State of North Dakota | In the District Court

County of Burleigh | South Central Judicial District

Steve Cates, Robert Skarphol, Catherine Cartier, and Charles Cartier,

Plaintiffs,

vs.

Kirsten Baesler, in her official capacity as the North Dakota State Superintendent of Public Instruction; John Stewart Dalrymple III, in his official capacity as Governor of North Dakota; Kelly Schmidt, in her official capacity as the North Dakota State Treasurer; North Dakota Department of Public Instruction; and Office of the North Dakota State Treasurer,

Defendants.

Case No. _____

**COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF**

[¶ 1] Plaintiffs Steve Cates, Robert Skarphol, Catherine Cartier, and Charles Cartier respectfully state the following in support of their Complaint for Declaratory and Injunctive Relief:

## NATURE OF THE ACTION

[¶ 2] This case presents a North Dakota taxpayer challenge to the disbursement of North Dakota funds to the Smarter Balanced Assessment Consortium ("SBAC"), an illegal interstate compact not authorized by the U.S. Congress, whose existence violates Article I, § 10, cl. 3 of the U.S. Constitution and other provisions of federal and state law.

[¶ 3] Since 2010, North Dakota state officials have engaged in a course of conduct to cede a portion of North Dakota's sovereignty over educational policy to SBAC, an

interstate consortium operating under the influence of federal regulators in Washington, D.C. Congress never sanctioned the interstate compact that created this consortium. As a result, North Dakota is poised to pay hundreds of thousands of taxpayer dollars during Fiscal Years 2015 and 2016 to support this illegal interstate compact.

[¶ 4] Plaintiffs, as North Dakota taxpayers, will suffer immediate and irreparable harm if such taxpayer funds are illegally disbursed before these controversies are resolved by the Court.

**PARTIES**

[¶ 5] Plaintiff Steve Cates is a North Dakota resident and taxpayer.

[¶ 6] Plaintiff Robert Skarphol is a North Dakota resident and taxpayer. He is a duly elected member of the North Dakota House of Representatives. He sues in his individual capacity as a North Dakota taxpayer.

[¶ 7] Plaintiff Catherine Cartier is a North Dakota resident and taxpayer.

[¶ 8] Plaintiff Charles Cartier is a North Dakota resident and taxpayer.

[¶ 9] Defendant Kirsten Baesler is the duly elected North Dakota Superintendent of Public Instruction and is sued in her official capacity.

[¶ 10] Defendant Governor John Stewart Dalrymple III is the duly elected Governor of North Dakota and is sued in his official capacity.

[¶ 11] Defendant Kelly Schmidt is the duly elected State Treasurer of North Dakota and is sued in her official capacity.

[¶ 12] Defendant North Dakota Department of Public Instruction ("DPI") is an Executive Department of the State of North Dakota established and existing under Chapter 15.1-03 of the North Dakota Century Code.

[¶ 13] Defendant Office of the North Dakota State Treasurer ("Office of the Treasurer") is an Executive Office of the State of North Dakota established and existing under Article V, § 2 of the North Dakota State Constitution.

## JURISDICTION AND VENUE

[¶ 14] Plaintiffs have standing to bring the claims contained in this Complaint as residents and taxpayers of North Dakota. Plaintiffs challenge expenditures of public funds and the potential increased levy in taxes that may result if this controversy is not resolved.

**[**¶ 15] This court has jurisdiction over this action pursuant to North Dakota State Constitution Article VI, § 8 and § 27-05-06 of the North Dakota Century Code.

**[**¶ 16] All of the defendants are either citizens of North Dakota residing within the State or are subdivisions of the State of North Dakota.

**[**¶ 17] Venue is proper in the District Court of Burleigh County pursuant to Chapter 28-04 of the North Dakota Century Code, because the majority of the conduct giving rise to this cause occurred within Burleigh County and because Defendants DPI and Office of the Treasurer are headquartered within Burleigh County.

## COMMON ALLEGATIONS

### A. Federal Law Preserves and Protects State Authority over Educational Policy.

[¶ 18] The Compact Clause of the United States Constitution provides that "[n]o state shall, without the consent of Congress . . . enter into any agreement or compact with another state." U.S. CONST. art. I, § 10, cl. 3.

[¶ 19] The Tenth Amendment to the U.S. Constitution provides that "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people." U.S. CONST. amend. X.

[¶ 20] Educational policy is an area of core state competence and concern under the Constitution and our system of federalism. The Constitution assigns no direct authority over educational policy to the Federal Government.

[¶ 21] For nearly fifty years, federal statutes have prohibited the Federal Government—and, in particular, the federal Department of Education—from controlling educational policy, curriculum decisions, or educational-assessment programs in elementary and secondary education.

[¶ 22] These statutes manifest the explicit intent of Congress that exclusive authority and control over the curriculum, programs of instruction, and administration of public schools should rest with the States and local educational agencies, not the Federal Government.

[¶ 23] In 1965, Congress enacted the General Education Provisions Act of 1965, 20 U.S.C. §§ 1221 *et seq*., which provides:

> 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.

20 U.S.C. § 1232a. This restriction was later made applicable to all programs administered by the federal Department of Education. 20 U.S.C. § 1221(c)(1).

[¶ 24] Similarly, the Department of Education Organization Act of 1979, 20 U.S.C. §§ 3401 *et seq*., which established the federal Department of Education, provides:

> 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.

20 U.S.C. § 3403(b).

[¶ 25] The Department of Education Organization Act reflects Congress's clear intent that States and local governments retain control over education policy and decision making:

> 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.

20 U.S.C. § 3403(a).

[¶ 26] Echoing these principles, 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.*, 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).

[¶ 27] Moreover, the ESEA prohibits the Department of Education 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).

[¶ 28] 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).

[¶ 29] In enacting the ESEA, Congress contemplated that decisions regarding "the specific types of programs or projects that will be required in school districts" would be "left to the discretion and judgment of the local public educational agencies." H.R. Rep. No. 143, 89th Congress, 1st Session, 5 (1965).

[¶ 30] "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. Barrerra*, 417 U.S. 402, 415-16 (1975), *judgment modified on other grounds*, 422 U.S. 1004 (1975). The Act reflects "a pronounced aversion in Congress to 'federalization' of local educational decisions." *Id.* at 416.

### B. The Common Core State Standards Reflect an Attempt to Nationalize and Federalize State Elementary and Secondary Education Curriculum.

[¶ 31] In 2009, the National Governor's Association and the Council of Chief State School Officers announced an initiative to develop the Common Core State Standards ("Common Core"). Common Core was intended to constitute a common set of standards among most or all states to define requisite skills and knowledge in English language arts and mathematics. From its inception, Common Core was intended to replace "the existing patchwork of state standards" with a uniform, nationalized set of standards and assessments, which would not vary from State to State. *See* 74 Fed. Reg. 59733 (Nov. 18, 2009).

[¶ 32] At present, Common Core includes uniform standards for English language arts and mathematics.

[¶ 33] Common Core was finalized in or around June 2010.

[¶ 34] Common Core has elicited criticism nationwide from parents, teachers, public-policy experts, and elected officials from across the political spectrum. This criticism has addressed both the substantive content of the Common Core standards and the federalization of the educational system through the implementation of Common Core. *See, e.g.*, Lindsey Burke & Jennifer A. Marshall, *Why National Standards Won't Fix American Education: Misalignment of Power and Incentives*, Heritage Foundation, *available at* http://www.heritage.org/research/reports/2010/05/why-national-standards-won-t-fix-american-education-misalignment-of-power-and-incentives; Al Baker, *Common Core Curriculum Now Has Critics on the Left*, N.Y. Times, Feb. 16, 2014, *available at* http://www.nytimes.com/2014/02/17/nyregion/new-york-early-champion-of-common-core-standards-joins-critics.html.

### C. The U.S. Department of Education, with the Active Cooperation of North Dakota State Officials, Sought to Federalize North Dakota's Curriculum by Implementing Common Core Through the Smarter Balanced Assessment Consortium.

[¶ 35] On February 17, 2009, the U.S. Congress passed the American Recovery and Reinvestment Act of 2009 ("ARRA"). Sections 14005 and 14006 of the ARRA provided for federal grant funding to the states related to education. Section 14005(d)(4) provided for grant funding relating to "standards and assessments," and provided that recipient states would "take steps to improve State academic content standards and student academic achievement standards . . . ." 123 Stat. 115, 282 (2009). Section 14006 provided for remaining funds to be used as state incentive grants in FY 2010 for states "that have made significant progress in meeting the objectives of paragraphs (2), (3), (4), and (5) of section 14005(d)." 123 Stat. 115, 283 (2009). ARRA did not mention or authorize common state educational standards, or "consortia" of states.

[¶ 36] On or about November 18, 2009, the U.S. Department of Education issued an invitation to the States to apply for Race to the Top ("RTTT") grant funding, pursuant to the ARRA. *See* 74 Fed. Reg. 59836 (Nov. 18, 2009). This 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 could (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.*

[¶ 37] To satisfy key criteria for grant funding under RTTT, a state thus had to commit to adopting a "common set of K-12 standards," *i.e.*, Common Core. Common Core was the only set of standards available that met the U.S. Department of Education's criteria at that time.

[¶ 38] On or about April 9, 2010, the federal Department of Education announced "scoring priorities" for the RTTT Assessment program, which would "provide[] funding to consortia of States to develop assessments" aligned with common K-12 standards, *i.e.* Common Core. *See* 75 Fed. Reg. 18171 (April 9, 2010). To be eligible, a consortium of states "must include at least 15 States." *Id.* The criteria required the adoption of "academic content standards for grades K-12" that are "substantially identical across all States in a consortium." *Id.* at 18177. The criteria further provided that "a State may supplement the common set of . . . standards with additional content standards, provided that the additional standards do not exceed 15 percent of the State's total standards for that content area." *Id.* These academic content standards had to be "fully implemented statewide in each State in the consortium no later than the 2014-2015 school year." *Id.* at 18171.

[¶ 39] On or about April 14, 2010, the federal Department of Education issued a second invitation for applications for RTTT funds. *See* 75 Fed. Reg. 19496 (April 14, 2010). This invitation again 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 19503.

### D. North Dakota State Officials Execute Agreements with the Smarter Balanced Assessment Consortium that Cede a Portion of the State's Authority Over its Educational Policy and Decisions.

[¶ 40] On or about April 14, 2010, former State Superintendent of Public Instruction Wayne Sanstead ("Superintendent Sanstead") signed a "Document of Commitment" to SBAC. *See* Document of Commitment (attached as Exhibit 1, and incorporated by reference herein). This document purported to commit North Dakota to serve as a "Member State" in SBAC.

[¶ 41] On or about June 2, 2010, Superintendent Sanstead signed a "Memorandum of Understanding" with SBAC. *See* Memorandum of Understanding (attached as Exhibit 2, and incorporated by reference herein). This Memorandum of Understanding purported to commit North Dakota to serve as an "Advisory State" in the SBAC consortium.

[¶ 42] On or about June 4, 2010, former Governor John Hoeven also signed the same Memorandum of Understanding with the SBAC consortium. *See id.* On information and belief, the North Dakota legislature never authorized this Memorandum of Understanding.

[¶ 43] The Memorandum of Understanding purportedly committed North Dakota to "[a]dopt the Common Core Standards . . . to which the Consortium's assessment system will be aligned, no later than December 31, 2011." *Id.* at 3. The Memorandum of Understanding also purported to commit North Dakota to participate in the development of assessments aligned with the Common Core State Standards for use by states in the consortium. *Id.* at 4.

[¶ 44] The Memorandum of Understanding purported to commit North Dakota to:

(a) "Adopt common achievement standards no later than the 2014-2015 school year";

(b) "Fully 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";

(c) "Adhere to the governance as outlined in [the Memorandum of Understanding]";

(d) "Agree to support the decisions of the Consortium";

(e) "Agree to follow agreed-upon timelines";

(f) "Be willing to participate in the decision-making process and, if a Governing State, final decision"; and

(g) "Identify and implement a plan to address 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."

*Id.* at 3.

[¶ 45] The Memorandum of Understanding also purported to commit North Dakota to submit to the Governance Structure of the SBAC consortium. *Id.* at 7-10.

[¶ 46] The Memorandum of Understanding also purported to commit North Dakota to comply with specific procedures for request and approval before exiting from the consortium. *Id.* at 12.

[¶ 47] The Memorandum of Understanding also purported to commit North Dakota to "identify existing barriers in State laws, statutes, regulations, or policies" to the implementation of statewide assessments aligned with Common Core, along with "the plan to remove the barrier." *Id.* at 13.

[¶ 48] The Memorandum of Understanding also purported to commit North Dakota to agree to a "financial plan" that would become effective by "September 1, 2014," that would "include as revenue at a minimum, State contributions" to SBAC, among other sources of funds, to fund SBAC after federal grant funding had expired. *Id.* at 5.

[¶ 49] The Memorandum of Understanding purported to agree that North Dakota would "be bound by" its terms. *Id.* at 16.

[¶ 50] The Memorandum of Understanding provided for the creation of "[a] representative governance structure" and purportedly authorized that "governance body" to "make any changes [to the Memorandum of Understanding's provisions] as necessary through a formal adoption process." *Id.* at 5.

[¶ 51] On information and belief, 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 Memorandum of Understanding signed by Superintendent Sanstead and Governor Hoeven. In or about July 2013, North Dakota amended its membership in SBAC to become a Governing State.

### E. SBAC Receives RTTT Funds, Sets up a Governance Structure, and Operates as an Interstate Compact, Without Congressional Consent, Under the Influence and Direction of Federal Regulators.

[¶ 52] 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 North Dakota—submitted an application for a Race to the Top Fund Assessment Program Comprehensive Assessment System Grant. *See* Race to the Top Assessment Program application submitted by Washington State on Behalf of the Smarter Balanced Assessment Consortium (attached hereto as Exhibit 3 and incorporated by reference herein).

[¶ 53] SBAC's grant application explained that SBAC would develop a uniform "multi-state assessment system based on the Common Core State Standards." The application further stated that "the role of [SBAC] is to influence and support the development and implementation of learning and assessment systems to ***radically reshape the education systems in participating States*** . . . ." (Emphasis added.). The application included numerous references to effects on "curriculum" of participating States.

[¶ 54] SBAC's RTTT application explained that "each member State is responsible for adopting the CCSS [*i.e.*, Common Core] no later than December 31, 2011, and each State that is a member of the Consortium in 2014-15 will also be responsible for adopting common achievement standards and fully implementing Statewide, no later than the 2014-15 school year, the Consortium's summative assessment in grades 3-8 and high school, for both English language arts and mathematics. In addition, all member States are expected to adhere to the governance as outlined in the MOU [and] support decisions of the Consortium . . . ."

[¶ 55] At the time of the RTTT application, SBAC purported to include 31 states, including North Dakota. Currently, SBAC purports to include 21 states, including North Dakota.

[¶ 56] 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 (attached as Exhibit 4, and incorporated by reference herein).

[¶ 57] Pursuant to the Governance Document, a Governing State must "[a]dopt[] common achievement standards no later than the 2014-2015 school year." A Governing

State also must be "committed to using the summative assessment system developed by [SBAC] and [to] fully implement[ing] statewide, no later than the 2014-2015 school year, the summative assessment for both mathematics and English language arts in grades 3 through 8 and grade 11." *Id.* at 4.

[¶ 58] The Governance Document also established several offices or entities, including the offices of Executive Director, Project Management Partner, a Technical Advisory Committee, Policy and Technical Consultants, Policy Advisors, and Advisory Partners. *Id.* at 11-13.

[¶ 59] The Governance Document established an Executive Committee, comprising nine voting members and the Executive Director as a non-voting member. The Governance Document authorized the Executive Committee to oversee and control nearly every aspect of SBAC's operations and activities. *Id.* at 7-8. The Governance Document required that the Executive Committee submit matters to a vote of representatives of the member states only if the decision relates to:

(a) "Budget line item changes that are greater than $100,000";

(b) "Deviations from original assessment structure and scope of Consortium work (as outlined in the grant application)";

(c) "Consortium policy"; or

(d) "Consortium governance."

*Id.* at 9.

[¶ 60] The Governance Document provided that "[w]hen making decisions, the Executive Committee may act by a majority of its nine voting members." *Id.* at 10.

[¶ 61] In votes by representatives of the member states, the Governance Document required a quorum of representatives from one half of the voting states. If a vote was not unanimous, discussion was to be reopened, and additional votes were to be conducted until there was a two-thirds majority of the voting quorum. *Id.* at 9-10.

[¶ 62] Under the terms of the Governance Document, SBAC purported to possess the capacity to dictate education decisions on other member states, even if those other states might dissent from the views of the majority of SBAC member states.

[¶ 63] The Governance Document purported to impose several limitations on member states' ability to withdraw from SBAC. Although member states could withdraw from the joint organization, they "must comply with the . . . exit process" established by the Governance Document. That exit process required that:

> (a) "The chief education officer of the member requesting an exit from the Consortium must submit in writing its request to leave the Consortium and reasons for the exit request";
>
> (b) "The Executive Committee will act upon the request at its next regularly scheduled meeting follow receipt of the request"; and
>
> (c) "Upon approval of the request, the Project Management Partner will then announce the changed of membership to the [United States Department of Education]."

[¶ 64] As alleged further below, the federal Department of Education has also imposed de facto sanctions on withdrawal from the RTTT consortia, such as SBAC, by threatening federal funding and the NCLB waivers of states who do not adopt the Common Core standards or their equivalents. Though the threat to the NCLB waivers

does not pose a threat to North Dakota directly, because North Dakota has withdrawn its request for an NCLB wavier, it does impose significant pressure on other States to remain in the consortia.

[¶ 65] 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 (attached as Exhibit 5, and incorporated by reference herein). The U.S. Department of Education advised SBAC that the federal Government would remain substantially involved in the work of SBAC: "[I]n accordance with 34 CFR 75.234(b), this award is classified as a cooperative agreement and will include ***substantial involvement*** on the part of the Department of Education (Department) program contact." *Id.* (emphasis added).

[¶ 66] 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"). Like SBAC, PARCC is an interstate consortium developing uniform, multi-state educational-assessment systems aligned with Common Core. Like SBAC, PARCC operates under the "substantial involvement" of the federal Department of Education. Like SBAC, PARCC was created pursuant to an interstate compact that was not authorized by Congress.

[¶ 67] SBAC and PARCC were the only two consortia to receive federal RTTT grants. Both consortia were created to design assessments aligned to Common Core.

[¶ 68] 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.

[¶ 69] SBAC operates with closed meetings and purports to be exempt from both state and federal open-records laws. SBAC also prevents teachers administering its assessments from reviewing the assessments. SBAC thus insulates itself from public accountability in a way that state and federal governments do not. This insulation constitutes a departure from historical practice in public education and in assessment development in particular.

[¶ 70] The RTTT Assessment program, in effect, granted a near monopoly over K-12 educational standards in English language arts and math to Common Core, under the aegis of SBAC and PARCC, making it extremely difficult for the minority of non-Common Core states to decline to adopt Common Core, and making it difficult for States to opt out of Common Core.

[¶ 71] On or about January 7, 2011, SBAC executed a "Cooperative Agreement" with the U.S. Department of Education. *See* Cooperative Agreement (attached as Exhibit 6, and incorporated by reference herein). This Cooperative Agreement provided for substantial federal involvement and control over the work of SBAC. Among other things, it provided for federal involvement to "ensure project consistency with … [federal] Department goals and objectives," and granted to a federal program officer authority to "review and approve modifications to the design of activities proposed under this Agreement."

[¶ 72] On information and belief, SBAC has operated under the influence and/or direction of federal regulator(s) at the U.S. Department of Education.

[¶ 73] The U.S. Congress never authorized, ratified, approved, or otherwise consented to SBAC, whether directly or indirectly.

[¶ 74] SBAC's lack of ratification by Congress represents a departure from historical practice. For example, the Education Commission of the States ("ECS") was created in 1965 for purposes similar to those of SBAC. It took the form of an interstate compact that was approved by Congress. ECS created and, for many years, administered the National Assessment of Educational Progress ("NAEP") tests, which were designed to assess the knowledge of American students in core subjects, much like the SBAC assessments. Unlike SBAC, Congress expressly consented to ECS.

[¶ 75] Congress has ratified and approved numerous other interstate compacts with far less far-reaching effects than those of SBAC. These include, among many others, the Driver License Compact, which allows states to exchange information about driving infractions committed in other states, and the New Hampshire-Vermont Interstate School Compact, which permits the formation of interstate school districts between New Hampshire and Vermont. Unlike SBAC, Congress has expressly consented to these interstate compacts.

### F. The Federal Department of Education Coerces States to Remain Committed to Common Core by Threatening the States' No Child Left Behind Waivers.

[¶ 76] On September 23, 2011, the federal Department of Education announced the Conditional No Child Left Behind ("NCLB") Waiver Plan, pursuant to which the Department will waive several onerous requirements under the ESEA in exchange for agreements that the applicant-states will comply with certain conditions aimed at

implementing changes in school curricula and assessment systems. *See* U.S. Dept. Of Educ., ESEA Flexibility Policy Document (attached as Exhibit 7 hereto and incorporated by reference herein).

[¶ 77] The Conditional NCLB Waiver Plan lacks statutory authority in ESEA or elsewhere in federal law. The federal Department of Education acknowledged that the waiver program operates "in a manner that was not originally contemplated by the No Child Left Behind Act of 2001." *Id.*

[¶ 78] Under Department of Education requirements, in order to receive an NCLB waiver, a state "must demonstrate that it has college- and career-ready expectations for all students in the State by adopting college- and career-ready standards in at least reading/language arts and mathematics, transitioning to and implementing such standards statewide for all students and schools, and developing and administering annual, statewide, aligned, high-quality assessments, and corresponding academic achievement standards, that measure student growth in at least grades 3-8 and at least once in high school." *Id.*

[¶ 79] By exercising such control over common standards and assessments, the federal Department of Education is effectively controlling curriculum in public schools nationwide. Control over standards and assessments constitutes de facto control over curriculum, as schools have little choice but to align their curriculum to meet the expectations of the standards and assessments.

[¶ 80] By conditioning the release from NCLB's onerous restrictions on the adoption of curriculum and assessment-system changes aligned with the Common Core or its functional equivalent, the U.S. Department of Education has sought to coerce states into

adopting those changes rather than risk facing further restrictions and possible loss of federal funding under ESEA and NCLB. The principal source and vehicle of these Common Core-aligned assessments are the RTTT-created consortia, SBAC and PARCC.

[¶ 81] In response to the mounting criticism of Common Core, on June 5, 2014, Oklahoma Governor Mary Fallin signed House Bill 3399, which required Oklahoma to withdraw from the PARCC consortium 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 (attached as Exhibit 8, and incorporated by reference herein). The letter stated that Oklahoma's application for an extension to the NCLB waiver was denied because Oklahoma had no longer committed to "adopt college- and career-ready standards that are ***common to a significant number of States***," due to the "legislation enacted in Oklahoma on June 5, 2014." *Id.* (emphasis added).

[¶ 82] On May 27, 2015, the U.S. Department of Education sent a letter to the Deputy Superintendent of Public Instruction of the State of Oregon. *See* May 27, 2015 Letter to the Hon. Rob Saxton (attached as Exhibit 9). In this letter, the federal Department threatened to withhold hundreds of millions of dollars of federal funding from Oregon if that State enacts legislation, currently under consideration, that would make it easier for parents to opt out of Common Core-aligned tests. *See id.* The letter stated that state and local educational agencies "must provide for the participation of *all* students on the [Common-Core aligned] assessments," and thus that allowing students and parents to opt

out of Common Core-aligned tests would threaten federal funding. *Id.* (emphasis in original).

[¶ 83] On information and belief, the purpose and effect of the federal regulatory scheme implemented through the ARRA funding and the RTTT grants has been (1) to induce the States to create a system or systems of standards and assessments based on and aligned with Common Core; and then (2) to compel the States to adopt the Common Core-aligned standards, assessments, and corresponding curriculum through the NCLB waivers, threats to federal funding, and other measures.

[¶ 84] Under federal regulations promulgated by the U.S. Department of Education, the adoption of a "common set of K-12 standards" requires a commitment of 85 percent of the state's standards. *See* 74 Fed. Reg. 59838 (Nov. 18, 2009) ("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.") (emphasis added). The implementation of Common Core, and assessments aligned with Common Core, would thus effectively create a national curriculum in the covered subject matters, in contravention of federal law.

[¶ 85] The purpose and effect of the NCLB waiver program is to place powerful pressure on States who have not yet adopted Common Core, or who wish to opt out of Common Core, to force them to align their state curricula to a federalized curriculum aligned to Common Core.

[¶ 86] SBAC and PARCC are thus creatures of the federal Department of Education that are designed to implement a national curriculum in circumvention of fifty years of explicit Congressional policy and numerous federal statutes. These entities threaten the

valid supremacy of the U.S. Congress over regulatory policy, and they threaten the sovereignty of both member States and non-member States over educational curriculum and policy, by extracting purportedly binding commitments from state officials and otherwise placing extreme pressure on all States to align their curricula to Common Core.

[¶ 87] SBAC and PARCC are interstate compacts created without Congress's consent that threaten to undermine the policy and authority of the U.S. Congress.

[¶ 88] SBAC and PARCC are interstate compacts created without Congress's consent that threaten the sovereignty of individual states over educational policy within their borders.

### G. Defendants Execute a New Memorandum of Understanding and Agreement with SBAC and Plan to Make Imminent Future Payments of North Dakota Funds to SBAC.

[¶ 89] On or about November 4, 2014, Assistant State Superintendent Robert Marthaller—acting on behalf of DPI—executed a Memorandum of Understanding and Agreement ("MOUA") with SBAC. A copy of the MOUA is attached hereto as Exhibit 10 and is incorporated by reference. On information and belief, this 2014 MOUA is intended to update and supersede the 2010 Memorandum of Understanding with SBAC.

[¶ 90] The MOUA established a partnership between SBAC and the University of California in order "to continue the work of the Consortium," *i.e.*, SBAC. *Id.* ¶ 5.5.

[¶ 91] The MOUA preserves SBAC as a separate entity, distinct from the University of California, and preserves the consortium's governance structure under the direction of the member States. *Id.* ¶¶ 1.6, 1.9, 1.10, 1.16, 1.24.

[¶ 92] 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, Frequently Asked Questions, *at*

http://www.smarterbalanced.org/resources-events/faqs/ (last visited May 8, 2015) (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"); States Move Forward with Smarter Balanced, *at* http://www.smarterbalanced.org/news/states-move-forward-smarter-balanced/ (last visited May 8, 2015) (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.").

[¶ 93] The MOUA has an initial term of three years and provides for automatic renewal thereafter unless member States follow the MOUA's termination provisions. *Id.* ¶ 2.1.

[¶ 94] The MOUA provides that "[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." *Id.* ¶ 3.1.

[¶ 95] The MOUA provides that "[t]he signatories to this [MOUA] represent that they have the authority to bind their respective organizations to this [MOUA]." *Id.* ¶ 9.9.

[¶ 96] The MOUA authorizes a complex governance structure similar to that established under the prior Memorandum of Understanding. It includes a Governing Board composed of representatives from member States, *id.* ¶ 3.1; an Executive Committee with responsibility for major operational decisions, *id.* ¶ 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, *id.* ¶¶ 1.11, 3.3.

[¶ 97] The MOUA vests governance of SBAC in the Governing Board, which consists of member States but does not include the University of California. "The Governing Board will provide direction and oversight with respect to Products and Services to be provided by SB to the members," and "[t]he Governing Board will be responsible for approving the Planning Documents." *Id.* ¶ 3.1.

[¶ 98] The Governing Board also establishes the Governing Board Procedures that bind the member States. *Id.* ¶¶ 1.11, 3.1, 3.2.

[¶ 99] "The Executive Committee will be authorized to act on behalf of the Governing Board." *Id.* ¶ 3.4.

[¶ 100] The MOUA provides that the Governance Document would continue to govern SBAC and its member states unless and until the Governing Board adopted a new governance structure. *Id.* ¶ 1.6, 1.11.

[¶ 101] The MOUA also purports to significantly limit the ability of member States to withdraw from SBAC. *Id.* ¶ 2.2.

[¶ 102] In order to terminate the MOUA for convenience, a State must give nine months' notice to SBAC and pay an additional year's worth of membership fees. *Id.* ¶ 2.2(c).

[¶ 103] The MOUA also purports to significantly circumscribe a State's ability to withdraw from SBAC even if the State withdraws legal authority to participate in SBAC. *Id.* ¶ 2.2(d). Thus, for example, if the North Dakota legislature were to pass a bill withdrawing from SBAC and the Governor were to sign it, North Dakota still purportedly could not leave SBAC for sixty days. *Id.*

[¶ 104] Under the MOUA, the University of California assumed the State of Washington's role as SBAC's fiscal and administrative agent, but the consortium remains

an independent compact under the direction of member States. MOUA Recitals A, D; ¶¶ 5.1, 5.2, 5.5.

[¶ 105] The MOUA provides that SBAC will "be funded by members paying annual fees to [the University], in order to allow the Consortium's work to continue for those members that execute this [MOUA]." *Id.* Recital F.

[¶ 106] As of the date of this Complaint, North Dakota remains a Governing State member in SBAC.

[¶ 107] Pursuant to the MOUA, Defendants plan and intend to make imminent future payments of North Dakota taxpayer funds from the State's treasury—either directly or indirectly—to SBAC.

[¶ 108] These payments will continue for at least the MOUA's three-year initial term. *Id.* ¶ 2.1.

[¶ 109] According to Exhibit A to the MOUA, North Dakota's "Annual Fees" paid to SBAC for membership during 2014-015 were $553,900.

[¶ 110] On or about January 30, 2015, SBAC adopted Governing Board Procedures to replace the Governance Document. A copy of the Governing Board Procedures is attached hereto as Exhibit 11 and is incorporated by reference.

[¶ 111] Pursuant to the Governing Board Procedures, Governing Member States such as North Dakota agreed to "[u]se the achievement standards and reporting scales initially adopted by Smarter Balanced in November 2014." *Id.* at 4.

[¶ 112] The Governing Board Procedures also require that Governing Members cede control over core educational decisions by, among other things, agreeing to:

(a) "Actively engage in Smarter Balanced discussion and activities";

(b) "Abide by security and administration procedures adopted by the Governing Board";

(c) "Adhere to the policies and principles detailed in these Governing Board Procedures as adopted and amended";

(d) "Engage in and support the decisions made by the Governing Board"; and

(e) "Abide by the terms of the [MOUA]."

*Id.* at 4.

[¶ 113] The Governing Board Procedures specifies the procedures, power, and membership of SBAC's Governing Board, *id.* at 4-6, and its Executive Committee, *id.* at 8-12.

[¶ 114] The Governing Board Procedures also establish the office of SBAC Executive Director, *id.* at 12, and provides for SBAC to employee other staff members, *id.* at 12-13. The Governing Board Procedures also provide for several "standing committees," including a Technical Advisory Committee, a Finance Committee, and a Performance Audit Committee. *Id.* at 13-14.

[¶ 115] On information and belief, during 2015, North Dakota has made substantial regular payments of membership fees to SBAC pursuant to the MOUA.

[¶ 116] Under the MOUA, North Dakota must make a substantial, imminent payment to SBAC—equal to one sixth of the State's annual membership fee—by July 1, 2015. *Id.* at 12, § 5.1(c). The State also must make ten monthly installment payments between August 1, 2015 and May 1, 2016. *Id.*

**H. North Dakota's Membership in SBAC Violates North Dakota Statutes.**

[¶ 117] North Dakota Century Code § 15.1-21-14 provides that "[u]on 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 annual assessments based on state standards] through this section as soon as the test is in the possession of the school district."

[¶ 118] Upon information and belief, the SBAC assessments provided through North Dakota's membership in SBAC are not available for public viewing by any individual over the age of twenty as soon as the test is in the possession of the school district.

[¶ 119] Provision of the SBAC assessments and alignment of North Dakota's public school curriculum with Common Core are among the clear and central purposes of North Dakota's MOUA with SBAC. Because the central purposes of the MOUA violate North Dakota law, including but not limited to Chapter 15.1 of the North Dakota Century Code, the MOUA is void under North Dakota law.

**COUNT I – DECLARATORY AND INJUNCTIVE RELIEF**

[¶ 120] Paragraphs 1 through 119 are hereby incorporated by reference.

[¶ 121] Plaintiffs' rights, status, or other legal relations are affected by the disbursement of funds from the North Dakota treasury to SBAC and by the actions of Defendants, as more fully set forth in this Complaint.

[¶ 122] SBAC is an illegal entity under federal and North Dakota law, for reasons including, but not limited to, the following:

(a) SBAC is an interstate compact that was not authorized by Congress, whose existence and operation violate Article I, § 10, cl. 3 of the United States Constitution;

(b) SBAC's existence, purpose, function, activities, governance, and manner of operation violate federal statutes guaranteeing state and local control of curriculum, programs of instruction, and related matters in public schools, including those set forth herein;

(c) SBAC was created through a course of conduct by the U.S. Department of Education, in collaboration with Defendants, that violated the doctrine of unconstitutional conditions, the non-delegation doctrine, and the sovereignty over educational policy guaranteed to the State of North Dakota and other States by the doctrine of federalism and the Tenth Amendment;

(e) Any putative contractual or other obligation of the State of North Dakota to make any direct or indirect payment to SBAC is void and unenforceable under North Dakota and federal law, including but not limited to North Dakota Century Code § 15.1-21-14 *et seq.*;

(f) The disbursement of North Dakota taxpayer funds directly or indirectly to SBAC, as an unconstitutional and illegal entity, is unlawful, and any legislation putatively authorizing such disbursement of funds is void as applied to SBAC; and

(g) In light of the foregoing, there exists no rational basis for the disbursement of North Dakota funds, directly or indirectly, to SBAC.

[¶ 123] An actual controversy, ripe for adjudication, currently exists between Plaintiffs and Defendants as to whether SBAC is illegal and void under federal and state law, and

whether North Dakota taxpayer funds may be lawfully disbursed to the SBAC, directly or indirectly.

[¶ 124] Plaintiffs therefore seek a declaratory judgment under Chapter 32-23 of the North Dakota Century Code and Rule 57 of the North Dakota Rules of Civil Procedure, to terminate this controversy and remove uncertainty.

[¶ 125] Disbursement of funds to SBAC is not only an *ultra vires* exercise of power by Defendants but also an unconstitutional and wasteful expenditure of government resources that harms Plaintiff as a taxpayer of the State.

[¶ 126] Plaintiffs lack an adequate remedy at law and therefore, under Chapters 32-05 and 32-06 of the North Dakota Century Code and Rule 65 of the North Dakota Rules of Civil Procedure, seeks to have the Court preliminarily and permanently enjoin Defendants, and each of them, and all those in active concert or participation with them, from taking any action to authorize, permit, or allow the disbursement of North Dakota taxpayer funds to SBAC.

[¶ 127] WHEREFORE, Plaintiffs respectfully pray that the Court enter its judgment:

(A) Declaring that SBAC is illegal and void as an entity whose existence, activities, and operation violate the U.S. Constitution, federal law, and North Dakota law;

(B) Declaring that any putative obligations of North Dakota to SBAC are illegal, void, and unenforceable under federal and North Dakota law;

(C) Declaring that no North Dakota taxpayer funds may be lawfully disbursed to SBAC, whether directly or indirectly;

(D) Preliminarily and permanently enjoining Defendants, and each of them, and all those in active concert or participation with them, from taking any action to implement or otherwise effectuate any disbursement of North Dakota funds to SBAC, whether directly or indirectly;

(E) Awarding Plaintiffs attorneys' fees, expenses, and/or costs pursuant to, *inter alia*, § 32-23-10, N.D.C.C.; and

(F) Granting Plaintiffs such other and further relief as the Court deems just and proper.

[¶ 128] Dated: June 17, 2015

Respectfully submitted,

*/s/ D. John Sauer*
D. John Sauer, Mo. Bar No. 58721 (*)
CLARK & SAUER, LLC
7733 Forsyth Blvd., Suite 625
St. Louis, MO 63105
Telephone: (314) 332-2980
Facsimile: (314) 332-2973
jsauer@clarksauer.com
(*) Pro hac vice pending

*/s/ Richard Thompson*
THOMAS MORE LAW CENTER
Richard Thompson, Mich. Bar
No. (P21410) (*)
Erin Mersino, Mich. Bar No. (P70886) (*)
24 Frank Lloyd Wright Blvd.
P.O. Box 393
Ann Arbor, MI 48106
Telephone: (734) 827-2001
Facsimile: (734) 930-7160
rthompson@thomasmore.org
emersino@thomasmore.org
(*) Pro hac vice pending

*/s/ Arnold V. Fleck*
Arnold V. Fleck (ND Bar ID #04102)
FLECK LAW OFFICE
Resident/Associate Attorney for Plaintiffs
314 East Thayer Avenue, Suite 220
P.O. Box 6178
Bismarck, ND 58506-6178
Phone: (701) 258-5256
Email: arnfleck@usa.net

*Attorneys for Plaintiffs*