

OFFICE OF THE ATTORNEY GENERAL
OF THE STATE OF NEW YORK

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In the Matter of

Assurance No. 13-487

Pearson Charitable Foundation and
Pearson Inc.

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ASSURANCE OF DISCONTINUANCE

WHEREAS, the Office of the Attorney General of the State of New York (“OAG”), Eric T. Schneiderman, has conducted an investigation pursuant to the Not-for-Profit Corporation Law (“N-PCL”), the Estates, Powers and Trust Law (“EPTL”) and Section 63(12) of the Executive Law into the corporate governance, programs and administration of charitable assets of the Pearson Charitable Foundation, a Delaware not-for-profit corporation doing business in New York (the “Foundation”), and the Foundation’s relationship with its corporate parent and sole member, Pearson Inc., a Delaware for-profit corporation (the “Investigation”);

WHEREAS, working with the OAG, and to strengthen its governance and ability to fulfill its charitable mission, the Foundation already has made changes to its governance, programs and policies during the pendency of the Investigation;

WHEREAS, the Foundation and Pearson Inc. neither admit nor deny the OAG’s findings recited in paragraphs 1 through 13 below and deny any violation of law in this matter;

WHEREAS, the parties each believe that the obligations imposed by this Assurance are prudent and appropriate and will advance their common goals of strengthening nonprofit governance and promoting best practices in the operation of charities; and

WHEREAS, the OAG finds the relief and agreements in this Assurance to be in the public interest, accepts the terms of this Assurance pursuant to New York Executive Law §

63(15) in lieu of commencing a statutory proceeding, and hereby discontinues its Investigation on the terms hereinafter set forth and agrees not to commence any action against the Foundation, Pearson Inc. or any of their officers, directors, employees, subsidiaries or affiliates based upon the allegations set forth herein.

This Assurance of Discontinuance (“Assurance”) contains the findings of the OAG’s Investigation and the relief agreed to by the OAG, the Foundation and Pearson Inc. (collectively, “the parties”).

OAG FINDINGS

1. Pearson Inc. is part of the Pearson family of companies. Pearson Inc. and its for-profit subsidiaries or affiliates are referred to herein collectively as “Pearson.” Pearson is now the largest learning company in the world. In recent years, Pearson has invested substantial resources in the areas of educational assessments, digital learning and creation of instructional content and curriculum to facilitate classroom instruction and prepare students to meet the standards required in many states. Pearson sells instructional content, assessment materials, systems and technology and other products and services for profit to states, school districts, and schools throughout the United States and across the world.

2. The Foundation is a 501(c)(3) organization established in 2003. The Foundation has shared personnel with Pearson since it was established, and Pearson Inc. remains the Foundation’s primary funder.

3. The Foundation’s status as a public operating charity is distinct among corporate-affiliated charitable foundations, the vast majority of which are grant-making entities that do not themselves conduct substantial programmatic activities. In contrast, the Foundation is a public

operating charity that conducts its own program activities because its founders believed that doing so would provide greater benefit to the public than traditional grant-making.

4. Pearson and the Foundation have a close working relationship. The Foundation's staff has consisted of Pearson employees; the Foundation's board was comprised entirely of Pearson executives until 2012; select Foundation programs have been conducted with the advice and participation of senior Pearson executives; and the Foundation continues to rely heavily upon Pearson Inc. for administrative support.

5. From 2008 through 2011, the Foundation provided grants to an independent organization of school officials in the U.S. for a jointly sponsored International Summit program, a series of conferences on education that were held abroad and attended by state school officials. The Foundation and Pearson also worked with the organization to plan and organize the International Summits, to identify speakers and presenters and in some cases to recommend school officials from participating countries. Since Pearson offers products and services throughout the U.S. and in many other countries, the school officials who were invited were from jurisdictions where Pearson actively did business and sought to do business. The travel and lodging of state school officials from the U.S. were paid for by the organization of school officials, with the use of Foundation grant funds. The Foundation independently sponsored the travel and lodging of guest speakers, presenters, and summit delegates, including school officials, from foreign countries. In some cases, the non-U.S. delegates who were invited to attend the International Summits were nominated by Pearson personnel.

6. Pearson personnel attended the International Summits, while no employee of any other for-profit education company ever attended. Following the International Summits, Pearson attendees could, and some international employees did, share information with their colleagues

in Pearson's international business concerning the interests and potential educational needs of some of the non-U.S. delegates to the Summit.

7. Beginning no later than 2010, Pearson has sought to develop a series of courses, associated instructional materials and software offerings aligned with the Common Core State Standards, a set of standards governing the skills in mathematics and language arts taught to students from kindergarten through the 12th grade. As of the date of this Assurance, 45 states, the District of Columbia, and four U.S. territories have adopted the Common Core State Standards. States and school districts will require the materials used in their schools to be "aligned" with the Common Core State Standards, creating an opportunity for educational companies to sell textbooks, course materials and testing materials.

8. Pearson decided to develop its system of course offerings ("the Courses") to meet the Standards within the Foundation, with substantial funding by Pearson. One reason, among others, for this approach was to obtain from a prominent foundation that was known to favor and support the Standards (i) its imprimatur for the Courses, (ii) a grant to the Foundation, and (iii) a commitment to participate in the design of the Courses and to partner with the Foundation to make four of the Courses available to the public free of charge. A senior official of that foundation had attended an International Summit in 2010. Certain Pearson executives believed that developing the Courses within the Foundation would enhance innovation, that the other foundation's support would potentially enhance Pearson's reputation with policymakers, the education community and potential customers and that the other foundation would be more comfortable working with the Foundation rather than one of Pearson's for-profit entities. The Foundation entered into the agreement with the other foundation, and announced the partnership publicly in early 2011.

9. The curriculum design team assigned by Pearson to develop the Courses was headed by former executives of an entity recently acquired by Pearson. The team leaders reported directly to senior Pearson executives, not to the President or board of the Foundation.

10. From inception, and as disclosed in the public announcement of the partnership with the other foundation, Pearson and the Foundation planned that commercial sale of the Courses would be done by Pearson, with the Foundation retaining rights that would enable it to make the four Courses openly available for free public access. Internal business analyses prepared by Pearson projected that after significant continued investment by Pearson in the Courses, related systems and technology, professional development and support, potential profits from sales of the Courses and the related offerings could be in the tens of millions of dollars. The Foundation anticipated receiving some additional funding for its charitable activities as a result of its anticipated license of commercial rights to Pearson and Pearson's subsequent sales of the Courses.

11. Beginning in late 2011, when the Courses were still only partially developed, Pearson and the Foundation undertook a legal and business reconsideration of the continued development of the Courses within the Foundation. These deliberations ultimately resulted in a decision that the Foundation would sell the partially developed Courses (the "Common Core Assets") to Pearson at a price of \$15.1 million plus other valuable consideration.

12. This sale price was determined by an independent outside valuation expert and ratified by independent board members of the Foundation, who were appointed to the Foundation's board in June 2012, after all the above events and subsequent to the commencement of OAG's investigation. The valuation experts and the independent board members concluded that there was no viable purchaser of the Common Core Assets other than

Pearson. The Common Core Assets have since been transferred from the Foundation to Pearson and payment has been made to the Foundation. The intended sale of the Common Core Assets to Pearson was first disclosed to the OAG on March 28, 2013, after the Foundation and Pearson had decided to sell the Common Core Assets to Pearson.

13. By engaging in the conduct described in paragraphs 4 - 11 above, the Foundation distributed some of its assets and projected income to its sole member, Pearson Inc., in violation of N-PCL § 515 and failed properly to administer the charitable assets and funds committed to its care as a trustee, in violation of EPTL §§ 8.1-1 and 8.1-4 and the common law. Pearson Inc. stood to benefit from the conduct described above in paragraphs 4 – 11.

PROSPECTIVE RELIEF

IT IS HEREBY UNDERSTOOD AND AGREED by and among the parties that, in consideration of the making and execution of this Assurance:

FOUNDATION PROGRAMS AND ACTIVITIES

14. The Foundation shall not develop products or services for commercial exploitation by any of its members or substantial funders, including without limitation Pearson.

15. The Foundation shall neither conduct nor sponsor events or programs that allow for participation on preferential terms by funders of the Foundation, including without limitation Pearson, other than attendance by officers and directors of the Foundation or Pearson employees assigned to spend substantial time on Foundation matters; provided, however, that (a) the Foundation may accept and distribute donations from funders and provide customary donor recognition for such donations; and (b) the Foundation may conduct charity fundraising events such as golf tournaments to which Pearson employees, vendors and associates may be invited.

16. For any activity other than a Foundation fundraising event that is (a) funded directly by the Foundation or (b) funded indirectly by the Foundation through specific project funding to another organization, with respect to which Pearson plays a planning or organizing role, and in which any purchasers or prospective purchasers of Pearson products are invited to participate:

- a. No Pearson products or services (other than donated products or services) will be presented at such activity; and.
- b. No Pearson employees may attend unless such employees are officers or directors of the Foundation or employees assigned to spend substantial time on Foundation matters.

17. Nothing contained in paragraphs 15 or 16 of this Assurance shall prohibit Pearson from conducting or funding activities that it undertakes with its own resources.

CORPORATE GOVERNANCE

18. Subject to the last sentence of this paragraph, by March 31, 2014, the Foundation shall: (a) establish two classes of directors, with the second class self-perpetuating and consisting of independent directors with no current financial relationship to Pearson and who have received no material benefit from Pearson during the last five years. The second class of directors shall include no fewer than three independent directors at least two of whom shall be current or former P-12 educators or college or university educators or administrators. OAG shall approve all independent directors appointed for a period of three years following the execution of this Assurance; and (b) approve the appointment of at least two independent directors to an audit committee comprised of three directors. If, however, by March 31, 2014, the Foundation becomes a grant-making organization that shall not thereafter carry out any direct programs or

activities (other than existing programs or activities to which it is already committed), it shall not be required to make any changes to the composition of its governing body or audit committee.

19. Any Foundation transaction that could reasonably be expected to result in a material benefit to Pearson or any other substantial funder of the Foundation shall require review by a committee consisting solely of the independent directors; a finding by such committee that the transaction is fair, reasonable and in the best interests of the Foundation; and approval by a majority vote of the board. Any such transaction involving Pearson shall require approval by a majority of the independent directors, who shall deliberate and vote on the transaction without the participation of any person affiliated with Pearson.

20. The Foundation's audit committee shall monitor the Foundation's compliance with federal tax and state not-for-profit laws, and shall monitor the Foundation's compliance with the provisions of this Assurance.

21. The Foundation shall conduct mandatory annual education programs for directors, officers and employees of the Foundation and any employees or contractors of Pearson who spend a substantial amount of time on Foundation matters. Such trainings shall address the proper relationship between Pearson and the Foundation, as well as issues of private benefit and private inurement. Such trainings shall include instruction for directors and officers of the Foundation concerning their fiduciary duties to the Foundation.

MONETARY RELIEF

22. The Foundation, in settlement of this Investigation, shall pay the sum of \$7,500,000 by February 15, 2014 into a fund to be held by OAG in escrow (the "Fund"). OAG will administer and pay monies from the Fund to support programs in New York and other states that recruit and retain excellent K-12 teachers and support such teachers in providing high

quality instruction aligned to the Common Core State Standards as are selected by OAG among programs identified by 100kin10, an independent not-for-profit organization.

23. The Foundation shall pay \$200,000 to the New York Department of Law for the costs of OAG's investigation by December 16, 2013.

24. All payments due under this Assurance shall be made by wire transfer, certified check and/or bank check.

ADDITIONAL PROVISIONS

25. The term of this Assurance is continuing, unless modified by mutual agreement of the parties, except that the terms of paragraphs 18 and 21 shall expire 3 years from the date of execution of this AOD.

26. OAG has agreed to the terms of this Assurance based on, among other things, the representations made to OAG by Pearson Inc, the Foundation and their counsel and OAG's own factual investigation. To the extent that any material representations are later found to be inaccurate or misleading, this Assurance is voidable by OAG in its sole discretion.

27. Pearson Inc. and the Foundation agree not to raise or interpose in any way their states of incorporation or other jurisdictional objection as a defense to any cause of action, claim or argument arising from the OAG's enforcement of this Assurance.

28. This Assurance constitutes the entire agreement between OAG and the other parties hereto, and supersedes all prior agreements and understandings, written or oral, among the parties with respect to the subject matter of this Assurance. No representation, inducement, promise, understanding, condition, or warranty not set forth in this Assurance has been made to or relied upon by any party in agreeing to this Assurance. The headings and captions in this

Assurance are for convenience only and do not affect or control the meaning or construction of this Assurance.

29. No party shall take any action or make any statement denying, directly or indirectly, the propriety of this Assurance. Nothing in this paragraph affects Pearson's or the Foundation's (i) testimonial obligations, or (ii) right to take legal or factual positions in defense of litigation to which the OAG is not a party. This Assurance is not intended for use by any third party in any other proceeding, and should not be construed as an admission of liability by Pearson Inc. or the Foundation or be admissible in connection with any determination of bidder responsibility for any Pearson company.

30. Each party represents and warrants, through the signatures below, that the terms and conditions of this Assurance are duly approved, and execution of this Assurance is duly authorized.

31. This Assurance may not be amended, except by an instrument in writing signed on behalf of all of the parties to this Assurance. This Assurance may be executed in one or more counterparts, and shall become effective when such counterparts have been signed by each of the parties and exchanged electronically or in hard copy.

32. This Assurance shall be binding on and inure to the benefit of all the parties hereto and their respective successors and assigns, provided that no party, other than OAG, may assign, delegate, or otherwise transfer any of its rights or obligations under this Assurance without the prior written consent of OAG.

33. In the event that any one or more of the provisions in this Assurance shall for any reason be held to be invalid, illegal, or unenforceable in any respect such invalidity, illegality, or unenforceability shall not affect any other provision of this Assurance.

34. The Foundation and Pearson Inc. shall, upon request by OAG, provide all documentation and information necessary for OAG to verify compliance with this Assurance without the necessity for a subpoena.

35. Acceptance of this Assurance by OAG shall not be deemed approval by OAG of any of the practices or procedures referenced in OAG's findings herein, and Pearson and the Foundation shall make no representation to the contrary.

36. Pursuant to Section 63(15) of the Executive Law, evidence of a violation of this Assurance shall constitute *prima facie* proof of violation of the N-PCL and/or the Executive Law in any action or proceeding thereafter commenced by the OAG. If any court of competent jurisdiction determines that Pearson Inc. or the Foundation has breached this Assurance, such party or parties shall pay to OAG the reasonable cost, if any, of such determination and of enforcing this Assurance, including without limitation legal fees, expenses and court costs.

37. All notices, reports, requests and other communications pursuant to this Assurance shall be in writing and shall be directed as follows:

If to OAG, to:

Bureau Chief
Charities Bureau
Office of the Attorney General
120 Broadway -- 3rd Floor
New York, New York 10271

If to the Foundation, to:

Cliff Perlman
Perlman & Perlman
41 Madison Avenue -- Suite 4000
New York, NY 10010-2202

If to Pearson Inc., to:

Laurie E. Foster
Morgan, Lewis & Bockius LLP
101 Park Avenue
New York, NY 10178-0060

38. This Assurance shall be governed by the laws of the State of New York without regard to any conflict of laws principles.

39. Nothing contained herein shall be construed as to deprive any person of any private right under the law.

IN WITNESS THEREOF, this Assurance is executed by the parties hereto as of the date set forth below.

Dated: December 12, 2013

PEARSON CHARITABLE FOUNDATION

By: 

Mark Nieker
President

PEARSON INC.

By: 

Susan Rudolph
Senior Vice President

ERIC T. SCHNEIDERMAN
Attorney General of the State of New York

By: 

David E. Nachman
Enforcement Section Chief,
Charities Bureau