

19th JUDICIAL DISTRICT COURT FOR THE PARISH OF EAST BATON ROUGE
STATE OF LOUISIANA

NUMBER 632170

SECTION 27

NAVIS HILL, ET AL

VERSUS

BOBBY JINDAL, IN HIS OFFICIAL CAPACITY AS GOVERNOR, STATE OF
LOUISIANA, ET AL

FIRST SUPPLEMENTAL AMENDED AND RESTATED
THIRD PARTY DEMAND FOR DECLARATORY JUDGMENT
AND INJUNCTIVE RELIEF

Defendant and now Third-Party Plaintiff, Louisiana Governor Bobby Jindal, hereby amends and restates his Third Party Demand for Declaratory Relief, the entirety of which now reads as follows:

NOW INTO COURT, through undersigned counsel, comes Louisiana Governor Bobby Jindal, appearing herein in his official capacity as Third-Party Plaintiff, who moves pursuant to La. C.C.P. art. 1871 and 1872 to interpret and declare invalid and unenforceable the "Memorandum of Understanding" of June 8, 2010, between the State of Louisiana and other member states of the Partnership For Assessment of Readiness for College and Careers ("PARCC"), and who moves pursuant to La. C.C.P. art. 3601, et seq., for injunctive relief on the following grounds:

Third-Party Defendant

1.

Made Third-Party Defendant is the Louisiana State Board of Elementary and Secondary Education ("BESE"), a body corporate with its domicile and principal place of business in the Parish of East Baton Rouge, created by Article 8, Section 3 of the Louisiana Constitution of 1974.

The Authority Paradigm For Educational Policy

2.

Article VIII, § 1 of the Constitution of Louisiana provides that “[t]he legislature shall provide for the education of the people of the state and shall establish and maintain a public education system.”

3.

Article VIII, § 2 establishes the office of the superintendent of education to serve as the administrative head of the Department of Education and to “implement the policies of the State Board of Elementary and Secondary Education (“BESE”) and the laws affecting schools under its jurisdiction.”

4.

Article VIII, § 3 provides that BESE shall “supervise and control the public elementary and secondary schools and special schools under its jurisdiction and shall have budgetary responsibility for all funds appropriated or allocated by the state for those schools, *all as provided by law.*” (Italics added).

5.

BESE’s authority over educational policy is “subject to the direction of the legislature.” Aguillard v. Treen, 440 So.2d 704, 709 (La. 1983).

6.

The legislature’s direction to BESE for developing and implementing educational policy is found in Title 17 of the Louisiana Revised Statutes. For instance, BESE is charged with responsibility for “all planning functions for the Department of Education, including collection, analysis and interpretation of all data, information, test results, evaluations, and other indicators that are used to formulate policy, identify areas of concern and need, and serve as the basis for short-range and long-range planning” (La.

R.S. 17:7(1)(c) and to “[a]pprove courses of study and prepare and adopt rules and regulations for the discipline of students and the governance of the public elementary and secondary schools and other public schools and programs under its jurisdiction.”

La. R.S. 17:7(5)(a).

7.

BESE has no authority to delegate or assign to any person or entity its obligations for developing and implementing educational policy as provided by the constitution and the legislature.

Student Assessments

8.

In 1980, the legislature enacted the Louisiana Competency-Based Education Program to define BESE’s authority over the development and implementation of statewide content standards, special education programs, teacher education programs, and the Louisiana Educational Assessment Program (“LEAP”). La. R.S. 17:24.4.

9.

In 2012, the legislature amended the provisions for the LEAP program to require that the assessments implemented by BESE for “English language arts and mathematics shall be based on nationally recognized content standards that represent the knowledge and skills needed for students to successfully transition to postsecondary education and the workplace. Rigorous student achievement standards shall be set with reference to test scores of the same grade levels nationally.” La. R.S. 17:24.4(F)(1)(d).

10.

Although requiring “nationally recognized content standards” for LEAP assessments, the legislature has not mandated or endorsed any particular assessment product, vendor or methodology. That responsibility lies with the elected members of

BESE, who must implement the legislature's stated policy in accordance with law.

**Common Core and Race to the Top -
Good Intentions Co-opted by Federal Coercion**

11.

In 2009, the National Governor's Association's Center for Best Practices and the Council of Chief State School Officers founded the Common Core State Standards Initiative ("CCSSI") to create a set of uniform standards that could be *voluntarily* used by the states to improve the quality of public education ("Common Core standards"). At base, the Common Core standards were designed to define the knowledge and skills students should have in their K-12 education in order to graduate from high school and to succeed in entry-level, credit bearing college courses and in workforce training programs.

12.

For purposes of development and receipt of public comments, the writers of the Common Core standards divided the standards into two categories: (1) college- and career-ready standards, which address what students are expected to have learned upon graduation from high school; and (2) K-12 standards, which address expectations for elementary school through high school. Announced on June 2, 2010, the final K-12 Common Core standards incorporated the college- and career-ready standards.

13.

In 2009, President Obama signed into law the American Recovery and Reinvestment Act, which provided funds for the Obama Administration's Race to the Top program. The program included the Race to the Top Fund and the Race to the Top Assessment Program. The Race to the Top Fund consisted of \$4 billion to disburse to states that agreed to comply with certain programmatic and substantive requirements.

The Race to the Top Assessment Program provided \$362 million in funding “to consortia of states to develop assessments . . . 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.” 75 Fed. Reg. 18, 171 (April 9, 2010).

14.

The Race to the Top Fund included several “priorities.” Priority 1 is an “absolute priority” for a Comprehensive Approach to Education Reform. Priority 2 is a “competitive preference priority” for Emphasis on Science, Technology, Engineering, and Mathematics. Priorities 3-6 are “invitational priorities,” respectively, relating to innovations in early learning, the expansion and use of longitudinal data systems, coordination of elementary and secondary education with post-secondary learning, and school-level reform. *See* 74 Fed. Reg. 59, 836-59, 837 (Nov. 18, 2009).

15.

To satisfy the State Reform Conditions Criteria for Race to the Top funding, states are required to adopt common K-12 standards. Guidance provided by the U.S. Department of Education to the peer reviewers for scoring Race to the Top applications effectively compels states to adopt a single, nationalized set of standards: A state earns “high” points if it is part of a standard consortium consisting of a majority of states that jointly develop and adopt common standards, while a state earns “medium” or “low” points “if the consortium includes one-half of the States in the country or less.” In addition, the “internationally benchmarked standards” refer to a “common set of K-12 standards” that the U.S. Department of Education defines as “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 [standards] consortium.” Id.

The PARCC Memorandum of Understanding

16.

In June 2010, the State of Louisiana entered a “Memorandum of Understanding” (the “PARCC Memorandum” or “MOU,” copy attached as Exhibit “A”) with other states to participate in a “Consortium” to receive grant funding under the Race to the Top Assessment Program for the study and design of standardized assessment tests. The organization of states is referred to as the “Partnership For Assessment of Readiness for College and Careers” (“PARCC”).

17.

Participation in PARCC was promoted as “voluntary,” although its terms clearly provide otherwise. Moreover, the federal purse strings to Race to the Top funding effectively compelled participation by the states.

18.

The PARCC Memorandum requires participating states to “support the work of the Consortium,” which includes meeting the following objectives:

- A. The Consortium shall develop procedures for the administration of its duties, set forth in By-laws, which will be adopted at the first meeting of the Governing Board.
- B. The Consortium shall adopt common assessment administration procedures no later than the spring of 2011.
- C. The Consortium shall adopt a common set of item release policies no later than the spring of 2011.
- D. The Consortium shall adopt a test security policy no later than the spring of 2011.
- E. The Consortium shall adopt a common definition of “English learner” and common policies and procedures for student participation and accommodations for English learners no later than the spring of 2011.
- F. The Consortium shall adopt common policies and procedures for

student participation and accommodations for students with disabilities no later than the spring of 2011.

- G. Each Consortium state shall adopt a common set of college- and career-ready standards no later than December 31, 2011.
- H. The Consortium shall adopt a common set of common performance level descriptors no later than the summer of 2014.
- I. The Consortium shall adopt a common set of achievement standards no later than the summer of 2015.

Section VI.

19.

As a "Governing State" under the PARCC Memorandum, Louisiana agreed to "not be a member of any other consortium" making application for Race to the Top funding and to implement the "administration of the assessment system developed by the Consortium," among numerous other commitments. Section VII, A(1).

20.

PARCC is administered by a "Governing Board" that consists of the chief state school officer or designee from each Governing State. Section VIII. According to the PARCC Memorandum, the "Governing Board shall make decisions regarding major policy, design, operational and organizational aspects of the Consortium's work," including design of assessments, common achievement levels, procurement strategy, and policies and decisions regarding control and ownership of intellectual property. Section VIII, A.

21.

Decisions of the PARCC Governing board "shall be made by consensus; where consensus is not achieved among Governing States, decisions shall be made by a vote of the Governing States. Each State has one vote. Votes of a super majority of the

Governing States are necessary for a decision to be reached.” A super majority is defined as “a majority of Governing States plus one additional State.” Section VIII, A(7).

22.

Section X of the PARCC Memorandum provides for “Binding Commitments and Assurances” of the participating states, which includes a certification that each state “[w]ill cooperate fully with the Consortium and will carry out all of the responsibilities associated with its selected membership classification.”

23.

Section XIV of the PARCC Memorandum provides that the PARCC Governing Board shall have final authority over all conflicts regarding interpretations of the agreement and that such decisions shall not be “subject to further appeal or to review by any outside court or other tribunal.”

24.

A participating state may withdraw from the PARCC Memorandum only upon agreement of “the individuals holding the same position that signed the MOU.” Section VII, D. The PARC Memorandum was signed on behalf of Louisiana by Governor Jindal; then-president of BESE, Keith Guice; and then-superintendent of education, Paul Pastorek. The current president of BESE and the current superintendent of education have ratified the PARCC Memorandum.

25.

Based on the conditions and implementation of the Race to the Top Program, which effectively coerce states to develop a single nationalized standard for education assessments, and the terms of the PARCC MOU, which effectively subject citizens of Louisiana to binding education policy developed by a private non-Louisiana entity, the

Common Core goal of creating “voluntary” standards to assist states has been lost.

26.

Governor Jindal has publically withdrawn his support for the PARCC Memorandum based on the now-clear intention of the Obama Administration to federalize education policy in contravention to the sovereign authority of the State of Louisiana.

27.

In addition, a dispute concerning state procurement law and implementation has arisen as direct result of the purported commitments under the PARCC Memorandum, as demonstrated by the allegations of the underlying principle demand.

DECLARATORY JUDGMENT

COUNT 1 - Unconstitutional Delegation of Authority

28.

The Supreme Court of Louisiana has clearly established that constitutional authority granted to a political office or agency cannot be delegated or assigned “either to the people or to any other body of authority.” Krielow v. Louisiana Dep't of Agric. & Forestry, 2013-1106 (La. 10/15/13); 125 So.3d 384, 389 (Declaring unconstitutional statutes that impermissibly delegated legislative authority to private persons and to public boards), and City of Alexandria v. Alexandria Firefighters Assn., 220 La. 754, 57 So.2d 673 (1952) (Declaring unconstitutional a statute that permitted firemen to vote on maximum number of hours they would be required to work under the statute).

29.

While the delegation of certain administrative functions to another public body may be permitted, the prohibition against delegation of authority to a non-public

person or entity is absolute: “The power conferred upon the majority is, in effect, the power to regulate the affairs of an unwilling minority. This is legislative delegation in its most obnoxious form; for it is not even delegation to an official or an official body, presumptively disinterested, but to private persons whose interest may be and often are adverse to the interest of others in the same business.” Krielow, at 390 (*quoting* Carter v. Carter Coal Co., 298 U.S. 238, 311 (1936)). “Even an intelligible principle cannot rescue a statute empowering private parties to wield regulatory authority.” Association of American Railroads v. United States Department of Transportation, 721 F.3d 666 (D.C. Cir. 2013).

30.

Delegating governmental authority to private citizens “saps our political system of democratic accountability.” Association of American Railroads, at 674. “This threat is particularly dangerous where both Congress and the Executive can deflect blame for unpopular policies by attributing them to the choices of a private entity.” Id. In addition, “fundamental to the public-private distinction in the delegation of regulatory authority is the belief that disinterested government agencies ostensibly look to the public good, not private gain. For this reason, delegations to private entities are particularly perilous.” Id. See also Texas Boll Weevil Eradication Found. v. Lewellen, 952, S.W.2d 454, 475 (Tex. 1997) (striking down an act of the legislature authorizing the creation of the Official Cotton Growers’ Boll Weevil Eradication Foundation as an overbroad delegation of power to private parties), and General Elec. Co. v. New York State Dep’t of Labor, 936 F.2d 1448, 1455 (2d Cir. 1991) (“[A] legislative body may not constitutionally delegate to private parties the power to determine the nature of rights to property in which other individuals have a property interest, without supplying standards to guide the private parties’ discretion.”).

31.

BESE is constitutionally required by Article VIII, §3 to develop and to implement educational policy under the direction of the legislature. And the superintendent is required by Article VIII, §2 to implement the policies of BESE.

32.

Under the PARCC Memorandum, BESE's obligation to develop and to implement the policy established in La. R.S. 17:24.4(F) has been effectively assigned to the PARCC Governing Board, a private non-Louisiana entity.

33.

The PARCC Memorandum is invalid and unenforceable under Louisiana law because it purports to delegate the constitutional authority of BESE and the legislature to a private entity governed by persons representing other sovereigns with potentially conflicting interests.

COUNT 2 - Violation of Federal Law

34.

The General Education Provisions Act ("GEPA"), the Department of Education Organization Act ("DOEA"), and the Elementary and Secondary Education Act ("ESEA"), as amended by the No Child Left Behind Act of 2001 expressly ban federal departments, officers and employees from directing, supervising, or controlling elementary and secondary school curriculum, programs of instruction, and instructional material.

35.

GEPA 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 (italics added).

36.

DOEA provides:

(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.

20 U.S.C. § 3403(a), (b) (italics added).

37.

ESEA provides:

(a) General prohibition

Nothing in this chapter shall be construed to authorize an officer or employee of the Federal Government *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 prohibition of Federal law, no funds provided to the Department under this chapter may be used by the Department *to endorse, approve, or sanction any curriculum* designed to be used in an elementary school or secondary school.

(c) 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 content or student academic achievement standards approved or certified by the Federal Government, in order to receive assistance under this chapter.

(2) Rule of construction

Nothing in this subsection shall be construed to affect requirements under subchapter I of this chapter or part A of subchapter VI of this chapter.

20 U.S.C. 7907(a)-(c) (italics added).

38.

The Common Core standards were originally created and promoted to be voluntary, with no strings tied to federal mandates or federal conditions affecting curriculum, programs of instruction, or instructional materials.

39.

The Race to Top Program, however, effectively coopted Common Core for the federal government, attempting to accomplish indirectly through economic coercion that which the federal government is prohibited from accomplishing directly.

40.

PARCC was created in direct response to the Race for the Top Assessment Program. Its purpose is to marshal states toward the centralized control of education standards and content through its “Comprehensive Assessment Systems”, which effectively controls assessment, testing, and instructional products and materials.

41.

Simply put, PARCC is the implementation platform for a carefully orchestrated federal scheme to supervise, direct and control educational curriculum, programs of instruction and instructional materials in direct violation of federal law. And the scheme is being perpetrated on the pretext of higher standards promised by Common Core.

42.

By committing the State to PARCC's governance, obligations and products, BESE is effectively enabling a violation of federal law.

COUNT 3 – PARCC Memorandum was not authorized by BESE

43.

In the exercise of its supervision and control over the public elementary and secondary schools and special schools under its jurisdiction, BESE has the authority to enter into contracts and agreements, in accordance with applicable law. See La. Const. VIII, §3; La. R.S. 17:6.

44.

The President of BESE is authorized to sign only those contracts, agreements or official documents which are specifically approved by the Board. La. Admin. Code Title 28 §305 (2014). The President is not authorized to take any action which obligates BESE without specific authority or subsequent ratification by the Board. Id.

45.

In January, 2010, in connection with its adoption of "common core", BESE generally approved Louisiana's participation in an Assessment Consortium of states to develop and implement Common Core standards. Six months later, in June, 2010, the State of Louisiana entered into the PARCC Memorandum.

46.

BESE has never specifically approved the State's participation in PARCC or the PARCC Memorandum and its associated obligations and commitments, including PARCC's centralized control of assessments and teaching products.

47.

The PARCC Memorandum has not been formally approved by BESE and is thus invalid.

INJUNCTIVE RELIEF

48.

Governor Jindal repeats and realleges the allegations in Paragraphs 1 through 47, as if set forth herein in their entirety.

49.

Despite the fact that PARCC had the exclusive control over the development of the material, in their Petition, Plaintiffs and BESE admit that the assessment systems and tools developed by PARCC will be utilized in Louisiana's schools in the 2014-15 school year. See generally, Plaintiffs' Pet., ¶¶ 80-84 and BESE's Pet. ¶¶ 48-49.

50.

Because of the nature of the violations alleged herein, namely, the unconstitutional delegation of authority to the PARCC Consortium and Governing Board in the PARCC Memorandum; the unauthorized execution of the PARCC Memorandum; and the unlawful exercise of federal control over education, a showing of irreparable harm is unnecessary in this matter. (See Jurisich v. Jenkins, 99-0076 (La. 10/19/99); 749 So. 2d 597, 599 "A petitioner is entitled to injunctive relief without the requisite showing of irreparable injury when the conduct sought to be restrained is unconstitutional or unlawful.").

51.

Governor Jindal shows, however, that he has met the higher burden and demonstrated entitlement to injunctive relief, as the citizens of the State of Louisiana will suffer irreparable injury, loss and damage if the assessment system and tools developed by PARCC are implemented in the 2014-15 school year because the assessments developed by PARCC represent an unlawful exercise of federal control of education in Louisiana.

52.

Because of the imminent risk of irreparable harm created by the unlawful exercise of federal control of education in Louisiana, Governor Jindal seeks a Preliminary Injunction, and in time, a Permanent Injunction, enjoining, restraining and prohibiting Third-Party Defendant, BESE, and any person or agency who is charged with the implementation of the policies of BESE, from implementing or administering any assessment system or tool developed pursuant to the PARCC Memorandum.

WHEREFORE, Third-Party Plaintiff, Louisiana Governor Bobby Jindal, respectfully prays for judgment as follows:

1. A declaration that the Memorandum of Understanding is invalid and unenforceable; or, alternatively
2. A declaration of the rights of the State of Louisiana under the Memorandum of Understanding and the legal relationship between the parties to the Memorandum of Understanding;
3. That a Preliminary Injunction, and in due course, a Permanent Injunction, should issue enjoining, restraining and prohibiting Third-Party Defendant, BESE, and any person or agency who is charged with the implementation of the policies of BESE, from implementing or administering any assessment system or tool developed pursuant to the PARCC Memorandum; and
4. Any other equitable and general relief deemed just and proper.

Respectfully submitted,

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OFFICIAL CAPACITY AS GOVERNOR,
STATE OF LOUISIANA**

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the above and foregoing First Supplemental Amended and Restated Third Party Demand for Declaratory Judgment and Injunctive Relief has this date been served upon all known parties by electronic mail to:

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Alexandria, Louisiana, this ____ day of _____, 2014.

OF COUNSEL

19th JUDICIAL DISTRICT COURT FOR THE PARISH OF EAST BATON ROUGE
STATE OF LOUISIANA

NUMBER 632170

SECTION 27

NAVIS HILL, ET AL

VERSUS

BOBBY JINDAL, IN HIS OFFICIAL CAPACITY AS GOVERNOR, STATE OF
LOUISIANA, ET AL

RULE TO SHOW CAUSE

Upon considering the First Supplemental Amended and Restated Third Party Demand for Declaratory Judgment and Injunctive Relief filed by Louisiana Governor Bobby Jindal,

IT IS HEREBY ORDERED that Third Party-Defendant, BESE, show cause on the ____ day of _____, 2014, at ____ o'clock, why a Preliminary Injunction should not issue herein enjoining, restraining and prohibiting Third-Party Defendant, BESE, and any person or agency who is charged with the implementation of the policies of BESE, from implementing or administering any assessment system or tool developed pursuant to the PARCC Memorandum.

Signed in Baton Rouge, Louisiana, on this ____ day of _____, 2014.

HONORABLE TODD W. HERNANDEZ
JUDGE, 19TH JUDICIAL DISTRICT COURT