



**FLOYD COUNTY BOARD OF EDUCATION**  
**Danny Adkins, Superintendent**  
**106 North Front Avenue**  
**Prestonsburg, Kentucky 41653**  
**Telephone (606) 886-2354 Fax (606) 886-8862**  
**www.floyd.kyschools.us**

Sherry Robinson, Chair - District 5  
Linda Gearheart, Vice-Chair - District 1  
Dr. Chandra Varia, Member - District 2  
Rhonda Meade, Member - District 4  
Junior Newsome, Member - District 3

**Consent Agenda Item (Action Item):** Retroactively approve the ACT District Testing agreement that would allow PHS to provide testing for the sophomore class.

**Applicable Statute or Regulation:** Board policy states that only the board of education/superintendent can enter into contract or agreement, policy number 1.11 powers and duties of the local board.

**Fiscal/Budgetary Impact:** PHS will use Title I funds to pay for the sophomore testing.

**History/Background:** ACT has reduced the unit price per student from \$55 to \$35 per student. This is an excellent opportunity to test sophomores and then design lessons/interventions to assist them.

**Recommended Action:** Retroactively approve the ACT College and Career Readiness Master Services agreement.

**Contact Person(s):** Lori Bricken

  
Principal

  
Director

  
Superintendent

**Date:** 1.17.2019

The Floyd County Board of Education does not discriminate on the basis of race, color, national origin, age, religion, marital status, sex, or disability in employment, educational programs, or activities as set forth in Title IX & VI, and in Section 504.

## ACT College and Career Readiness Master Services Agreement

profit corporation having a principal place of business at 500 ACT Drive, Iowa City, IA 52242-1077

1. **Purpose:** ACT provides a variety of products and services to help individuals achieve education and career success

and conditions by which the Assessments and Services are offered to Customer by ACT.

2. **Term:** This Agreement shall commence on the Effective Date indicated above, and shall remain in effect through the term of all incorporated Description of Services. Each Description of Services document will have a unique Term applicable to the Assessments and Services provided under such Description of Services.

3. **Description of Services (DOS):** ACT agrees to provide Customer with the Assessments and Services memorialized in the incorporated Description of Services. Each specific Assessment or Service ordered by Customer shall be memorialized in a separate DOS, to be mutually agreed upon and executed by both parties. In the event of a conflict between the terms and conditions of a DOS and the terms of the Agreement, the terms of the DOS shall prevail.

4. **Payment Terms:** Customer agrees to pay ACT the amounts set forth in the DOS for the delivery of the Assessments and Services, pursuant to the terms in the DOS. Customer shall make all payments within thirty (30) days of receipt of an invoice from ACT. Customer will pay a service fee of one percent (1%) per month or the maximum rate allowed by law, whichever is less, on any fees not paid when due under this Agreement. All invoices shall be sent to the address and contact person identified in the applicable DOS. Customer shall be responsible for any sales, use, or other taxes due as a result of any fees paid to ACT under this Agreement, unless Customer is exempt from tax as evidenced by a valid tax exemption certificate provided to ACT. Customer shall promptly provide ACT with Customer required purchase order, as applicable, prior to the scheduled delivery of Assessments and Services.

5. **Ownership of Materials:** ACT owns the Assessments, including but not limited to, paper based or online assessment documents, testing materials, administration and registration materials, publications, data, reports, documentation, related materials, trademarks and all associated intellectual property rights, including any and all derivatives or modifications created during the

as expressly granted in a DOS, Customer does not acquire any right, title, or interest in or to the ACT Materials. Customer shall not copy, modify, enhance, reverse engineer, or make any addition to the ACT Materials. Customer may not sell or otherwise transfer the ACT Materials to any other person, provided however that Customer may provide the Assessments to authorized, registered examinees and its personnel solely for testing and interpretation purposes. Customer may not (a) use the ACT Materials for any other purpose, (b) assign, license, sell, loan, lease, or otherwise transfer the ACT Materials in whole or in part, (c) authorize or allow a third party to use the ACT online test and Services or ACT Materials, (d) copy, or allow anyone else to copy, in whole or in part, the ACT Materials, or (e) modify, reverse engineer, decompile, or disassemble the ACT online system or Materials.

6. **Confidentiality:** Customer agrees that neither it nor its employees shall at any time during or following the Term, either directly or indirectly, publish, display or otherwise disclose to any person, organization, or entity in any manner whatsoever any ACT

Materials, except as strictly necessary for Customer to use the ACT Materials for their intended purpose under this Agreement.

procedures and using a standard of care appropriate for secure test materials. To the extent Customer believes a statutory of ACT Materials, Customer will provide ACT with notice of such request and allow ACT a reasonable time to petition for an exemption to the public release. All ACT Materials shall be and remain the property of ACT notwithstanding the subsequent termination of this Agreement. The ACT Materials shall, within ten (10) days of ACT's written request, be returned to ACT (including all copies).

7. **Testing Procedures:** Customer agrees to administer the Assessments in accordance with all policies and procedures provided by ACT. Customer shall store the ACT Materials at secure location(s) approved by ACT. Customer agrees that all used and unused ACT Materials will be returned to ACT, in accordance with the policies and procedures provided by ACT, for scoring and/or processing. Customer agrees to fully cooperate with ACT, and cause those individuals involved in the administration of or cooperate with ACT in the event of a test security incident. Customer acknowledges that failure to maintain the confidentiality of the Assessments will result in damages to ACT and may require ACT to develop a replacement form. Accordingly if through the fault of Customer or Administration Staff, the security of an Assessment is compromised, Customer agrees to pay ACT the costs of developing a new form in addition to any other remedies under the law. ACT may, in its sole and absolute discretion, cancel scores in cases of testing irregularities, which may include without limitation, use of a compromised test form, falsification by an examinee of his/her identity, impersonation of another examinee (surrogate testing), unusual similarities in the answers of examinees at the same test center, or other indicators that the test educational development.

8. **Online Assessment System:** Some Assessments and Services are provided through an Online Assessment System. ACT will provide Customer with access to the Online Assessment System solely for the purpose of assessing Examinees at authorized test centers, and using the ACT Materials solely in connection with the authorized administration of the Assessments. ACT has scheduled maintenance windows during which the Online Assessment System may be unavailable to Customer to allow for routine updates and maintenance. ACT publishes the times of the maintenance windows periodically on its website. ACT also reserves the right to make the Online Assessment System unavailable for unscheduled maintenance. ACT shall not be responsible for any damages or costs incurred by Customer, if any, for such downtime. The Online Assessment System may be ACT may charge a fee for new or optional services made available through the Online Assessment System, subject to written agreement of the Customer. Additional requirements regarding the Online Assessment System applicable to specific Assessments and Services may be included in each applicable DOS.

9. **Data:** The parties acknowledge and agree that ACT may use and disclose the data collected from the administration of the

Design Envelope ID: F43F31E-0033-4234-800B-3FAC1F391EAD

**ACT® District Testing Program  
Description of Services  
Late Spring 2019**

to this DOS shall be incorporated into and governed by the terms of the Agreement.

- I. **Background:** \_\_\_\_\_ grade students. Eleventh grade students are excluded from testing under this Agreement because they are eligible to test under the ACT Agreement with the Kentucky Department of Education. \_\_\_\_\_ based and/or online assessments that include English, Mathematics, Reading and Science assessments, as well as an Interest Inventory. This DOS \_\_\_\_\_
- II. **Services Term.** This Description of Services shall be effective on \_\_\_\_\_ and shall remain in effect through the final delivery of Score Reports.
- III. **Deliverables.** The following Assessments and Services will be provided by ACT to Customer:
1. **Program Planning Documentation.** ACT will provide Customer with a Schedule of Events and other program documentation available on the ACT District Testing website.
  2. **Organization File Layout.** ACT will provide Customer with an Organization File layout template and instructions for use.
  3. **Student Data Upload (SDU) File Layout.** ACT will provide Customer with a SDU file layout template and instructions for use.
  4. **Online Platform.** ACT will provide an online platform which Customer shall use to indicate appropriate Designated Personnel information, complete Manage Participation, upload SDU File, and order Test Materials.
  5. **Test Administration Available Dates.** The Assessments will be available on the following Test Dates:
    - ☒ Initial Standard Administration Test Date (Paper): April 2, 2019
    - ☒ Initial Accommodation Administration Test Window (Paper): April 2 - 16, 2019 (weekdays only)
    - ☒ Initial Standard & Accommodation Administration Test Window (Online): April 2, 3, 4 & 9, 10, 11, 2019
    - ☒ Makeup Standard Administration Test Date (Paper): April 24, 2019
    - ☒ Makeup Accommodation Administration Test Window (Paper): April 24, 25, 26, 29 & 30, 2019
  6. **Test Materials.** ACT will provide paper test materials to each Designated Test Site. For online testing, as applicable, ACT will provide Customer with access to the Assessments through the ACT Online Assessment System.
  7. **Pre-paid Shipping Labels.** ACT will provide each Designated Test Site with pre-paid return shipping labels for the return of test materials to ACT.
  8. **Accommodations.** ACT will provide available and ACT approved accessibility supports and accommodations, based on decisions made by ACT accommodation specialists and in some cases by the local educational authorities, as detailed in ACT policies.
  9. **Training.** ACT will provide standard online training and/or instructional materials to Designated Personnel.
  10. **Communications.** ACT will communicate upcoming activities and deadlines related to the assessments directly to Designated Personnel through email and/or on the District Testing website.
  11. **Customer Service.** ACT will provide a toll-free number and email contact information for use in preparation and administration of the ACT, Monday through Friday, from 7:00 a.m. to 5:00 p.m. CST (except ACT holidays).
  12. **Score Reports.** \_\_\_\_\_ provided to ACT. In addition, ACT will provide the following score reports as part of the Services:
    - a. **School Deliverables.** The following reports are shipped to the Director of Counseling within 3-8 weeks after ACT receives answer folders that do not require additional investigation:
      - ☒ ACT High School Check List Report
      - ☒ ACT High School Report (student level score data)
      - ☒ ACT Student Score Labels
    - b. **School Deliverables.** The following are posted to the online reports portal, and shipped to the School Test Coordinator. The estimated report delivery date will be available in the Schedule of Events found on the ACT District Testing website. Delivery may take longer if ACT receives answer folders that require additional investigation.
      - ☒ ACT Non-College Reportable Score Notification Letter (if applicable)

www.act.org, as amended from time to time.

10. **Limitation on Damages:** ACT's liability for damages arising out of or in connection with this Agreement shall not exceed the amount Customer has paid ACT during the Term of the applicable DOS. In no event shall ACT be liable to Customer for special, indirect, incidental, punitive, exemplary, or consequential damages.

11. **Warranty and Limitations:** ACT WARRANTS THAT THE ASSESSMENTS HAVE BEEN DEVELOPED IN ACCORDANCE WITH AND THE SERVICES WILL BE PERFORMED IN A MANNER CONSISTENT WITH INDUSTRY STANDARDS. EXCEPT AS SET FORTH IN THIS SECTION, ACT EXPRESSLY DISCLAIMS ANY AND ALL REPRESENTATIONS, WARRANTIES AND CONDITIONS OF ANY KIND OR NATURE, EXPRESS OR IMPLIED AND THOSE ARISING BY STATUTE OR OTHERWISE IN LAW OR FROM A COURSE OF DEALING OR USE OF TRADE.

12. **Termination and Cancellation:** Either party may terminate this Agreement upon written notice to the other party in the event that other party breaches its obligations under this Agreement and fails to cure such breach within thirty (30) days after receiving written notice of such breach. This Agreement may also be terminated without cause at any time by either party giving thirty (30) days

Assessments and Services designated in a DOS will be automatically cancelled, and such DOS will be deemed terminated without further notice if Customer fails to provide student registration information and organizational files to ACT by the deadline required by ACT and indicated in the DOS. Customer shall pay ACT for all Assessments and Services delivered through the date of termination. Upon termination of this Agreement for any reason, Customer shall immediately discontinue use of the ACT Materials and shall immediately return all copies of the ACT Materials in its possession. Upon the expiration or termination of this Agreement, the obligations set forth in the following provisions of the Agreement shall survive: Payment, Ownership of Materials, Confidentiality, Testing Procedures, Data, Limitation on Damages and Warranty and Limitations.

13. **Force Majeure:** ACT shall not be liable to Customer for any delay or failure to perform, which delay or failure is due to causes or circumstances beyond its control, including, without limitation, the actions of Customer, national emergencies, fire, flood, inclement weather, epidemics, or catastrophe, acts of God, governmental authorities, or parties not under the control of ACT, insurrection, war, riots, or failure of transportation, communication, or power supply. ACT shall exercise commercially reasonable efforts to mitigate the extent of the excusable delay or failure and its adverse consequences; provided, however, that should any such delay or failure continue for more than sixty (60) days, the Agreement may be terminated by either the party upon notice to the other.

14. **Assignment:** This Agreement may not be assigned by Customer without the express prior written consent of ACT. No

permitted assignment shall relieve Customer of its obligations under the Agreement.

15. **Relationship of the Parties:** The parties to this Agreement are independent contractors. Neither party shall have the right or authority or shall hold itself out to have the right or authority to bind the other party, nor shall either party be responsible for the acts or omissions of the other.

16. **No Third Party Beneficiaries:** The parties agree that there are no third party beneficiaries to this Agreement and that no third party shall be entitled to assert a claim against either of the Parties based upon this Agreement.

17. **Severability; Headings; Governing Law:** Should any provision of this agreement be held by a court to be unenforceable, such provision shall be modified by the court and interpreted so as to best accomplish the objectives of the original provision to the fullest extent permitted by law, and the remaining provisions of the Agreement shall remain in full force and effect. Headings used in the Agreement are for reference purposes only and shall not affect the meaning or interpretation of this Agreement. This Agreement shall be governed by the laws of the State of Iowa.

18. **Entire Agreement:** This Agreement, including all incorporated or referenced DOS, constitutes the entire agreement between the parties with respect to the Assessments and Services and supersedes all other prior agreements and understandings, both written and oral. The terms and conditions contained in this Agreement are the only conditions applying to the delivery of the Assessments and Services. Except as may be incorporated in a DOS, ACT expressly objects to and rejects any different or additional terms included in Customer's request for proposal, quotation, purchase order, acknowledgment form, or other documents that purport to bind the parties. Certain Assessments and Services may be subject to additional or different terms and conditions, which are set forth in the DOS. No waiver, consent, modification, or amendment to this Agreement shall be binding unless in writing and signed by both parties.

19. **Notices:** Notices under this Agreement shall be deemed to be adequate and sufficient notice if given in writing and delivered via (a) registered or certified mail, postage prepaid, in which case notice shall be deemed to have been received three business days following deposit to U.S. mail; or (b) a nationally recognized overnight air courier, next day delivery, prepaid, in which case such notice shall be deemed to have been received one business day following delivery to such nationally recognized overnight air courier. All notices shall be sent to ACT at the following address: ACT, Inc. 500 ACT Drive, P.O. Box 168, Iowa City, Iowa 52243-0168, Attention: CFO, Fax: 319-341-2760. All notices to Customer shall be sent to the address provided in the first paragraph of the Agreement.

20. **Authorization:** Each party represents and warrants (a) that it has the requisite authority to enter into this Agreement; and (b) that the individual(s) signing this Agreement on behalf of such party is (are) authorized to do so.

ACT, Inc.

Signature: Charlie Astorino  
Name: Charlie Astorino  
Title: Vice President, Sales  
Date: 1/16/2019

PRESTONSBURG HIGH SCHOOL

Signature: \_\_\_\_\_  
Name: Lori Bricken  
Title: Principal  
Date: \_\_\_\_\_

Delivery may take longer if ACT receives answer folders that require additional investigation.

- ☒ ACT Profile Report ☒ High School
- ☒ ACT Profile Report ☒ District
- ☒ ACT Student Level Data File ☒ District

#### Customer Actions and Required Information.

Upon timely receipt of the Customer Required Information:

1. **Customer Designated Personnel.** Customer will designate Testing Coordinators that will be responsible for communicating with ACT. Customer changes the Designated Personnel, Customer will provide ACT with email notification of the change.
2. **Organization File.** Customer will provide a file to ACT, in the ACT-designated file format, containing eligible participating sites and Designated Personnel. Customer shall provide the Organizational File to ACT by **January 18, 2019**.
3. **Manage Participation Deadline.** Customer Designated Personnel will confirm participation, select material delivery date, select initial test date and the accommodations testing window in the ACT Online Platform. The deadline to complete the management of participation details is **February 15, 2019**.
4. **Student Data Upload (SDU).** Customer shall upload a file, in the ACT designated format, to the Online Platform containing the required student data for all students Customer anticipates testing. Customer shall upload the SDU file to the ACT Online Platform no later than **February 15, 2019**.
5. **Late SDU Upload.** In the event the Customer uploads the SDU file after **February 15, 2019** but before **March 20, 2019**, Customer shall pay a five hundred dollar (\$500) late SDU processing fee. ACT will be unable to provide barcode labels for paper testing for students uploaded after **February 15, 2019**. Customer will be unable to test if Customer fails to complete the SDU before **March 20, 2019**.
6. **Accommodations Requests.** If applicable, Customer Designated Personnel shall submit requests for ACT-approved accommodation through the ACT accommodations process by **February 15, 2019**.
7. **Change Participation Requests.** If Customer wishes to cancel participation, Customer shall complete the District Testing Change in Participation Form on the District Testing Web page no later than **February 15, 2019**. If Customer wishes to move to Early Spring 2019 District Testing, Customer shall complete the Change in Participation Form on the District Testing Web page no later than **November 30, 2018**. A new DOS will be required if Customer wishes to change the test date. If Customer wishes to change from the ACT without Writing to ACT with Writing, or vice versa, Customer must notify ACT by **February 15, 2019**.

#### Fees and Invoicing.

1. **Customer Enrollment Determination.** The fees owed by Customer for the Assessments and Services provided pursuant to this Platform as of the first day of the Makeup Testing Window, **April 24, 2019**, as applicable based on the number of assessments eligible to be scored.
2. **Fee Calculation.** ACT will charge Customer the Unit Price per Student indicated on the Table below for the total Enrollment for the applicable Assessment Option at the applicable Program Price Tier. The applicable Program Price Tier is based on the Customer's percentage of students eligible for the Free and Reduced Price Lunch (FRPL), across all Schools in the Customer's jurisdiction. Customer shall identify its applicable FRPL percentage on its District Testing order form, and ACT may verify the accuracy of the applicable percentage based on federally reported data.

Assessment	Unit Price Per Student
The ACT (without writing)	\$35.00

3. **Invoicing and Payment.** ACT will submit an invoice after the final Test Administration Date, or the day of the Makeup Test, as applicable. The invoice will reflect the total Enrollment and the applicable Fee owed, based on the Program Price Tier for the applicable Assessment Options, in addition to any applicable Late SDU Upload Fees. ACT will not provide any credits or refunds, including but not limited to refunds or credits for the difference between the Enrollment and the number of scores provided.
4. **Fee Waivers.** Student fee waivers and vouchers are not accepted as a form of payment for the ACT District Testing program.

**Additional Terms and Conditions.** The following terms and conditions, in addition to the terms of the Agreement, shall govern the ACT Assessment and Services:

**Cancellation.** This Description of Services will be automatically cancelled without further notice if Customer fails to provide the Organization File by January 18, 2019 or Manage Participation and SDU to ACT by March 20, 2019.

**Computer Requirements.** In the event Customer administers the online assessment, Customer will comply with the computer configuration requirements located at <http://www.act.org/content/act/en/products-and-services/state-and-district-solutions/act-online-testing.html>. Compliant computer configuration is required to properly access and use the ACT Online Assessment System. ACT configuration requirements from time to time in its sole discretion. Customer shall be responsible for implementing any hardware or software updates or changes necessary to meet the revised computer configuration requirements for the Online Assessment System within the time frame set forth in the written or electronic notice from ACT. If Customer cannot implement the required configuration updates Customer may (a) request paper based testing in the Online Platform, if timely (b) provide ACT with notice of cancellation of this DOS

1. **U.S. Government End Users.** The ACT taken online is a "commercial item," as that term is defined in 48 C.F.R. 2.101 (Oct. 1995) consisting of "commercial computer software" and "commercial computer software documentation," as such terms are used in 48 C.F.R. 12.212 (Sept. 1995). Consistent with 48 C.F.R. 12.212 and 48 C.F.R. 227.7202-1 through 227.7202-4 (June 1995), all U.S. Government End Users acquire The ACT online system with only those rights set forth herein.

4. **Limited Use of Assessments and Services.** Subject to this Agreement, ACT hereby grants to the Customer a limited, revocable, non-exclusive, non-transferable, and non-sublicenseable right during the term of this Agreement to use the Assessments and Services. All Assessments and Services made available under this Agreement are licensed, not sold, by ACT to the Customer. Except to the extent expressly granted in this Agreement, no rights are granted by ACT under this Agreement.

Acceptance of the terms and conditions of this Description of Services, incorporated into the Agreement.

ACT, Inc.

PRESTONSBURG HIGH SCHOOL

Signature: Charlie Astorino

Name: Charlie Astorino

Title: Vice President, Sales

Date: 1/16/2019

Signature: \_\_\_\_\_

Name: Lori Bricken

Title: Principal

Date: