

EXHIBIT 3

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

AMERICAN EDUCATIONAL RESEARCH ASSOCIATION, INC., AMERICAN PSYCHOLOGICAL ASSOCIATION, INC., and NATIONAL COUNCIL ON MEASUREMENT IN EDUCATION, INC.,)	
Plaintiffs/Counterclaim Defendants,)	Civil Action No. 1:14-cv-00857-TSC-DAR
v.)	EXPERT’S DECLARATION AND REPORT OF KURT F. GEISINGER, Ph. D. PURSUANT TO FED. R. CIV. P. 26(a)(2)(B)
PUBLIC.RESOURCE.ORG, INC.,)	
Defendant/Counterclaimant.)	

I, KURT F. GEISINGER, Ph. D., declare:

1. I am currently Director of the Buros Center on Testing and W. C. Meierhenry Distinguished University Professor at the University of Nebraska-Lincoln.

2. The following constitutes my expert’s report in this action on behalf of Plaintiffs, the American Educational Research Association, Inc. (“AERA”), the American Psychological Association, Inc. (“APA”) and the National Council on Measurement in Education, Inc. (“NCME”) (collectively, “Plaintiffs”), complaining of certain activities engaged in by Defendant, Public.Resource.Org, Inc. (“Public Resource”).

3. This Declaration and Report contains my opinions to date. The basis for my opinions, the materials I considered in reaching my opinions, and my qualifications for rendering such opinions are set forth in this Declaration and attached Exhibits. I reserve the right to supplement my Declaration to address any additional documents and testimony introduced in this action that come to my attention between now and the time of any deposition, hearing or trial.

My Qualifications

4. I received my doctoral degree in Educational Psychology in 1977 from the Pennsylvania State University, after previously receiving my masters' degree in Psychology at the University of Georgia and my bachelor's degree from Davidson College (with honors). I also studied German, Psychology and other topics as an undergraduate at the Phillips Universität in Marburg, Germany and at Harvard University when I attended the Institute for Educational Management in 1995.

5. Previously, I served as the Vice President of Academic Affairs and Professor of Psychology at the University of St. Thomas in Houston, Texas, where I was responsible for four academic schools, approximately 200 faculty members, and over 4,000 students. I also served as Academic Vice President and Professor of Psychology at Le Moyne College, Dean of the College of Arts and Sciences and Professor of Psychology at the State University of New York at Oswego, and Professor of Psychology at Fordham University in New York City, where I was department chair for the Department of Psychology and director of the Doctoral program in Psychometrics.

6. Over the past forty years, I have researched, studied, and taught psychometrics. Psychometrics, defined in more detail later in this report, is the quantitative study of tests and measures in terms of the value, usefulness, and interpretation of the results of such measures. I also am a fellow, diplomate, and member of numerous professional societies involving educational and psychological testing, such as the APA (fellow), the American Association for Assessment Psychology (diplomate), the AERA (fellow), and the NCME, as well as other professional associations. I have represented the APA by serving on and chairing the Joint Committee on Testing Practices (which is separate from the joint committee of the AERA, the

APA and the NCME responsible for the 1999 *Standards for Educational and Psychological Testing*) and have served on the APA's Committee on Psychological Tests and Assessment. In 2010, I was elected to serve two terms (2006-2008 and 2009-2011) as the representative on the Council of Representatives for the APA's Division of Evaluation, Measurement and Statistics. My second term was cut short by one year when I was elected to serve as a member-at-large on the APA's Board of Directors in 2010, a position I held for a three-year term (2011-2013).

7. I have authored numerous publications about psychological and educational testing. I have worked at the Educational Testing Service ("ETS"), chaired its Technical Advisory Committee for the Graduate Record Examination ("GRE"), served on the Board of Directors for the GRE (a Board that I also chaired), and have been a member of the College Board, (formerly known as the College Entrance Examination Board) for which I served on its SAT Committee (from 2000-2002). I recently concluded a four-year term (from 2011-2014) on the Advisory Research Committee for the College Board, serving the last two years as its chair. I currently serve on the Technical Advisory Committee for the Educational Records Bureau.¹

8. In 2010, I was elected to the Council (i.e., Board of Directors) for the International Test Commission—the primary international testing body. In 2012, I also was elected as its Treasurer and to serve on its Executive Council. I am the only American on its Executive Council.

9. I was asked to review and share my comments on chapters of the 1999 *Standards for Educational and Psychological Testing*, published jointly by the AERA, the APA, and the

¹ The Educational Record Bureau specializes in the development and use of tests and testing products for private and independent educational institutions at the p-12 levels.

NCME (the “1999 Standards”). The *Joint Standards*² embody the professionally accepted practices for testing and measurement. One of the chapters I reviewed was based upon the testing of individuals with disabilities, an area in which I have engaged in research and have served as an expert witness in federal courts as well as state courts in New York, New Jersey, and California. The other chapter related to the rights and responsibilities of test takers. See Exh. A. I note that the *Joint Standards* were revised in 2014.

10. In addition to my 130 plus journal articles and book chapters, I have written, edited, or co-edited approximately 15 books and monographs. The vast majority of these publications deal with testing and measurement issues. For example, I have edited two books on the psychological testing of Hispanics and another I co-edited related to fairness in testing. I also have co-edited several books of reviews of published tests and measures. I also was Editor-in-Chief for the three-volume *Handbook of Testing and Assessment in Psychology* (published by the APA in 2013). Additionally, I have been editor of the journal *Applied Measurement in Education* for the past 8 plus years. Taylor & Francis, in conjunction with the Buros Center for Testing, publishes this journal.

11. I also co-chaired a sub-committee of the APA’s Joint Committee on Testing Practices and the overall committee itself that developed a document on the rights and responsibilities of test takers (from 1993-2001). This document has been endorsed by a number of professional associations related to proper test use, including the APA, the National Association of School Psychologists, the American Counseling Association, and the NCME. While chairing the Joint Committee on Testing Practices, the committee developed a book entitled *Assessing Individuals with Disabilities*, in which I wrote a chapter. I also served on a

² I use the term *Joint Standards* to refer to the *Standards for Educational and Psychological Testing* as a whole, not a specific version of the Standards, i.e. 1999 or 2014

task force charged to illuminate issues related to the testing of individuals with disabilities as well as ethnic minorities. The task force wrote and edited a book entitled *Test Interpretation and Diversity: Achieving Equity in Assessment*, which was published by the APA's publication unit in 1997. I authored three chapters in that volume.

12. I additionally served on an APA task force (from 2007-2010) that considered the assessment and intervention of individuals with disabilities. The results of our work, Guidelines for the "Assessment of and Intervention with Individuals with Disabilities," was published in the *American Psychologist*, the premier publication of the APA (Geisinger et al., 2012) and endorsed as the policy of the APA by its governance. A reference for the *American Psychologist* article may be found on my curriculum vitae, which is attached as Exhibit A.

13. In the past two years (2014-2015), I have served on two task forces related to the use of measures in clinical psychology. One of these has written a policy, recently accepted by the APA's Board of Directors, that differentiates the use of tests and other measures, for screening and assessment, two highly related types of testing, but which differ in specificity and focus. Tests are usually standardized measures that are given to a number of people for a specific purpose. A bar examination would be an example of a test. Measures are other typically quantitative values used to evaluate a person and include tests. A bathroom scale results in a measure (weight), but would not normally be considered as a test.

14. During 2013-2014, I served on a committee of the Institute of Medicine (a component of the National Academy of Sciences) that evaluated the use of psychological and clinical neuropsychological measures by the Social Security Administration in determining disability status. The final report, entitled *Psychological Testing in the Service of Disability*

Determination, is in the process of being published, but is also available from the Institute of Medicine's website.

15. For approximately four years (from 2008-2012), I jointly represented three professional associations (the AERA, the APA, and the NCME) in developing the International Organization for Standardization's ("ISO") first standard on psychological testing. The results of the work of the committee that engaged in this activity was ISO Standard 10677. The standard is divided into two parts. The first part establishes requirements and guidance for a client working with a service provider to carry out the assessment of an individual, a group, or an organization for work-related purposes. ISO 10667-1:2011 enables the client to base its decisions on sound assessment results. ISO 10667-1:2011 also specifies the responsibilities of a service provided in terms of the assessment methods and procedures that can be carried out for various work-related purposes made by or affecting individuals, groups or organizations. The second part lays out the responsibilities of the service provider in terms of the same assessment project.

16. I also developed or helped to develop a number of testing measures. Specifically, I served as the primary consultant on a number of civil service examinations given in New York City for police officer, sergeant, lieutenant, and captain, fire fighter, fire lieutenant, fire captain, sanitation supervisor, and a variety of other civil service occupations over a period of at least a decade ending in 1992. I sometimes defended these measures in court. I also represented the Public Service Alliance of Canada against the Public Service of Canada in two cases related to their national testing efforts and Disability Rights Advocates with regard to several testing disputes concerning individuals with disabilities. *See* Exh. A.

17. In recent years, my primary efforts have been to assure testing fairness for those with disabilities, language minorities, and ethnic minorities.

18. My curriculum vitae is attached to this Declaration and Report as part of Exhibit A.

19. A list of all publications that I have authored in the past 10 years is included in my curriculum vitae. *See* Exh. A.

20. To the best of my memory, during the past 4 years, I have not testified as an expert at trial or by deposition. Previously, I have been accepted as an expert on testing in state courts in New York, New Jersey, and California, and in federal courts in New York, New Jersey, and Canada. Within the past four years (2011-2015), I have been identified as an expert in cases that were settled prior to trial. I wrote a report on the use of testing to deny an individual with disability benefits for a state agency in Nebraska this past fall, but the matter was resolved prior to going to court or arbitration. In none of these cases have I given deposition testimony.

21. To explain what psychometrics is, I provide below the first two paragraphs of my entry in the *Corsini Encyclopedia of Psychology* (2010, Wiley, 3rd edition) on the topic of “Psychometrics: Norms, Reliability, Validity, and Item Analysis”.

The field of psychometrics generally considers the data from educational and psychological tests and assessments from a quantitative perspective. Such data normally emerges from test responses, although it may come from a wide variety of measurement instruments. Two divisions might be identified within psychometrics: theoretical and applied psychometrics. Psychometric theory (as portrayed by Embretson & Reise, 2000; Lord, 1980; McDonald, 1999; Nunnally, 1978) provides researchers and psychologists with mathematical models used in considering responses to individual test items, entire

tests and sets of tests. Applied psychometrics is the implementation of these models and their analytic procedures to test data (e.g., Thorndike, 1982).

22. For over five years (1989-1995), I taught courses for the Cornell University School of Industrial and Labor Relations on the topic of affirmative action and equal opportunity hiring. These courses related to the use of tests in a fair and valid way to make personnel decisions such as hiring and promotion while attempting to increase diversity and to be in conformance with federal laws and guidelines.

23. I have had past and ongoing relationships, as a member or fellow, with each of the three Plaintiff associations. I currently serve as a committee chair of one of AERA's divisions' (Division D – Measurement and Research Methodology) International Committee. I have presented at AERA's annual conferences regularly.

24. I have served on and chaired NCME's professional development committee (1990-1992), served as a program co-chair for its annual meeting (1993), ran for its board (and was defeated) (1993), represented it on the committee that developed its code of professional conduct (ethics), and was a representative and advisory board member of a doctoral program in psychometrics that was being developed at Morgan State University (2007-2012). I have published in several of NCME's journals and have served on the editorial committee for the journal, *Educational Measurement: Issues and Practice* (1992-1995).

25. I also was elected, and have served, as a member of APA's Committee on Psychological Tests and Assessment (1998-2000); on its Committee on International Relations in Psychology (2010); on its Joint Committee on Testing Practices (1992-1996), on its Council of Representatives (two terms from (2006-2010) representing the Division of Measurement, Evaluation and Statistics; and on its Board of Directors. I was appointed to serve on APA's

Good Governance Task Force that prepared a plan to reorganize its governance. I also was appointed to serve on perhaps a half dozen APA task forces over the years related to testing issues of one type or another (e.g., the testing of individuals with disabilities, the testing of individuals who are ethnic minorities, the use of testing in clinical psychology). I served for eight years (from 1992-2000) as a member of APA's editorial board for its journal, *Psychological Assessment*, and recently served on the committee that selected a new editor for that journal. Further, I served all three of these organizations by representing them on an American National Standards Institute ("ANSI")/International Organization for Standardization ("ISO") committee that developed an international standard for industrial testing.

Materials that I have Considered

26. A list of the facts, data, and materials that I have considered in forming my opinions in this case is attached to this Declaration and Report as Exhibit B.

My Opinions Relevant to this Case, and the Basis and Reasons for my Opinions

27. The *Joint Standards* serve as the foundation for the testing profession. It is the most authoritative single source about the best practices in testing. Other associations (i.e., the International Test Commission and the American Counseling Association) have much shorter and less comprehensive guidelines or standards related to testing or certain aspects of testing, but none have achieved the prominence that the *Joint Standards* currently enjoy. Also, none have the pervasive influence across different aspects of the use of tests. That is, the *Joint Standards* are appropriate in a wide range of diverse clinical, counseling, educational, and industrial settings with a variety of populations. It is because of the widespread respect in which the *Joint Standards* are held that they are sometimes cited in court cases. Elaborations of this conclusive statement follow.

28. I currently direct and have directed for the past nine years the Buros Center for Testing, formerly known as the Buros Institute of Mental Measurements. It was founded some 80 years ago by Oscar Buros, then a faculty member at the Rutgers University, to be essentially the *Consumer Reports* of the testing industry. The Buros Center publishes comprehensive, critical reviews of testing. These reviews are available through our published volumes entitled *Mental Measurement Yearbooks*. I have spoken with the other editors of our primary document, the *Mental Measurements Yearbook*, and we agree that the most commonly cited document in the reviews of tests is the *Joint Standards*. Those who review tests and testing practices refer to the *Joint Standards* constantly, and this is reflected in our *Mental Measurements Yearbooks*. We believe it to be the most frequently used comprehensive yardstick against which the quality of tests and measures and the quality of test use is evaluated.

29. In the 1990s, I co-chaired APA's Joint Committee on Testing Practices (which had no direct or formal relationship with the joint committee of the AERA, APA and NCME that develops and revises the *Joint Standards*). The role of this committee on testing practices was to develop documents and products that could improve testing practices. One document that the committee developed and subsequently revised was entitled the *Code of Fair Testing Practices in Education*, a very brief document written for parents and users of educational tests alike. The members of the Joint Committee on Testing Practices agreed that the principles espoused in the *Code of Fair Testing Practices in Education* had to be consistent with the *Joint Standards* (given their pre-eminent status). I also co-chaired a working group of that committee, which developed a document entitled *the Rights and Responsibilities of Test Takers*. We began our work this document by reviewing everything that the *Joint Standards* had to say about this aspect of testing.

30. In the multiple editions of the *Joint Standards*, various psychometric concepts have evolved or changed. Most testing experts believe that the single most important quality in testing is the validity of test scores—that they are used and interpreted in appropriate and useful ways. One can trace the history of our profession’s perceptions of validity and how it may be estimated and determined by studying its portrayals throughout the seven versions of the *Joint Standards* that have been published to date.

31. Background of the *Standards for Educational and Psychological Testing*, and its importance to the testing professions: The history of the *Joint Standards* is not brief. This history reflects changes in psychometric technology, our understandings of testing, and psychological/educational characteristics, societal fluctuations, technological improvements, as well as general zeitgeist differences. The first set of standards was published in 1954 by the APA and was entitled, *Technical Recommendations for Psychological Tests and Diagnostic Techniques*. Its impact on the testing field was monumental. Shortly after the publication of this volume in 1955, AERA and NCMUE (the original name of NCME was the National Council on Measurements Used in Education) published a similar document devoted almost exclusively to educational measures entitled, *Technical Recommendations for Achievement Tests*. There had been collaboration across these organizations in the development of these two initial documents (Eignor, 2013). The three organizations subsequently decided that their work should continue collaboratively. The two preceding documents and their first joint effort all described what test publishers should include in their test-related documentation and, to generate such information, what research efforts should be made in test development and use.

32. In 1963, the Joint Committee (across the three associations – AERA, APA and NCME) was formed, and the first *Joint Standards* were ultimately published in 1966 as the

Standards for Educational and Psychological Tests and Manuals (the “1966 Standards”). The next effort began only five years after the publication of the 1966 Standards. The Joint Committee worked from 1971 through the publication of their revised Standards in 1974 (the “1974 Standards”). This 1974 set of test standards focused less on documentation and more on topics such as how tests should best be developed, used, scored, and results reported. To emphasize the reduced focus on documentation, the title of the 1974 Standards was changed to *Standards for Educational and Psychological Tests*.

33. In the early 1980s, still another Joint Committee was empaneled and charged with the revision of the *Joint Standards*, a process that concluded with the publication of the 1985 *Standards for Educational and Psychological Testing* (“the 1985 Standards”). This minor change in the title from “tests” to “testing” emphasizes the changed focus from the tests themselves to the process of, use of, and interpretation of tests and the results of testing.

34. The 1999 Standards in question in this case held with the same title. The development process of the 1999 Standards began with open meetings where many individuals were able to speak to the Joint Committee to provide input into the ways that they believed the *Joint Standards* should change. I was one such participant at meetings in Alexandria, VA in October of 1994. Whereas the time needed to write the Test Standards had been approximately 3 years prior to the 1999 Standards, it appears that the time was closer to 4 years before the 1999 Standards became available.

35. The revision process for the current Standards that were published in 2014 was longer, although the final publication was delayed due to the present dispute with Public Resource. The Joint Committee was formalized in or around 2007, the first meeting was held in

January 2008, and the Committee completed its work in 2013. This revision process took five years.

36. The members of each Joint Committee are all volunteers, but staff support is needed. Not counting the very real costs of contributed staff support, the budget for the Joint Committee's meetings was approximately \$400,000. Had the staff salaries been covered in this budget, and had members of the Joint Committee received even minimal compensation for the work they performed, the budget for revising and updating the *Joint Standards* would have been approximately \$2,000,000. These costs will continue to increase.

37. There are several reasons I expect such cost increases. Testing is becoming both increasingly complex and increasingly technological. For example, 20 years ago all testing was "in person" or "paper-and-pencil." Now there is testing via computer, testing via tablet, and testing via phone, but the "in-person" and "paper-and-pencil" testing method still continues. Unproctored testing on the internet is presently the most common type of personnel selection testing in non-public settings in the United States. In northern Europe, the most common type of testing is now via the internet. Secondly, society is putting increasing emphasis upon measurement concerns. Teachers are being evaluated in many settings based upon how their students perform on tests. Every year more professions and positions require tests to justify access to positions (e.g., via licensure and certification testing). As more and more testing cases are litigated, the need for clarification of professional practice increases concomitantly. Finally, travel and hotel expenses only continue to rise.

38. Prior to the 1985 Standards, all of the individual standards composing the Standards volume were considered separately as "essential, very desirable, or desirable". These statements indicated relative degrees of importance. The 1985 Standards were identified as

primary, secondary, or conditional, depending upon both the importance and the nature of their use. Beginning in 1999, no status was assigned to individual standards, a practice that was also continued for the 2014 Standards. I heard informally from members of the 1999 Joint Committee that the reason for the change was to de-emphasize the role that the *Joint Standards* might play in litigation.

39. One can glean from the prior discussion that the *Joint Standards* are changed and updated approximately every 10-15 years. The revision process has been taking an ever-longer amount of time, probably due at least in part to the increased focus on educational testing in the accountability movement across education in the United States. Testing is now used in part to affect federal budgets allocated to states to provide education and, for example, for teacher and professional staff evaluation. It is likely that the time frame will continue to increase as the focus on educational testing shows no letup in the foreseeable future. In fact, it is clear that the *Joint Standards* were once revised every 10 years and for the past two revisions, it has taken about 15 years. One reason for this temporal increase relates to the complexity of the changes.

40. Having three important professional associations involved in the development and updating of the *Joint Standards* helps bring much credence to them. It also, however, makes the process more cumbersome due to the communications and decision-making necessitated by having three professional associations involved that may all see various professional issues differently.

41. Since the revision of the 1999 Standards, the development of revised *Joint Standards* is controlled by a Management Committee. The three associations (AERA, APA, and NCME) established a Management Committee consisting of three representatives, one from each sponsoring organization. These members are appointed by the Chief Executive Officers of

AERA and APA and by the President of NCME. Each member normally serves a 3-year, renewable term. Members are usually appointed so that terms are staggered, providing for continuity. Members may be reappointed for one additional three-year term, and in years when the *Joint Standards* are in active revision, members' terms for the duration of the publication period may be extended by each sponsoring organization.

42. Members of the Management Committee oversee all aspects of the *Joint Standards* on an ongoing basis, including, but not limited to: publication and distribution, oversight of the Development Fund, protecting the copyright of the Standards, archival activities, gathering information about their use, and potential revision issues. The Management Committee represents both the interests of the *Joint Standards* and the interests of all three sponsoring organizations in conducting its administrative duties.

43. At least once every five years, members of the Management Committee confer with the leadership of their respective organizations to assess the need for revision of the *Joint Standards*.

44. If it is determined that the *Joint Standards* need revision, the Management Committee first appoints co-chairs of a "Joint Committee" that addresses the specifics of the revision effort. In the case of the 2014 Standards, a website was developed whereby members of the sponsoring organizations could provide feedback concerning the changes that they believe necessary or important. Following this process, in collaboration with the co-chairs, the Management Committee appoints members of the Joint Committee who represent the sponsoring organizations. The Joint Committee provides a structure for communication with the sponsoring organizations throughout the revision process.

45. One of the reasons that the process is so lengthy is that the Joint Committee is composed of nationally prominent experts cutting across clinical psychology, counseling psychology, school psychology, industrial/organizational psychology, clinical neuropsychology, and educational testing. The Joint Committee is composed of highly regarded professionals at the top of their respective fields, who have specialized knowledge regarding the use of tests and measures in their respective disciplines. Getting such extraordinarily busy individuals to agree to serve in a volunteer, unpaid fashion is difficult enough. Working with their schedules to set up meetings when all can attend is administratively an arduous process. My understanding is that the individuals take on this task as service to their profession, their associations, and the *Joint Standards* themselves.

46. The Management Committee oversees the process throughout the development of new standards, and reports back to their respective associations.

47. The entire *Joint Standards* revision process is financed through sales of a prior version of the *Joint Standards*. As noted above, the direct costs for the development process has been estimated at \$400,000 for the 2014 Standards and between \$500,000 and \$600,000 for the 1999 Standards.

48. What Public Resource did with the 1999 Standards: I reviewed Public Resource's discovery responses and the transcripts (with exhibits) from the depositions of Carl Malamud (President and Founder of Public Resource) and Chris Butler (Office Manager of the Internet Archive). In May 2012, I understand that Mr. Malamud purchased a used copy of the 1999 Standards. I understand further that he then sliced the printed pages out from their bindings, scanned the pages to a PDF file, and posted the file to Public Resource's website as well as to a publicly available collection on the Internet Archive. See Exh. C at 5-6. A graduate psychology

student who engaged in such actions would probably be dismissed from his or her program. Most certainly he or she would be subject to ethics charges that could follow them throughout the person's career.

49. The PDF file posted to Public Resource's website and to the Internet Archive contained a cover page prepared by Mr. Malamud, leading Internet users who came upon it to believe that the 1999 Standards were freely available for download, copying, or whatever use someone wanted to make of the text. *See* Exh. D. To the extent that individuals accessed the 1999 Standards in this fashion, it would appear to be theft of services.

50. The PDF file with Mr. Malamud's cover page was posted to Public Resource's website and to the Internet Archive from July 2012 until June 2014. *See* Exh. C at 5. Based upon incomplete records provided by Public Resource, during the time it was posted to the Internet, the PDF file containing the entire text of the 1999 Standards that was posted to Public Resource's website was accessed by Internet users at least 4,405 times. *See* Exh. C at 9-10. The same PDF file containing the entire text of the 1999 Standards that was posted to the Internet Archive website was accessed by Internet users at least 1,113 times. *See* Exh. E. No restrictions were placed on this PDF file to prevent Internet users from downloading the file to their local hard drives or printing it using a printer attached to an Internet user's computer. *See* Exh. F at 346-47. These accessions represent considerable lost revenue to the organizations supporting the Joint Committee. However, even if the incomplete records kept by Public Resource and Internet Archive were completely accurate, such numbers would not represent the real numbers as lost revenue because one person can download the *Joint Standards* and share them with hundreds of colleagues.

51. In December 2013, AERA asked Mr. Malamud to remove the 1999 Standards from the Internet locations where he posted the document. He refused. Ultimately, Mr. Malamud did remove the 1999 Standards from public view on the Internet, but only after Public Resource was sued for copyright infringement and threatened with a motion for a preliminary injunction. *See* Exhs. F at 324-26, G.

52. During his deposition, Mr. Malamud testified that, should Public Resource succeed in this litigation, it would be a very easy matter for him to re-post the 1999 Standards to his company's website and to the Internet Archive website. *See* Exh. F at 307. Further, Mr. Malamud contemplated that Public Resource might do the same with the 2014 Standards. *See* Exh. F at 308-09. Such actions would almost certainly lead to the 2014 Standards being the last one developed or published. I have heard from definitive sources within the three organizations (AERA, APA and NCME) that without the revenue from the sale of the *Joint Standards*, there would not be funding from other sources to continue updating them. There simply would not be funding to continue the updates without these needed sales revenues.

53. Given the changes happening concomitantly in testing, the testing profession, and society generally, the cessation of updates to the *Joint Standards* would be a travesty. The profession relies on the *Joint Standards* increasingly in a changing world where high stakes decisions are often buttressed by information gleaned from tests and measures. Indeed, the *Joint Standards* are needed. The *Joint Standards* are critically important to professionals who work with tests and measures in education and psychology.

54. Public Resource's justification for posting the 1999 Standards to the Internet: It is Public Resource's view that, once the 1999 Standards were incorporated by reference into federal and/or state regulations, the 1999 Standards lost their copyright protection. As a

consequence, Public Resource believes that it and others can freely reproduce the 1999 Standards (in this case, in electronic format), and post the document to the Internet so that it is freely available to everyone. *See* Exh. H.

55. The past and continued harm that electronically reproducing and posting the 1999 Standards to the Internet will cause AERA, APA and NCME: The three associations that are the Plaintiffs in this case (AERA, APA, and NCME) are integrally involved in the revision and publishing of the *Joint Standards*. I have discussed the prospects of the continuation of the *Joint Standards* with knowledgeable representatives of all three organizations. I fear that the 2014 Standards will be the final version should AERA's, APA's, and NCME's copyright infringement claims against Public Resource not succeed. The loss of income caused by the document being made freely available has already had a significant and negative impact. The loss of sales revenue negatively affected the three associations' budget for the development of the 2014 Standards, and cost the associations some credibility for seeming to permit an organization such as Public Resource to violate copyrights that the testing profession considers so sacred (because tests too are copyrighted).

56. Almost certainly, none of the three associations would be willing or able to finance the continuation of revisions to the *Joint Standards* if they are made freely available. The Plaintiff associations would not be financially able to continue the re-development process into the future. None of the associations would even have the inclination of their governance or membership to carry on with publishing the *Joint Standards*, given the additional burden this would place on membership costs.

57. The past and continued harm that electronically reproducing and posting the 1999 Test Standards to the Internet will cause to the testing professions and the public: The primary

consequences of not revising the *Joint Standards* would be twofold: to the public, who are impacted by changes in testing practices, and to test users and their clients. Because of society's reliance on test results, a significant portion of the population is benefitted by proper testing practices (e.g., employers select the best and most appropriate job candidates, colleges and universities choose the applicants most likely to succeed in their programs, students receive credit for their learning, programs can assess their successfulness). Changes are necessitated to testing practices when societal norms and technology change. Recent editions of the *Joint Standards* have included chapters on the testing of ethnic minorities, individuals with disabilities, and fairness, for example. The *Joint Standards* represent something of a gold standard to which test developers and users aspire. The *Joint Standards* also have been modified as the needs for various kinds of measurement have changed. Should the practice of posting the *Joint Standards* to the Internet continue, it is likely that there will be no formally sanctioned process for their continuation. The agency that I run is essentially one for consumer protection. Without the *Joint Standards*, I fear that many customers (clinical psychologists, counseling psychologists, industrial psychologists, school psychologists, test developers, psychometricians, and the organizations that each works in) will be the ones losing.

Conclusions

58. The *Joint Standards* represent the single best and most complete statement of how tests and other measurements should be developed, used, evaluated, and interpreted. The *Joint Standards* have a long development history (for the social sciences). It is a history that is currently endangered by what I consider copyright theft. We in academe and the scholarly professions often report that all we have is our ideas and our writing. If someone is able to steal our ideas so openly and callously, our professions and indeed our society suffer.

59. AERA, APA, and NCME have engaged in a laborious and time consuming project (actually a history of projects) that they expected to be rewarded with resultant modest revenues. The vast portion of these revenues has gone to funding the process for the continual revision of the *Joint Standards*. Without such a revenue stream, the *Joint Standards* may end with the current edition.

60. If there is not a next edition of the *Joint Standards* in the 2020s, then needed changes in professional practice would not be acknowledged in as formal and yet aspirational a manner as permitted by the *Joint Standards*. While the *Joint Standards* are not published to make money *per se*, there is an expectation of modest revenues. The *Joint Standards* are debated, considered, and written to improve practice. Funding is needed to continue this effort.

61. Extremely well qualified members of our professions are willing to volunteer their time to serve on the Joint Committee to work on the *Joint Standards*. They do so for two primary reasons: i) to improve professional practice in their area of expertise, and ii) to benefit their professional associations. If the latter goal is removed due to lost revenues to the professional associations, then the quality of those willing to serve is likely to be reduced. People may only engage in this work if they are compensated, which again would be extremely difficult given the lack of or severe reduction in revenues.

62. The current *Joint Standards* were published in 2014. Yet the version that Public Resource placed on the Internet for free access was the 1999 version of the *Joint Standards*. Unsuspecting people (e.g., students) may well access these freely available standards and believe that they are the “current” *Joint Standards*. Moreover, given the high stakes nature of our society presently, suppose a small test developer (and there are many of them) accessed the outdated *Joint Standards* and used them to develop, use, and/or interpret the results of a test. It

is possible that their decisions and actions would be out of date. Further, given that the *Joint Standards* have been quoted as having been given great deference by the courts, it is possible that should a situation like the above occur, a test developer or test user could be placed in a situation whereby the advice that they follow is outdated, perhaps inappropriate advice. They could even be subjected to legal liability for such a well-intended, if somewhat naïve, action.

63. I expect that when one successively publishes a document and revisions to that document, one has a reasonable expectation that the publisher does so on the basis of exclusivity. No one else can publish that same document. The *Mental Measurement Yearbooks*, which the Buros Center for Testing that I direct publishes, lost considerable money in its first four or five editions. We are now publishing the 20th edition, and we have the expectation to earn revenues with each successive edition. I would hope that if someone else would be prohibited from simply copying our books and distributing them for free. The well-earned reputation of solid and professional work should be rewarded with an expectation of a fair return. Giving an item away for free, such as the *Joint Standards*, violates that very principle. If the revenue loss is serious enough, it may remove the desire and expectation for the sponsoring organizations (AERA, APA and NCME) to continue publishing the document. That is exactly the situation in which these three professional organizations find themselves.

Engagement and Compensation

64. A Letter of Agreement engaging my services in this action and stating the compensation that I will be paid for my study and testimony in the case is attached to this Report as Exhibit I.

I DECLARE, and the penalty of perjury, that the foregoing is true and correct.

Dated: June 10, 2015



Kurt F. Geisinger, Ph. D.