

Agreement Between
The Montana Office of Public Instruction and
National Center for Education Statistics, Westat,
Educational Testing Service and NCS Pearson, Inc.

This Agreement is entered into by the Montana Office of Public Instruction (MOPI), the National Center for Education Statistics (NCES) at 1990 K Street, NW, 8th and 9th Washington, D.C., and its contractors Westat, Inc. (Westat) at 1600 Research Boulevard, Rockville, Maryland, Educational Testing Service (ETS) at 660 Rosedale Road, Princeton, New Jersey and NCS Pearson, Inc. (Pearson) at 5601 Green Valley Drive, Bloomington, Minnesota (hereinafter collectively referred to as "Contractors"). Westat is contracted by NCES to collect information needed to conduct the National Assessment of Educational Progress (NAEP). Westat will be receiving data from the MOPI, as detailed in Appendix A of this Agreement and shall provide such data to Pearson and ETS, as provided below.

The Family Educational Rights and Privacy Act, 20 U.S.C. § 1232g (FERPA) permits the disclosure of personally identifiable information (PII) from education records to an authorized representative to audit or evaluate a federal or state-supported education program or to enforce or comply with federal legal requirements that relate to those education programs. To affect the transfer of data subject to FERPA, Contractors agree to the following:

- I. **PARTIES.** The MOPI is a state educational authority authorized to receive information from local educational agencies ("LEAs") subject to FERPA, as authorized by 34 C.F.R. Section 99.31. Westat is a research corporation contracted by the National Center for Education Statistics of the U.S. Department of Education to collect information needed to conduct the National Assessment of Educational Progress (NAEP). NAEP is a study authorized by the U.S. Secretary of Education. The MOPI hereby designates the Contractors as its "authorized representatives" pursuant to FERPA for the permitted access and use of PII as set forth within this Agreement.

- II. **DEFINITIONS.** The following definitions shall be the same as provided in FERPA and the regulations promulgated thereunder, as amended from time to time: Attendance, Authorized Representative, Education Program, Educational Agency, Education Record, Disclosure, Institution of Postsecondary Education, Student, and PII. In addition, the following definitions shall apply.
 - A. **Re-disclosure:** Re-disclosure means transfer or disclosure of PII to any other person or entity whose access to PII is not specifically authorized in this Agreement.

 - B. **Protected:** For the purposes of this agreement, data shall be deemed protected when on a secure server that is hosted by the Contractors and is password protected by a password that meets the following criteria:

1. Contains at least 8 characters;
2. Is comprised of at least 3 of the following 4 types of characters:
 - a. Lower case letters (i.e. a-z),
 - b. Upper case letters (i.e. A-Z),
 - c. Numbers (i.e. 0-9),
 - d. Special characters (e.g. !@#\$\$%^&*()_+|-); and
3. Has not been used in the past year.

C. Encrypted: For the purposes of this agreement, data shall be deemed encrypted when the data has been transformed into a form in which there is a low probability of assigning meaning without use of a confidential process or key and such confidential process or key that might enable decryption has not been breached.

III. PURPOSE. This agreement is for the purpose of ensuring that data and information will be shared between the parties in a manner consistent with FERPA. The MOPI is disclosing PII to the Contractors in order for them to conduct NAEP, a study authorized by the U.S. Secretary of Education. Results of NAEP are published as the Nation's Report Card, which is used to inform the public about the academic achievement of elementary and secondary students in the United States. Since 1969, NAEP assessments have been conducted periodically in a variety of content areas. NAEP collects and reports information on student performance at the national and state levels, making the assessment an integral part of our nation's evaluation of the condition and progress of education.

MOPI will transfer student data to Westat for the purpose of student sampling and demographic data reporting for NAEP. Westat will securely transfer the names of students sampled to Pearson to prepare materials for the assessment, and Westat transfers de-identified student demographic information to ETS to conduct analyses and reports. Westat, Pearson and ETS shall not disclose PII to any other entities. NCES shall not receive any PII from the MOPI, Westat, Pearson or ETS. PII of sampled students for each school will be securely accessed electronically by each respective school to complete preparations for the assessment.

Notwithstanding anything herein to the contrary, it is understood and agreed between the parties that personally identifying information (PII) received by the Contractors pursuant to this Agreement shall be transmitted, maintained, secured and protected exclusively in accordance with the procedures described in the Data Security Agreement for the 2015 National Assessment of Educational Progress (NAEP) attached and incorporated herein as Exhibit 1.

IV. DATA ELEMENTS. The MOPI shall provide to Westat the data elements detailed in Appendix A of this Agreement.

V. DUTIES OF THE CONTRACTORS.

- A. In all respects, Contractors shall comply with the provisions of FERPA. For purposes of this Agreement, "FERPA" includes any amendments or other relevant provisions of federal law, as well as all requirements of Chapter 99 of Title 34 of the Code of Federal Regulations, as amended from time to time. Nothing in this Agreement may be construed to allow either party to maintain, use, disclose or share student information in a manner not allowed by federal law or regulation or by this Agreement.
- B. Contractors shall use the data shared under this Agreement for no purpose other than to carry out the audit, evaluation, or enforcement or compliance activity.
 - 1. The Contractors agree to immediately cease all use of the data shared under this Agreement in the case of a data breach or suspected data breach.
 - 2. The ability to access or maintain data under this Agreement shall not under any circumstances transfer from Contractors to any other institution or entity, except as provided in Section III above.
- C. Contractors agree to allow the Legislative Audit Division for the State of Montana, subject to FERPA restrictions, access to data shared under this Agreement and any relevant records of Contractors for purposes of completing authorized audits of the parties. The Contractors further agree not to share data received under this Agreement with any other entity for any purpose, except as provided in Section III above.
- D. Contractors shall require all employees to comply with all applicable provisions of FERPA and other federal laws with respect to the data shared under this Agreement.
 - 1. Contractors agree to require and maintain an appropriate confidentiality agreement from each employee with access to data pursuant to this Agreement and to limit access to confidential information to staff members with legitimate interests related to the audit or evaluation.
 - 2. The Contractors agree to ensure that authorized employees only access the confidential data for legitimate purposes related to the audit or evaluation.
- E. Contractors shall maintain all data obtained pursuant to this Agreement in a secure computer environment that is hosted by the Contractors on secure drives where access is restricted to authorized persons.
 - 1. Contractors shall not store data on stand-alone computer/notebook hard disks or portable storage devices like external/removable hard drives, flash cards (such as SD, Compact Flash), flash drives (also known as thumb or jump drives), compact disks or digital video disks.
 - 2. Contractors shall not copy, reproduce or transmit data except as necessary to fulfill the purpose of this Agreement.
- F. Contractors agree that all copies of data of any type, including but not limited to any modifications or additions to data from any source that contains information regarding students, are subject to the provisions of this Agreement in the same manner as the original data.

- G. Contractors agree to inform the MOPI immediately and cease using all MOPI provided data should it be banned by any organization from receiving PII during the life of the agreement. Furthermore, the Contractors agree that they shall not resume use of the MOPI provided data without written authorization from the MOPI.
- H. The Contractors assure that they will not disclose any data obtained under this Agreement in a manner that could identify an individual student to any other entity at any time and during any stage of this evaluation.
- I. The Contractors agree that they shall not provide any data obtained under this Agreement to any party ineligible to receive data protected by FERPA or prohibited from receiving data from any entity by virtue of a finding under Section 99.31(b)(6)(iii) of Title 34, Code of Federal Regulations.
- J. The Contractors agree not to release to any entity except the MOPI any data where the cell size of the group reported would be less than or equal to five (5). In the case of assessment data, the Contractors agree to a minimum cell size of twenty (20).
- K. The Contractors agree to provide the MOPI a thirty (30) day review and approval period prior to publishing or otherwise sharing any results or findings of this evaluation, with the exception of reading and mathematics for grades 4 and 8, beyond the Contractors' staff and the MOPI. Should the Contractors not receive either a written approval or disapproval of publishing of the results from the MOPI within thirty (30) days, the release of the results shall be considered approved.
- L. The Contractors shall destroy and render permanently inaccessible all data obtained under this Agreement and all data related to this evaluation that may contain confidential information when it is no longer needed for the purpose for which it was obtained or if the Agreement is cancelled per Section IX of this Agreement, but no later than the end date of the Agreement.
 1. Nothing in this Agreement authorizes the Contractors to maintain data beyond the time period reasonably needed to complete the purpose of the request.
 2. All data no longer needed shall be destroyed or returned to the MOPI in compliance with 34 C.F.R. Section 99.35(b)(2) by the end of each assessment cycle.
 3. The Contractors shall provide written verification to the MOPI within 30 days of such destruction.
 4. The Contractors agree to require all employees to comply with this provision.
 5. The Contractors agree that failure to abide by the destruction requirements of this Agreement shall constitute a breach of confidential information, which is subject to the breach related requirements detailed later in this Agreement.

VI. CONFIDENTIALITY: All data provided to the Contractors by the State or developed internally by the Contractors with regard to the State will be treated as proprietary to the MOPI and confidential unless the MOPI agrees in writing to the contrary. The Contractors agree to forever hold in confidence all files, records, documents, or other information as designated,

whether prepared by the State or others, which may come into Contractors' possession during the term of this contract, except where disclosure of such information by the Contractors is required by other governmental authority to ensure compliance with laws, rules, regulations, and such disclosure will be limited to that actually so required. Where such disclosure is required, the Contractors will provide advance notice to the MOPI of the need for the disclosure and will not disclose anything absent consent from the MOPI unless such advance notice is in and of itself in violation of applicable laws, rules and regulations.

- A. "Confidential Information" shall mean any name, number or other information that may be used, alone or in conjunction with any other information, to identify a specific individual including, but not limited to, such individual's name, date of birth, mother's maiden name, motor vehicle operator's license number, Social Security number, employee identification number, employer or taxpayer identification number, alien registration number, government passport number, health insurance identification number, demand deposit account number, savings account number, credit card number, debit card number or unique biometric data such as fingerprint, voice print, retina or iris image, or other unique physical representation. Without limiting the foregoing, Confidential Information shall also include any information that the Department classifies as "confidential" or "restricted." Confidential Information shall not include information that may be lawfully obtained from publicly available sources or from federal, state, or local government records which are lawfully made available to the general public.
- B. "Confidential Information Breach" shall mean an instance where an unauthorized person or entity accesses Confidential Information in any manner, including but not limited to the following occurrences: (1) any Confidential Information that is not encrypted or protected is misplaced, lost, stolen or in any way compromised; (2) one or more third parties have had access to or taken control or possession of any Confidential Information that is not encrypted or protected without prior written authorization from the State; (3) the unauthorized acquisition of encrypted or protected Confidential Information together with the confidential process or key that is capable of compromising the integrity of the Confidential Information; or (4) if there is a substantial risk of identity theft or fraud to the client, the Contractors, the Department or State.
- C. Protection of Confidential Information
1. Contractors, at their own expense, have a duty to and shall protect from a Confidential Information Breach any and all Confidential Information which it comes to possess or control, wherever and however stored or maintained, in a commercially reasonable manner in accordance with current industry standards.
 2. Contractors shall implement and maintain a comprehensive data - security program for the protection of Confidential Information. The safeguards contained in such program shall be consistent with and comply with the safeguards for protection of Confidential Information, and information of a similar character, as set forth in all applicable federal and state law. Such data-security program shall include, but not be limited to, the following:

- a. A security policy for employees related to the storage, access and transportation of data containing Confidential Information;
 - b. Reasonable restrictions on access to records containing Confidential Information, including access to any locked storage where such records are kept;
 - c. A process for reviewing policies and security measures at least annually; and
 - d. Creating secure access controls to Confidential Information, including but not limited to passwords.
 - e. Encrypting of Confidential Information that is being transmitted electronically.
3. In the case of a breach or suspected breach of any Confidential Information related to this Agreement, Contractors shall:
 - a. Notify the MOPI and the Montana Office of the Attorney General as soon as practical, but no later than twenty-four (24) hours after they become aware of or suspect that any confidential information which Contractor possesses or controls has been subject to a confidential information breach or suspected breach;
 - b. Immediately cease all use of the data provided by the MOPI or developed internally by Contractor; and
 - c. Within three (3) business days after the notification, present to the Office of the Attorney General and the MOPI with either:
 - i. A report detailing the breach and a plan to mitigate the effects of the breach and specifying the steps taken to ensure future breaches do not occur, or
 - ii. A report detailing why, upon investigation, Contractors believe no breach in fact occurred.
 4. Based on the report and, if appropriate, plan provided, the MOPI will decide, in its sole discretion, whether to permit Contractors to restart use of the data or to cancel the agreement, per section IX of this Agreement.
 5. The Contractors acknowledge that the breach of this agreement or its part may result in irreparable and continuing damage to the MOPI for which money damages may not provide adequate relief. In the event of a breach or threatened breach of this agreement by the Contractors, the MOPI, in addition to any other rights and remedies available to the MOPI under federal and state law or in equity, may be entitled to preliminary and permanent injunctions to enjoin and restrain the breach or threatened breach. If the United States Department of Education's Family Policy Compliance Office determines that the Contractors have violated paragraph 34 C.F.R. 99.31(a)(6)(iii)(B), the MOPI may not allow the Contractors access to personally identifiable information from education records for at least five (5) years.
 6. Nothing in this Section shall supersede in any manner Contractors' obligations pursuant to HIPAA or the provisions of this Contract concerning the obligations of Contractors as a Business Associate of the Department.
 7. Contractors will use the secure MyNAEP website to receive and transmit data files containing PII data. MyNAEP is an HTTPS site that uses a secure sockets layer (SSL) for security, and use the HTTPS protocol to encrypt the data being sent back and forth with SSL encryption. In the unlikely event someone were to capture the data being transferred via HTTPS, it would be unrecognizable. MyNAEP requires strong passwords of 8-14 characters, including at least one uppercase letter, lowercase letter, number, and special character (!@#%&*?/<>). Passwords expire every 90 days. As an additional security feature, MyNAEP automatically logs users off after 20 minutes of inactivity.

Only the school coordinator designated by each school's principal will have access to all student-level data for that school in MyNAEP. Up to three specialists from each school can be designated to provide SD and ELL information, as well as data support, and will have access to limited sections of MyNAEP that allow the specialist(s) to enter information about SD and ELL students. All MyNAEP users must accept a confidentiality agreement before gaining access to the site.

8. Contractors maintain student information data files during the current assessment year. Each school participating in NAEP is provided with a NAEP storage envelope in December to securely store all documents with identifiable student information until June 1 or the end of the school year, at which point they are to shred the contents of the envelope. After the assessment in each school, field staff members remove the tear-off strips preprinted with student names from administrative records and any printouts from MyNAEP, place them in the storage envelope, and hand the envelope to the school coordinator. Moreover, all documents with student information that are printed from the MyNAEP website include a "Confidential" watermark and a notice stating that the printout must be kept in the NAEP storage envelope. All individual student data submitted electronically during the list submission process are destroyed in August following the assessment period. NCES may ask that information is retained longer for specific research projects undertaken in collaboration with states and TUDA districts, in which case the information is destroyed following the conduct of the research study.

VII. PARTIES' REPRESENTATIVES.

- A. Contractors identify the following individuals to serve as their representatives under this Agreement.

1. For Westat:

Dianne F. Walsh, Vice President
NAEP SDC Co-Project Director
Westat
1600 Research Boulevard
RE 300
Rockville, MD 20850
Phone: 301-251-4338
Email: DianneWalsh@westat.com

2. For ETS:

Steve Lazer, Senior Vice President
Educational Testing Service.
660 Rosedale Road,
Princeton, NJ 08541

3. For Pearson:

Anne Parmley, Managing Director,
National Assessment Services

Pearson
MS 160
2510 North Dodge Street
Iowa City, IA 52245
Phone: 319 - 339 - 6538

B. The aforementioned representatives shall be responsible for transmitting all data requests and maintaining a log or other record of all data requested and received pursuant to this Agreement, including confirmation of the completion of any projects and the return or destruction data as required by this Agreement. The MOPI or its agents may upon request review the records required to be kept under this section.

C. NCES names the following individual as its contact person:

Gina Broxterman
Project Officer State and District Operations
1990 K Street, NW
Room 8011
Washington, DC 20006
Phone: 202-502-7822
Email: Gina.Broxterman@ed.gov

D. MOPI names the following individual as its contact person:

VIII. RELATED PARTIES. Contractors represent that they are authorized to bind to the terms of this contract, including confidentiality and destruction or return of student data, all employees who may have access to the data or may own, lease or control equipment or facilities of any kind where the data is stored, maintained or used in any way. This Agreement takes effect only upon acceptance by authorized representatives of the Contractors, by which that institution agrees to abide by its terms and return or destroy all student data upon completion of the research for which it was intended or upon the termination of its current relationship with Contractors.

IX. TERM and CANCELLATION. This Agreement takes effect upon signature by the authorized representative of each party and shall continue until June 30, 2019. The parties further understand that the MOPI may cancel this Agreement at any time, upon reasonable notice. The MOPI specifically reserves the right to cancel this Agreement without notice should the MOPI, in its sole discretion, determine that student information has been released in a manner inconsistent with this Agreement, has not been maintained in a secure manner, or that substantially similar data access has become generally available for research purposes through any other mechanism approved by the MOPI.

- X. CONFIDENTIAL INFORMATION BREACH. Contractors acknowledge that in addition to the penalties described above in Section VI. C., a Confidential Information Breach may result in the Contractors being subject to a five (5) year ban from receiving access to the MOPI's PII from education records.
- XI. AMENDMENTS. A formal contract amendment, in writing, shall not be effective until executed by both parties to the contract, and where applicable, the Attorney General. Such amendments shall be required for extensions to the final date of the contract period and to terms and conditions specifically stated in this contract, including but not limited to revisions to the maximum contract payment, to the unit cost of service, to the contract's objectives, services or plan, to due dates for reports, to completion of objectives or services, and to any other contract revisions determined material by the MOPI.
- XII. CONTRACT ASSIGNMENT. No right or duty, in whole or in part, of the Contractors under this Agreement may be assigned or delegated without the prior written consent of the MOPI.
- XIII. SEVERABILITY. If any provision of this Agreement shall be held invalid by any court of competent jurisdiction, such holding shall not invalidate any other provision hereof.
- XIV. ENTIRE AGREEMENT. This written Agreement shall constitute the entire Agreement between the parties and no other terms and conditions in any document, acceptance or acknowledgment shall be effective or binding unless expressly agreed to in writing by MOPI. This Agreement may not be changed other than by a formal written contract amendment signed by the parties hereto and approved by the Office of the Attorney General.

IN WITNESS WHEREOF, the Parties have affixed their signatures:

For the Montana Office of Public Instruction

By: _____ Date _____

For Westat, Inc.:

By:  11-20-14
Dianne F. Walsh Date
Vice-President
Westat, Inc.

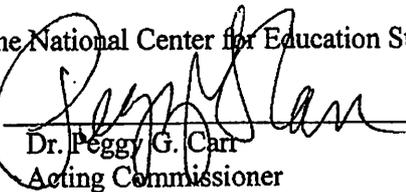
For Educational Testing Service:

By:  11-21-14
Steve Lazer Date
Senior Vice President
Student and Teacher Programs

For NCS Pearson, Inc.:

By:  21 Nov 2014
Anne Parmley Date
Managing Director, National Assessment Services

For the National Center for Education Statistics:

By:  21 Nov 2014
Dr. Peggy G. Carr Date
Acting Commissioner

IN WITNESS WHEREOF, the Parties have affixed their signatures:

For the Montana Office of Public Instruction

By: Madalyn Quinlan

11/14/14
Date

For Westat, Inc.:

By: _____
Dianne F. Walsh
Vice-President
Westat, Inc.

Date

For Educational Testing Service, Inc.:

By: _____
Steve Lazer
Senior Vice President
Student and Teacher Programs

Date

For NCS Pearson, Inc.:

By: Anne Parmley
Anne Parmley
Managing Director, National Assessment Services

11/17/14
Date

For the National Center for Education Statistics:

By: _____
Dr. Peggy G. Carr
Acting Commissioner

Date

Appendix A.

The MOPI shall provide the Contractors the following data elements, where available, in the years listed for the students identified by the Contractors pursuant to this Agreement for the study described therein. The years are as indicated. Full School year data are referred to by the year the school year begins (e.g., 2014-15 would be shown as 2014).

A. Data (October file of each school year)	
Data Element	Years
State unique student identifier	2014-2018
Student Name	2014-2018
Month of Birth	2014-2018
Year of Birth	2014-2018
School Name	2014-2018
Grade	2014-2018
Gender	2014-2018
Race/ethnicity	2014-2018
English Language Learner Status	2014-2018
Special Education Status	2014-2018
Free/Reduced Lunch Eligibility Status	2014-2018