supremacy."). "Unless that pressure transgresses the bounds of the Commerce Clause or the Privileges and Immunities Clause. . . it is not clear how our federal structure is implicated." *Id.* at 478. Plaintiffs have not shown that the fifteen states which have similar agreements with UC "touch[] upon constitutional strictures" and enhance state power *with respect to* the National Government. *Id.* The UC-MOU is not a threat to the sovereignty of nonmember states.

III.

THE CIRCUIT COURT CORRECTLY DETERMINED THAT THE SMARTER BALANCED ASSESSMENT DID NOT VIOLATE SDCL 13-3-55.

Part of the Smarter Balanced assessment is computer adaptive, with the difficulty of questions changing based on a student's response to measure the academic progress of each student. SR 561. Plaintiffs claim that this adaptive nature violates a State statute which reads:

> Every public school district shall annually administer the same assessment to all students in grades three to eight, inclusive, and in grade eleven. The assessment shall measure the academic progress of each student. Every

> public school district shall annually administer to all students in at least two grade levels an achievement test to assess writing skills. The assessment instruments shall be provided by the Department of Education, and the department shall determine the two grade levels to be tested. The tests shall be administered within timelines established by the Department of Education by rules promulgated pursuant to chapter 1-26 starting in the spring of the 2002-2003 school year. Each state-designed test shall be correlated with the state's content standards. The South Dakota Board of Education may promulgate rules pursuant to chapter 1-26 to provide for administration of all assessments.

SDCL 13-3-55 (emphasis added). According to Plaintiffs, the fact that one student does not receive *the exact same questions* as another student means the "same assessment" is not being used. PB 32-38. Plaintiffs never clearly address the circuit court's holding on this issue, instead dedicating page upon page of their brief to the various definitions of assessment and the argument that an assessment is a test. *Id.* The issue is not whether an assessment is a test. The issue is that the circuit court rejected Plaintiffs' contention that "assessment" should be read as *"individual test questions."*

> The statute uses the broader term "assessment" rather than the more specific word "questions." Had the Legislature intended every student in the same grade answer the same questions, the Legislature could have been more specific, but this Court cannot add words to the statute … As written … same assessment … means that if the Department of Education chooses to administer the Smarter Balanced assessment test, then every student in grade three through eight, and grade eleven, in all public school districts across the State must take the Smarter Balanced assessment test.

SR 699.

The circuit court also pointed out that this reading fit with the entire context of the statute, which was to measure the academic progress of *each* student. *Id.* *See Klein v. Sanford USD Medical Center*, 2015 S.D. 95 ¶ 13, 872 N.W.2d 802, 806; *Save Our Neighborhood--Sioux Falls v. City of Sioux Falls*, 2014 S.D. 35, ¶ 9, 849 N.W.2d 265, 268 (citations omitted) (Statutory words and phrases are not read in isolation and must be read in their context in the statute as a whole). Interestingly, Plaintiffs' counter to this reading is to cite a number of articles which are not part of the settled record in this case, meaning it should be disregarded by this Court. PB 37-38.

The circuit court correctly interpreted the plain meaning of the statute. Plaintiffs' interpretation, on the other hand, clearly would lead to an absurd result. Plaintiffs contend that the plain meaning of "same assessment" is "identical test questions." If one plugs Plaintiffs' alleged plain meaning into the statute as written, it then reads, "Every public school district shall annually administer the [identical test questions] to all students in grades three to eight, inclusive, and in grade eleven." SDCL 13-3-55. This would require third graders to receive the same questions as eleventh graders.

Plaintiffs allege that their plain meaning would only require students in the *same grade level* to receive the same questions. But Plaintiffs cannot have it both ways on this issue. If one accepts Plaintiffs' reading of the statute, then the absurd result follows from the remainder

of the statutory language. The only reading which harmonizes with the entire context is that adopted by the circuit court, which is why the circuit court's opinion on this issue should be affirmed.

CONCLUSION

Based on the arguments and authorities provided above, the State respectfully requests this Court find that the UC-MOU is not a compact subject to a Compact Clause analysis and that, as found by the Circuit Court, the UC-MOU did not need Congressional approval in order to be valid. Additionally, the State requests that this Court uphold the circuit court's decision finding the Smarter Balanced Assessment does not violate SDCL 13-3-55.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. I certify that the Appellee's Brief is within the limitation provided for in SDCL 15-26A-66(b) using Bookman Old Style typeface in 12 point type. Appellee's Brief contains 7,490 words.

2. I certify that the word processing software used to prepare this brief is Microsoft Word 2010.

Dated this 16th day of November, 2016.

_____
Richard M. Williams
Deputy Attorney General

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 16th day of November, 2016, a true and correct copy of Appellee's Brief in the matter *Amber Mauricio and Shelli Grinager v. Dennis M. Daugaard, et al.* was served via electronic mail upon Robert Rohl, rjr@johnsoneiesland.com, D. John Sauer & Michael Martinich-Sauter, jsauer@jamesotis.com, and Kate Oliveri, rthompson@thomasmore.org.

_____
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Deputy Attorney General

APPENDIX

Table of Contents

Original Model Multistate Tax Compact

TEXT OF THE MODEL MULTISTATE TAX COMPACT

Article I. Purposes.

The purposes of this compact are to:

1. Facilitate proper determination of State and local tax liability of multistate taxpayers, including the equitable apportionment of tax bases and settlement of apportionment disputes.

2. Promote uniformity or compatibility in significant components of tax systems.

3. Facilitate taxpayer convenience and compliance in the filing of tax returns and in other phases of tax administration.

4. Avoid duplicative taxation.

Article II. Definitions.

As used in this compact:

1. "State" means a State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, or any Territory or Possession of the United States.

2. "Subdivision" means any governmental unit or special district of a State.

3. "Taxpayer" means any corporation, partnership, firm, association, governmental unit or agency or person acting as a business entity in more than one State.

4. "Income tax" means a tax imposed on or measured by net income including any tax imposed on or measured by an amount arrived at by deducting expenses from gross income, one or more forms of which expenses are not specifically and directly related to particular transactions.

5. "Capital stock tax" means a tax measured in any way by the capital of a corporation considered in its entirety.

6. "Gross receipts tax" means a tax, other than a sales tax, which is imposed on or measured by the gross volume of business, in terms of gross receipts or in other terms, and in the determination of which no deduction is allowed which would constitute the tax an income tax.

7. "Sales tax" means a tax imposed with respect to the transfer for a consideration of ownership, possession or custody of tangible personal property or the rendering of services measured by the price of the tangible personal property transferred or services rendered and which is required by State or local law to be separately stated from the sales price by the seller, or which is customarily separately stated from the sales price, but does not include a tax imposed exclusively on the sale of a specifically identified commodity or article or class of commodities or articles.

8. "Use tax" means a nonrecurring tax, other than a sales tax, which (a) is imposed on or with respect to the exercise or enjoyment of any right or power over tangible personal property incident to the ownership, possession or custody of that property or the leasing of that property from another including any consumption, keeping, retention, or other use of tangible personal property and (b) is complementary to a sales tax.

9. "Tax" means an income tax, capital stock tax, gross receipts tax, sales tax, use tax, and any other tax which has a multistate impact, except that the provisions of Articles III, IV and V of this compact shall apply only to the taxes specifically designated therein and the provisions of Article IX of this compact shall apply only in respect to determinations pursuant to Article IV.

Article III. Elements of Income Tax Laws.

Taxpayer Option, State and Local Taxes.

1. Any taxpayer subject to an income tax whose income is subject to apportionment and allocation for tax purposes pursuant to the laws of a party State or pursuant to the laws of subdivisions in two or more party States may elect to apportion and allocate his income in the manner provided by the laws of such States or by the laws of such States and subdivisions without reference to this compact, or may elect to apportion and allocate in accordance with Article IV. This election for any tax year may be made in all party States or subdivisions thereof or in any one or more of the party States or subdivisions thereof without reference to the election made in the others. For the purposes of this paragraph, taxes imposed by subdivisions shall be considered separately from State taxes, and the apportionment and allocation also may be applied to the entire tax base. In no instance wherein Article IV is employed for all subdivisions of a State may the sum of all apportionments and allocations to subdivisions within a State be greater than the apportionment and allocation that would be assignable to that State if the apportionment or allocation were being made with respect to a State income tax.

Taxpayer Option, Short Form.

2. Each party State or any subdivision thereof which imposes an income tax shall provide by law that any taxpayer required to file a return whose only activities within the taxing jurisdiction consist of sales and do not include owning or renting real estate or tangible personal property and whose dollar volume of gross sales made during the tax year within the State or subdivision, as the case may be, is not in excess of $100,000 may elect to report and pay any tax due on the basis of a percentage of such volume and shall adopt rates which shall produce a tax which reasonably approximates the tax otherwise due. The Multistate Tax Commission, not more than once in five years, may adjust the $100,000 figure in order to reflect such changes as may occur in the real value of the dollar, and such adjusted figure, upon adoption by the Commission, shall replace the $100,000 figure specifically provided herein. Each party State and subdivision thereof may make the same election available to taxpayers additional to those specified in this paragraph.

Coverage.

3. Nothing in this Article relates to the reporting or payment of any tax other than an income tax.

Article IV. Division of Income.

1. As used in this Article, unless the context otherwise requires:

(a) "Business income" means income arising from transactions and activity in the regular course of the taxpayer's trade or business and includes income from tangible and intangible property if the acquisition, management and disposition of the property constitute integral parts of the taxpayer's regular trade or business operations.

(b) "Commercial domicile" means the principal place from which the trade or business of the taxpayer is directed or managed.

(c) "Compensation" means wages, salaries, commissions and any other form of remuneration paid to employees for personal services.

(d) "Financial organization" means any bank, trust company, savings bank, industrial bank, land bank, safe deposit company, private banker, savings and loan association, credit union, cooperative bank, small loan company, sales finance company, investment company, or any type of insurance company.

(e) "Nonbusiness income" means all income other than business income.

(f) "Public utility" means any business entity (1) which owns or operates any plant, equipment, property, franchise, or license for the transmission of communications, transportation of goods or persons, except by pipeline, or the production, transmission, sale, delivery, or furnishing of electricity, water or steam; and (2) whose rates of charges for goods or services have been established or approved by a Federal, State or local government or governmental agency.

(g) "Sales" means all gross receipts of the taxpayer not allocated under paragraphs of this Article.

(h) "State" means any State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, any Territory or Possession of the United States, and any foreign country or political subdivision thereof.

(i) "This State" means the State in which the relevant tax return is filed or, in the case of application of this Article to the apportionment and allocation of income for local tax purposes, the subdivision or local taxing district in which the relevant tax return is filed.

2. Any taxpayer having income from business activity which is taxable both within and without this State, other than activity as a financial organization or public utility or the rendering of purely personal services by an individual, shall allocate and apportion his net income as provided in this Article. If a taxpayer has income from business activity as a public utility but derives the greater percentage of his income from activities subject to this Article, the taxpayer may elect to allocate and apportion his entire net income as provided in this Article.

3. For purposes of allocation and apportionment of income under this Article, a taxpayer is taxable in another State if (1) in that State he is subject to a net income tax, a franchise tax measured by net income, a franchise tax for the privilege of doing business, or a corporate stock tax, or (2) that State has jurisdiction to subject the taxpayer to a net income tax regardless of whether, in fact, the State does or does not do so.

4. Rents and royalties from real or tangible personal property, capital gains, interest, dividends or patent or copyright royalties, to the extent that they constitute nonbusiness income, shall be allocated as provided in paragraphs 5 through 8 of this Article.

5. (a) Net rents and royalties from real property located in this State are allocable to this State.

(b) Net rents and royalties from tangible personal property are allocable to this State: (1) if and to the extent that the property is utilized in this State, or (2) in their entirety if the taxpayer's commercial domicile is in this State and the taxpayer is not organized under the laws of or taxable in the State in which the property is utilized.

(c) The extent of utilization of tangible personal property in a State is determined by multiplying the rents and royalties by a fraction the numerator of which is the number of days of physical location of the property in the State during the rental or royalty period in the taxable year and the denominator of which is the number of days of physical location of the property everywhere during all rental or royalty periods in the taxable year. If the physical location of the property during the rental or royalty period is unknown or unascertainable by the taxpayer, tangible personal property is utilized in the State in which the property was located at the time the rental or royalty payer obtained possession.

6. (a) Capital gains and losses from sales of real property located in this State are allocable to this State.

(b) Capital gains and losses from sales of tangible personal property are allocable to this State if (1) the property had a situs in this State at the time of the sale, or (2) the taxpayer's commercial domicile is in this State and the taxpayer is not taxable in the State in which the property had a situs.

(c) Capital gains and losses from sales of intangible personal property are allocable to this State if the taxpayer's commercial domicile is in this State.

7. Interest and dividends are allocable to this State if the taxpayer's commercial domicile is in this State.

8. (a) Patent and copyright royalties are allocable to this State: (1) if and to the extent that the patent or copyright is utilized by the payer in this State, or (2) if and to the extent that the patent or copyright is utilized by the payer in a State in which the taxpayer is not taxable and the taxpayer's commercial domicile is in this State.

(b) A patent is utilized in a State to the extent that it is employed in production, fabrication, manufacturing, or other processing in the State or to the extent that a patented product is produced in the State. If the basis of receipts from patent royalties does not permit allocation to States or if

the accounting procedures do not reflect States of utilization, the patent is utilized in the State in which the taxpayer's commercial domicile is located.

(c) A copyright is utilized in a State to the extent that printing or other publication originates in the State. If the basis of receipts from copyright royalties does not permit allocation to States or if the accounting procedures do not reflect States of utilization, the copyright is utilized in the State in which the taxpayer's commercial domicile is located.

9. All business income shall be apportioned to this State by multiplying the income by a fraction the numerator of which is the property factor plus the payroll factor plus the sales factor and the denominator of which is three.

10. The property factor is a fraction the numerator of which is the average value of the taxpayer's real and tangible personal property owned or rented and used in this State during the tax period and the denominator of which is the average value of all of the taxpayer's real and tangible personal property owned or rented and used during the tax period.

11. Property owned by the taxpayer is valued at its original cost. Property rented by the taxpayer is valued at eight times the net annual rental rate. Net annual rental rate is the annual rental rate paid by the taxpayer less any annual rental rate received by the taxpayer from subrentals.

12. The average value of property shall be determined by averaging the values at the beginning and ending of the tax period; but the tax administrator may require the averaging of monthly values during the tax period if reasonably required to reflect properly the average value of the taxpayer's property.

13. The payroll factor is a fraction the numerator of which is the total amount paid in this State during the tax period by the taxpayer for compensation and the denominator of which is the total compensation paid everywhere during the tax period.

14. Compensation is paid in this State if:

(a) the individual's service is performed entirely within the State;

(b) the individual's service is performed both within and without the State, but the service performed without the State is incidental to the individual's service within the State; or

(c) some of the service is performed in the State and (1) the base of operations or, if there is no base of operations, the place from which the service is directed or controlled is in the State, or (2) the base of operations or the place from which the service is directed or controlled is not in any State in which some part of the service is performed, but the individual's residence is in this State.

15. The sales factor is a fraction the numerator of which is the total sales of the taxpayer in this State during the tax period and the denominator of which is the total sales of the taxpayer everywhere during the tax period.

16. Sales of tangible personal property are in this State if:

(a) the property is delivered or shipped to a purchaser, other than the United States Government, within this State regardless of the f.o.b. point or other conditions of the sale; or

(b) the property is shipped from an office, store, warehouse, factory, or other place of storage in this State and (1) the purchaser is the United States Government or (2) the taxpayer is not taxable in the State of the purchaser.

17. Sales, other than sales of tangible personal property, are in this State if:

(a) the income-producing activity is performed in this State; or

(b) the income-producing activity is performed both in and outside this State and a greater proportion of the income-producing activity is performed in this State than in any other State, based on costs of performance.

18. If the allocation and apportionment provisions of this Article do not fairly represent the extent of the taxpayer's business activity in this State, the taxpayer may petition for or the tax administrator may require, in respect to all or any part of the taxpayer's business activity, if reasonable:

(a) separate accounting;

(b) the exclusion of any one or more of the factors;

(c) the inclusion of one or more additional factors which will fairly represent the taxpayer's business activity in this State; or

(d) the employment of any other method to effectuate an equitable allocation and apportionment of the taxpayer's income.

Article V. Elements of Sales and Use Tax Laws.

Tax Credit.

1. Each purchaser liable for a use tax on tangible personal property shall be entitled to full credit for the combined amount or amounts of legally imposed sales or use taxes paid by him with respect to the same property to another State and any subdivision thereof. The credit shall be applied first against the amount of any use tax due the State, and any unused portion of the credit shall then be applied against the amount of any use tax due a subdivision.

Exemption Certificates. Vendors May Rely.

2. Whenever a vendor receives and accepts in good faith from a purchaser a resale or other exemption certificate or other written evidence of exemption authorized by the appropriate State or subdivision taxing authority, the vendor shall be relieved of liability for a sales or use tax with respect to the transaction.

Article VI. The Commission.

Organization and Management.

1. (a) The Multistate Tax Commission is hereby established. It shall be composed of one "member" from each party State who shall be the head of the State agency charged with the administration of the types of taxes to which this compact applies. If there is more than one such agency, the State shall provide by law for the selection of the Commission member from the heads of the relevant agencies. State law may provide that a member of the Commission be represented by an alternate, but only if there is on file with the Commission written notification of the designation and identity of the alternate. The Attorney General of each party State or his designee, or other counsel if the laws of the party State specifically provide, shall be entitled to attend the meetings of the Commission, but shall not vote. Such Attorneys General, designees, or other counsel shall receive all notices of meetings required under paragraph 1(e) of this Article.

(b) Each party State shall provide by law for the selection of representatives from its subdivisions affected by this compact to consult with the Commission member from that State.

(c) Each member shall be entitled to one vote. The Commission shall not act unless a majority of the members are present, and no action shall be binding unless approved by a majority of the total number of members.

(d) The Commission shall adopt an official seal to be used as it may provide.

(e) The Commission shall hold an annual meeting and such other regular meetings as its bylaws may provide and such special meetings as its Executive Committee may determine. The Commission bylaws shall specify the dates of the annual and any other regular meetings and shall provide for the giving of notice of annual, regular and special meetings. Notices of special meetings shall include the reasons therefor and an agenda of the items to be considered.

(f) The Commission shall elect annually, from among its members, a Chairman, a Vice Chairman and a Treasurer. The Commission shall appoint an Executive Director who shall serve at its pleasure, and it shall fix his duties and compensation. The Executive Director shall be Secretary of the Commission. The Commission shall make provision for the bonding of such of its officers and employees as it may deem appropriate.

(g) Irrespective of the civil service, personnel or other merit system laws of any party State, the Executive Director shall appoint or discharge such personnel as may be necessary for the performance of the functions of the Commission and shall fix their duties and compensation. The Commission bylaws shall provide for personnel policies and programs.

(h) The Commission may borrow, accept or contract for the services of personnel from any State, the United States, or any other governmental entity.

(i) The Commission may accept for any of its purposes and functions any and all donations and grants of money, equipment, supplies, materials and services, conditional or otherwise, from any governmental entity, and may utilize and dispose of the same.

(j) The Commission may establish one or more offices for the transacting of its business.

(k) The Commission shall adopt bylaws for the conduct of its business. The Commission shall publish its bylaws in convenient form and shall file a copy of the bylaws and any amendments thereto with the appropriate agency or officer in each of the party States.

(l) The Commission annually shall make to the Governor and legislature of each party State a report covering its activities for the preceding year. Any donation or grant accepted by the Commission or services borrowed shall be reported in the annual report of the Commission and shall include the nature, amount and conditions, if any, of the donation, gift, grant or services borrowed and the identity of the donor or lender. The Commission may make additional reports as it may deem desirable.

Committees.

2. (a) To assist in the conduct of its business when the full Commission is not meeting, the Commission shall have an Executive Committee of seven members, including the Chairman, Vice Chairman, Treasurer and four other members elected annually by the Commission. The Executive Committee, subject to the provisions of this compact and consistent with the policies of the Commission, shall function as provided in the bylaws of the Commission.

(b) The Commission may establish advisory and technical committees, membership on which may include private persons and public officials, in furthering any of its activities. Such committees may consider any matter of concern to the Commission, including problems of special interest to any party State and problems dealing with particular types of taxes.

(c) The Commission may establish such additional committees as its bylaws may provide.

Powers.

3. In addition to powers conferred elsewhere in this compact, the Commission shall have power to:

(a) Study State and local tax systems and particular types of State and local taxes.

(b) Develop and recommend proposals for an increase in uniformity or compatibility of State and local tax laws with a view toward encouraging the simplification and improvement of State and local tax law and administration.

(c) Compile and publish such information as would, in its judgment, assist the party States in implementation of the compact and taxpayers in complying with State and local tax laws.

(d) Do all things necessary and incidental to the administration of its functions pursuant to this compact.

Finance.

4. (a) The Commission shall submit to the Governor or designated officer or officers of each party State a budget of its estimated expenditures for such period as may be required by the laws of that State for presentation to the legislature thereof.

(b) Each of the Commission's budgets of estimated expenditures shall contain specific recommendations of the amounts to be appropriated by each of the party States. The total amount of appropriations required under any such budget shall be apportioned among the party States as follows: one-tenth in equal shares; and the remainder in proportion to the amount of revenue collected by each party State and its subdivisions from income taxes, capital stock taxes, gross receipts taxes, sales and use taxes. In determining such amounts, the Commission shall employ such available public sources of information as, in its judgment, present the most equitable and accurate comparisons among the party States. Each of the Commission's budgets of estimated expenditures and requests for appropriations shall indicate the sources used in obtaining information employed in applying the formula contained in this paragraph.

(c) The Commission shall not pledge the credit of any party State. The Commission may meet any of its obligations in whole or in part with funds available to it under paragraph 1(i) of this Article; provided that the Commission takes specific action setting aside such funds prior to incurring any obligation to be met in whole or in part in such manner. Except where the Commission makes use of funds available to it under paragraph 1(i), the Commission shall not incur any obligation prior to the allotment of funds by the party States adequate to meet the same.

(d) The Commission shall keep accurate accounts of all receipts and disbursements. The receipts and disbursements of the Commission shall be subject to the audit and accounting procedures established under its bylaws. All receipts and disbursements of funds handled by the Commission shall be audited yearly by a certified or licensed public accountant and the report of the audit shall be included in and become part of the annual report of the Commission.

(e) The accounts of the Commission shall be open at any reasonable time for inspection by duly constituted officers of the party States and by any persons authorized by the Commission.

(f) Nothing contained in this Article shall be construed to prevent Commission compliance with laws relating to audit or inspection of accounts by or on behalf of any government contributing to the support of the Commission.

Article VII. Uniform Regulations and Forms.

1. Whenever any two or more party States or subdivisions of party States have uniform or similar provisions of law relating to an income tax, capital stock tax, gross receipts tax, or sales or use tax, the Commission may adopt uniform regulations for any phase of the administration of such law, including assertion of jurisdiction to tax or prescribing uniform tax forms. The Commission may also act with respect to the provisions of Article IV of this compact.

2. Prior to the adoption of any regulation, the Commission shall:

(a) As provided in its bylaws, hold at least one public hearing on due notice to all affected party States and subdivisions thereof and to all taxpayers and other persons who have made timely request of the Commission for advance notice of its regulation-making proceedings.

(b) Afford all affected party States and subdivisions and interested persons an opportunity to submit relevant written data and views, which shall be considered fully by the Commission.

3. The Commission shall submit any regulations adopted by it to the appropriate officials of all party States and subdivisions to which they might apply. Each such State and subdivision shall consider any such regulation for adoption in accordance with its own laws and procedures.

Article VIII. Interstate Audits.

1. This Article shall be in force only in those party States that specifically provide therefor by statute.

2. Any party State or subdivision thereof desiring to make or participate in an audit of any accounts, books, papers, records or other documents may request the Commission to perform the audit on its behalf. In responding to the request, the Commission shall have access to and may examine, at any reasonable time, such accounts, books, papers, records, and other documents and any relevant property or stock of merchandise. The Commission may enter into agreements with party States or their subdivisions for assistance in performance of the audit. The Commission shall make charges, to be paid by the State or local government or governments for which it performs the service, for any audits performed by it in order to reimburse itself for the actual costs incurred in making the audit.

3. The Commission may require the attendance of any person within the State where it is conducting an audit or part thereof at a time and place fixed by it within such State for the purpose of giving testimony with respect to any account, book, paper, document, other record, property or stock of merchandise being examined in connection with the audit. If the person is not within the jurisdiction, he may be required to attend for such purpose at any time and place fixed by the Commission within the State of which he is a resident.

4. The Commission may apply to any court having power to issue compulsory process for orders in aid of its powers and responsibilities pursuant to this Article, and any and all such courts shall have jurisdiction to issue such orders. Failure of any person to obey any such order shall be punishable as contempt of the issuing court. If the party or subject matter on account of which the Commission seeks an order is within the jurisdiction of the court to which application is made, such application may be to a court in the State or subdivision on behalf of which the audit is being made or a court in the State in which the object of the order being sought is situated.

5. The Commission may decline to perform any audit required if it finds that its available personnel or other resources are insufficient for the purpose or that, in the terms requested, the audit is impracticable of satisfactory performance. If the Commission, on the basis of its experience, has reason to believe that an audit of a particular taxpayer, either at a particular time or on a

particular schedule, would be of interest to a number of party States or their subdivisions, it may offer to make the audit or audits, the offer to be contingent upon sufficient participation therein as determined by the Commission.

6. Information obtained by any audit pursuant to this Article shall be confidential and available only for tax purposes to party States, their subdivisions or the United States. Availability of information shall be in accordance with the laws of the States or subdivisions on whose account the Commission performs the audit and only through the appropriate agencies or officers of such States or subdivisions. Nothing in this Article shall be construed to require any taxpayer to keep records for any period not otherwise required by law.

7. Other arrangements made or authorized pursuant to law for cooperative audit by or on behalf of the party States or any of their subdivisions are not superseded or invalidated by this Article.

8. In no event shall the Commission make any charge against a taxpayer for an audit.

9. As used in this Article, "tax," in addition to the meaning ascribed to it in Article II, means any tax or license fee imposed in whole or in part for revenue purposes.

Article IX. Arbitration.

1. Whenever the Commission finds a need for settling disputes concerning apportionments and allocations by arbitration, it may adopt a regulation placing this Article in effect, notwithstanding the provisions of Article VII.

2. The Commission shall select and maintain an Arbitration Panel composed of officers and employees of State and local governments and private persons who shall be knowledgeable and experienced in matters of tax law and administration.

3. Whenever a taxpayer who has elected to employ Article IV, or whenever the laws of the party State or subdivision thereof are substantially identical with the relevant provisions of Article IV, the taxpayer, by written notice to the Commission and to each party State or subdivision thereof that would be affected, may secure arbitration of an apportionment or allocation if he is dissatisfied with the final administrative determination of the tax agency of the State or subdivision with respect thereto on the ground that it would subject him to double or multiple taxation by two or more party States or subdivisions thereof. Each party State and subdivision thereof hereby consents to the arbitration as provided herein, and agrees to be bound thereby.

4. The Arbitration Board shall be composed of one person selected by the taxpayer, one by the agency or agencies involved, and one member of the Commission's Arbitration Panel. If the agencies involved are unable to agree on the person to be selected by them, such person shall be selected by lot from the total membership of the Arbitration Panel. The two persons selected for the Board in the manner provided by the foregoing provisions of this paragraph shall jointly select the third member of the Board. If they are unable to agree on the selection, the third member shall be selected by lot from among the total membership of the Arbitration Panel. No member of a Board selected by lot shall be qualified to serve if he is an officer or employee of or is otherwise

affiliated with any party to the arbitration proceeding. Residence within the jurisdiction of a party to the arbitration proceeding shall not constitute affiliation within the meaning of this paragraph.

5. The Board may sit in any State or subdivision party to the proceeding, in the State of the taxpayer's incorporation, residence or domicile, in any State in which the taxpayer does business, or in any place that it finds most appropriate for gaining access to evidence relevant to the matter before it.

6. The Board shall give due notice of the times and places of its hearings. The parties shall be entitled to be heard, to present evidence, and to examine and cross-examine witnesses. The Board shall act by majority vote.

7. The Board shall have power to administer oaths, take testimony, subpoena and require the attendance of witnesses and the production of accounts, books, papers, records, and other documents, and issue commissions to take testimony. Subpoenas may be signed by any member of the Board. In case of failure to obey a subpoena, and upon application by the Board, any judge of a court of competent jurisdiction of the State in which the Board is sitting or in which the person to whom the subpoena is directed may be found may make an order requiring compliance with the subpoena, and the court may punish failure to obey the order as a contempt.

8. Unless the parties otherwise agree, the expenses and other costs of the arbitration shall be assessed and allocated among the parties by the Board in such manner as it may determine. The Commission shall fix a schedule of compensation for Arbitration Board members and of other allowable expenses and costs. No officer or employee of a State or local government who serves as a member of a Board shall be entitled to compensation therefor unless he is required on account of his service to forego the regular compensation attaching to his public employment, but any such Board member shall be entitled to expenses.

9. The Board shall determine the disputed apportionment or allocation and any matters necessary thereto. The determinations of the Board shall be final for purposes of making the apportionment or allocation, but for no other purpose.

10. The Board shall file with the Commission and with each tax agency represented in the proceeding: the determination of the Board; the Board's written statement of its reasons therefor; the record of the Board's proceedings; and any other documents required by the arbitration rules of the Commission to be filed.

11. The Commission shall publish the determinations of Boards together with the statements of the reasons therefor.

12. The Commission shall adopt and publish rules of procedure and practice and shall file a copy of such rules and of any amendment thereto with the appropriate agency or officer in each of the party States.

13. Nothing contained herein shall prevent at any time a written compromise of any matter or matters in dispute, if otherwise lawful, by the parties to the arbitration proceedings.

Article X. Entry Into Force and Withdrawal.

1. This compact shall enter into force when enacted into law by any seven States. Thereafter, this compact shall become effective as to any other State upon its enactment thereof. The Commission shall arrange for notification of all party States whenever there is a new enactment of the compact.

2. Any party State may withdraw from this compact by enacting a statute repealing the same. No withdrawal shall affect any liability already incurred by or chargeable to a party State prior to the time of such withdrawal.

3. No proceeding commenced before an Arbitration Board prior to the withdrawal of a State and to which the withdrawing State or any subdivision thereof is a party shall be discontinued or terminated by the withdrawal, nor shall the Board thereby lose jurisdiction over any of the parties to the proceeding necessary to make a binding determination therein.

Article XI. Effect on Other Laws and Jurisdiction.

Nothing in this compact shall be construed to:

(a) Affect the power of any State or subdivision thereof to fix rates of taxation, except that a party State shall be obligated to implement Article III 2 of this compact.

(b) Apply to any tax or fixed fee imposed for the registration of a motor vehicle or any tax on motor fuel, other than sales tax; provided that the definition of "tax" in Article VIII 9 may apply for the purposes of that Article and that the Commission's powers of study and recommendation pursuant to Article VI 3 may apply.

(c) Withdraw or limit the jurisdiction of any State or local court or administrative officer or body with respect to any person, corporation or other entity or subject matter, except to the extent that such jurisdiction is expressly conferred by or pursuant to this compact upon another agency or body.

(d) Supersede or limit the jurisdiction of any court of the United States.

Article XII. Construction and Severability.

This compact shall be liberally construed so as to effectuate the purposes thereof. The provisions of this compact shall be severable and if any phrase, clause, sentence, or provision of this compact is declared to be contrary to the constitution of any State or of the United States or the applicability thereof to any government, agency, person or circumstance is held invalid, the validity of the remainder of this compact and the applicability thereof to any government, agency, person or circumstance shall not be affected thereby. If this compact shall be held contrary to the constitution of any State participating therein, the compact shall remain in full force and effect as to the remaining party States and in full force and effect as to the State affected as to all severable matters.

STATE OF NORTH DAKOTA

IN DISTRICT COURT

COUNTY OF BURLEIGH

SOUTH CENTRAL JUDICIAL DISTRICT

Steve Cates, Robert Skarphol, Catherine Cartier, and Charles Cartier,

Plaintiffs,

v.

Kirsten Baesler, in her official capacity and the North Dakota State Superintendent of Superintendent of Public Instruction; John Stewart Dalrymple III, in his official capacity as Governor of North Dakota; Kelly Schmidt, in her official capaciy as the North Dakota State Treasurer; North Dakota Department of Public Instruction; and Office of the North Dakota State Treasurer,

Defendants.

Case Number: 08-2015-CV-1350

ORDER ON MOTION FOR PRELIMINARY INJUNCTION AND MOTION TO DISMISS

I. Procedural History.

[¶1] Plaintiffs commenced this action for declaratory and injunctive relief seeking an order declaring the Smarter Balanced Assessment Consortium (SBAC) an illegal entitly and declaring the State of North Dakota's obligations to the SBAC void and unenforceable [Index # 2]. Plaintiffs filed a motion for a preliminary injunction seeking to enjoin the disbursement of ND taxpayer funds to the SBAC [Index # 16]. The State filed a memorandum in opposition to the plaintiff's motion for a preliminary injunction [Index # 29] and also filed a motion to dismiss the plaintiffs' complaint [Index # 24]. Plaintiffs filed a memorandum in opposition to the

defendants' motion to dismiss [Index # 61]. A hearing on the motions was held July 27, 2015. Following the hearing, Plaintiffs filed a sur-reply in opposition to the motion to dismiss and the Defendants filed a reply brief in support of the motion to dismiss.

[¶2] Plaintiffs allege in their motion that the SBAC: (1) constitutes and unlawful interstate compact formed without Congress's consent and that North Dakota's participation in the SBAC violates the Compact Clause of Article 1, § 10, cl. 3 of the United States Constitution; (2) that the SBAC's existence and operation, and North Dakota's participation in the SBAC, violoates numerous federal statutes; and, (3) was created through a course of conduct by the United States Department of Education, in collaberation with the defendants, that violates the doctrine of unconstitutional conditions, the non-delegation doctrine, and the sovereignty over educational policy guaranteed to the State of North Dakota under the Tenth Amendment. Plaintiffs assert that any commitments or agreements under which North Dakota would disburse funds to the SBAC should be declared unlawful and void.

[¶3] In their motion to dismiss [Index # 24], the Defendants assert that the complaint fails to state a claim upon which relief can be granted, because as a matter of law, the Consortium is not an illegal interstate compact and does not violate any federal or state laws.

II. Pertinent Facts.

[¶4] In June 2010, the North Dakota Department of Public Instruction ("DPI") signed a Memorandum of Understanding SMARTER Balanced Assessment Consortium ("2010 MOU"). A number of states, including North Dakota, entered into the 2010 MOU to participate in the "Race to the Top Fund ("RTTT") Assessment Program: Comprehensive Assessment Systems

Grant Application, " in accordance with a Notice Inviting Applications ("NIA") published in the Federal Register on April 9, 2010 (75 Fed. Reg. 18171-18185). The NIA provided federal funding to support a limited number of grant projects to develop, but not implement, a new generation of appropriately valid and reliable assessments that would be understood as measuring student progress, leading to college and career readiness. Participation in the grant program was voluntary and did not establish a contractual agreement. All grant activities were funded with federal grant funds; no state funds were obligated to the grant project.

[¶5] North Dakota entered the Consortium as an Advisory State, a status indicating a lower level of commitment than a Governing State. The 2010 MOU, provided that an advisory state:

> - Has not fully committed to any Consortium but supports the work of this Consortium,
>
> - Participates in all Consortium activities but does not have a vote unless the Steering Committee deems it beneficial to gather input on decisions or chooses to have the Total Membership vote on an issue,
>
> - May contribute to policy, logistical, and implementation discussions that are necessary to fully operationalize the SMARTER Balanced Assessment System, and
>
> - Is encouraged to participate in the Work Groups.

[¶6] The 2010 MOU provided that North Dakota and other member states could exit the Consortium without cause. It also allowed North Dakota to change from an Advisory State to a Governing State.

[¶7] Relying on the 2010 MOU, the Consortium applied for and received federal RTTT assessment grant funds. The Consortium used the funds to begin developing assessments, with the State of Washington providing fiscal management and a home for the Consortium's administration and staff.

[¶8] The Consortium issued a document entitled Governance Structure, dated July 1, 2010. The document addressed membership criteria, organizational structure, and membership policies. With regard to exiting the Consortium, the document provided: "Any State may leave the Consortium] without cause" by submitting a written request to exit the Consortium. It further provided the written request would be acted upon by the Executive Committee within a week of the request.

[¶9] The Governing States amended the Governing Structure Document in September 2012. The amendment did not change the process for exiting the Consortium.

[¶10] On July 12, 2013, Governor Jack Dalrymple and State Superintendent of Public Instruction Kirsten Baesler co-signed a letter providing notification of North Dakota's intent to change from an Advisory State to a Governing State. The State's change to Governing State status did not amend, in any regard, the terms of the 2010 MOU.

[¶11] The Governing States amended the Consortium's governing structure in September 2013. With regard to exiting the Consortium, the amendment provided the Executive Committee would act on a member state's notification it was leaving the Consortium at the Executive Committee's next regularly scheduled meeting, rather than within a week of the notification.

[¶12] In 2014, the member states entered into a new MOU with the University of California-Los Angeles (2014 MOU). The 2014 MOU is the only agreement under which the State has made or would make Consortium payments. The 2014 MOU permits North Dakota to terminate the MOU (withdraw from the Consortium) at any time.

[¶13] The Governing States amended the Consortium's governing structure in January 2015. The 2015 amendment did not address or limit a member state's ability to leave the Consortium without cause.

[¶14] On March 24, 2015, DPI issued to school districts a memorandum regarding "Districts' Options to Support the Public's Right to View the NDSA" and a document entitled

Voluntary Guidelines to Local School Districts for Public Viewing of the North Dakota State Assessments.

III. The State's Motion to Dismiss.

A. The SBAC does not violate the Compact Clause.

[¶15] In their motion to dismiss [Index # 24], the Defendants assert that the complaint fails to state a claim upon which relief can be granted, because as a matter of law, the Consortium is not an illegal interstate compact and the State's participation in the consortium does not violate the Compact Clause. A motion to dismiss a complaint for failure to state a claim upon which relief can be granted under North Dakota Rules of Civil Procedure Rule 12(b)(6) tests the legal sufficiency of the statement of the claim presented in the complaint. A complaint should not be dismissed unless "it is disclosed with certainty the impossibility of proving a claim upon which relief can be granted. *Moseng v. Frey,* 2012 ND 220, ¶ 5; 822 N.W.2d 464 (citations omitted.)

[¶16] There is little case law directly on point on the issues raised in the parties' motions. Plaintiffs attach to their brief in support of their motion for a preliminary injunction a copy of a Judgment entered February 24, 2015, in the Circuit Court of Cole County, Missouri, in which the Circuit Court granted summary judgment in favor of the taxpayer plaintiffs finding that the SBAC constituted an unlawful interstate compact in violation of the Compact Clause of the United States Constitution and "numerous federal statutes" and that Missouri's participation in the SBAC as a member was unlawful under state and federal law. The two paragraph Judgment contained no legal analysis for the Circuit Court's decision. An appeal of the Judgment was rendered moot when the Missouri General Assembly passed a law prohibiting the Missouri Department of Elementary and Secondary Education ("DESE") from disbursing any state appropriated funds to the SBAC, which in turn led to the termination of Missouri's membership in the SBAC by the DESE. *See, Sauer, Gassel and Logue v. Jeremiah W. (Jay) Nixon, et al.*, 474

S.W.3rd 624 (Mo. Ct. App., W. Dist., 2015).

[¶17] In an opinion issued April 11, 2016, the United States District Court in Idaho dismissed a similar action commenced in U.S. District Court after determining that the taxpayer plaintiffs lacked standing to maintain such an action. See, *Regan v. C.L. "Butch" Otter*, No. 1:15 CV 00455 BLW, 2016 WL 1430006 (D. Idaho Apr. 11, 2016).

[¶18] An unpublished decision issued by the Circuit Court of South Dakota, Sixth Judicial District on June 13, 2016, in the case of *Amber Mauricio and Shelli Grinager v. Dennis Daugaard, et al.*, Hughes County Civil No. 15-292, was filed in Odyssey in this case by the State on June 14, 2016. Addressing issues similar issues to those raised in this case, the South Dakota court denied the State's motion to dismiss for failure to state a claim, but because matters outside the pleadings were presented, treated the State's motion to dismiss as a motion for summary judgment and granted summary judgment of dismissal in favor to the State. (In this case, plaintiffs attached Exhibits 1 -11 to their complaint. Rule 10(c) of the North Dakota Rules of Civil Procedure provides that a written instrument attached to a pleading is part of the pleading for all purposes. Thus, Exhibits 1 - 11 can be considered as part of the pleadings for the purpose of determining the State's motion to dismiss.)

[¶19] The South Dakota court determined that the 2014 Memorandum of Understanding and Agreement signed by the South Dakota Secretary Schoop of the South Dakota Department of Education and the Regents of the University of California regarding the State's continued participation in the SBAC was a compact, but that the compact did not require Congressional consent and was not subject to the Compact Clause because the agreement did not increase the political power of the State and did not encroach upon or interfere with the supremacy of the United States. The Court found it compelling that education policy and curriculum remained matters of state concern over which the federal government had no authority. The Court also found it relevant that the State had the ability to withdraw from the agreement. The Court further

determined that participation in the SBAC did not violate any of the federal statutes cited by the plaintiffs. Finally, the Court determined that participation in SBAC did not violate South Dakota state law.

[¶20] The Compact Clause of Article 1, § 10, cl. 3 of the United States Constitution provides that: "No State shall, without the Consent of the Congress, ... enter into any Agreement or Compact with another State . Congressional consent is not required for interstate agreements that fall outside the scope of the Compact Clause. Where an agreement is not "directed to the formation of any combination tending to the increase of political power in the States, which may encroach upon or interfere with the just supremacy of the United States," it does not fall within the scope of the Clause and will not be invalidated for lack of congressional consent. See, *e. g.*, *United States Steel Corp. v. Multistate Tax Comm'n*, 434 U.S. 452, 468, 98 S.Ct. 799, 810, 54 L.Ed.2d 682 (1978). Agreements among states without Congressional approval are common. Numerous examples of such agreements are noted in the State's brief

[¶21] In the only North Dakota Supreme Court decision addressing the Compact Clause, *Gray v. North Dakota Game and Fish Department*, 2005 ND 204, ¶ 21, 706 N.W.2d 614, the Court noted "the United States Supreme Court has held that when an agreement between states is not directed to the formation of any combination tending to increase the political power in the states, which may encroach upon or interfere with the supremacy of the United States, the agreement does not fall within the scope of the compact clause and will not be invalidated for lack of congressional consent." The Court applied that standard in *Gray* to determine that the Interstate Wildlife Violator Compact did not require congressional consent under the compact clause. *Id.* ¶ 22.

[¶22] As the State correctly stated in its brief, based on *Gray*, this court must evaluate whether the SBAC is subject to the Compact Clause by determining: (1) whether the Consortium authorized North Dakota to do anything collectively that is could not do

individually; and, (2) whether the Consortium requires North Dakota to delegate or cede its sovereignty in any way.

[¶23] The Consortium in this case does not usurp federal power. It does not authorize the member states to do anything collectively that they could not do individually. The parties agree that North Dakota determines its education policy and has exclusive authority over curriculum, programs of instructions, and assessments. Whether considered individualy or as a group, the Consortium member states have not gained political power by joining together. Nor has the Consortium diminished the political power of nonparticipating states. The political power of the those states remains unchanged.

[¶24] The State has not delegated or ceded its sovereignty by participating in the Consortium. In *U.S. Steel Corp. v. Multistate Tax Comm'n*, 434 U.S. 452, 473, 98 S.Ct. 799, 813, 54 L.Ed.2d 682 (1978), in determining whether a State's sovereignty is threatened, the U.S. Supreme Court considered a state's freedom to withdraw at any time from the compact.

[¶25] The 2014 MOU is the only agreement the State has entered into for the making of payments to the Consortium. The 2014 MOU provides four different ways for the State to terminate the agreement: (1) by providing written notice of nonrenewal between July 1 and October 1 of any calendar year and the MOU will terminate at the end of the current term; (2) on reasonable prior written notice if the member state withdraws, materially reduces or limits the member state's ability to perform under the agreement or fails to appropriate funds for the member's annual fee; (3) on 30 days written notice for breach by either party or if the Governing Board takes any action that violates the member state's laws; and, (4) for convenience by providing written notice prior to October 1 (no justification required, nine month notice required). None of these conditions for withdrawal create unreasonable barriers to withdraw. The above conditions notwithstanding, in reality the State can leave the Consortium at any time with the only sanctions being the loss of the right to participate as a member in the development

of or to use the Consortium's work product. Because the State may withdraw from the Consortium at any time, the arrangement does not implicate the Compact Clause.

[¶26] The SBAC and the 2014 MOU are not subject to the Compact Clause as a matter of law because they do not increase the political power of the State and do not encroach upon or interfere with the supremacy of the United States.

B. North Dakota did not violate federal law by joining SBAC.

[¶27] The plaintiffs argue that the SBAC violates a number of federal statutes. The statutes cited generally state that no U.S. Department of Education program shall authorize the Department to exercise any direction, supervision, or control over the curriculum, program of instruction, administration, or personnel of any educational institution or school. None of the federal statutes cited mandate or prohibit action by North Dakota. None of the statutes cited restrict the State from exercising it's sovereign power to establish educational policy. None of the statutes cited restrict or prohibit the State from joining the SBAC or entering into the 2014 MOU.

C. North Dakota did not violate N.D.C.C. 15.1-21-14 by joining SBAC.

[¶28] The complaint alleges that North Dakota's membership in the SBAC violates North Dakota statutes, specifically N.D.C.C. § 15.1-21-14 which provides that "[u]pon request, a school district must allow any individual over the age of twenty to view any test administered under sections 15.1-21-08 [requiring assessments based on state standards] through this section as soon as the test is in the possession of the school district."

[¶29] None of the plaintiffs allege that they made a request under N.D.C.C. § 15.1-21-14 to view a test and that their request was denied. Absent such a request and denial, an actual case or controversy does not exist regarding the application of N.D.C.C. § 15.1-21-14. Absent an actual case or controversy, the plaintiffs lack standing to assert this claim.

[¶30] For the foregoing reasons, because the State's participation in the SBAC does not

implicate or violate the Compact Clause and because no federal or state statutes were violated, the State's motion to dismiss the complaint is GRANTED.

IV. The Plaintiffs' Motion for a Preliminary Injunction:

[¶31] Having granted the States motion to dismiss, it is not necessary for the court to rule on the plaintiffs' motion of a preliminary injunction. However, in the event the judgment of dismissal is reversed, the court will briefly address the motion for a preliminary injunction.

[¶32] Rule 65(b) of the North Dakota Rules of Civil Procedure provides for the issuance of a preliminary injunction to prevent irreparable injury until the court decides whether to issue a permanent injunction at trial. In *Vorachek v. Citizens State Bank*, 461 N.W.2d 580, 585 (N.D. 1990) the North Dakota Supreme Court restated the requirements for a preliminary injunction as follows:

> Generally, "a preliminary injunction is an extraordinary and drastic remedy and should not be granted unless the movant, by a clear showing, carries the burden of persuasion." 11 C. Wright & A. Miller, Federal Practice & Procedure, § 2948, at 428 (1973). A trial court's discretion to grant or deny a preliminary injunction is based upon the following factors: (1) substantial probability of succeeding on the merits; (2) irreparable injury; (3) harm to other interested parties; and (4) effect on the public interest. F-M Asphalt, Inc., supra; see Dataphase Systems, Inc. v. C L Systems, Inc., 640 F.2d 109 (8th Cir. 1981).

[¶33] For the reasons stated in the language of the above Order granting the State's motion to dismiss, the plaintiffs are not likely to prevail on the merits in this matter. The agreements at issue do not fall within the scope of the Compact Clause. The State's power has not been enhanced or diminished. The State has the ability to withdraw from the consortium and terminate the agreement, and the agreement does not interfere with the supremacy of the United States. The Plaintiffs have shown no violations of federal statutes or state law.

[¶34] The plaintiffs have not demonstrated the threat of irreparable harm. While their interest as taxpayers is sufficient to confer standing in this action, it is not sufficient to extablish the requisite irreparable harm for a preliminary injunction. *See, White v. Davis*, 68 P.3d 74, 93

(Cal. 2003); *Leach v. City of San Marcos*, 261 Cal. Rptr. 805, 813 (Cal. Ct. App. 1989); *Cohen v. Bd. of Supervisors*, 225 Cal. Rptr. 114, 117-118 (Cal. Ct. App. 1986).

[¶35] The plaintiffs have not shown the requisite harm to others and the State has set forth several potental negative effects on the public interest that could result from granting the requested preliminary injunction.

[¶36] For these reasons, the plaintiffs have failed to carry their burden of persuasion for the granting of a preliminary injunction in this case.

V. Conclusion.

[¶37] This case is not about the wisdom of the State's participation in the SBAC, but rather about whether the State's participation in the SBAC is illegal for the reasons alleged by the plaintiffs. For the reasons stated above, the court does not find the State's participation in the SBAC to be illegal. The court does not find that the agreements at issue fall within the scope of the Compact Clause and therefore there can be no violation of the Compact Clause as a matter of law. Furthermore, the court does not agree with the plaintiffs' arguments that any federal or state statutes were violated.

[¶38] For these reasons, the State's motion to dismiss the complaint is GRANTED. Although granting the motion to dismiss makes it unnecessary for the court to rule on the motion for a preliminary injunction, if the court needed to consider that motion, it would be DENIED for the reasons stated above.

SO ORDERED.

Dated this 12th day of September, 2016.

BY THE COURT:

David E. Reich
District Judge

cc: Douglas Bahr
D. John Sauer
Richard Thompson
Erin Mersino
Arnold Fleck

No. 27931

IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

AMBER MAURICIO and SHELLI GRINAGER,

Plaintiffs/Appellants,

vs.

DENNIS M. DAUGAARD; THE STATE OF SOUTH DAKOTA; DR. MELODY SCHOPP; RICHARD L. SATTGAST; THE SOUTH DAKOTA DEPARTMENT OF EDUCATION; THE SOUTH DAKOTA BOARD OF EDUCATION; and THE OFFICE OF THE STATE TREASURER OF SOUTH DAKOTA,

Defendants/Appellees.

On Appeal from the Circuit Court of the Sixth Judicial District
Hughes County, South Dakota
The Honorable Mark Barnett, Circuit Court Judge

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ARGUMENT

I. SBAC CONSTITUTES AN UNLAWFUL INTERSTATE COMPACT TO WHICH CONGRESS HAS NEVER CONSENTED, IN VIOLATION OF THE COMPACT CLAUSE.

A. The State's agreement with SBAC *requires* the State to administer SBAC-created assessments, and this binding mandate cedes a significant component of the State's sovereign control over education.

As Appellants' explained in their Opening Brief, the MOUA purports to extract a binding commitment from the State to administer educational assessments created by SBAC. *See* Opening Br., at 22-23. The MOUA provides that the State is "bound by the Governing Board Procedures." R348, A119, ¶ 3.1. And the Governing Board Procedures in turn provide that the State must "[u]se the achievement standards and reporting scales initially adopted by Smarter Balanced in November 2014 as the basis for federal accountability reporting." R366, A137. But the "achievement standards" adopted by SBAC are nothing more than score cut-offs associated with SBAC's assessments. *See* Opening Br., at 22-23. The State cannot use the SBAC score cut-offs without also using the assessments to which those cut-offs correspond. *See id.* Thus, the State has necessarily committed to administer the SBAC assessments. *Id.*

The State essentially concedes the key premise of this syllogism, *i.e.*, that an agreement to use the SBAC achievement cutoffs necessarily would entail an agreement to use the SBAC assessments. As the State explains, "[i]t would be an absurd result to require the use of achievement standards and reporting scales for an assessment that was not provided—the corresponding assessment must first be given." State Br., at 15. But rather than following this concession to its logical conclusion—*i.e.*, that the State's agreement to use the SBAC achievement standards entails an agreement to use the SBAC

assessments—the State instead seeks to modify the contractual language found in the MOUA. The State claims that the MOUA requires the State to use the SBAC achievement standards applies "only if the Smarter Balanced Assessment is actually provided to the students." State Br., at 15. But the text of the MOUA does not contain such a condition. R348, A119, ¶ 3.1. Rather, the covenant to use the SBAC achievement standards is unconditional. *Id.* A reviewing court "may neither rewrite the parties' contract nor add to its language." *Culhane v. W. Nat'l Mut. Ins. Co.*, 2005 S.D. 97, ¶ 27, 704 N.W.2d 287, 297. The State cannot add new contractual conditions that do not appear the text of the MOUA. *Id.* The State's agreement with SBAC *mandates* that the State use SBAC's educational assessments.

This binding mandate cedes an important component of the State's sovereign control over education. Elementary and secondary education have long been committed to state control. *See United States v. Lopez*, 514 U.S. 549, 564 (1995); *see also* State Br., at 11 ("[E]ducation is a matter left to the states . . . ."). And assessments are an essential component of elementary and secondary education. *See, e.g.,* SDCL 13-3-55. The MOUA's binding requirement that the State administer SBAC assessments deprives the State of its sovereign right and obligation to determine what educational assessments best serve the needs of South Dakota students. Through the MOUA, the State has delegated a portion of its "sovereign power" over education to SBAC, and the State does not "retain[] complete freedom to adopt or reject" the SBAC Governing Board's decisions regarding educational assessments. *U.S. Steel Corp. v. Multistate Tax Comm'n*, 434 U.S. 452, 473 (1978). Thus, SBAC constitutes an interstate compact within the purview of the

Compact Clause. Because the United States Congress has never consented to SBAC, the compact violates the Compact Clause. U.S. Const. Art. I, § 10, cl. 3.

B. SBAC imposes substantial barriers to withdrawal from the compact.

As Appellants described in their Opening Brief, the MOUA imposes substantial barriers to the State's withdrawal from SBAC. *See* Opening Br., at 24-26. In particular, the MOUA purports to require that a state wishing to withdraw from the compact give *nine months' advance notice* and pay an additional year's worth of fees. *See* R347, A118, ¶ 2.2(c). The State dismisses these restrictions as mere "timing" rules that establish "an orderly procedure for withdrawal." State Br., at 24.[1] The State grossly understates the effects that these limitations on withdrawal can have on the State and its citizens.

As noted above, the MOUA requires the State to administer assessments created by SBAC during the term of the MOUA. *See* Part I.A, *supra*. By requiring the State to delay at least nine months before departing SBAC, the MOUA in effect requires the State to administer the SBAC assessments for an additional academic year after the State has concluded that it no longer wishes to administer those tests. *See* R348, A119, ¶ 3.1. Given that education is a quintessentially state concern, any arrangement that would impose a testing regime on the State against its will—even for a single academic year—would constitute an extraordinary affront to state sovereignty. *Lopez*, 514 U.S. at 564. This effect goes far beyond mere "timing" rules.

[1] The State also observes in passing that "Paragraph 2.2(a) [of the MOUA] permits a state to terminate the [MOUA] for breach." State Br., at 24. No party has suggested that SBAC has breached any provision of the MOUA. Thus, ¶ 2.2(a) does not provide an alternate method for the State to withdraw from SBAC, and it has no relevance to this case.

Moreover, the MOUA's withdrawal restrictions would require the State to pay substantial fees to SBAC even after the State had decided to leave the compact. For the 2014-2015 school year, the State was obligated to pay $680,628.50 to SBAC. *See* R336, A107. Given that this fee is based on the total number of students who will take the SBAC assessments, it is extremely unlikely that the State would pay substantially less than this amount if it were to withdraw from SBAC. R352, A123, ¶ 5(b). Again, the MOUA's withdrawal restrictions go far beyond timing. In addition to holding the State's testing regime hostage, they require the State to transfer hundreds of thousands of dollars in taxpayer money to SBAC, even after the State expresses its intent to leave the compact.

The State also claims that SBAC imposes less stringent limitations on withdrawal than does the Multistate Tax Commission, which the Supreme Court has approved. State Br., at 23-24. This argument lacks merit. The State may be right that the Multistate Tax Commission required member states to enact repealing legislation in order to withdraw from the Commission, while SBAC does not require legislative action. *See id.* But this observation is a red herring. The only relevant consideration is whether "each State is free to withdraw ***at any time***." *Multistate Tax Comm'n*, 434 U.S. at 473 (emphasis added). It is irrelevant whether member states exercise this right through legislation, executive orders, or an informal letter. In *Multistate Tax Commission*, the member states could, by legislative action, withdraw from the Commission "at any time." *Id.* Under the MOUA, however, SBAC member states cannot freely withdraw from the compact "at any time." Instead, they must—at a minimum—wait nine months, during which time they remain contractually obligated to administer SBAC assessments and to pay

substantial membership fees to SBAC. R347, A118, ¶ 2.2(c). Thus, SBAC constitutes an interstate compact within the scope of the Compact Clause, and it requires consent from the United States Congress.

C. SBAC constitutes an interstate compact among States, not a bilateral agreement between South Dakota and the University of California.

The State contends that the MOUA is not an interstate compact at all, but rather a mere bilateral contract between South Dakota and the University of California. *See* State Br., at 12-13. As an initial matter, the University of California is an arm of the State of California. *See, e.g.*, *Hamilton v. Regents of the University of California*, 293 U.S. 245, 257 (1934) (explaining that the University of California "is a constitutional department or function of the state government [of California]"); *Feied v. Regents of the University of California*, 188 F. App'x 559, 561 (9th Cir. 2006) ("This Court has repeatedly held that the Regents [of the University of California] are an arm of the state . . . .") (collecting cases). Thus, an agreement between the State of South Dakota and the University of California would still constitute an agreement between States, and it would still implicate the Compact Clause. *See id.* The Compact Clause does not contain an exception for bilateral interstate compacts. *See* U.S. Const., Art. I, § 10, cl. 3. Indeed, if the Compact Clause did exempt bilateral agreements, the many prominent cases in which the Supreme Court considered whether two-state bilateral agreements constituted interstate compacts would have been wholly unnecessary. *See, e.g.*, *New Hampshire v. Maine*, 426 U.S. 363, 369 (1976) (considering whether an agreement between New Hampshire and Maine constituted an interstate compact requiring congressional consent); *Virginia v. Tennessee*, 148 U.S. 503, 517-18 (1893) (considering whether an agreement between Virginia and

Tennessee constituted an interstate compact requiring congressional consent). Thus, even under the State's bilateral-agreement theory, the relationship created by the MOUA still would require congressional consent.

Moreover, SBAC plainly constitutes a compact among several States, not a bilateral relationship between the State and the University of California. The MOUA creates an elaborate governance structure under the control of SBAC's member States, independent of the University. R343, A114, ¶¶ 1.9, 1.10. Governance of SBAC is vested in the Governing Board, which consists of member States. R348, A119, ¶ 3.1; R349, A120, ¶ 3.3. The University is not a member of the Governing Board and is not bound by the Governing Board Procedures. R349, A120, ¶ 3.3. The MOUA expressly provides that the University's employees and agents are not agents of SBAC. R349, A120, ¶ 3.7. The University's role is simply to serve as "fiscal and administrative agent" for SBAC. R334, A105, Recital A. This arrangement does not reflect a bilateral agreement between a state and the University. Rather, it reflects a quintessential multistate compact, with a joint organization that can issue binding dictates to member states, and that is not subject to the control of any individual state. *See Northeast Bancorp, Inc. v. Bd. of Governors of Fed. Reserve Sys.*, 472 U.S. 159, 175 (1985) (noting that a "classic indici[um] of a compact" is a "joint organization or body [that] has been established to regulate" regarding the subject-matter of the compact); *Hess v. Port Authority Trans-Hudson Corp.*, 513 U.S. 30, 42 (1994) (noting that a quintessential hallmark of an interstate compact is a joint body that is "not subject to the unilateral control of any one of the [member] States"). SBAC constitutes an interstate compact within the scope of the Compact Clause.

The State also claims that SBAC does not constitute an interstate compact because, "[u]nlike many interstate compacts, the [MOUA] was not codified by act of the legislature." State Br., at 25. "Without legislative approval, the Secretary of the South Dakota Department of Education is without authority to cede State sovereignty." *Id.* at 25-26. But as described in Appellants' Opening Brief and in this Reply, the MOUA *does* purport to cede important aspects of state sovereignty to SBAC. That cession of state sovereignty brings SBAC within the scope of the Compact Clause. *See Multistate Tax Comm'n*, 434 U.S. at 473. To be sure, as the State notes, the cession of state sovereignty without legislative authorization *also* violates the State Constitution. State Br., at 25-26. But this violation of state law does not immunize SBAC from a challenge under the Compact Clause. Indeed, the fact that interstate compacts are not accountable to state legislatures is one of the central concerns about interstate compacts, and one reason why the Constitutional requires congressional consent. The "political accountability" of interstate compacts "is diffuse" and "is two or more steps removed from popular control." *Hess*, 513 U.S. at 42 (quotation omitted). SBAC constitutes an interstate compact within the Compact Clause that has not received the consent of Congress.

D. It is irrelevant whether the State's obligations to SBAC are conditioned on other member states making reciprocal commitments.

The State claims that SBAC differs from traditional interstate compacts, because the State's obligations to SBAC purportedly are not conditioned on other member states' assumption of reciprocal obligations to SBAC. *See* State Br., at 16-18. This argument misses the mark, because courts have never treated reciprocity or conditionality as a prerequisite for an interstate agreement to fall within the Compact Clause. The Supreme

Court has repeatedly emphasized that reciprocity *does not* affect whether an interstate agreement comes within the scope of the Compact Clause. *See, e.g.*, *Multistate Tax Comm'n*, 434 U.S. at 476 (holding that an interstate agreement involving "reciprocal legislation" did not fall within the Compact Clause); *id.* at 469 (collecting cases in which the Court had upheld interstate agreements involving reciprocal legislation); *Bode v. Barrett*, 344 U.S. 583, 586 (1953) ("[An otherwise permissible] reciprocal arrangement between states has never been thought to violate the Compact Clause . . . .").[2] The Supreme Court has explained that "the mere form of the interstate agreement cannot be dispositive." *Multistate Tax Comm'n*, 434 U.S. at 470. The sole inquiry is whether SBAC exhibits the classic hallmarks of an interstate compact, such as "purport[ing] to authorize the member States to exercise any powers they could not exercise in its absence," or involves "delegation of sovereign power to the [compact]." *Id.* at 473.[3]

Thus, it is irrelevant whether the State's obligations to SBAC are conditioned upon other member states making reciprocal covenants. The Court must focus solely on whether SBAC exhibits the classic hallmarks of an interstate compact within the meaning of the Compact Clause. *Id.* As described in Appellants' Opening Brief and in this Reply,

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[2] Indeed, the Court has suggested that, if anything, "more formalized 'compacts'" like SBAC raise more obvious Compact Clause concerns than do arrangements "effected through reciprocal legislation." *Multistate Tax Comm'n*, 434 U.S. at 470.

[3] The two cases cited by the State exemplify this point rather than undermining it. The State notes that the interstate agreements at issue in *Gray v. North Dakota Game & Fish Department*, 706 N.W.2d 614 (N.D. 2005), and *Koterba v. Commonwealth*, 736 A.2d 761 (Pa. Commw. 1999), both involved reciprocity. State Br., at 16. But as the State also observes, "[i]n neither case was the compact found to need the approval of congress." *Id.* It is the effect of the interstate agreement on the federal system, and not the "form of the interstate agreement," that determines whether the agreement requires congressional consent. *Multistate Tax Comm'n*, 434 U.S. at 470. For that reason, neither *Gray* nor *Koterba* dwelled on whether the interstate agreements involved reciprocity, but they instead focused on the classic hallmarks of interstate compacts. *See Gray*, 706 N.W.2d at 622; *Koterba*, 736 A.2d at 765-66.

SBAC does exhibit these classic hallmarks: SBAC involves a cession of state sovereignty over matters of quintessential state concern; it permits member states to exercise authority over the educational decisions of other member states that they would not wield absent SBAC's existence; it undermines the constitutional authority of the United States Congress; and it impermissibly pressures non-member states to adopt assessments and curricular materials aligned to Common Core. Thus, SBAC constitutes an interstate compact within the meaning of the Compact Clause. Because SBAC has never received the consent of the United States Congress, its existence and operations violated the Compact Clause.

E. SBAC infringes on the just supremacy of the United States.

As Appellants explained in detail in their opening brief, SBAC threatens to undermine the authority of the United States Congress by facilitating an attempt by the U.S. Department of Education ("DOE") to evade restrictions imposed by Congress. Opening Br., at 14-19. The State offers three responses to this point, but all three lack merit. First, the State notes that because education is an area historically committed to state control, a compact relating to education cannot interfere with the just supremacy of the United States. *See* State Br., at 19-21. But the threat to the federal supremacy goes beyond simply the subject-matter of the compact. The United States Congress has repeatedly and clearly prohibited DOE from seeking to influence state and local educational decisionmaking. *See, e.g.*, 20 U.S.C. § 1232a; 20 U.S.C. § 3403; 20 U.S.C. § 7907; Pub. L. 114-95, § 1111(j); *Wheeler v. Barerra*, 417 U.S. 402, 415-16 (1974), *judgment modified on other grounds*, 422 U.S. 1004 (1975). DOE sought to use its influence over SBAC to evade this restrictions. Opening Br., at 15-18. This unlawful

action by the federal Executive has at least the potential to "encroach upon or interfere with the just supremacy of the United States," *Multistate Tax Comm'n*, 434 U.S. at 471, because the "just supremacy of the United States" includes only duly enacted federal laws, not all action of federal officials, *see* U.S. Const. Art. VI.

Second, the State asserts—without substantial argument—that DOE did not attempt to exercise control of the curriculum or program of instruction of state and local schools. *See* State Br., at 21. As Appellants explained in their Opening Brief, DOE's actions were clearly intended to implement a uniform curriculum or program of instruction, and that has (unsurprisingly) been the effect of DOE's influence on SBAC and PARCC. *See* Opening Br., at 18-19. The State does not actually address the substance of Appellants' argument, but instead objects to Appellants' citations of scholarly articles. State Br., at 21.[4] This objection lacks merit. As litigants routinely do in appellate briefing, Appellants' have cited scholarly articles that provide information regarding the operations of, and incentives associated with, elementary and secondary education and assessment. Opening Br., at 18-19. This Court and other courts routinely consider scholarly and secondary sources for such purposes. *See*, *e.g.*, *State v. Akuba*, 2004 S.D. 94, ¶ 48, 686 N.W.2d 406, 424 (relying on secondary sources regarding the psychological reactions of citizens to encounters with police); *Glossip v. Gross*, 135 S. Ct. 2726, 2733 (2015) (relying entirely on secondary sources for important information regarding the availability of drugs used in capital punishment); *King v. Burwell*, 135 S. Ct. 2480, 2493-94 (2015) (relying heavily on secondary sources to predict the economic

[4] The circuit court denied a motion to strike filed by the State that presented a similar argument. *See* R725 (denying motion to strike); R548 (portion of motion to strike presenting similar argument). The State has not cross-appealed the circuit court's ruling.

consequences of an interpretation of a statute). By failing to respond to the substance of Appellants' arguments, the State has waived any objection to them.

Third, the State complains that DOE is not joined as a party to this case. State Br., at 20-21.[5] The State never explains how this fact is relevant to whether SBAC infringes upon the just supremacy of the United States. *See id.* Moreover, there is no reason for Appellants to have joined DOE as a defendant. Appellants seek relief only against the State. *See* R29-30. As the circuit court explained, with respect to the Compact Clause claim, "[t]he Complaint only requests declaratory relief that SBAC is an illegal entity and requests that the State be enjoined from remitting any further payment to SBAC." R712, A10. Thus, it would be neither necessary nor proper for Appellants to have joined the United States or any federal agency as a party.

For the reasons set forth in Appellants' Opening Brief and this Reply, SBAC threatens the just supremacy of the United States. Thus, it constitutes an interstate compact within the scope of the Compact Clause and required congressional consent. The Court should reverse the circuit court's entry of summary judgment in favor of the State.

II. SBAC'S COMPUTER-ADAPTIVE TEST DOES NOT PROVIDE "THE SAME ASSESSMENT" TO EVERY STUDENT AT EACH GRADE LEVEL, IN VIOLATION OF SDCL § 13-3-55.

As Appellants explained in their Opening Brief, SDCL 13-3-55 requires the State to administer the same assessment—that is, the same set of test questions—to each student in a single grade. Opening Br., at 32-38. The assessments created by SBAC and

[5] The circuit court rejected a similar argument made by the State that DOE constituted a necessary and indispensable party to the case. R712, A10 (denying the State's motion to dismiss). The State has not cross-appealed the circuit court's denial of its motion to dismiss.

administered by the State do not comply with this requirement. Instead, they provide a different—sometimes extremely different—set of questions to each student. *See* R433-35, A148-50; Opening Br., at 33-34. Because the SBAC assessments make it impossible to "administer the same assessment to all students" in a single grade, SDCL 13-3-55, the assessment violates South Dakota law, *id.*

In the State's view, SDCL 13-3-55 merely requires that every student take a test composed of questions promulgated by SBAC, regardless of whether the questions answered by one student overlap at all with the questions answered by another student. State Br., at 31 (citing R699). Students need not answer the same questions, so long as all students take an SBAC exam. *See id.* The State's interpretation wholly misconstrues the plain meaning of the word "same." Under its plain and ordinary meaning, "the same" means "resembling ***in every way***," "conforming ***in every respect***," and "IDENTICAL, SELFSAME." WEBSTER'S THIRD NEW INT'L DICTIONARY 2007 (2002) (emphasis added). One test is not "identical" to another test—does not "conform[] in every respect" to another test—merely because the same entity created both tests. At best, the State seeks to replace the statutory term "same" with the less-stringent adjective "similar." Courts cannot "rewrite the language of the statute as this is an action reserved for the Legislature." *In re Estate of Flaws*, 2016 S.D. 60, ¶ 44, 885 N.W.2d 336, 349.

The State also claims that its interpretation of SDCL 13-3-55 "fit[s] with the entire context of the statute, which was to measure the academic progress of *each* student." State Br., at 32. But the State has never shown—indeed, has never even argued—that administering the same test questions to each student would somehow inhibit the measuring of each individual student's academic progress. At most, the

parties' conflicting interpretations both advance the statutory goal of measuring individual progress. But the Legislature did not give the Department of Education *carte blanche* to administer whatever assessments the Department thought might advance this goal. Instead, the Legislature prescribed a specific method of measuring individual progress: "administer[ing] ***the same assessment to all students***." SDCL 13-3-55 (emphasis added). Whatever benefits might flow from the individualized testing facilitated by computer adaptive testing, the Legislature has prescribed a different method. Defendants must implement the legislatively prescribed method unless and until they can persuade the Legislature to revise SDCL 13-3-55.

Finally, the State claims that Appellants' interpretation of SDCL 13-3-55 would lead to the absurd result that students in every grade would have to answer the same test questions. State Br., at 32-33. Nothing in Appellants' argument necessitates such a conclusion. Courts seek to apply a "common sense interpretation of the statutory language," and they "will not construe a statute to arrive at a strained, impractical, or illogical conclusion." *Santema v. South Dakota Bd. of Pardons & Paroles*, 2007 S.D. 57, ¶ 14, 735 N.W.2d 904, 908. The statute here requires the State to "administer the same assessment to all students in grades three to eight, inclusive, and in grade eleven." SDCL 13-3-55. The common sense and reasonable interpretation of this requirement is that the State must administer the one assessment to all students in grade three, administer another assessment to all students in grade four, and so on. The fact that the statutory phrase "same assessment" means "an assessment containing identical test questions" does not undermine this reasonable and common-sense reading of the statute.

For the reasons stated, the computer-adaptive SBAC tests violated SDCL. The Court should reverse the circuit court's entry of summary judgment in favor of the State.

CONCLUSION

For the reasons stated, the Court should reverse the circuit court's entry of summary judgment in favor of the State, and remand this case to the circuit court for further proceedings consistent with the Court's disposition.

Dated: December 5, 2016.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

In accordance with SDCL § 15-26A-66(b)(4), I certify that this brief complies with the requirements set forth in the South Dakota Codified Laws. The body of the brief uses proportionally spaced Times New Roman with 12-point typeface. Excluding the table of contents, table of cases, jurisdictional statement, statement of legal issues, addendum materials, and certificates of counsel, the brief contains 4,019 words as calculated by Microsoft Word.

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