

STATE OF COLORADO
Colorado Department of Education
Contract with The National Center for the Improvement
of Educational Assessment, Inc.

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I. PARTIES

This contract, is entered into by and between the State of Colorado, for the use and benefit of the Colorado Department of Education, 201 East Colfax, Denver, Colorado 80203, hereinafter referred to as CDE, and The National Center for the Improvement of Educational Assessment, Inc., 31 Mount Vernon Street, Dover, New Hampshire 03820, hereinafter referred to as the Contractor.

II. EFFECTIVE DATE AND NOTICE OF NON-LIABILITY

This Contract shall not be effective or enforceable until it is approved and signed by the Colorado State Controller or designee (hereinafter called the Effective Date). The State shall not be liable to pay or reimburse Contractor for any performance hereunder including, but not

limited to, costs or expenses incurred, or be bound by any provision hereof prior to the Effective Date.

III. RECITALS

A. Authority, Appropriation, and Approval

Funds have been budgeted, appropriated and otherwise made available and a sufficient unencumbered balance thereof remains available for payment. Required approvals, clearance and coordination have been accomplished from and with appropriate agencies.

B. Consideration

The Parties acknowledge that the mutual promises and covenants contained herein and other good and valuable consideration are sufficient and adequate to support this Contract.

C. Purpose

The purpose of this Contract is to have the National Center for the Improvement of Educational Assessment continue to support the work for Senate Bill 09-163 (the Education Accountability Act of 2009), continue to support the implementation of the Colorado Growth Model by providing growth analysis, review and guidance, to assist in developing a new accountability framework through statistical analyses including confidence interval, cut point and distribution weight analyses, to conduct analysis and provide requested student reports through the use of student information, educational records, and data to validate data accuracy, provide relevant reports to local education agencies, and to provide feedback regarding various application of the Colorado Growth Model to student level data.

D. References

All references in this Contract to sections, subsections, exhibits or other attachments, are references to sections, subsections, exhibits or other attachments contained herein or incorporated as a part hereof, unless otherwise noted.

IV. DEFINITIONS

The following terms as used herein shall be construed and interpreted as follows:

“Contract” means this Contract, its terms and conditions, attached exhibits, documents incorporated by reference under the terms of this Contract, and any future modifying agreements, exhibits, attachments or references incorporated herein pursuant to Colorado State law, Fiscal Rules, and State Controller Policies.

“Contract Funds” means funds available for payment by the State to Contractor pursuant to this Contract.

“Evaluation” means the process of examining Contractor’s Work and rating it based on criteria established in Section VI and Exhibit Insert letter of applicable Exhibit (A, B, C, etc).

“Goods” means tangible material acquired, produced, or delivered by Contractor either separately or in conjunction with the “Evaluation” means the process of examining Contractor’s Work and rating it based on criteria established in Section VI below.

“Party” means the State or Contractor and “Parties” means both the State and Contractor

“Personally Identifiable Information (PII)” includes, but is not limited to the student's name; the name of the student's parent or other family members; the address of the student or student's family; a personal identifier, such as the student's social security number, student number, or biometric record; other indirect identifiers, such as the student's date of birth, place of birth, and mother's maiden name; other information that, alone or in combination, is linked or linkable to a specific student that would allow a reasonable person in the school community, who does not have personal knowledge of the relevant circumstances, to identify the student with reasonable certainty; or information requested by a person who the educational agency or institution reasonably believes knows the identity of the student to whom the education record relates.

PII also means a dataset that is linked to a specific individual that would allow a reasonable person in a school community, who does not have knowledge of the relevant circumstances, to identify the individual with reasonable certainty.

“Review” means examining Contractor’s Work to ensure that it is adequate, accurate, correct and in accordance with the criteria established in Section VI below.

“Services” means the required services to be performed by Contractor pursuant to this Contract.

“Subcontractor” means third-parties, if any, engaged by Contractor to aid in performance of its obligations.

“Work” means the tasks and activities Contractor is required to perform to fulfill its obligations under this Contract, including the performance of the Services and delivery of the Goods.

“Work Product” means the tangible or intangible results of Contractor’s Work, including, but not limited to, software, research, reports, studies, data, photographs, negatives or other finished or unfinished documents, drawings, models, surveys, maps, materials, or work product of any type, including drafts.

V. TERM AND EARLY TERMINATION

A. Initial Term-Work Commencement

The Parties’ respective performances under this Contract shall commence on the later of either the Effective Date or July 15, 2014. This Contract shall terminate on June 30, 2015, unless sooner terminated or further extended as specified elsewhere herein.

B. Two Month Extension

The State, at its sole discretion upon written notice to Contractor, may unilaterally extend the term of this Contract for a period not to exceed two months if the Parties are negotiating a replacement Contract (and not merely seeking a term extension) at or near the end of any initial term or renewal term. The provisions of this Contract in effect when such notice is given, including, but not limited to prices, rates, and delivery requirements, shall remain in effect during the two-month extension. The two-month extension shall immediately terminate when and if a replacement Contract is approved and signed by the Colorado State Controller.

C. State's Option to Extend

The State may require continued performance for a period of one year at the same rates and same terms specified in the Contract. The total duration of this Contract, including the exercise of any options under this clause, shall not exceed two years.

VI. STATEMENT OF WORK

- A. Contractor shall conduct research, generate reports and provide technical support to CDE to produce individual student growth reports and provide technical guidance/analytics concerning the Colorado Growth Model, including data validation.
- B. Contractor's research analysis shall be provided to CDE so that CDE is better informed about the student growth measures that are calculated based on state summative assessment results.
- C. Work to be completed under this Contract requires the use of identifiable student-level data since Contractor will be producing student-level growth reports based on data obtained from Colorado summative assessments including Assessing Comprehension and Communication in English State-to-State for English Language Learners (ACCESS for ELLs), Colorado Student Assessment Program (CSAP), Transitional Colorado student Assessment Program (TCAP), and the Partnership for Assessment of Readiness for College and Careers (PARCC). In addition, analytics surrounding CDE's growth model require student level data to track longitudinal changes in performance and allow for statistical calculations including validation of student level results. The table below lists project activities, variables of interest and anticipated analyses:

Project Activities, Variables of Interest, and Anticipated Analyses

Question/Activity	Variables	Analyses
Generate Individual Student Growth Reports based on TCAP Results	CSAP, TCAP, PARCC student level data related to achievement and growth.	Produce individual student growth reports utilizing student level CSAP, TCAP, and/or PARCC assessment data for all content areas.

Question/Activity	Variables	Analyses
Generate Individual Student Growth Reports based on ACCESS for ELLs Assessment Results	ACCESS for ELLs student level data related to overall achievement and growth.	Produce individual student growth reports utilizing student level ACCESS for ELLs assessment data that includes student name and student achievement and growth scores.
Student Growth File Data Validation (Annual) for TCAP/PARCC	TCAP and/or PARCC Student Overall Growth Percentiles	Independent validation of derived student growth files produced from the TCAP and/or PARCC assessment administrations.
Student Growth File Data Validation (Annual) for ACCESS	ACCESS for ELLs Student Overall Growth Percentiles	Independent validation of derived student growth files produced from the ACCESS assessment administration.
Other Growth Model Analytics	CSAP, TCAP, PARCC, ACCESS for ELLs assessment results including both achievement and growth.	Conduct <i>ad hoc</i> analysis related to the Colorado Growth Model to support all aspects of state work conducted by the Accountability and Data Analysis Unit.

- D. Contractor shall conduct analysis and provide requested student reports through the use of student information, educational records, and data to validate data accuracy, provide relevant reports to local education agencies, and to provide feedback regarding various application of the Colorado Growth Model to student level data.
- E. Contractor shall perform the following tasks:
1. Task 1 - Growth analysis. Support for CDE's growth work in state fiscal year 2015. Support will involve technical assistance related to the calculation, validation, and reporting of student growth percentiles, including support with the generation of Individual Student Growth Reports for the Transitional Colorado Assessment Program (TCAP) and Assessing Comprehension and Communication in English State-to-State (ACCESS) along with Student Growth File Data Validation. Additional assistance with growth model comparability calculations are required due to the transition between the TCAP and the Partnerships for Assessment of Readiness for College and Careers (PARCC) assessments.

Table 1 -Growth analysis during assessment transition

Growth Related Activities	Estimated Days	Estimated Costs
Growth analysis guidance, review and advisory work	4	\$7,200
Travel and lodging (assumes 1 trip)		\$2,000
Total for Task 1		\$9,200

2. Task 2: Complete needs assessment work. Analyze data collected from the needs assessment. CDE anticipates that the analysis from interviews, focus group work and the survey results will be completed by the end of July. Contractor shall submit a report (see Task 4) to CDE Accountability and Data Analysis staff by mid-August, 2014. A presentation of findings may also be required as requested.

Table 2 - Completing needs assessment work

Completing needs assessment work	Estimated Days	Estimated Costs
Analysis work	3	\$5,400
Total for Task 2		\$5,400

3. Task 3: Data analyses and technical guidance relating to changes to calculations and metrics for improving the accountability frameworks.

a. Task 3 activities shall include:

- 1) Conducting analysis with CDE Accountability and Data Analysis staff to review the possible use of confidence intervals for growth for accountability purposes.
- 2) Conducting analysis of school and district performance profiles to inform consideration to re-set accountability performance cuts.
- 3) Providing input to CDE based on results from CDE Accountability and Data Analysis staff analysis conducted to review possible accountability design changes including: shifting current distribution of weights in the framework, considering the use of a "super sub-group", considering the use of growth metrics such as the percentage of students catching or keeping up, and other possible measures/metrics.

Table 3: New accountability framework

Accountability Framework Activities	Estimated Days	Estimated Costs
Analysis work	5	\$9,000
Advisory role and review of analysis (assumes mix of senior associates and associate director time)	9	\$16,650
Total for Task 3		\$25,650

4. Task 4 - Develop recommendations for a new accountability framework.

- a. Create a report that combines the results of the data analysis and needs assessment with other technical considerations resulting in recommendations for the new accountability framework.

- b. Serve in an advisory capacity for CDE Accountability and Data Analysis staff throughout the year on new accountability design discussions.

Table 4: Develop recommendations for a new accountability framework

Accountability Framework Recommendation Study/Report	Estimated Days	Estimated Costs
Advisory role	8	\$14,400
Write report and present findings from needs assessment	7	\$12,600
Travel and lodging (assumes 1 trip)		\$2,000
Total for Task 4		\$29,000

5. Task 5 - Request for reconsideration process review work. A total of three days or **\$5,400** will be used to support the ongoing refinement of the request for reconsideration process. More specifically, Contractor shall review and provide input on CDE guidance documents provided to districts and schools for collecting evidence to support their efforts to have their accountability ratings reconsidered by the state.

F. Contractor shall:

1. Provide CDE with a list of researchers participating in the project who will be responsible for the student records obtained.
2. Use student records appropriately and only for authorized purposes, in accordance with federal and state law and as specified in this Contract, including the Confidentiality provisions contained herein.
3. Implement appropriate electronic safeguards to prevent use or disclosure of data not authorized by this Contract.
4. Ensure that the data are kept in a secured environment at all times and that only authorized users have access. If data is stored in a cloud environment not controlled by the Contractor, Contractor is responsible for assuring that the Cloud vendor meets or exceeds CDE required cyber security requirements/policies and follows the Family Educational Rights and Privacy Act (FERPA), 20 U.S.C. Sec. 1232g requirements. Cloud usage is restricted to United States based data centers only.
5. Destroy student records that have been provided by CDE one year after completion of the services, and if requested, provide certification that such records have been destroyed.
6. Prior to publication/release, provide any documents generated as a result of using student records received from CDE for review and verification that the intended purpose has been adhered to.

7. Understand that deliberate or accidental misuse of student records may result in loss of access to data, termination of the Contract, and/or legal action including prosecution under the scope of any applicable federal and state laws.
8. Ensure that access to the data covered by this Contract is limited to eligible personnel and the minimum number of individuals necessary to complete the services set forth in the Contract.

G. Contractor shall not:

1. Share student records with any individuals or third parties not included in the Contract.
2. Make or allow any unauthorized use of information provided/generated.
3. Permit access to cloud based servers via any mechanism other than the secure portal provided by the vendor, and not a web interface on the Internet or allowing telnet from the Internet.
4. Publish any publically available reports with a cell size of less than 16. (Reports must mask these cells so that results are not revealed.)

H. CDE shall provide Contractor with the raw data files and fields outlined in Appendix A.

I. CDE reserves the right to review before release any information using this student data if it is to be released publicly.

J. Employees

All persons employed by Contractor or Subcontractors to perform Work under this Contract shall be Contractor's or Subcontractors' employee(s) for all purposes hereunder and shall not be employees of the State for any purpose as a result of this Contract.

VII. PAYMENTS TO CONTRACTOR

The State shall, in accordance with the provisions of this section, pay Contractor in the amounts and using the methods set forth below:

A. Maximum Amount

1. The maximum amount payable under this Contract to Contractor by the State is \$74,650 as determined by the State from available funds. Payments to Contractor are limited to the unpaid obligated balance of the Contract.
2. Payment shall be made upon receipt and acceptance of the deliverables as outlined in Section VI. above within 45 days of receipt of the invoice.

B. Payment

1. Advance, Interim and Final Payments

Any advance payment allowed under this Contract shall comply with State Fiscal Rules and be made in accordance with the provisions of this Contract or such Exhibit. Contractor shall initiate any payment requests by submitting invoices to the State in the form and manner set forth in approved by the State.

2. Interest

The State shall fully pay each invoice within 45 days of receipt thereof if the amount invoiced represents performance by Contractor previously accepted by the State. Uncontested amounts not paid by the State within 45 days shall bear interest on the unpaid balance beginning on the 46th day at a rate not to exceed one percent per month until paid in full; provided, however, that interest shall not accrue on unpaid amounts that are subject to a good faith dispute. Contractor shall invoice the State separately for accrued interest on delinquent amounts. The billing shall reference the delinquent payment, the number of day's interest to be paid and the interest rate.

3. Available Funds-Contingency-Termination

The State is prohibited by law from making commitments beyond the term of the State's current fiscal year. Therefore, Contractor's compensation beyond the State's current Fiscal Year is contingent upon the continuing availability of State appropriations as provided in the Colorado Special Provisions. If federal funds are used to fund this Contract, in whole or in part, the State's performance hereunder is contingent upon the continuing availability of such funds. Payments pursuant to this Contract shall be made only from available funds encumbered for this Contract and the State's liability for such payments shall be limited to the amount remaining of such encumbered funds. If State or federal funds are not appropriated, or otherwise become unavailable to fund this Contract, the State may terminate this Contract immediately, in whole or in part, without further liability in accordance with the provisions hereof.

4. Erroneous Payments

At the State's sole discretion, payments made to Contractor in error for any reason, including, but not limited to overpayments or improper payments, and unexpended or excess funds received by Contractor, may be recovered from Contractor by deduction from subsequent payments under this Contract or other contracts, grants or agreements between the State and Contractor or by other appropriate methods and collected as a debt due to the State. Such funds shall not be paid to any party other than the State.

5. Use of Funds

Contract Funds shall be used only for eligible costs identified herein and/or in the Budget.

VIII. REPORTING – NOTIFICATION

Reports, Evaluations, and Reviews required under this Section shall be in accordance with the procedures of and in such form as prescribed by the State.

A. Performance, Progress, Personnel, and Funds

State shall submit a report to the Contractor upon expiration or sooner termination of this Contract, containing an Evaluation and Review of Contractor's performance and the final status of Contractor's obligations hereunder.

B. Litigation Reporting

Within 10 days after being served with any pleading in a legal action filed with a court or administrative agency, related to this Contract or which may affect Contractor's ability to perform its obligations hereunder, Contractor shall notify the State of such action and deliver copies of such pleadings to the State's principal representative as identified herein. If the State's principal representative is not then serving, such notice and copies shall be delivered to the Deputy Commissioner of CDE.

C. Performance Outside the State of Colorado and/or the United States

[Not applicable if Contract Funds include any federal funds] Following the Effective Date, Contractor shall provide written notice to the State, in accordance with Section XVII (Notices and Representatives), within 20 days of the earlier to occur of Contractor's decision to perform, or its execution of an agreement with a Subcontractor to perform, Services outside the State of Colorado and/or the United States. Such notice shall specify the type of Services to be performed outside the State of Colorado and/or the United States and the reason why it is necessary or advantageous to perform such Services at such location or locations. All notices received by the State pursuant to this Section VIII.C shall be posted on the Colorado Department of Personnel & Administration's website. Knowing failure by Contractor to provide notice to the State under this Section VIII.C shall constitute a material breach of this Contract.

D. Noncompliance

Contractor's failure to provide reports and notify the State in a timely manner in accordance with this Section may result in the delay of payment of funds and/or termination as provided under this Contract.

E. Subcontracts

Copies of any and all subcontracts entered into by Contractor to perform its obligations hereunder shall be submitted to the State or its principal representative upon request by the State. Any and all subcontracts entered into by Contractor related to its performance hereunder shall comply with all applicable federal and state laws and shall provide that such subcontracts be governed by the laws of the State of Colorado.

IX. CONTRACTOR RECORDS

A. Maintenance

Contractor shall make, keep, maintain, and allow inspection and monitoring by the State of a complete file of all records, documents, communications, notes and other written materials, electronic media files, and communications, pertaining in any manner to the Work or the delivery of Services or Goods hereunder. Contractor shall maintain such records until the last to occur of: (i) a period of three years after the date this Contract expires or is sooner terminated, or (ii) final payment is made hereunder, or (iii) the resolution of any pending Contract matters, or (iv) if an audit is occurring, or Contractor has received notice that an audit is pending, until such audit has been completed and its findings have been resolved (collectively, the Record Retention Period).

B. Inspection

Contractor shall permit the State, the federal government and any other duly authorized agent of a governmental agency to audit, inspect, examine, excerpt, copy and/or transcribe Contractor's records related to this Contract during the Record Retention Period for a period of three years following termination of this Contract or final payment hereunder, whichever is later, to assure compliance with the terms hereof or to evaluate performance hereunder. The State reserves the right to inspect the Work at all reasonable times and places during the term of this Contract, including any extensions or renewals. If the Work fails to conform with the requirements of this Contract, the State may require Contractor promptly to bring the Work into conformity with Contract requirements, at Contractor's sole expense. If the Work cannot be brought into conformance by re-performance or other corrective measures, the State may require Contractor to take necessary action to ensure that future performance conforms to Contract requirements and exercise the remedies available under this Contract, at law or in equity, in lieu of or in conjunction with such corrective measures.

C. Monitoring

Contractor shall permit the State, the federal government, and governmental agencies having jurisdiction, in their sole discretion, to monitor all activities conducted by Contractor pursuant to the terms of this Contract using any reasonable procedure, including, but not limited to: internal evaluation procedures, examination of program data, special analyses, on-site checking, formal audit examinations, or any other procedures. All monitoring controlled by the State shall be performed in a manner that

shall not unduly interfere with Contractor's performance hereunder.

D. Final Audit Report

If an audit is performed on Contractor's records for any fiscal year covering a portion of the term of this Contract, Contractor shall submit a copy of the final audit report to the State or its principal representative at the address specified herein. Contractor shall ensure the provisions of this paragraph apply to any subcontract related to performance under the Contract. Contractor shall, at Contractor's sole expense, reconstruct any records not preserved or retained as required by this paragraph.

X. CONFIDENTIAL INFORMATION

- A. The term "confidential information" as used in this Contract means any and all student information provided by the State to Contractor which is protected by the Family Educational Rights and Privacy Act (FERPA), 20 U.S.C. Sec. 1232g and all other similar federal and state laws. Such personal information is exempt from mandatory disclosure by the State under the terms of the state public disclosure laws codified as Title 24, Article 72, regarding Colorado Laws Concerning Public (Open) Records.
- B. To affect the transfer of data and information that is subject to federal and state confidentiality laws and to ensure that the required confidentiality of personally identifiable information shall always be maintained, Contractor agrees to the following in compliance with 34 C.F.R. Sec. 99.31 (a) (6):
1. In all respects, Contractor will comply with the provisions of FERPA. Nothing in this Contract may be construed to allow either Party to maintain, use, disclose, or share student record information in a manner not allowed under federal or state law or regulation;
- C. For purposes of this Contract and to ensure Contractor's compliance with the terms of this Contract and all application of state and federal laws, Contractor designates Damian Betebenner, Ph.D. the temporary custodian of the data CDE shares with Contractor. CDE will release all data and information under this Contract to Dr. Betebenner who shall be responsible for transmitting all data requests and maintaining a log or other record of all data requested and received pursuant to the Contract, including confirmation of the return or destruction of data as described below. CDE or its agents may, upon request, review the records Contractor is required to keep under this Contract. CDE designates Dan Jorgensen, Ph.D. as its liaison for all communications with Contractor regarding the confidentiality provisions of this Contract.
1. Contractor will use data shared under this Contract for no purpose other than the goals outlined in this Contract. Nothing in the Contract shall be construed to authorize Contractor to have access to additional data from the State that is not included in the scope of the Contract. Contractor understands that the Contractor does not convey ownership of data.

2. Contractor shall require all employees, subcontractors, and agents of any kind to comply with the Contract and all applicable provisions of FERPA and other laws and regulations with respect to the shared data and information. Contractor agrees to require and maintain an appropriate confidentiality agreement from each employee, subcontractor, or agency with access to data pursuant to this Contract. Nothing in this section authorizes Contractor to share data and information provided under this Contract with any other individual, agency, or entity for any purpose other than completing Contractor's work as authorized by the State for and on behalf of the State, consistent with this Contract.
 3. Contractor will not disclose data produced to it under this Contract in any manner that could identify any individual student or teacher, except as authorized by FERPA, to any entity other than the State or authorized employees, subcontractors, or agents of Contractor also working for and on behalf of the State pursuant to the terms of this Contract. Publications and reports of data and information shared, including preliminary descriptions and draft reports, shall involve only aggregate data and no personally identifiable information or other information that could lead to the identification of any student or teacher.
 4. Contractor will not provide any data obtained under this Contract to any individual, agency, or entity without the prior written consent of the State, unless required to make such disclosure under an applicable law or court order.
 5. Upon termination of all work related to the Contract, Contractor shall return all data files and hard copy records to the State and purge any copies of data from its computer systems. Contractor agrees to require all employees, subcontractors, or agents of any kind using the State data to comply with this provision. No other entity is authorized to continue research using the data obtained under this Contract upon termination of the Contract. Contractor shall destroy all data obtained under the Contract when no longer needed for the purpose for which it was released by the State. Upon request, Contractor agrees to provide certification to the State that such records have been destroyed.
 6. Contractor agrees that disclosure of confidential student information, without permission of the State, is just cause for the State to immediately terminate the Contract.
- D. Contractor has the right consistent with scientific standards, to present, publish, or use student results it has gained in the course of the research for and on behalf of the State under this Contract, but only if the publication, presentation, or use does not permit personal identification of parents, students, or teachers by individuals other than representatives of the Contractor. Any violation of this Contract and/or the provisions of FERPA or accompanying regulations related to the nondisclosure of protected student information may result in a determination by CDE that the violating party is prohibited from accessing student education records for up to five (5) years, pursuant to 34 C.F.R. Section 99.31 (a) (6) (iv).

E. Confidentiality

Contractor shall keep all State records and information confidential at all times and comply with all laws and regulations concerning confidentiality of information. Any request or demand by a third party for State records and information in the possession of Contractor shall be immediately forwarded to the State's principal representative.

F. Notification

Contractor shall notify its agent, employees, Subcontractors and assigns who may come into contact with State records and confidential information that each is subject to the confidentiality requirements set forth herein, and shall provide each with a written explanation of such requirements before permitting them to access such records and information.

G. Use, Security, and Retention

Confidential information of any kind shall not be distributed or sold to any third party or used by Contractor or its agents in any way, except as authorized by this Contract or approved in writing by the State. Contractor shall provide and maintain a secure environment that ensures confidentiality of all State records and other confidential information wherever located. Confidential information shall not be retained in any files or otherwise by Contractor or its agents, except as permitted in this Contract or approved in writing by the State. All confidential information, State data of any kind shall be stored, processed, or transferred only in or to facilities located within the United States.

H. Protection

If Contractor provides physical or logical storage, processing or transmission of confidential or sensitive State data, Contractor shall provide, and shall cause its Subcontractors to provide, physical and logical protection for State hardware, software, applications and data that meet or exceed industry standards and requirements as set forth in the Contract. Contractor shall provide the State with access, subject to Contractor's reasonable access security requirements, seven (7) days a week, twenty-four (24) hours a day, for the purpose of inspecting and monitoring access and use of State data, maintaining State systems, and evaluating physical and logical security control effectiveness. Contractor, if it retains, stores, or is given protected or confidential information, at all times shall maintain, and shall cause its Subcontractor's to maintain, network, system, and application security, which includes network firewalls, intrusion detection, and annual security testing. Contractor, if it retains, stores, or is given protected or confidential information, shall comply and shall cause its Subcontractors to comply, with State and federal regulations and guidelines related to security, confidentiality and auditing, including but not limited to the Family Educational Rights and Privacy Act (FERPA), 20 U.S.C. 1232g and 34 C.F.R. Part 99. Contractor, if it retains, stores, or is given protected or confidential information shall ensure, and shall cause its Subcontractors to ensure, that security is not compromised by unauthorized access to computers, program, software, databases, or other electronic environments and

shall promptly report all breaches or attempted breaches to a representative of the OIS. Neither Contractor nor its Subcontractors shall have any rights to use or access any OIT or other State agency data or information, except with the prior approval of the State. Contractor shall review, on a semi-annual basis, the Colorado Cyber Security Program (CCSP), posted at <http://www.colorado.gov/cs/Satellite/Cyber/CISO/1207820732279>, and its related documents, including its policies and procedures to ensure compliance with the standards and guidelines published therein. Contractor shall cooperate, and shall cause its Subcontractors to cooperate, with the performance of security audit and penetration tests by OIS. Contractor shall follow, and shall cause its Subcontractors to follow, the State's Data Handling and Disposal policy, which can be found at www.colorado.gov/oit/security_policies. Contractor shall perform, and shall cause its Subcontractor's to perform, in a form reasonably acceptable to the State, current background checks on all of its respective employees and agents performing services or having access to State confidential information provided under the Contract. A background check performed within thirty (30) days prior to the date such employee or agent begins performance or obtains access shall be deemed to be current.

I. Security-Notice

Contractor is responsible for the security of all information provided to it by the State. If information is provided to Contractor or any Subcontractor by the State, Contractor shall comply with and shall cause its Subcontractors to comply with the State's Cyber Security Policies, which the OIS has promulgated pursuant to C.R.S. Sections 24-37.5-401 through 406 and 8 C.C.R. Section 1501-5. The Policies are posted at <http://www.colorado.gov/cs/Satellite/Cyber/CISO/1207820732279>.

J. Security Breach Remediation

If Contractor becomes aware of a data security breach, it shall notify the State immediately and cooperate with the State regarding recovery, remediation, and the necessity to involve law enforcement, if any. Unless Contractor can establish that Contractor or any of its Subcontractors is not the cause or source of the breach, Contractor shall be responsible for the cost of notifying each Colorado resident and residents of other states whose personal information may have been compromised. Notice shall be made as soon as possible within the legitimate needs of law enforcement and according to the requirements of the State. Contractor shall be responsible for performing an analysis to determine the cause of the breach, and for producing a remediation plan to reduce the risk of incurring a similar type of breach in the future. Contractor shall present such analysis and remediation plan to the State within ten (10) days of notifying the State of the data security breach. The State reserves the right to adjust this plan, in its sole discretion. If Contractor cannot produce the required analysis and plan within the allotted time, the State, in its sole discretion, may perform such analysis, produce a remediation plan, and Contractor shall reimburse the State for the reasonable costs thereof. A breach of Personal Identity Information (PII) shall have occurred when there has been unauthorized acquisition of unencrypted PII data (electronic or otherwise) used in performance of the Contract, or any subcontract from the Contractor's or any Subcontractors possession which compromises security, confidentiality, or integrity of

such PII. Contractor agrees to be liable for any unauthorized disclosure of PII in its possession or in the possession of its Subcontractors as if Contractor was the owner of the data. Contractor acknowledges that any breach of PII is a material breach of the Contract. Contractor shall notify the State immediately of any breach or suspected breach, but in no event later than twenty-four (24) hours after Contractor learns of suspected breach. The State may establish required remediation procedures and Contractor shall comply without limitation as directed by the State. Contractor shall bear all costs of such remediation.

K. Disclosure-Liability

Disclosure of State records or other confidential information by Contractor or any Subcontractor for any reason may be cause for legal action by third parties against Contractor, the State or their respective agents. Contractor shall indemnify, save, and hold harmless the State, its employees and agents, against any and all claims, damages, liability and court awards including costs, expenses, and attorney fees and related costs, incurred as a result of any act or omission by Contractor, or its employees, agents, Subcontractors, or assignees pursuant to this §3. Notwithstanding any other provision of the Contract, Contractor shall be liable to the State for all consequential and incidental damages arising from a data security breach. The Work under the Contract may require the State to supply data to the Contractor that contains PII. The State, in its sole discretion may securely deliver such data directly to the facility where the data is used to perform the Work. The data is not to be maintained or forwarded to or from any other facility or location except for the authorized and approved purposes of backup and disaster recovery purposes. The Contractor shall ensure that the data is not retained beyond timeframes established by the State.

L. End of Agreement Data Handling

Upon request by the State made before or within sixty (60) days after the effective date of termination of the Contract, Contractor will make available to the State a complete and secure (i.e. encrypted and appropriately authenticated), download file of all system data in XML format, including all schema and transformation definitions, and/or delimited text files with documented, detailed schema definitions along with attachments in their native format. The Parties agree that on the termination of the provision of data processing services, the Contractor shall, at the choice of the State, return all the personal data transferred, and the copies thereof to the State, or shall destroy all the personal data and certify to the State that it has done so, unless legislation imposed upon the Contractor prevents it from returning or destroying all or part of the data transferred. In that case, the Contractor warrants that it will guarantee the confidentiality of the data transferred and will not actively process the data transferred anymore.

M. Disposition of Data

The State retains the right to use the established operational services to access and retrieve State data content stored on Contractor's infrastructure at its sole discretion. The Contractor and Subcontractor warrant that upon request of the State and/or of the

supervisory authority, the Contractor will submit its data processing facilities for an audit of the measures referred to in Paragraph IX..D. The State reserves all right, title and interest, including all intellectual property and proprietary rights, in and to system data and content.

N. Safeguarding Personal Identifiable Information (PII)

If Contractor or any of its Subcontractors will or may receive PII under the Contract, Contractor shall provide for the security of such PII, in a form acceptable to the State, including, without limitation, non-disclosure, use of appropriate technology, security practices, computer access security, data access security, data storage encryption, data transmission encryption, security inspections and audits. Contractor shall take full responsibility for the security of all data in its possession or in the possession of its Subcontractors, and shall hold the State harmless for any damages or liabilities resulting from the unauthorized disclosure of loss thereof.

XI. CONFLICTS OF INTEREST

Contractor shall not engage in any business or personal activities or practices or maintain any relationships which conflict in any way with the full performance of Contractor's obligations hereunder. Contractor acknowledges that with respect to this Contract, even the appearance of a conflict of interest is harmful to the State's interests. Absent the State's prior written approval, Contractor shall refrain from any practices, activities or relationships that reasonably appear to be in conflict with the full performance of Contractor's obligations to the State hereunder. If a conflict or appearance exists, or if Contractor is uncertain whether a conflict or the appearance of a conflict of interest exists, Contractor shall submit to the State a disclosure statement setting forth the relevant details for the State's consideration. Failure to promptly submit a disclosure statement or to follow the State's direction in regard to the apparent conflict constitutes a breach of this Contract.

XII. INDEMNIFICATION

Contractor shall indemnify, save, and hold harmless the State, its employees and agents, against any and all claims, damages, liability and court awards including costs, expenses, and attorney fees and related costs, incurred as a result of any act or omission by Contractor, or its employees, agents, subcontractors, or assignees pursuant to the terms of this Contract; however, the provisions hereof shall not be construed or interpreted as a waiver, express or implied, of any of the immunities, rights, benefits, protection, or other provisions, of the Colorado Governmental Immunity Act, C.R.S. 24-10-101 *et seq.*, or the Federal Tort Claims Act, 28 U.S.C. 2671 *et seq.*, as applicable, as now or hereafter amended.

XIII. REPRESENTATIONS AND WARRANTIES

Contractor makes the following specific representations and warranties, each of which was relied on by the State in entering into this Contract.

A. Standard and Manner of Performance

Contractor shall perform its obligations hereunder in accordance with the highest standards of care, skill and diligence in Contractor's industry, trade, or profession and in the sequence and manner set forth in this Contract.

B. Legal Authority – Contractor Signatory

Contractor warrants that it possesses the legal authority to enter into this Contract and that it has taken all actions required by its procedures, and by-laws, and/or applicable laws to exercise that authority, and to lawfully authorize its undersigned signatory to execute this Contract, or any part thereof, and to bind Contractor to its terms. If requested by the State, Contractor shall provide the State with proof of Contractor's authority to enter into this Contract within 15 days of receiving such request.

C. Licenses, Permits, Etc.

Contractor represents and warrants that as of the Effective Date it has, and that at all times during the term hereof it shall have and maintain, at its sole expense, all licenses, certifications, approvals, insurance, permits, and other authorizations required by law to perform its obligations hereunder. Contractor warrants that it shall maintain all necessary licenses, certifications, approvals, insurance, permits, and other authorizations required to properly perform this Contract, without reimbursement by the State or other adjustment in Contract Funds. Additionally, all employees, agents, and Subcontractors of Contractor performing Services under this Contract shall hold all required licenses or certifications, if any, to perform their responsibilities. Contractor, if a foreign corporation or other foreign entity transacting business in the State of Colorado, further warrants that it currently has obtained and shall maintain any applicable certificate of authority to transact business in the State of Colorado and has designated a registered agent in Colorado to accept service of process. Any revocation, withdrawal or non-renewal of licenses, certifications, approvals, insurance, permits or any such similar requirements necessary for Contractor to properly perform the terms of this Contract is a material breach by Contractor and constitutes grounds for termination of this Contract.

XIV. INSURANCE

Contractor and its Subcontractors shall obtain and maintain insurance as specified in this section at all times during the term of this Contract. All policies evidencing the insurance coverage required hereunder shall be issued by insurance companies satisfactory to Contractor and the State.

A. Contractor

1. Public Entities

If Contractor is a "public entity" within the meaning of the Colorado Governmental Immunity Act, C.R.S. Section 24-10-101, *et seq.*, as amended (the

GIA), then Contractor shall maintain at all times during the term of this Contract such liability insurance, by commercial policy or self-insurance, as is necessary to meet its liabilities under the GIA. Contractor shall show proof of such insurance satisfactory to the State, if requested by the State. Contractor shall require each contract with a Subcontractor that is a public entity, to include the insurance requirements necessary to meet such Subcontractor's liabilities under the GIA.

2. Non-Public Entities

If Contractor is not a "public entity" within the meaning of the GIA, Contractor shall obtain and maintain during the term of this Contract insurance coverage and policies meeting the same requirements set forth in Section XIII.B with respect to subcontractors that are not "public entities".

B. Contractors – Subcontractors

Contractor shall require each contract with subcontractors other than those that are public entities, providing Goods or Services in connection with this Contract, to include insurance requirements substantially similar to the following:

1. Worker's Compensation

Worker's Compensation Insurance as required by State statute, and Employer's Liability Insurance covering all of Contractor or subcontractor employees acting within the course and scope of their employment.

2. General Liability

Commercial General Liability Insurance written on ISO occurrence form CG 00 01 10/93 or equivalent, covering premises operations, fire damage, independent contractors, products and completed operations, blanket contractual liability, personal injury, and advertising liability with minimum limits as follows: (a) \$1,000,000 each occurrence; (b) \$1,000,000 general aggregate; (c) \$1,000,000 products and completed operations aggregate; and (d) \$50,000 any one fire.

If any aggregate limit is reduced below \$1,000,000 because of claims made or paid, subcontractor shall immediately obtain additional insurance to restore the full aggregate limit and furnish to Contractor a certificate or other document satisfactory to Contractor showing compliance with this provision.

3. Automobile Liability

Automobile Liability Insurance covering any auto (including owned, hired and non-owned autos) with a minimum limit of \$1,000,000 each accident combined single limit.

4. Privacy Insurance

Such insurance shall include, at a minimum, coverage for claims and losses with respect to network or data risks (such as data breaches, release of confidential information, unauthorized access/use of information, identity theft, invasion of privacy, damage/loss/theft of data, degradation, downtime, etc.) Minimum limit of coverage of \$1,000,000.00 per occurrence and \$2,000,000 aggregate.

5. Technology Errors & Omissions

Such insurance shall cover any and all acts, errors, omissions or negligence in the delivery, performance or non-performance of products and/or services under this Contract. Such Technology Errors & Omissions insurance shall include, at a minimum, coverage for claims and losses with respect to network or data risks and intellectual property infringement, such as copyrights, trademarks, services marks and trade dress. Minimum coverage shall be \$1,000,000.00.

6. Additional Insured

The State shall be named as additional insured on all Commercial General Liability and Automobile Liability Insurance policies (leases and construction contracts require additional insured coverage for completed operations on endorsements CG 2010 11/85, CG 2037, or equivalent) required of Contractor and any subcontractors hereunder.

7. Primacy of Coverage

Coverage required of Contractor and subcontractor shall be primary over any insurance or self-insurance program carried by Contractor or the State.

8. Cancellation

The above insurance policies shall include provisions preventing cancellation or non-renewal without at least 30 days prior notice to Contractor and Contractor shall forward such notice to the State in accordance with Section XVII (Notices and Representatives) within seven days of Contractor's receipt of such notice.

9. Subrogation Waiver

All insurance policies in any way related to this Contract and secured and maintained by Contractor or its subcontractors as required herein shall include clauses stating that each carrier shall waive all rights of recovery, under subrogation or otherwise, against Contractor or the State, its agencies, institutions, organizations, officers, agents, employees, and volunteers.

10. Certificates

Contractor and all subcontractors shall provide certificates showing insurance coverage required hereunder to the State within seven business days of the Effective Date of this Contract. No later than 15 days prior to the expiration date

of any such coverage, Contractor and each subcontractors shall deliver to the State or Contractor certificates of insurance evidencing renewals thereof. In addition, upon request by the State at any other time during the term of this Contract or any sub-contract, Contractor and each subcontractors shall, within 10 days of such request, supply to the State evidence satisfactory to the State of compliance with the provisions of this Section.

XV. BREACH

In addition to any breaches specified in other sections of this Contract, the failure of either Party to perform any of its material obligations hereunder in whole or in part or in a timely or satisfactory manner, constitutes a breach. The institution of proceedings under any bankruptcy, insolvency, reorganization or similar law, by or against Contractor, or the appointment of a receiver or similar officer for Contractor or any of its property, which is not vacated or fully stayed within 20 days after the institution or occurrence thereof, shall also constitute a breach.

In the event of a breach, notice of such shall be given in writing by the aggrieved Party to the other Party. If such breach is not cured within 30 days of receipt of written notice, or if a cure cannot be completed within 30 days, or if cure of the breach has not begun within 30 days and pursued with due diligence, the State may exercise any of the remedies set forth in Section XVI. Notwithstanding anything to the contrary herein, the State, in its sole discretion, need not provide advance notice or a cure period and may immediately terminate this Contract in whole or in part if reasonably necessary to preserve public safety or to prevent immediate public crisis.

XVI. REMEDIES

If Contractor is in breach under any provision of this Contract, the State shall have all of the remedies listed in this Section in addition to all other remedies set forth in other sections of this Contract following the notice and cure period set forth in Section XV. The State may exercise any or all of the remedies available to it, in its sole discretion, concurrently or consecutively.

A. Termination for Cause and/or Breach

The State may terminate this entire Contract or any part of this Contract. Exercise by the State of this right shall not be a breach of its obligations hereunder. Contractor shall continue performance of this Contract to the extent not terminated, if any.

1. Obligations and Rights

To the extent specified in any termination notice, Contractor shall not incur further obligations or render further performance hereunder past the effective date of such notice, and shall terminate outstanding orders and subcontracts with third parties. However, Contractor shall complete and deliver to the State all Work, Services and Goods not cancelled by the termination notice and may incur obligations as are necessary to do so within this Contract's terms. At the sole

discretion of the State, Contractor shall assign to the State all of Contractor's right, title, and interest under such terminated orders or subcontracts. Upon termination, Contractor shall take timely, reasonable and necessary action to protect and preserve property in the possession of Contractor in which the State has an interest. All materials owned by the State in the possession of Contractor shall be immediately returned to the State. All Work Product, at the option of the State, shall be delivered by Contractor to the State and shall become the State's property.

2. Payments

The State shall reimburse Contractor only for accepted performance up to the date of termination. If, after termination by the State, it is determined that Contractor was not in breach or that Contractor's action or inaction was excusable, such termination shall be treated as a termination in the public interest and the rights and obligations of the Parties shall be the same as if this Contract had been terminated in the public interest, as described herein.

3. Damages and Withholding

Notwithstanding any other remedial action by the State, Contractor shall remain liable to the State for any damages sustained by the State by virtue of any breach under this Contract by Contractor and the State may withhold any payment to Contractor for the purpose of mitigating the State's damages, until such time as the exact amount of damages due to the State from Contractor is determined. The State may withhold any amount that may be due Contractor as the State deems necessary to protect the State against loss, including loss as a result of outstanding liens, claims of former lien holders, or for the excess costs incurred in procuring similar goods or services. Contractor shall be liable for excess costs incurred by the State in procuring from third parties replacement Work, Services or substitute Goods as cover.

B. Early Termination in the Public Interest

The State is entering into this Contract for the purpose of carrying out the public policy of the State of Colorado, as determined by its Governor, General Assembly, and/or Courts. If this Contract ceases to further the public policy of the State, the State, in its sole discretion, may terminate this Contract in whole or in part. Exercise by the State of this right shall not constitute a breach of the State's obligations hereunder. This subsection shall not apply to a termination of this Contract by the State for cause or breach by Contractor, which shall be governed by Section XV.A or as otherwise specifically provided for herein.

1. Method and Content

The State shall notify Contractor of such termination. The notice shall specify the effective date of the termination and whether it affects all or a portion of this Contract.

2. Obligations and Rights

Upon receipt of a termination notice, Contractor shall be subject to and comply with the same obligations and rights set forth in Section XV.A.1.

3. Payments

If this Contract is terminated by the State pursuant to this Section XV.B, Contractor shall be paid an amount which bears the same ratio to the total reimbursement under this Contract as Contractor's obligations that were satisfactorily performed bear to the total obligations set forth in this Contract, less payments previously made. Additionally, if this Contract is less than 60% completed, the State may reimburse Contractor for a portion of actual out-of-pocket expenses (not otherwise reimbursed under this Contract) incurred by Contractor which are directly attributable to the uncompleted portion of Contractor's obligations hereunder; provided that the sum of any and all reimbursement shall not exceed the maximum amount payable to Contractor hereunder.

C. Remedies Not Involving Termination

The State, its sole discretion, may exercise one or more of the following remedies in addition to other remedies available to it:

1. Suspend Performance

Suspend Contractor's performance with respect to all or any portion of this Contract pending necessary corrective action as specified by the State without entitling Contractor to an adjustment in price/cost or performance schedule. Contractor shall promptly cease performance and incurring costs in accordance with the State's directive and the State shall not be liable for costs incurred by Contractor after the suspension of performance under this provision.

2. Withhold Payment

Withhold payment to Contractor until corrections in Contractor's performance are satisfactorily made and completed.

3. Deny Payment

Deny payment for those obligations not performed, that due to Contractor's actions or inactions, cannot be performed or, if performed, would be of no value to the State; provided, that any denial of payment shall be reasonably related to the value to the State of the obligations not performed.

4. Removal

Notwithstanding any other provision herein, the State may demand immediate

removal of any of Contractor's employees, agents, or subcontractors whom the State deems incompetent, careless, insubordinate, unsuitable, or otherwise unacceptable, or whose continued relation to this Contract is deemed to be contrary to the public interest or the State's best interest.

5. Intellectual Property

If Contractor infringes on a patent, copyright, trademark, trade secret or other intellectual property right while performing its obligations under this Contract, Contractor shall, at the State's option (a) obtain for the State or Contractor the right to use such products and services; (b) replace any Goods, Services, or other product involved with non-infringing products or modify them so that they become non-infringing; or, (c) if neither of the foregoing alternatives are reasonably available, remove any infringing Goods, Services, or products and refund the price paid therefore to the State.

XVII. NOTICES AND REPRESENTATIVES

Each individual identified below is the principal representative of the designating Party. All notices required to be given hereunder shall be hand delivered with receipt required or sent by certified or registered mail to such Party's principal representative at the address set forth below. In addition to, but not in lieu of a hard-copy notice, notice also may be sent by e-mail to the e-mail addresses, if any, set forth below. Either Party may from time to time designate by written notice substitute addresses or persons to whom such notices shall be sent. Unless otherwise provided herein, all notices shall be effective upon receipt.

State:

Alyssa Pearson
Department of Education
201 East Colfax
Denver, Colorado 80203
(303) 866-6855
Pearson_a@cde.state.co.us

Contractor:

Scott Marion
The National Center for the Improvement of Educational
Assessment, Inc.
31 Mount Vernon Street
Dover, New Hampshire 03820
(303) 516-7900
dbetebenner@nciea.org

XVIII. RIGHTS IN DATA, DOCUMENTS, AND COMPUTER SOFTWARE

- A. Subject to the provisions of paragraph XVIII.A., any software, research, reports, studies, data, photographs, negatives or other documents, drawings, models, materials, or Work Product of any type, including drafts, prepared by Contractor in the performance of its obligations under this Contract shall be the exclusive property of the State and, all Work Product shall be delivered to the State by Contractor upon completion or termination hereof. The State's exclusive rights in such Work Product shall include, but not be limited to, the right to copy, publish, display, transfer, and prepare derivative works. Contractor shall not use, willingly allow, cause or permit such Work Product to be used for any purpose other than the performance of Contractor's obligations hereunder without the prior written consent of the State.
- B. Any works and materials created, developed, and purchased under this Contract (collectively the "Works and Materials") shall be owned by and remain the property of Contractor. Contractor agrees that all ideas, discoveries, inventions, works and materials, including but not limited to reports, studies, specifications, estimates, computations, systems, computer programs, methods, graphic representations, correspondence, and any other materials created, developed, conceived, reduced to practice or purchased under this Contract or that result from the Services performed by or on behalf of the Contractor (collectively the "Works and Materials" specified under the Scope of Work) shall be delivered to CDE upon termination or completion of the applicable work. Contractor grants to CDE, a co-exclusive, unlimited, royalty-free, world-wide license to use, reproduce, modify, prepare derivative versions of, and display the Works and Materials. No Works and Materials produced in whole or in part under this Contract shall be the subject of an application for copyright or patent by or on behalf of CDE or Contractor.

XIX. GOVERNMENTAL IMMUNITY

Liability for claims for injuries to persons or property arising from the negligence of the State of Colorado, its departments, institutions, agencies, boards, officials, and employees is controlled and limited by the provisions of the Governmental Immunity Act Section 24-10-101, *et seq.* and the risk management statutes, C.R.S. Section 24-30-1501, *et seq.*, as amended.

XX. STATEWIDE CONTRACT MANAGEMENT SYSTEM

If the maximum amount payable to Contractor under this Contract is greater than \$100,000, either on the Effective Date or at anytime thereafter, this Section applies.

Contractor agrees to be governed, and to abide, by the provisions of C.R.S. Section 24-102-205, Section 24-102-206, Section 24-103-601, Section 24-103.5-101 and Section 24-105-102 concerning the monitoring of vendor performance on state contracts and inclusion of contract performance information in a statewide contract management system.

Contractor's performance shall be subject to Evaluation and Review in accordance with the terms and conditions of this Contract, State law, including C.R.S. Section 24-103.5-101, and

State Fiscal Rules, Policies and Guidance. Evaluation and Review of Contractor's performance shall be part of the normal contract administration process and Contractor's performance will be systematically recorded in the statewide Contract Management System. Areas of Evaluation and Review shall include, but shall not be limited to quality, cost and timeliness. Collection of information relevant to the performance of Contractor's obligations under this Contract shall be determined by the specific requirements of such obligations and shall include factors tailored to match the requirements of Contractor's obligations. Such performance information shall be entered into the statewide Contract Management System at intervals established herein and a final Evaluation, Review and Rating shall be rendered within 30 days of the end of the Contract term. Contractor shall be notified following each performance Evaluation and Review, and shall address or correct any identified problem in a timely manner and maintain work progress.

Should the final performance Evaluation and Review determine that Contractor demonstrated a gross failure to meet the performance measures established hereunder, the Executive Director of the Colorado Department of Personnel and Administration (Executive Director), upon request by CDE, and showing of good cause, may debar Contractor and prohibit Contractor from bidding on future contracts. Contractor may contest the final Evaluation, Review and Rating by: (a) filing rebuttal statements, which may result in either removal or correction of the evaluation (C.R.S. Section 24-105-102(6)), or (b) under C.R.S. Section-105-102(6), exercising the debarment protest and appeal rights provided in C.R.S. Sections 24-109-106, 107, 201 or 202, which may result in the reversal of the debarment and reinstatement of Contractor, by the Executive Director, upon showing of good cause.

XXI. GENERAL PROVISIONS

A. Assignment and Subcontracts

Contractor's rights and obligations hereunder are personal and may not be transferred, assigned or subcontracted without the prior, written consent of the State. Any attempt at assignment, transfer, subcontracting without such consent shall be void. All assignments, subcontracts, or subcontractors approved by Contractor or the State are subject to all of the provisions hereof. Contractor shall be solely responsible for all aspects of subcontracting arrangements and performance.

B. Binding Effect

Except as otherwise provided in Section XXI.A, all provisions herein contained, including the benefits and burdens, shall extend to and be binding upon the Parties' respective heirs, legal representatives, successors, and assigns.

C. Captions

The captions and headings in this Contract are for convenience of reference only, and shall not be used to interpret, define, or limit its provisions.

D. Counterparts

This Contract may be executed in multiple identical original counterparts, all of which shall constitute one agreement.

E. Entire Understanding

This Contract represents the complete integration of all understandings between the Parties and all prior representations and understandings, oral or written, are merged herein. Prior or contemporaneous additions, deletions, or other changes hereto shall not have any force or affect whatsoever, unless embodied herein.

F. Jurisdiction and Venue

All suits or actions related to this Contract shall be filed and proceedings held in the State of Colorado and exclusive venue shall be in the City and County of Denver.

G. Modification

1. By the Parties

Except as specifically provided in this Contract, modifications of this Contract shall not be effective unless agreed to in writing by both parties in an amendment to this Contract, properly executed and approved in accordance with applicable Colorado State law, State Fiscal Rules.

2. By Operation of Law

This Contract is subject to such modifications as may be required by changes in Federal or Colorado State law, or their implementing regulations. Any such required modification automatically shall be incorporated into and be part of this Contract on the effective date of such change, as if fully set forth herein.

H. Order of Precedence

The provisions of this Contract shall govern the relationship of the State and Contractor. In the event of conflicts or inconsistencies between this Contract and its exhibits and attachments, including, but not limited to, those provided by Contractor, such conflicts or inconsistencies shall be resolved by reference to the documents in the following order of priority:

1. Colorado Special Provisions.

2. The provisions of the main body of this Contract.

I. Severability

Provided this Contract can be executed and performance of the obligations of the Parties accomplished within its intent, the provisions hereof are severable and any provision that

is declared invalid or becomes inoperable for any reason shall not affect the validity of any other provision hereof, provided that the Parties can continue to perform their obligations under this Contract in accordance with its intent.

J. Survival of Certain Contract Terms

Notwithstanding anything herein to the contrary, provisions of this Contract requiring continued performance, compliance, or effect after termination hereof, shall survive such termination and shall be enforceable by the State if Contractor fails to perform or comply as required.

K. Taxes

The State is exempt from all federal excise taxes under IRC Chapter 32 (No. 84-730123K) and from all State and local government sales and use taxes under C.R.S. Sections 39-26-101 and 201 *et seq.* Such exemptions apply when materials are purchased or services are rendered to benefit the State; provided however, that certain political subdivisions (e.g., City of Denver) may require payment of sales or use taxes even though the product or service is provided to the State. Contractor shall be solely liable for paying such taxes as the State is prohibited from paying or reimbursing Contractor for such taxes.

L. Third Party Beneficiaries

Enforcement of this Contract and all rights and obligations hereunder are reserved solely to the Parties. Any services or benefits which third parties receive as a result of this Contract are incidental to the Contract, and do not create any rights for such third parties.

M. Waiver

Waiver of any breach under a term, provision, or requirement of this Contract, or any right or remedy hereunder, whether explicitly or by lack of enforcement, shall not be construed or deemed as a waiver of any subsequent breach of such term, provision or requirement, or of any other term, provision, or requirement.

N. CORA Disclosure

To the extent not prohibited by federal law, this Contract and the performance measures and standards under C.R.S. Section 24-103.5-101, if any, are subject to public release through the Colorado Open Records Act, C.R.S. Sections 24-72-101, *et seq.*

O. Debarred or Suspended Entities.

Contractor shall not enter into any contract or subcontract in connection with this Contract with a party that has been debarred or suspended from contracting with the Federal Government or the State of Colorado. See Excluded Parties List System at <https://www.epls.gov>

P. Certification Regarding Lobbying

The Contractor certifies, to the best of his or her knowledge and belief, that:

No federal appropriated funds have been paid or shall be paid, by or on behalf of the undersigned, to any person for influencing or attempting to influence an officer or employee of an agency, a Member of Congress, an officer or employee of Congress, or an employee of a Member of Congress in connection with the awarding of any federal Contract, the making of any federal grant, the making of any federal loan, the entering into of any cooperative agreement and the extension, continuation, renewal, amendment, or modification of any federal Contract, grant, loan, or cooperative agreement.

If any funds other than federally appropriated funds have been paid or shall be paid to any person for influencing or attempting to influence an office or employee of any agency, a Member of Congress, an office or employee of Congress, or an employee of a Member of Congress in connection with this federal Contract, grant, loan, or cooperative agreement, the undersigned shall complete and submit Standard Form-LLL, "Disclosure Form to Report Lobbying," in accordance with its instructions.

The undersigned shall require that the language of this certification be included in the award documents for all sub awards at all tiers (including subcontracts, subgrants and Contracts under grants, loans and cooperative agreements) and that all subrecipients shall certify and disclose accordingly.

This certification is a material representation of fact upon which reliance was placed when the transaction was made or entered into. Submission of the certification is a requisite for making or entering into transaction imposed by Section 1352, Title 31, U.S. Code. Any person who fails to file the required certification shall be subject to a civil penalty of not less than \$10,000 and not more than \$100,000 for each such failure.

Q. Nondiscrimination

Both Parties agree that no individual shall be excluded from participation in, denied the benefits of, subjected to discrimination under, or denied employment in the administration of or in connection with any aspect of this Contract because of sex, race, creed, religion, color, national origin, age, honorably discharged veteran or military status, sexual orientation including gender expression or identity, the presence of any sensory, mental or physical disability, or the use of trained dog guide or service animal by a person with a disability. The Parties agree to abide by the standards of responsibility toward the disabled as specified by the Americans with Disabilities Act and Colorado Law against Discrimination. In the event that one of the Parties hereto refuses to comply with the above provision, this Contract may be canceled, terminated, or suspended in whole or in part by the other party.

COLORADO SPECIAL PROVISIONS

The Special Provisions apply to all Contracts except where noted in italics.

1. CONTROLLER'S APPROVAL. C.R.S. Section 24-30-202 (1).

This Contract shall not be valid until it has been approved by the Colorado State Controller or designee.

2. FUND AVAILABILITY. C.R.S. Section 24-30-202(5.5).

Financial obligations of the State payable after the current fiscal year are contingent upon funds for that purpose being appropriated, budgeted, and otherwise made available.

3. GOVERNMENTAL IMMUNITY.

No term or condition of this Contract shall be construed or interpreted as a waiver, express or implied, of any of the immunities, rights, benefits, protections, or other provisions, of the Colorado Governmental Immunity Act, C.R.S. Section 24-10-101 *et seq.*, or the Federal Tort Claims Act, 28 U.S.C. Section 1346(b) and 2671 *et seq.*, as applicable now or hereafter amended.

4. INDEPENDENT CONTRACTOR

Contractor shall perform its duties hereunder as an independent contractor and not as an employee. Neither Contractor nor any agent or employee of Contractor shall be deemed to be an agent or employee of the State. Contractor and its employees and agents are not entitled to unemployment insurance or workers compensation benefits through the State and the State shall not pay for or otherwise provide such coverage for Contractor or any of its agents or employees. Unemployment insurance benefits shall be available to Contractor and its employees and agents only if such coverage is made available by Contractor or a third party. Contractor shall pay when due all applicable employment taxes and income taxes and local head taxes incurred pursuant to this Contract. Contractor shall not have authorization, express or implied, to bind the State to any contract, liability or understanding, except as expressly set forth herein. Contractor shall **(a)** provide and keep in force workers' compensation and unemployment compensation insurance in the amounts required by law, **(b)** provide proof thereof when requested by the State, and **(c)** be solely responsible for its acts and those of its employees and agents.

5. COMPLIANCE WITH LAW.

Contractor shall strictly comply with all applicable federal and State laws, rules, and regulations in effect or hereafter established, including, without limitation, laws applicable to discrimination and unfair employment practices.

6. CHOICE OF LAW.

Colorado law, and rules and regulations issued pursuant thereto, shall be applied in the interpretation, execution, and enforcement of this Contract. Any provision included or incorporated herein by reference which conflicts with said laws, rules, and regulations shall be null and void. Any provision incorporated herein by reference which purports to negate this or any other Special Provision in whole or in part shall not be valid or enforceable or available in any action at law, whether by way of complaint, defense, or otherwise. Any provision rendered null and void by the operation of this provision shall not invalidate the remainder of this Contract, to the extent capable of execution.

7. BINDING ARBITRATION PROHIBITED.

The State of Colorado does not agree to binding arbitration by any extra-judicial body or person. Any provision to the contrary in this contract or incorporated herein by reference shall be null and void.

8. SOFTWARE PIRACY PROHIBITION. Governor's Executive Order D 002 00.

State or other public funds payable under this Contract shall not be used for the acquisition, operation, or maintenance of computer software in violation of federal copyright laws or applicable licensing restrictions. Contractor hereby certifies and warrants that, during the term of this Contract and any extensions, Contractor has and shall maintain in place appropriate systems and controls to prevent such improper use of public funds. If the State determines that Contractor is in violation of this provision, the State may exercise any remedy available at law or in equity or under this Contract, including, without limitation, immediate termination of this Contract and any remedy consistent with federal copyright laws or applicable licensing restrictions.

9. EMPLOYEE FINANCIAL INTEREST. C.R.S. Sections 24-18-201 and 24-50-507.

The signatories aver that to their knowledge, no employee of the State has any personal or beneficial interest whatsoever in the service or property described in this Contract. Contractor has no interest and shall not acquire any interest, direct or indirect, that would conflict in any manner or degree with the performance of Contractor's services and Contractor shall not employ any person having such known interests.

10. VENDOR OFFSET. C.R.S. Sections 24-30-202 (1) and 24-30-202.4.

[*Not Applicable to intergovernmental agreements*] Subject to C.R.S. Section 24-30-202.4 (3.5), the State Controller may withhold payment under the State's vendor offset intercept system for debts owed to State agencies for: (a) unpaid child support debts or child support arrearages; (b) unpaid balances of tax, accrued interest, or other charges specified in C.R.S. Section 39-21-101, *et seq.*; (c) unpaid loans due to the Student Loan Division of the Department of Higher Education; (d) amounts required to be paid to the Unemployment Compensation Fund; and (e) other unpaid debts owing to the State as a result of final agency determination or judicial action.

11. PUBLIC CONTRACTS FOR SERVICES. C.R.S. Section 8-17.5-101.

[*Not Applicable to Agreements relating to the offer, issuance, or sale of securities, investment advisory services or fund management services, sponsored projects, intergovernmental Agreements, or information technology services or products and services*] Contractor certifies, warrants, and agrees that it does not knowingly employ or contract with an illegal alien who shall perform work under this Contract and shall confirm the employment eligibility of all employees who are newly hired for employment in the United States to perform work under this Contract, through participation in the E-Verify Program or the State program established pursuant to C.R.S. Section 8-17.5-102(5)(c), Contractor shall not knowingly employ or contract with an illegal alien to perform work under this Contract or enter into a contract with a subcontractor that fails to certify to Contractor that the subcontractor shall not knowingly employ or contract with an illegal alien to perform work under this Contract. Contractor (a) shall not use E-Verify Program or State program procedures to undertake pre-employment screening of job applicants while this Contract is being performed, (b) shall notify the subcontractor and the contracting State agency within three days if Contractor has actual knowledge that a subcontractor is employing or contracting with an illegal alien for work under this Contract, (c) shall terminate the subcontract if a subcontractor does not stop employing or contracting with the illegal alien within three days of receiving the notice, and (d) shall comply with reasonable requests made in the course of an investigation, undertaken pursuant to C.R.S. Section 8-17.5-102(5), by the Colorado Department of Labor and Employment. If Contractor participates in the State program, Contractor shall deliver to the contracting State agency, Institution of Higher Education or political subdivision, a written, notarized affirmation, affirming that Contractor has examined the legal work status of such employee, and shall comply with all of the other requirements of the State program. If Contractor fails to comply with any requirement of this provision or C.R.S. Section 8-17.5-101 *et seq.*, the contracting State agency, institution of higher education or political

subdivision may terminate this Contract for breach and, if so terminated, Contractor shall be liable for damages.

12. PUBLIC CONTRACTS WITH NATURAL PERSONS. C.R.S. Section 24-76.5-101.

Contractor, if a natural person eighteen (18) years of age or older, hereby swears and affirms under penalty of perjury that he or she **(a)** is a citizen or otherwise lawfully present in the United States pursuant to federal law, **(b)** shall comply with the provisions of C.R.S. Section 24-76.5-101 *et seq.*, and **(c)** has produced one form of identification required by C.R.S. Section 24-76.5-103 prior to the effective date of this Contract.

SPs Effective 1/1/09

THE PARTIES HERETO HAVE EXECUTED THIS CONTRACT

*** Persons signing for Contractor hereby swear and affirm that they are authorized to act on Contractor's behalf and acknowledge that the State is relying on their representations to that effect.**

CONTRACTOR:

The National Center for the
Improvement of Educational Assessment, Inc.

STATE OF COLORADO

John W. Hickenlooper, GOVERNOR

Department of Education

Robert Hammond, Commissioner

By: Scott F. Marion

Title: Vice-President

[Signature]
*Signature

Date: 7/14/14

[Signature]
Robert Hammond, Commissioner

Date: 7.15.14

LEGAL REVIEW

John W. Suthers, Attorney General

By: _____
Signature - Assistant Attorney General

Date: _____

ALL CONTRACTS REQUIRE APPROVAL BY THE STATE CONTROLLER

CRS §24-30-202 requires the State Controller to approve all State Contracts. This Contract is not valid until signed and dated below by the State Controller or delegate. Contractor is not authorized to begin performance until such time. If Contractor begins performing prior thereto, the State of Colorado is not obligated to pay Contractor for such performance or for any goods and/or services provided hereunder.

STATE CONTROLLER

Robert Jaros, CPA, MBA, JD

By: [Signature]
Dave Grier, CDE Controller

Date: 7-16-14

Appendix A - Data File Description

All data files will be provided on an annual basis. Prior files will be destroyed following this transition and a new Data Sharing Agreement will be established.

Two files will be provided to Contractor annually:

File 1: to include ACCESS for ELL performance scores including the data elements identified below.

File 2: to include CSAP, TCAP, and PARCC performance scores including the data elements identified below.

The inclusion of the identified data is utilized for all 'growth' calculations and for between year matching of students for such calculations. Contractor will be provided with all prior years of data available.

Field Name	Brief Description
ID	Unique student Identifier
LAST_NAME	Student last name
FIRST_NAME	Student first name
CONTENT_AREA	Assessment content area (e.g. math, reading, writing, etc.)
YEAR	Year of test administration
GRADE	Identified grade of student
SCALE_SCORE	Scale score obtained on identified assessment
ACHIEVEMENT_LEVEL	Obtained proficiency level on identified assessment
GENDER	Male or female
ETHNICITY	Racial designation
FREE_REDUCED_LUNCH_STATUS	Free, reduced, or not eligible lunch designation
ELL_STATUS	English Language Learner status (limited English Proficient, etc.)
IEP_STATUS	Yes or no
GIFTED_TALENTED_PROGRAM_STATUS	Yes or no
EMH_LEVEL	Instructional level of school administering assessment
SCHOOL_NAME	School name
SCHOOL_NUMBER	School identification number
DISTRICT_NAME	District name
DISTRICT_NUMBER	District identification number
SCHOOL_ENROLLMENT_STATUS	Included in school performance calculations; yes or no
DISTRICT_ENROLLMENT_STATUS	Included in district performance calculations; yes or no
STATE_ENROLLMENT_STATUS	Included in state performance calculations; yes or no
VALID_CASE	If duplicate records for a student exist this indicates the record of inclusion for growth calculations