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October 7, 2014

Honorable Gary Herbert
Governor
Utah State Capitol
350 North State Street, Suite 200
Salt Lake City, Utah 84114

Re: Common Core Standards Legal Analysis

Dear Governor Herbert,

At your request, the Utah Attorney General's Office analyzed a series of legal questions regarding state educational authority and policy regarding Utah's Core Standards also known as "Common Core Standards" (also referred to herein as "Core Standards").

Before answering the specific questions, a summary is provided to concisely clarify your understanding regarding: a) Utah's adoption of the Common Core Standards; b) a lawsuit challenging the adoption of those standards; c) the interplay of the ESEA waiver and Core Standards; and d) the possible problems that arise if Utah elects to repeal these Core Standards.

The State Board of Education's 2010 adoption of Common Core Standards was compliant with Utah law. Recently, a lawsuit was commenced alleging that Utah failed to follow the Utah Administrative Rulemaking Act (UARA) when it adopted these standards. Given that Utah Code Ann. §53A-1-402(1) distinguishes rules from standards, this rulemaking argument will probably not be valid for this and other reasons.

In addition, a recent law review article by University of South Carolina law professor Derek Black entitled "Federalizing Education by Waiver?" persuasively maintains that the U.S. Department of Education (USDOE) has effectively coerced states by imposing ESEA waiver conditions which require states to develop and implement "college and career-ready standards" like the Common Core standards. The article further asserts that the 2001 No Child Left Behind Act (NCLB), from which these waivers are derived, does not require these "college and career-ready standards." Thus, the USDOE, by imposing these waiver conditions, has infringed upon state and local authority over public education. States have consented to this infringement, through federal coercion, because they fear severe NCLB consequences to most Title I schools not meeting Adequate Yearly Progress (AYP) requirements.

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Utah has the legal ability to repeal its Core Standards in mathematics and English language arts; but, if it chooses this action, it may have a significant impact on Utah's Title I schools that don't meet AYP unless other college and career-ready standards are adopted. Utah has the option to replace these Core Standards with college and career-ready standards endorsed by Utah's higher education institutions and adopted by the State Board of Education. If Utah elects to repeal its Core Standards aka Common Core standards, the State Board of Education is the appropriate constitutional body to conduct this activity. Executive or Legislative branch repeal of these standards may infringe upon the State Board of Education's constitutional and statutory authority over Utah's education system.

Attached is an ESEA Waiver Legal Analysis memorandum and addendum, which are public documents that were provided to the State Board of Education. In addition, a second addendum including relevant statutes and other documents of interest are attached for your review.

I. Questions Presented And Answers

A. First Series of Questions

Does the State Board of Education have authority to set academic standard for Utah Students? *Yes.*

Was the State Board's adoption of the Common Core State Standards "illegal" in any way? *No.*

Discussion:

1. The State Board of Education Has Authority to Establish Core Standards

Under Utah law, the State Board of Education has the authority to set academic standards. Utah Code Ann. §53A-1-402(1) (c) (iv) provides: "[t]he State Board of Education shall establish rules and minimum standards for the public schools [for] . . . curriculum and instruction requirements."

2. Utah's Adoption of the Core Standards was not "Illegal"

In August 2014, a Petition for Declaratory Judgment was filed seeking ruling that adoption of Utah Core Standards required a rule making process under Utah Administrative Rulemaking Act (UARA). Utah Code Ann. §63G-3-101 et. seq. No rulemaking process was conducted for the adoption of Utah Core Standards; however it was a very public process.

a. Core Standards are Standards and Not Rules

In evaluating the UARA's definition of a "rule", a plausible interpretation can be made that Utah Core Standards constitute rules and therefore UARA's rulemaking process should have been followed. Utah Code Ann. §63G-3-102 (16) (a) defines rule as " an agency's statement that: (i) is explicitly or implicitly required by state or federal statute or other law; (ii) implements or interprets a state or federal legal *mandate*; and (iii) applies to a class of persons or another agency."

However, Utah Code Ann. §53A-1-402(1) maintains that "[t]he State Board of Education shall establish rules and minimum standards for the public schools. . ." Since this statute distinguishes rules and standards, a more persuasive argument exists that the Utah Core Standards are not rules. Unfortunately, Utah law does not define the meaning of the term "standard".

b. The Core Standards were Adopted in a Public Process

In the Petition for a Declaratory Judgment, it is also claimed that the Board of Education did not comply with Utah Code Ann. §53A-1-402.6(1). This statute requires the Board to "consult [ ] with local school boards, school superintendents, teachers, employers, and parents, in implementing core curriculum standards . . ."

In August 2010, this statutory language was not in effect when the Utah Core Standards were adopted. This portion of the statute was added/amended in 2014, by Chapter 352, 2014 General Session.

Nevertheless, during 2009 and 2010, significant outreach occurred with Local Education Agencies (LEAs), the Utah Legislature's Interim Education Committee and the public. Public meetings discussing the proposed Core Standards were held with superintendents, charter school directors, curriculum directors, legislators, PTA members, higher education representatives, business leaders, and other members of the public. Furthermore, between May 2009 and August 2010, State Board of Education meeting minutes reflect that consideration of the Common Core standards was an agenda item or public comment topic in 10 meetings.

B. Second Series of Questions

By the adoption of Common Core Standards, has Utah ceded authority over standards and curriculum? *No.*

Do Utah charters or local school boards (LEAs) control their curriculum? *Yes.*

Are there any partnerships or programs that have indirect control on the curriculum? *No.*

Discussion:

1. Utah's Authority Over Standards and Curriculum Has Not Been Ceded

By its adoption of the Common Core Standards in mathematics and English language arts, Utah has not ceded authority over standards or curriculum. The Core Standards, which include Utah's adoption of Common Core standards, apply to standards and not curriculum. Furthermore, Utah has the option, under its ESEA waiver, to repeal the Common Core standards and adopt "College and Career-Ready" standards approved by Utah's higher education institutions.

The Utah State Board of Education adopted the Common Core standards in August of 2010, which replaced their previous standards in mathematics and English language arts. Approximately one year later, the Federal Department of Education announced the ability of states to receive a waiver from certain portions of the Elementary and Secondary Education Act (ESEA) or No Child Left Behind. To qualify for a waiver, states had to demonstrate rigor in standards, assessments, and teacher evaluation practices.

In regards to standards, states had two options. The first option was to adopt a set of standards common to a group of states, such as the Common Core Standards. The Common Core standards were developed by the National Association of State Governors

and the Association of State Superintendents. Utah actively participated in the state led development of these standards. The second option was to adopt "College and Career-Ready" standards approved by Utah's higher education institutions. Since the Board had already adopted the Common Core standards in 2010, this was the option checked on their waiver application. Utah ultimately received a waiver in 2012.

If Utah were to repeal its standards in mathematics and English language arts, the Common Core standards, new college and career-ready standards would have to be adopted by the Board in order to continue to qualify for an ESEA waiver. Utah is not required to implement the Common Core standards. (See attachment on ESEA Waiver Legal Analysis.)

With respect to the second option (standards approved by Utah's higher education institutions), concern has been raised that allowing Utah's higher education institutions to establish "College and Career-Ready" standards would infringe upon the Board's legal responsibility to establish standards. If this second option were selected, such standards, once developed, would ultimately have to be adopted by the State Board of Education. This committee-based recommendation to the Board is authorized under Utah law.

Utah Code Ann. § 53A-1-402.8, a recently enacted statute, requires the formation of a Standards Review Committee. This committee makes recommendations to the Board in concerning its adoption of core curriculum standards. Utah Code Ann. § 53A-1-402.8, (11). Furthermore, this statute clearly provides that the Board has the ultimate authority in establishing these core curriculum standards. Utah Code Ann. § 53A-1-402.8 (12). Clearly, this statutory framework allows this second option.

2. LEAs Have Control of Their Curriculum

Common Core impacts standards and not curriculum. Utah Code Ann. §53A-1-402.6 (5) expressly states that LEAs ". . . shall design their school programs, that are supported by generally accepted scientific standards of evidence, to focus on the core curriculum standards . . ." Likewise, Utah Code Ann. §53A-1-402.6 (6) provides that "each school may select instructional materials and methods of teaching . . . that it considers most appropriate to meet core curriculum standards."

Meanwhile, NCLB §9527(a) prohibits the Federal Government "to mandate, direct, or control a State . . . or school's curriculum [or] program of instruction." Likewise, NCLB §9527(b) prohibits federal funding to be used "to endorse, approve, or sanction any curriculum designed to be used in a . . . school." Finally, NCLB §9527(c), instructs 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 . . ."

3. There are No Partnerships or Programs which have Indirect Control on the Curriculum

Common Core standards were developed in concert with the National Association of State Governors and the Association of State Superintendents. Utah was an active participant in this Common Core process which developed "standards" not "curriculum". See Section B.2 above for discussion on LEA's statutory control over curriculum and federal law prohibitions on mandating curriculum.

C. Third Series of Questions

Are we, as a state, bound by any federal entanglements in regards to our academic standards? What about curriculum? *Federal entanglements are debatable as to standards. No entanglements exist with respect to curriculum.*

Did we (Utah) receive federal monies to adopt Common Core Standards? *No.*

Did we (Utah) acquiesce educational control or state sovereignty by adopting Common Core Standards? *No.*

Discussion:

1. There May be Federal Entanglement with ESEA Waivers Condition that Require Utah Adopt and Implement College and Career-Ready Standards

Since 2012, the USDOE has issued Utah an ESEA Waiver from NCLB requirements. In August 2014, Utah requested a one year ESEA waiver extension which is currently being reviewed by the USDOE. Under this waiver, Utah must comply with four waiver principles.

One of those four principles is "College and Career-Ready Expectations for All Students" This principle requires Utah ". . . adopt [ ] college- and career-ready standards in at least reading/language arts and mathematics, transitioning to and implementing such standards statewide for all students and schools . . ." These ESEA waiver principles or conditions are not part of NCLB's express statutory terms. As a result, a plausible argument exists that ESEA waiver conditions are USDOE requirements and are not authorized by Congress in NCLB.

In addition, Utah has been arguably coerced into complying with these ESEA waiver principles. Since most of Utah's Title I schools have not met NCLB's Adequate Yearly Progress (AYP) requirements, they are subject to a five year systematic progression of severe changes which include, but are not limited to: 1) transporting students to nearby compliant schools; 2) replacing teachers and principals; and 3) significantly restructuring under performing schools. In order to avoid these potentially drastic measures, Utah, and other states, have consented to ESEA waiver conditions, which include adopting College and Career-Ready standards such as the Common Core standards. This consent occurs despite the fact that such standards are not authorized by the NCLB statute. (See Professor Derek Black's law review article entitled "Federalizing Education by Waiver?")

Since Utah has been coerced to seek an ESEA waiver with College and Career-ready standards conditions, a plausible argument exists that federal entanglement exists with respect to Utah's standards and the ESEA waiver. However, it should be noted that Utah adopted Utah Core Standards (Common Core) in August 2010. It did not receive its first ESEA waiver until June 2012.

2. Utah Did Not Receive Federal Funds to Adopt Common Core

NCLB § 9527 (c) (1) provides that "no State shall be required to have . . . student academic achievement standards approved or certified by the Federal Government certified by the Federal Government, in order to receive assistance under this Act. Given this statutory language, federal funding cannot be made contingent on adopting Common Core standards.

At the current time, approximately $26 million of Utah's $3.7 million education budget is comprised of federal Title I funds. Utah's NCLB noncompliance never jeopardized its Title I funds. Rather, Utah's NCLB noncompliance would impact its flexibility in using the Title I funds. NCLB noncompliance requires that a portion of these funds be set aside for specified statutory purposes such as: 1) transportation costs; 2) after school tutoring; and teacher training. The ESEA waiver preserved LEA's flexibility in their Title I funding use.

Lastly, the Obama Administration, as part of the "Race to the Top" (RTTT) distributed more than $3 billion in competitive grants to states that developed innovative education programs. While not an express grant requirement, all RTTT grant recipients adopted Common Core standards. However, Utah and a number of other states, which adopted these standards, did not receive RTTT awards. A Senate Resolution co-sponsored by Utah Senator Mike Lee alleged that adoption of Common Core standards were a requirement for RTTT grant money awards. Since 45 of 50 states had adopted these standards, a causal connection cannot necessarily be drawn. (See Senate Resolution attachment.)

3. Utah Did Not Acquiesce Educational Control or State Sovereignty by Adopting Common Core Standards

In 2010, Utah's State Board of Education adopted the Core Standards pursuant to their powers under Utah's Constitution and statutory law. Furthermore, in its process of adopting these standards, the Board conferred with the legislature's Education Committee, educational stakeholders and parents from across Utah. Since these standards where adopted two years before Utah obtained its 2012 ESEA waiver, there was no acquiescence of educational control or state sovereignty at the time of adoption. (For discussion of this question after Utah obtained ESEA waiver see section C.1 answer)

D. Fourth Series of Questions

Can we change our academic standards, including modifications to Common Core Standards? *Yes*

What are the conditions or restraints on our ability to make changes? *Changes to Common Core standards must comply with Utah's legislature's learning objectives, public outreach, standards review committee and public notice requirements.*

Will we lose federal monies if we modify Common Core Standards? *No.*

Discussion:

1. Utah Can Modify the Utah Core Standards aka Common Core Standards

Utah Code Ann. § 53A-1-402 (1) authorizes: "the State Board of Education [to] establish . . . minimum standards for the public schools . . ." Since Utah's Board has the authority to establish the minimum standards; it also is authorized to modify the standards. In fact, Utah has modified its Utah Core Standards since their adoption in August 2010. However, Utah's legislature has recently imposed some requirements necessary for modifying its Core Standards.

2. **Utah Law Places a Number of Conditions on the State Board of Education when Adopting or Modifying Utah Core Standards. There is No Federal Law or Rule which Limits Utah's Ability to Modify Its Core Standards.**

Utah Code Ann. §§53A-1-402.6 and 53A-1-402.8 imposes certain conditions on the State Board when it is establishing or amending standards. These conditions can be categorized as follows:

a. Compliance with legislature's learning objectives.
b. Consultation with education, business and parent stakeholders.
c. Formation of Standards Review Committee to make recommendations.
d. Public notice, comment period and hearing requirements.

3. **Utah Will Not Lose Federal Money if it Modifies, or Even Repeals Common Core Standards**

There is no federal restraint on Utah's ability to modify its Core Standards. In fact, NCLB §9527(c) (1) provides: "no State shall be required to have student academic achievement standards approved or certified by the Federal government in order to receive assistance under this Act." For further discussion on ESEA Title I funding issues, see Section C.2.

E. Fifth Series of Questions

Can we confirm that our waiver from No Child Left Behind is also in compliance with SB0287? *Yes*

Discussion:

1. **If Utah is Granted an ESEA Waiver Extension, It will have the Unilateral Authority to Repeal its 2010 Adoption of Common Core Standards as Allowed by SB0287 which was Codified in 2012 in Utah Code Ann. §53A-1-402.6 (6)**

Utah Code Ann. §53A-1-402.6 (6) provides: "[t] he state may exit any agreement, contract, memorandum of understanding, or consortium that cedes control of Utah's core curriculum standards to any other entity, including a federal agency or consortium, for any reason . . ." Clearly, Utah law authorizes the repeal of the Utah Core Standards in mathematics and English language arts, aka Common Core Standards.

As previously stated, Utah's ESEA waiver requires adoption of College and Career-Ready standards. If Utah repeals it current standards, it will be required to develop alternative standards approved by its higher education institutions and adopted by the Board. Utah's failure to adopt alternative standards will result in the loss of its ESEA waiver. This loss will significant impact Utah's Title I schools. See sections B.1, C.1, and C.2 for more in depth discussion about Utah's standard's options and the potential impacts of no ESEA waiver.