

## Settlement Agreement

This Settlement Agreement (the "Agreement") is entered into as of the 17<sup>th</sup> day of May 2016 ("Effective Date"), by and between the Regents of the University of California, by and on behalf of its Los Angeles campus, including Smarter Balanced, a part of the UCLA Graduate School of Education and Information Studies ("UC"), and the Nevada Department of Education ("Member"), a political subdivision of the State of Nevada (each, a "Party" and collectively, the "Parties").

### Recitals

I. Effective December 9, 2014, UC and Member entered into a contract (the "Contract") wherein UC agreed to provide certain Products and Services (as defined in the Memorandum of Understanding incorporated into the Contract as Attachment B (the "MOU"), at Exhibit B) to the State of Nevada for compensation. The Contract included obligations on the part of UC for the delivery of items related to the summative assessments, which Member represents are required by NRS 389.550 (the "CRT").

II. For its work related to the CRT, UC was to be paid \$1,326,031.00 in the form of membership dues from Nevada (See, Exhibit C to the MOU).

III. The Contract identified Measured Progress as a third party vendor chosen by Member for the implementation, operation and delivery of the CRT (Exhibit A to the MOU).

IV. The delivery of the CRT was not acceptable to Member or Nevada students and no efforts on the part of UC were accepted by Member as sufficient to resolve the issues that arose during testing, and a majority of Nevada students were unable to successfully complete the CRT.

V. Member and UC have agreed to the terms and conditions contained in this Agreement as a final resolution to any and all disputes between them related to the Contract, including issues concerning the deployment of the CRT.

VI. UC acknowledges Nevada's contention that the majority of Nevada students did not have a successful testing experience, creating a number of challenges within the State and further, UC wishes to work cooperatively with Nevada as provided below.

### Section 1 – Settlement Terms

1.1 The Parties agree that Member shall receive a credit of \$996,895.00 against 2015-16 membership fees payable to UC.

1.2 UC shall retain a qualified firm unaffiliated with UC to conduct a study of the open source testing system to evaluate its quality and performance. This study must be completed by June, 2016 and include conclusions regarding whether the open source testing system is capable of administering a computer-adaptive, criterion referenced test to all Nevada students as well as the steps UC would need to take to have the open source testing system capable of administering a computer-adaptive criterion referenced test to up to fifty thousand (50,000) Nevada students by June, 2016. **Estimated cost to UC: \$250,000.**

1.3 UC shall retain a qualified firm unaffiliated with UC to conduct a study of Nevada's data, to evaluate the validity of the 2015 CRT scores of Nevada's students. This study must be completed by June, 2016 and include conclusions regarding the validity of completed and partially completed 2015 CRTs. **Estimated cost to UC: \$100,000.**

1.4 UC shall develop a statement of work to procure enhancements to the test delivery system for consistency with the appropriate standards of quality and performance, in accordance with professional standards in the industry. This Statement of Work has been completed and included specific steps that UC is taking so that the test delivery system is capable of administering a computer-adaptive, criterion referenced test to up to fifty thousand (50,000) Nevada students by June, 2016. **Estimated cost to UC: \$450,000.**

1.5 UC shall provide support and training to Clark County, which experienced the most significant testing challenges. Clark County requested video training (in lieu of in-person training) to familiarize teachers with the Digital Library. Video training materials were sent to Clark County on or around March 17, 2016. Video production was managed in-house by UC staff. **Estimated cost to UC: up to \$5,000.**

1.6 This Agreement compromises a disputed claim, and the proposed remediation is not to be construed as or deemed an admission of liability. The Parties agree that the agreements, compensation, and promises contained herein effectively address the challenges associated with the CRT, and to mutually release each other from any further actions or claims, as provided below.

## Section 2 – Mutual Releases

2.1 In consideration of the terms and promises set forth in this Agreement and for other good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, UC hereby absolutely, finally, fully, and irrevocably releases, remises, acquits, and forever discharges Member and its affiliates, partners, joint venturers, heirs, successors, assigns, contractors, subcontractors, officers, directors, governing board, members, employees, agents, attorneys and insurers (in their individual and representative capacities) from any and all claims of whatever nature and kind, whether known or unknown, suspected or unsuspected, vested or contingent, past, present or future, arising from or attributable to any incident or event relating to any demands, losses, damages, actions, causes of action, suits, debts, promises, liabilities, obligations, liens, costs, expenses, attorneys' fees, indemnities, subrogations (contractual or equitable) or duties, of any nature, character or description whatsoever, whether fixed or contingent, including claims arising from or related to, directly or indirectly, the Contract and the 2014-15 CRT under the Contract(the "Released Claims"), subject to Section 2.3 below.

2.2 In consideration of the terms and promises set forth in this Agreement and for other good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, Member hereby absolutely, finally, fully, and irrevocably releases, remises, acquits, and forever discharges UC, and its affiliates, partners, joint venturers, heirs, successors, assigns, contractors, subcontractors, officers, directors, governing board, members, employees, agents, attorneys and insurers (in their individual and representative capacities) from any and all claims of whatever nature and kind, whether known or unknown, suspected or unsuspected, vested or contingent, past, present or future, arising from or attributable to any incident or event relating to any demands, losses, damages, actions, causes of action, suits, debts, promises, liabilities, obligations, liens, costs, expenses, attorneys' fees, indemnities, subrogations (contractual or equitable) or duties, of any nature, character or description whatsoever,

whether fixed or contingent, including claims arising from or related to, directly or indirectly, the Contract and the 2014-15 CRT under the Contract (the "Released Claims"),, subject to Section 2.3 below.

2.3 Each Party agrees to the fullest extent permitted by law, that it will not initiate or file a lawsuit or other proceeding to assert any of the Released Claims against the other Party. If any such action is brought, this Agreement will constitute an affirmative defense thereto, and the Party against whom the action is brought shall be entitled to recover reasonable costs and attorneys' fees incurred in defending against any Released Claims. Excluded from the releases provided in Section 2 shall be this Agreement and the obligations and rights arising under this Agreement, and nothing herein shall be construed to release any Party of its obligations under this Agreement.

2.4. UC and Member each acknowledge that it may discover facts or law different from, or in addition to, the facts or law it knows or believes to exist with respect to a released claim. UC and Member nonetheless each agree that this Agreement and the releases contained in it shall be and remain effective in all respects notwithstanding such different or additional facts or law.

2.5. UC and Member each expressly acknowledge and agree that the releases contained in this Agreement include a waiver of all rights under Section 1542 of the California Civil Code. This statute reads as follows:

A GENERAL RELEASE DOES NOT EXTEND TO CLAIMS WHICH THE CREDITOR DOES NOT KNOW OF OR SUSPECT TO EXIST IN HIS OR HER FAVOR AT THE TIME OF EXECUTING THE RELEASE, WHICH IF KNOWN BY HIM OR HER MUST HAVE MATERIALLY AFFECTED HIS OR HER SETTLEMENT WITH THE DEBTOR.

UC and Member each acknowledge that it has read all of this Agreement, including the above Civil Code section, and that it fully understands both the Agreement and the Civil Code section. UC and Member each waive any benefits and rights granted to it pursuant to Civil Code section 1542.

### **Section 3 - Representation on Authority of Parties/Signatories**

Each person signing this Agreement represents and warrants that he or she is duly authorized and has legal capacity to execute and deliver this Agreement. Each Party represents and warrants to the other that the execution and delivery of the Agreement and the performance of such Party's obligations hereunder have been duly authorized and that the Agreement is a valid and legal agreement binding on such Party and enforceable in accordance with its terms. Each Party further represents and warrants that it has not transferred its rights under the Contract or Agreement to any third party.

### **Section 4 - Binding Effect**

This Agreement shall inure to the benefit of, and be binding upon, the Parties and their respective heirs, successors and assigns. This Agreement does not create, and shall not create, any rights in any person who is not a party to this Agreement.

### **Section 5 - Waiver**

Neither the failure nor any delay on the part of any Party to exercise any right, remedy, power or privilege under this Agreement shall operate as a waiver of that right, remedy, power or privilege. No waiver of any right, remedy, power or privilege with respect to any particular occurrence shall be construed as a waiver of such right, remedy, power or privilege with respect to any other occurrence.

### **Section 6 - Time of the Essence**

Time is of the essence for this Agreement and all of its terms, provisions, conditions and covenants.

### **Section 7 - Entire Agreement**

The Parties declare and represent that no promise, inducement or agreement not discussed in this Agreement has been made between the Parties and that this Agreement contains the entire agreement between the Parties with regard to the matters set forth herein. This Agreement may not be changed or terminated orally, but only by a written instrument executed by the Parties after the date of this Agreement.

### **Section 8 - Construction**

The terms and conditions of this Agreement shall be construed as a whole according to the Agreement's fair meaning and not strictly for or against any Party. The Parties acknowledge that each of them has reviewed this Agreement and has had the opportunity to have it reviewed by its attorneys and that any rule or construction to the effect that ambiguities are to be resolved against the drafting Party shall not apply in the interpretation of this Agreement, including its exhibits or any amendments.

### **Section 9 - Partial Invalidity**

If any term of this Agreement, or the application of any term of this Agreement, should be held by a court of competent jurisdiction to be invalid, void or unenforceable, all provisions, covenants and conditions of this Agreement, and all of its applications, not held invalid, void or unenforceable, shall continue in full force and effect and shall not be affected, impaired or invalidated in any way.

### **Section 10 - Necessary Action**

Each of the Parties shall take commercially reasonable efforts to execute any or all documents or instruments necessary or proper to effectuate the provisions and intent of this Agreement.

### **Section 11 - Counterparts**

This Agreement may be executed in any number of counterparts, each of which when duly executed and delivered shall be an original, but all such counterparts shall constitute one and the same agreement. Any signature page of this Agreement may be detached from any counterpart without impairing the legal effect of any signatures, and may be attached to another counterpart, identical in form, but having attached to it one or more additional signature pages. This Agreement may be executed by signatures provided by electronic facsimile transmission (also known as "Fax" copies) or electronic scans of original signatures, which signatures shall be as binding and effective as original signatures.

### **Section 12 - Notices**

12.1 Any and all notices and demands by or from any Party required or desired to be given under this Agreement shall be in writing and shall be validly given or made if served either personally or if deposited in the United States mail, certified or registered, postage prepaid, return receipt requested or through a commercial overnight delivery service, return receipt requested. If such notice or demand

is served by registered or certified mail in the manner provided, service shall be conclusively deemed given upon receipt, whichever is sooner.

12.2 Any notice or demand to Member shall be addressed to: State of Nevada Department of Education, 700 E. Fifth Street, Carson City, NV 89701; with a copy to: Nevada Attorney General, 100 N. Carson St., Carson City, NV 89701-4717.

12.3 Any notice or demand to UC shall be addressed as set forth on the UC website (as such address may be updated on such website from time to time).

### **Section 13- Miscellaneous**

13.1 The captions appearing at the commencement of the sections of this Agreement are descriptive only and for convenience in reference to this Agreement and shall not define, limit or describe the scope or intent of this Agreement, nor in any way affect this Agreement.

13.2 Masculine or feminine pronouns shall be substituted for the neuter form and vice versa, and the plural shall be substituted for the singular form and vice versa, in any place or places in this agreement in which the context requires such substitution or substitutions.

13.3 The Parties understand and agree that the execution of this Agreement shall not be, and shall not be deemed or construed to be, a precedent or model for the resolution or settlement of any future charge, claim, grievance, complaint, or lawsuit resulting from the same, similar or different circumstances.

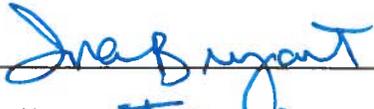
13.4 To the fullest extent possible, the Parties agree that this Agreement shall be deemed admissible as evidence only in an action for breach of this Agreement, and that it shall not be admissible as evidence in any other action.

**[signature page follows]**

IN WITNESS WHEREOF, the Parties have executed this Agreement as of the day and year first above written.

THE REGENTS OF THE UNIVERSITY OF CALIFORNIA

NEVADA DEPARTMENT OF EDUCATION

By:   
Print Name: Ira Bryant  
Title: Senior Counsel

By: \_\_\_\_\_  
Print Name: \_\_\_\_\_  
Title: \_\_\_\_\_

By:   
Print Name: Steven A. Olsen  
Title: Vice Chancellor & CFO