

Smarter Balanced Position Regarding Patent 8,303,309

Introduction

The Smarter Balanced Assessment Consortium is developing an open source platform for delivering standardized assessments with tools, supports and accommodations for all students, including those with special needs. The member states of the consortium will be procuring test delivery services from independent vendors who are certified to deliver Smarter Balanced assessments. Some of those vendors will use the open source platform developed by Smarter Balanced, others will use their own solution and some will use a hybrid of the two.

There are likely to be a number of patents related to student assessment. Vendors should be aware of this and conduct their own survey and review. Patent number 8,303,309¹ has gained special attention due to its association with the IMS APIP standard. Awarded to Measured Progress in 2012, this patent defines a method for delivering assessments with accommodations. While associated with IMS APIP, the patent applies to any use of the patented method regardless of the assessment item format. Therefore, it is important for partners and states working with Smarter Balanced to determine how their solutions relate to this patent.

After carefully studying the 8,303,309 patent and consulting with patent law experts, Smarter Balanced has determined that the methods embodied in the Smarter Balanced open source solution would not infringe the Measured Progress patent. Furthermore, any other solution that complies with the Smarter Balanced Usability, Accessibility, and Accommodations Guidelines² should not infringe the patent.

Nevertheless, we recommend that vendors consult their own legal counsel as individual circumstances vary.

The balance of this document will summarize key features of the method patented by Measured Progress and then indicate how the Smarter Balanced implementation differs from the patented method.

The Method Embodied in Patent 8,303,309

The independent claims of the patent describe the same method in several different ways. Each case includes the following features:

1. Providing a test from a test database that contains only one version of each test item.
2. Offering multiple accommodation tools to facilitate test-taking for test-takers.
3. Making settings beforehand that indicate which accommodation tools should be permitted for each individual student.
4. A test interface that may be customized to make accommodation tools available to the student.
5. Allowing the student to activate or deactivate accommodations tools for each of the test items in the test.

The patent is on the combination of the above five features. Therefore, any method or implementation that is missing *at least one* of these five features would not infringe the patent.

¹ Integrated Interoperable Tools System and Method for Test Delivery
<http://www.google.com/patents/US8303309>

² Smarter Balanced Assessment Consortium: Usability, Accessibility, and Accommodations Guidelines
http://www.smarterbalanced.org/wordpress/wp-content/uploads/2013/09/SmarterBalanced_Guidelines_091113.pdf

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No Ability to Change Accommodations During the Test

The Smarter Balanced Usability, Accessibility, and Accommodations Guidelines include tools which are available to all students such as a highlighter, zoom, and English glossary. Other supports and accommodations must be enabled by an educator prior to commencement of the test. Some of these tools, supports, and accommodations may be activated or deactivated by the student. All activations and deactivations, whether by the student or by an educator, *must be done before the commencement of the test*. While a student may choose whether or not to make use of tools, supports, or accommodations, the presence or *activation* of those tools cannot be changed from item to item. (See pages 6, 9, and 13 of the *Guidelines*)

Thus, the Smarter Balanced implementation does not include feature #5 of the patented method. Since accommodations must be chosen before the commencement of the test, active accommodations will be the same for all items in the test. The student does not have the ability to change accommodations from item to item.³

Furthermore, any test delivery implementation that complies with the Smarter Balanced Usability, Accessibility, and Accommodations Guidelines would also not infringe the patent for the same reason.

Test Database Includes Multiple Versions of Items

For test items that are translated into other languages or forms (e.g., Spanish, Braille), the open source Smarter Balanced test delivery system stores multiple versions – one for each language or form. Thus, the Smarter Balanced implementation does not include feature #1 of the patented method.

However, it is possible to develop a test delivery system that complies with Smarter Balanced requirements but merges translation information into a single version of the item as in the patented method.

Summary

The open source Smarter Balanced test delivery system does not include two of the five features in the patented method. Avoiding any one of the features would constitute non-infringement of the patent. Therefore, it is the opinion of the Smarter Balanced Assessment Consortium that the open source Smarter Balanced test delivery system does not infringe Patent 8,303,309.

This position is offered for information only and no warranty or indemnification is intended or implied. Organizations are encouraged to seek legal counsel to consider their individual circumstances and implementations.

³ For one example of how this is manifest, see the Smarter Balanced Practice Tests at <http://www.smarterbalanced.org/pilot-test/>