

## SETTLEMENT AGREEMENT

This Settlement Agreement (the "Agreement") is entered into as of the 20th day of August, 2015 ("Effective Date"), by and between Measured Progress, Inc. ("Measured Progress"), a Delaware Non-Profit Corporation, and the Nevada Department of Education (the "Department"), a political subdivision of the State of Nevada (collectively the "Parties").

### Recitals

I. In May of 2010, Measured Progress and the Department entered into a contract wherein Measured Progress agreed to provide various goods and services to the State of Nevada for compensation. The contract between Measured Progress and the Department was mutually amended several times and further amended on May 30, 2014 to revise the scope of work for fiscal year 2015 (as amended "the Contract") to include obligations on the part of Measured Progress for the delivery of the Smarter Balanced Assessments. In the Contract, it was identified that the Smarter Balanced consortium was responsible for, among other items, test content and a test delivery platform to be used by Measured Progress in support of Nevada's 2014-15 Criterion Referenced Test (the "CRT").

II. For its work related to implementing the CRT, Measured Progress was to be paid \$2,656,349.

III. The proposed and accepted Contract assumed that Measured Progress would receive fully functional items and a test delivery platform related to the CRT from Smarter Balanced, a third party vendor.

IV. The delivery of the CRT was not acceptable to the Department or Nevada students due to the lack of platform scalability. No efforts on the part of Measured Progress or Smarter Balanced were able to improve upon the scalability of the Smarter Balanced platform during operational testing. Thus, a majority of Nevada students were unable to successfully complete the CRT.

V. The Department notified Measured Progress of its breach of the Contract related to the CRT testing failures, and the parties have since engaged in discussions related to resolving the breach as well as any and all issues related to the CRT testing failures.

VI. The Department and Measured Progress enjoyed a long mutually beneficial contractual arrangement preceding the Contract and 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 and the breach related to the CRT.

VII. Further, Measured Progress acknowledges that the majority of Nevada students did not have a successful testing experience, and Measured Progress wishes to cure its breach by offering the consideration described below.

### Section 1 – Settlement Terms

1.1 Upon the full execution of this Agreement, the total compensation to Measured Progress under the Contract shall be reduced by \$789,021 to \$1,867,328 in lieu of a cash disbursement.

1.2 Measured Progress shall provide the Department a perpetual, irrevocable, royalty-free, fully paid-up, worldwide license to use The STEM Gauge™ which is 15 sets of 20-25 assessment items based on Next Generation Science Standards topics, built to the NGSS Performance Expectations. It will also include a Teacher's Guide and Formative Support Tools to help teachers integrate assessment items into instruction (Middle School). This product will be delivered in PDF format in two releases only; one in the fall and one in the winter of the 2015-16 school year. Measured Progress represents that the product has a value of approximately \$510,000 and shall be delivered without charge.

## **Section 2 – Mutual Releases**

2.1 Measured Progress, on its own behalf and on behalf of its officers, agents, and employees, hereby absolutely, finally, fully, and irrevocably releases, remises, acquits, and forever discharges the State of Nevada and the Department and their affiliates, partners, joint venturers, heirs, successors, assigns, contractors, subcontractors, officers, directors, shareholders, employees, agents, attorneys and insurers (in their individual and representative capacities) from any and all known and existing claims, demands, losses, damages, actions, causes of action, suits, debts, promises, liabilities, obligations, liens, costs, expenses, attorneys' fees, indemnities, subrogation's (contractual or equitable) or duties, of any nature, character or description whatsoever, whether fixed or contingent, arising from or related to, directly or indirectly, the Contract and the 2014-15 CRT under the Contract.

2.2 The Department, hereby absolutely, finally, fully, and irrevocably releases, remises, acquits, and forever discharges Measured Progress and their affiliates, partners, heirs, successors, assigns, contractors, subcontractors, officers, directors, shareholders, employees, attorneys, insurers and agents, from any and all known and existing claims, demands, losses, damages, actions, causes of action, suits, debts, promises, liabilities, obligations, liens, costs, expenses, attorneys' fees, indemnities, subrogation's (contractual or equitable) or duties, of any nature, character or description whatsoever, whether fixed or contingent, arising from, or related to, directly or indirectly, the Contract and the 2014-15 CRT under the Contract.

2.3 Excluded from the Releases provided in Sections 2.1 and 2.2 shall be this Agreement and the obligations and rights arising under this Agreement.

2.4 The parties agree that this Agreement effectively cures Measured Progress' breach of the Contract as notified on April 21, 2015.

## **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 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. Except as stated in Sections 2 and 3, this Agreement is not intended to 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 of this Agreement and all of its terms, provisions, conditions and covenants.

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

This Agreement contains the entire agreement between the Parties and 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 - Attorneys' Fees**

In any action or proceeding to enforce the terms of this Agreement or to redress any violation of this Agreement, the prevailing Party shall be entitled to recover as damages its reasonable attorneys' fees and costs incurred, whether or not the action is reduced to judgment. For the purposes of this provision, the "prevailing party" shall be that party who has been successful with regard to the main issue, even if that party did not prevail on all the issues.

### **Section 11 - Governing Law and Forum**

The laws of the State of Nevada applicable to contracts made, or to be wholly performed there (without giving effect to choice of law or conflict of law principles), shall govern the validity, construction, performance and effect of this Agreement. Any lawsuit to interpret or enforce the terms of this Agreement shall be brought in a court of competent jurisdiction in the State of Nevada.

### **Section 12 - Necessary Action**

Each of the Parties shall do any act or thing and execute any or all documents or instruments necessary or proper to effectuate the provisions and intent of this Agreement.

### **Section 13 - 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 14 - Notices**

14.1 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 or attempted delivery, whichever is sooner.

14.2 Any notice or demand to the Department 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.

14.3 Any notice or demand to Measured Progress shall be addressed to: Measured Progress Inc., PO Box 1217, 100 Education Way, Dover NH 03821; with a copy to: Patti Ayer, Director Contracts, [ayer.patti@measuredprogress.org](mailto:ayer.patti@measuredprogress.org) or by secure fax 603-718-3019.

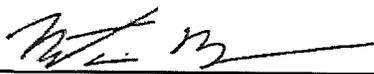
**Section 15 - Miscellaneous**

15.1 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.

15.2 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.

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

MEASURED PROGRESS, INC.

By:  \_\_\_\_\_

Print Name: Martin Borg

Title: President and CEO

NEVADA DEPARTMENT OF EDUCATION

By:  \_\_\_\_\_

Print Name: Dale A.R. Erquiaga

Title: Superintendent of Public Instruction