CIRCUIT COURT OF SOUTH DAKOTA
SIXTH JUDICIAL CIRCUIT

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

MEMORANDUM DECISION

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

FACTUAL BACKGROUND

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

A. Legal Standard.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

D. Motion to Dismiss the Claim for Attorney Fees.

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

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

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

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

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

A. Legal Standard.

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

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

B. SBAC is an interstate compact.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[12] *Id.*

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

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

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

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

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

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

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[13] *Id.*

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

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

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

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

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

The MOUA states,

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

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[16] Complaint, ¶¶ 18, 19-28; *see also* U.S. Const. Amend. X. Plaintiffs argue that because education is not an enumerated power of the federal government, the Tenth Amendment precludes the federal government from directly controlling education systems, standards, or curriculum.

[17] *Wheeler v. Barrera*, 417 U.S. 402, 415-16, 94 S. Ct. 2274, 2282, 41 L. Ed. 2d 159 (1974), *modified on other grounds*, 422 U.S. 1004, 95 S. Ct. 2625, 45 L. Ed. 2d 667 (1975) ("The legislative history, the language of the Act, and the regulations clearly reveal the intent of Congress to place plenary responsibility in local and state agencies for the formulation of suitable programs under the Act. There was a pronounced aversion in Congress to 'federalization' of local educational decisions.").

[18] *Defendants' Brief in Opposition*, at 10.

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

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

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

MOUA, ¶ 3.5.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Tex. Educ. Code Ann. § 39.023(a):

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

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

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

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

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

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

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

South Dakota statutory interpretation rules are well-settled:

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

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

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

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

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

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

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

CONCLUSION

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

Mark Barnett

Honorable Mark Barnett
Circuit Court Judge