

STATE OF WISCONSIN

CIRCUIT COURT
BRANCH 2

JEFFERSON COUNTY

NATIONAL COUNCIL ON TEACHER
QUALITY and LAURA POMERANCE,

Plaintiffs,

v.

Case No. 12-CV-63

LEGAL RECORDS CUSTODIANS for the
UNIVERSITY OF WISCONSIN-EAU CLAIRE,
UNIVERSITY OF WISCONSIN-GREEN BAY,
UNIVERSITY OF WISCONSIN-LA CROSSE,
UNIVERSITY OF WISCONSIN-MADISON,
UNIVERSITY OF WISCONSIN-MILWAUKEE,
UNIVERSITY OF WISCONSIN-OSHKOSH,
UNIVERSITY OF WISCONSIN-PLATTEVILLE,
UNIVERSITY OF WISCONSIN-RIVER FALLS,
UNIVERSITY OF WISCONSIN-STEVENS POINT,
UNIVERSITY OF WISCONSIN-STOUT,
UNIVERSITY OF WISCONSIN-SUPERIOR, and
UNIVERSITY OF WISCONSIN-WHITEWATER.

Defendants.

SETTLEMENT AGREEMENT AND ORDER

Plaintiffs National Council on Teacher Quality and Laura Pomerance (collectively, "NCTQ") and Defendants Legal Records Custodians for the University of Wisconsin-Eau Claire, University of Wisconsin-Green Bay, University of Wisconsin-La Crosse, University of Wisconsin-Madison, University of Wisconsin-Milwaukee, University of Wisconsin-Oshkosh, University of Wisconsin-Platteville, University of Wisconsin-River Falls, University of Wisconsin-Stevens Point, University of Wisconsin-Stout, University of Wisconsin-Superior, and University of Wisconsin-Whitewater (collectively, the "Records Custodians") desire to resolve this case expeditiously and economically. Each party believes that the terms of this stipulated

settlement agreement (this "Agreement") represent a reasonable and appropriate resolution of the claims in dispute.

WHEREFORE, the parties stipulate and agree to the following terms and conditions:

1. By December 17, 2012, the Records Custodians will make available to NCTQ's designated counsel copies of course syllabi for all Spring 2012 and Fall 2012 core undergraduate education courses identified or described in Items 1-5 and 16 of the public records requests attached as Exhibits A-L to the Complaint filed January 25, 2012 and described in this paragraph ("the Education School Records") taught in the schools or departments of education at the University of Wisconsin-Eau Claire, University of Wisconsin-Green Bay, University of Wisconsin-La Crosse, University of Wisconsin-Madison, University of Wisconsin-Milwaukee, University of Wisconsin-Oshkosh, University of Wisconsin-Platteville, University of Wisconsin-River Falls, University of Wisconsin-Stevens Point, University of Wisconsin-Stout, University of Wisconsin-Superior, and University of Wisconsin-Whitewater (each, a "UW Campus"). For purposes of this Agreement, "core undergraduate education courses" shall mean all sections of all required undergraduate teacher education courses taught within a department, division, school, or college of education and shall exclude courses offered by other departments that include teacher education materials. Responsive syllabi for core undergraduate education courses taught by instructors no longer employed by the University of Wisconsin-Eau Claire, University of Wisconsin-Green Bay, University of Wisconsin-La Crosse, University of Wisconsin-Madison, University of Wisconsin-Milwaukee, University of Wisconsin-Oshkosh, University of Wisconsin-Platteville, University of Wisconsin-River Falls, University of Wisconsin-Stevens Point, University of Wisconsin-Stout, University of Wisconsin-Superior, and University of Wisconsin-Whitewater shall be provided if copies remain available at the UW

Campuses where such instructors taught core undergraduate education courses for which the syllabi are Education School Records. The Education School Records may be provided to NCTQ's designated counsel by posting electronic copies of the Education School Records to a password-protected website, or by other means.

2. By December 21, 2012, the Records Custodians will make available to NCTQ's designated counsel copies of course syllabi for all Spring 2012 and Fall 2012 courses (other than core undergraduate education courses) identified in Items 4-5 and 16 of the public records requests attached as Exhibits A-I, to the Complaint filed January 25, 2012, in this lawsuit (the "Additional Records," and, together with the "Education School Records," the "Records"). Responsive syllabi for these courses taught by instructors no longer employed by the University of Wisconsin-Eau Claire, University of Wisconsin-Green Bay, University of Wisconsin-La Crosse, University of Wisconsin-Madison, University of Wisconsin-Milwaukee, University of Wisconsin-Oshkosh, University of Wisconsin-Platteville, University of Wisconsin-River Falls, University of Wisconsin-Stevens Point, University of Wisconsin-Stout, University of Wisconsin-Superior, and University of Wisconsin-Whitewater shall be provided if copies of those syllabi remain available at the UW Campuses where such instructors taught courses for which the syllabi for which are Additional Records. The Additional Records may be provided to NCTQ's designated counsel by posting electronic copies of the Additional Records to a password-protected website, or by other means. The Additional Records will be provided on a rolling basis, by UW Campus, as each UW Campus completes collection of its Additional Records.

3. No later than 5:00 p.m., January 11, 2013, Plaintiffs' counsel shall notify Defendants' undersigned counsel in writing of any alleged defect in the Records to which access

is provided pursuant to this Agreement. If any such notification of alleged defect is provided to Defendants' undersigned counsel by 5:00 p.m., January 11, 2013, the parties and their counsel will cooperate to expeditiously remedy any such alleged defect.

4. NCTQ will limit its use of the Records to uses reasonably necessary for the preparation of NCTQ's report evaluating teacher training programs in Wisconsin.

5. NCTQ agrees that NCTQ's report evaluating teacher training programs in Wisconsin will not quote directly from any of the course syllabi being provided as part of this Agreement. NCTQ further agrees that NCTQ's report evaluating teacher training programs in Wisconsin will not identify any University of Wisconsin school or department, or any University of Wisconsin professor or course, or the University of Wisconsin System, as a negative example in its case-specific examples. In addition, NCTQ's report evaluating teacher training programs in Wisconsin will not rate or review individual professors or individual courses, although it may identify curricular areas, and it may rate schools or departments of education on the whole. The parties acknowledge that NCTQ's report may reflect on individual courses or professors by inference, particularly in small schools or departments where a single or small number of courses or instructors are involved in a particular area of evaluation. Except as generally reflected in de-identified fashion in NCTQ's evaluation of campuses and curricular areas as a whole, and delivery of evaluated course content and skills, NCTQ will not use any University of Wisconsin instructor or course in any narrative setting forth examples of good or bad teacher training.

6. NCTQ will use the Records and any information contained in the Records only in the conduct of activities that are legal and do not violate any applicable law, including copyright law. NCTQ will not use, nor will it condone the use by any other person or entity of, the Records or any information contained in the Records in any activity that is illegal or violates any

applicable law, including copyright law. NCTQ will use the Records and all information contained in the Records only for purposes constituting "fair use" as defined in 17 U.S.C. § 107 (2010).

7. NCTQ will not include any Records in any database made available to the public. NCTQ will redisclose any Records to persons outside of the NCTQ organization or its legal counsel: (a) only for peer review of NCTQ's evaluation or professional research on teacher training; and (b) only if any such person first signs a confidentiality agreement, substantially in the form attached hereto as Exhibit A, limiting any use or disclosure as provided in ¶¶ 4-7 of this Agreement. "Peer review" shall mean work performed by qualified researchers to analyze the teacher training evaluation prepared by NCTQ. "Researcher" shall mean an individual with academic or journalistic qualifications recognized as credible and substantial in that individual's profession. "Professional research" shall mean academic or journalistic research recognized as credible and substantial in that individual's profession. NCTQ will not sell or otherwise profit financially from any redistribution of any Records.

8. Within ten business days of signature of any confidentiality agreement described in ¶ 7 above, NCTQ will provide a copy of the signed confidentiality agreement to the General Counsel, University of Wisconsin System, 1856 Van Hise Hall, 1220 Linden Drive, Madison, WI, 53706 or (608) 263-3487 (facsimile).

9. Provision of the Records to NCTQ will completely resolve NCTQ's public records requests for the course syllabi identified as Items 1-5 and 16 in the public records requests attached to the Complaint as Exhibits A-L. No additional records will be provided by the Records Custodians, or any of their agents, officers, or employees, or by the individual

institutions, in response to Items 1-5 and 16 of the public records requests attached to the Complaint as Exhibits A-L.

10. The Records Custodians waive the requirement that NCTQ pay any copying fees, reproduction fees, location costs, or other applicable fees authorized by the Wisconsin public records law for the Records provided pursuant to this Agreement.

11. This case will be dismissed with prejudice pursuant to a Stipulation for Voluntary Dismissal with Prejudice that will be executed by counsel for the parties simultaneously with this Agreement. The Stipulation for Voluntary Dismissal with Prejudice, following execution by counsel for the parties, will be held in escrow by Defendants' counsel until the later of 8:30 a.m., January 14, 2013, if no written notification is provided by Plaintiffs' counsel as described in ¶ 3, or written agreement by counsel for the parties—which agreement shall not unreasonably be withheld—that any alleged defect identified in writing by Plaintiff's counsel as described in ¶ 3 has been remedied. Defendants' counsel will file the Stipulation for Voluntary Dismissal within three business days of the date identified in this paragraph.

12. The Records Custodians will pay the aggregate amount of \$ 9,957.70 consisting of attorneys' fees of \$9,500.00, statutory damages of \$100.00, and costs of \$357.70 by check issued to NCTQ's counsel within ten (10) business days of receiving confirmation that Case No. 12-CV-63 has been dismissed with prejudice. The Records Custodians' agreement to pay a negotiated amount of attorneys' fees and costs in settlement of this lawsuit is not nor is it to be construed as any admission of liability or of a violation of the public records law by the Records Custodians, or their agents, officers, or employees.

13. Absent change of applicable law, the Records Custodians agree that course syllabi for courses identified in Items 1-5 and 16 of Exhibits A-L to the Complaint (or similar courses)

will be provided to Plaintiffs if Plaintiffs make future public records requests for those course syllabi. Plaintiffs agree that the Records Custodians are entitled to impose the fees specified in Wis. Stat. § 19.35(3) for response to any future public records requests by Plaintiffs for those course syllabi. The parties acknowledge that this Agreement does not provide Plaintiffs with greater rights to access the course syllabi, or any other information, than are provided by Wis. Stat. §§ 19.31-19.37, or other applicable law.

14. This Agreement is a full, final, and complete compromise and settlement of claims, actual, doubtful, or disputed, as to questions of liability, damage, and remedy for the claims raised in this case or that could have been raised in this case; is not, nor is it to be construed as, an admission by the NCTQ that the Records provided to them pursuant to this Agreement are not subject to disclosure in response to a public records request; and is not, nor is it to be construed as, an admission of liability or of a violation of the Wisconsin public records law by the Records Custodians, or their agents, officers, or employees.

15. The parties shall cooperate and promptly take all such action needed to give effect to all terms of this Agreement.

16. This Agreement is made for the benefit of, shall be binding upon, and be enforceable by the parties and their respective legal representatives, successors, and assigns.

17. The statements in this Agreement are contractual terms, and not mere recitals. Any questions concerning this Agreement shall be determined and governed by the terms of this Agreement and the law of the State of Wisconsin.

18. If any provision of this Agreement is determined by a Court of competent jurisdiction to be unenforceable, that provision will be deemed severable; and this Agreement may be enforced with that provision severed or as modified by the Court.

19. No waiver or any breach of this Agreement shall be deemed a continuing waiver of that breach or a waiver of any other breach of this Agreement.

20. The provisions of this Agreement may not be modified, amended, supplemented, waived, or changed orally, but only by writing signed by both parties in making specific reference to this Agreement.

21. This Agreement represents the entire understanding and agreement between the parties with respect to the subject matter hereof, and supersedes all of their negotiations, understandings, and representations made by and among such parties.

22. This Agreement was negotiated between the parties at arm's length. Accordingly, neither party should be construed as the drafter of the Agreement.

23. This Agreement may be executed by facsimile or by electronic transmission and in counterparts, each of the signatures taken independently to be combined together and construed as a whole. A copy of a signature transmitted by facsimile or electronic transmission shall be as valid as an original.

FOR PLAINTIFFS:

Dated: 12/14/12


RICHARD M. EISENBERG
State Bar #1005622

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FOR DEFENDANTS:

Dated: 12/14/12



MARY E. BURKI

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Wisconsin Department of Justice
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(608) 266-0323
burkeme@doj.state.wi.us

Attorney for Defendants

SO ORDERED:

BY THE COURT:

Date: _____

THE HONORABLE WILLIAM F. HUE
Circuit Court Judge, Branch 2

EXHIBIT A
[FORM OF CONFIDENTIALITY AGREEMENT]

CONFIDENTIALITY AGREEMENT

1. I, the undersigned signer of this Confidentiality Agreement, acknowledge that I am being provided access to course syllabi ("Syllabi") authored by University of Wisconsin faculty and provided to the National Council on Teacher Quality ("NCTQ") for uses reasonably necessary for the preparation of NCTQ's report evaluating teacher training programs in Wisconsin.

2. I acknowledge that the Syllabi were provided to NCTQ pursuant to a Settlement Agreement in *National Council for Teacher Quality, et al., v. Legal Records Custodians for the University of Wisconsin-Eau Claire, et al.*, Case No. 12-CV-63 (Jefferson County, Wisconsin) and that my access to the Syllabi is governed by the Settlement Agreement.

3. I acknowledge that my execution of and compliance with this Confidentiality Agreement is required by the Settlement Agreement in order for me to access and review the Syllabi.

4. I will limit my use of the Syllabi to uses reasonably necessary for peer review of NCTQ's report evaluating teacher training programs in Wisconsin or other professional research on teacher training. "Peer review" shall mean work performed by qualified researchers to analyze the teacher training evaluation prepared by NCTQ. "Researcher" shall mean an individual with academic or journalistic qualifications recognized as credible and substantial in that individual's profession. "Professional research" shall mean academic or journalistic research recognized as credible and substantial in that individual's profession.

5. In any written or other publication, remarks, presentation, comments, narrative, or statements (collectively, "work") involving my use of the Syllabi: (a) I will not quote directly

from any of the Syllabi; (b) I will not identify any University of Wisconsin school or department, or any University of Wisconsin professor or course, or the University of Wisconsin System, as a negative example in its case-specific examples; and (c) I will not rate or review individual professors or individual courses, although I may identify curricular areas, and may rate schools or departments of education on the whole. My work involving my use of the Syllabi may reflect on individual courses or professors by inference, particularly in small schools or departments where a single or small number of courses or instructors are involved in a particular area of evaluation. Except as generally reflected in de-identified fashion in any evaluation of campuses and curricular areas as a whole, and delivery of evaluated course content and skills, I will not use any University of Wisconsin instructor or course in any narrative setting forth examples of good or bad teacher training.

6. I will not redisclose any of the Syllabi to anyone outside of my organization or its legal counsel for purposes other than peer review of my analysis or professional research on teacher training. I will not include any of the Syllabi in any database made available to the public.

7. I will use the Syllabi and any information contained in the Syllabi only in the conduct of activities that are legal and do not violate any applicable law, including copyright law. I will use the Syllabi and all information contained in the Syllabi only for purposes constituting "fair use" as defined in 17 U.S.C. § 107 (2010).

8. I understand and agree that this Confidentiality Agreement is a legally binding document and that the University of Wisconsin or the authors of Syllabi to which I am being provided access pursuant to this Confidentiality Agreement may take legal action against me for any violation of this Confidentiality Agreement.

9. I understand and agree Confidentiality Agreement shall be governed by and construed in accordance with the laws of the State of Wisconsin. I understand and agree that any litigation arising under this Confidentiality Agreement shall be resolved in the state or federal courts of Wisconsin and I expressly consent to the jurisdiction of such courts.

DATE:

SIGNATURE:

PRINTED NAME

TITLE

INSTITUTION

ADDRESS

TELEPHONE NUMBER

EMAIL