

Kenton County School District | *It's about ALL kids.*

THE KENTON COUNTY BOARD OF EDUCATION

1055 EATON DRIVE, FORT WRIGHT, KENTUCKY 41017

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WEBSITE: www.kenton.kyschools.us

Dr. Henry Webb, Superintendent of Schools

KCSD Issue Paper

11/09/2020

AGENDA ITEM (ACTION ITEM):

Consider/Approve Consider/Approve the agreement and purchase of an ACT exam for sophomores in the Kenton County School District (approximately 1,000 exams).

APPLICABLE BOARD POLICY:

1.11 General Powers of the Board

HISTORY/BACKGROUND:

It was decided for the 19-20 school year sophomores in the Kenton County School District would take the ACT. The ACT is an opportunity to demonstrate transition readiness and a graduation qualifier. With the use of the ACT in 10th grade, sophomores will have additional time for interventions before the end of the students' senior year in order to reach benchmark. Due to COVID-19, funds for the 2020 testing were not dispersed to ACT, as the 10th grade ACT administration was cancelled. Kenton County would like to proceed with testing the 10th graders in 2021.

FISCAL/BUDGETARY IMPACT:

\$36,000 from the Assessment budget.

RECOMMENDATION:


It is recommended the board approve the agreement and purchase of an ACT exam for sophomores for the 2020-2021 school year.

CONTACT PERSON:

Mary Beth Huss


Principal


District Administrator


Superintendent

Use this form to submit your request to the Superintendent for items to be added to the Board Meeting Agenda. complete, print, sign and send to your Director. Director –if approved, sign and put in the Superintendent's mailbox.

Principal –

Kenton County Board of Education

Board Members: Carl Wicklund, Chairperson Karen L. Collins, Vice Chairperson Carla Egan Shannon Herold Jessica Jehn

"The Kenton County Board of Education provides *Equal Education & Employment Opportunities.*"

ACT®
Terms and Conditions
Kentucky 2020-2021

These Terms and Conditions are a binding legal Agreement ("Agreement") between ACT, Inc., a non-profit corporation having a principal place of business at 500 ACT Drive, Iowa City, IA 52242 ("ACT") and KENTON COUNTY SCHOOLS, having an address of 1055 EATON DR, FT WRIGHT, KY 41017-9655 ("Customer"). ACT provides a variety of products and services to help individuals achieve education and career success ("Assessments and Services"). This Agreement provides the terms and conditions pursuant to which the Assessments and Services are offered to Customer by ACT. Each Assessment and Service ordered by Customer will also be subject to Supplemental Terms and Conditions applicable to such product or service. By ordering and using ACT Assessments and Services, Customer expressly agrees to these Terms and Conditions, and the Supplemental Terms and Conditions for each Assessment and Service.

1. Term: This Agreement shall commence on the date an Enrollment Form or Order for Assessments and Services is placed by Customer and shall remain in effect for one year.
2. Services to be Provided: The Assessments and Services will be provided pursuant to ACT's standard delivery specifications and requirements, as indicated in the Supplemental Terms and Conditions for each Assessment and Service ordered, attached and incorporated herein.
3. Payment Terms: Customer agrees to pay ACT the amounts set forth in the Supplemental Terms and Conditions for the delivery of the Assessments and Services. 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. Please note that ACT may place your order on hold for issues related to credit or outstanding invoices. All invoices shall be sent to the "Bill-To" address identified by Customer on the Enrollment Form. Customer warrants and represents that the Bill-To entity and address identified in the Enrollment Form is responsible for making payment on Customer's account. To the extent the Bill-To address/entity identified in the Enrollment Form fails to make payment, ACT shall send the invoice to Customer's address and Customer shall be obligated to make payment immediately. 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.
4. 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 term of this Agreement (collectively, the "ACT Materials"). Except as expressly granted in a Supplemental Terms and Conditions, 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.

5. **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. Customer shall protect the ACT Materials in accordance with ACT's procedures and using a standard of care appropriate for secure test materials. To the extent Customer believes a statutory 'Freedom of Information Act' provision requires the public release 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).
3. **Testing Procedures:** Customer agrees to administer the Assessments and Services 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 preparation for the Assessments ("Administration Staff") to fully 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 scores may not accurately reflect the examinee's level of educational development.
7. **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 modified or updated from time to time at ACT's sole discretion. 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 Supplemental Terms and Conditions.
3. **Data:** The parties acknowledge and agree that ACT may use and disclose the data collected from the administration of the Assessments, as set forth in ACT's Privacy Policy available at www.act.org/privacy, as amended from time to time.
3. **Limitation on Damages:** THE LIABILITY OF ACT AND ANY ACT AFFILIATE OR LICENSOR FOR DAMAGES ARISING OUT OF OR IN CONNECTION WITH THIS AGREEMENT SHALL NOT EXCEED

THE AMOUNT CUSTOMER HAS PAID HEREUNDER DURING THE APPLICABLE CONTRACT TERM. IN NO EVENT SHALL ACT OR ANY ACT AFFILIATE OR LICENSOR BE LIABLE TO CUSTOMER FOR SPECIAL, INDIRECT, INCIDENTAL, PUNITIVE, EXEMPLARY, OR CONSEQUENTIAL DAMAGES.

10. 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. CUSTOMER WARRANTS THAT CUSTOMER HAS OBTAINED ALL NECESSARY PERMISSIONS FOR THE DELIVERY OF ASSESSMENT SERVICES AND THE ASSESSMENTS AND THAT CUSTOMER WILL USE, DELIVER, AND HANDLE DATA FROM THE ASSESSMENT SERVICES, AND WILL TAKE NECESSARY STEPS TO ASSIST ACT OR ITS AFFILIATES OR LICENSORS TO USE, DELIVER, AND HANDLE DATA FROM THE ASSESSMENT SERVICES, CONSISTENT WITH APPLICABLE LAWS, RULES, AND REGULATIONS.
11. 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 written notice to the other. Customer's participation in the Assessments and Services designated in a Supplemental Terms and Conditions will be automatically cancelled, and this Agreement will be deemed terminated without further notice if Customer fails to meet the Key Deadlines and provide the required information necessary for ACT to provide the Assessments and Services, as indicated in the Supplemental Terms and Conditions. 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.
12. 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.
13. 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.
14. 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.

15. 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.
16. 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.
17. Entire Agreement: This Agreement, including all incorporated or referenced Supplemental Terms and Conditions, 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 Supplemental Terms and Conditions, 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 Supplemental Terms and Conditions. No waiver, consent, modification, or amendment to this Agreement shall be binding unless in writing and signed by both parties.
18. 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: General Counsel. All notices to Customer shall be sent to the address provided by Customer in the Enrollment Form.
19. Customer Authorization: The Customer's named representative placing this Order, and agreeing to the terms and conditions, 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.

By signing below or by the use of electronic signature(s), the parties' authorized representatives hereby indicate their authority to execute, and acceptance of the terms and conditions of this Description of Services, incorporated into the Agreement.

ACT, Inc.

Signature: 

Name: C. Blake Curwen

Title: Vice President

Date: 11/9/2020

KENTON COUNTY SCHOOLS

Signature: _____

Name: MaryBeth Huss

Title:

Date:

ACT® District Testing Program Supplemental Terms and Conditions

1. **ACT District Testing.** ACT will support the Customer's administration of the ACT assessments to its eligible 10th, 11th, and/or 12th grade students. Under the Agreement "the ACT" is used to refer to paper-based and/or online assessments that include English, Mathematics, Reading and Science assessments, as well as an Interest Inventory. Customer may administer the ACT during the available Testing Windows selected by Customer on the Enrollment Form, or otherwise noted on the ACT District Testing Website available at: <https://success.act.org/s/article/The-ACT-District-Testing-Details> ("Website"). The Website is periodically updated to provide information for each Testing Window. Customer is required to check the Website regularly for updates regarding the Assessments and Services.

 2. **Term of Services.** ACT will provide ACT District Testing Services for Customer for each Test Window selected by Customer in the ACT online registration system, conditioned upon Customer providing all required information and completing all required actions by the Key Deadlines indicated on the Website. In the event Customer fails to provide required information and data by the Key Dates and Deadlines, ACT will be unable to provide services, and may terminate this Agreement or require Customer to reschedule for an alternate Test Window.

 3. **Services and Customer Required Actions.** ACT will provide Customer with standard ACT District Testing Services, as more fully described on the Website, which may be updated from time to time. The Services will include test administration, scoring, and reporting services for the ACT. Customer is responsible for regularly reviewing the Website to identify any changes to the Schedule of Events, Key Deadlines, and other customer required actions. To the extent Customer fails to complete any required actions by the Key Deadlines detailed on the Website, ACT may not provide the Services to Customer for the selected Test Window.

 4. **Fees and Invoicing.**
 - a. **Customer Enrollment Determination.** The fees owed by Customer for the Services provided for ACT District Testing will be based on the total number of students included in the Customer's SDU file(s) in the ACT Online Platform as of the last day of the Makeup Accommodation Test Window (total "Enrollment"). The Enrollment is not based on the number of assessments eligible to be scored.

 - b. **Fee Calculation.** ACT will charge Customer the Unit Price per Student indicated on the Table below for the total Enrollment for the applicable Testing Year. Customers that had contracted to administer the ACT in Spring 2020 but were unable to complete testing in Spring 2020 due to the pandemic may reschedule a Fall 2020 administration and pay the Fees listed for the Late Spring Testing Reschedule, listed below. All new Customers registering for any Fall 2020 through Spring/Summer 2021 Testing Window shall pay the 2020-21 Testing Fee listed below.

Late Spring 2020 Reschedule Testing Fee (per student)	Fall 2020- Spring 2021 Testing (per student)
\$35.00	\$36.00

 - c. **Invoicing and Payment.** ACT will submit an invoice after the last day of the Makeup Accommodations Test Window, 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. 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.

 - d. **Fee Waivers.** Student fee waivers and vouchers are not accepted as a form of payment for the ACT District Testing program.
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5. **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 shall have no liability relating to Customer's failure to comply with ACT's computer requirements. ACT may revise these 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 the Services.

6. 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.

7. 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-sublicensable 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.