



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

Issue Paper

DATE:

08/08/22

AGENDA ITEM (ACTION ITEM):

Consider/Approve the agreement and purchase of an ACT exam for sophomores in the Kenton County School District (approximately 1,100 exams).

APPLICABLE BOARD POLICY:

1.11 General Powers of the Board

HISTORY/BACKGROUND:

The ACT is an opportunity to demonstrate transition readiness and is 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. Kenton County would like to proceed with the testing of the sophomores in the Spring of 2023. The price has increased from \$36.00 per student in 2022 to \$37.00 per student in 2023.

FISCAL/BUDGETARY IMPACT:

\$40,700.00 from the ARP ESSER Budget

RECOMMENDATION:

Approval to the agreement and purchase of the ACT exam for sophomores in the Kenton County School District for the Spring of 2023.

CONTACT PERSON:

Mary Beth Huss

Principal/Administrator

District Administrator

Superintendent

Use this form to submit your request to the Superintendent for items to be added to the Board Meeting Agenda.

Principal –complete, print, sign and send to your Director. Director –if approved, sign and put in the Superintendent's mailbox.

ACT®
Terms and Conditions

THESE TERMS AND CONDITIONS GOVERN YOUR USE OF ACT SERVICES. IT IS IMPORTANT THAT YOU READ AND UNDERSTAND THE FOLLOWING TERMS. BY CLICKING THE "ENROLL" BOX YOU ARE AGREEING THAT THESE TERMS WILL APPLY TO YOUR ACCESS OR USE OF ACT SERVICES. IF YOU DO NOT AGREE TO BE BOUND BY THESE TERMS OF USE, DO NOT CLICK ENROLL OR ORDER ACT SERVICES AND DO NOT USE THE SERVICE.

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 52243 ("ACT") and you, the Customer placing an order for ACT products and/or services ("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 the period of time indicated on the Enrollment Form.

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. To the extent the Customer also receives ACT Assessments and Services pursuant to a contract between ACT and a State education agency, the terms of the agreement between ACT and the State education agency apply to the services provided to Customer pursuant to that State Agreement.

3. Payment Terms: Customer shall make all payments within thirty (30) days of receipt of an invoice from ACT. ACT may charge Customer 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 or has license for the Assessments and Services, including but not limited to, the skill definitions on which assessments are based, paper-based or online assessment documents, testing materials, test questions, answer choices, administration and registration materials, publications, data, the score resulting from the assessment, reports, documentation, related materials, any and all derivatives or modifications thereof (collectively, the "ACT Materials"). ACT owns copyrights in the ACT Materials. The ACT Materials are licensed on a limited, revocable, non-exclusive and non-assignable manner, not sold. 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 may not (a) use

the ACT Materials for any purpose other than as expressly permitted, (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, sell, loan or lease the Assessments and Services or ACT Materials, (d) copy, reproduce, distribute, email, post, scan, make available, display publicly, transfer, sell, modify, enhance, reverse engineer, decompile, disassemble, make derivative works from, remove information from or make any addition to the ACT Materials, in whole or in part, or allow anyone else to do so, except as permitted in writing by ACT, or (e) modify, reverse engineer, decompile, or disassemble the ACT online system. Customer shall promptly notify ACT, in writing, of any known, threatened, or suspected infringement or unauthorized use of the ACT Materials by any third party. Customer's rights to the ACT Materials expressly terminate upon the termination of this Agreement. Customer may not sell, provide access to, or otherwise transfer the ACT Materials to any other person, provided however that Customer may provide the Assessments and Services to its Designated Personnel, Participating Testing Sites, and examinees solely for testing and interpretation purposes consistent with the terms of this Agreement and any related agreement for the use of the Assessments and Services.

5. Grant and Scope of License. Subject to the terms and conditions of this Agreement, ACT grants to Customer and Customer-designated schools, campuses, facilities, or other training or administrative locations where Assessments may be taken ("Participating Testing Sites") a limited, non-exclusive, non-transferable right during the term of the Agreement to (a) access the Assessments and Services solely for testing and interpretation purposes consistent with the terms of this Agreement, (b) administer the Assessments to examinees, (c) resell the Assessments to examinees (as applicable), and (d) use the ACT Materials in connection with the authorized administration of the Assessments. Customer may administer the Assessments at Participating Testing Sites that provide for a proper assessment environment as set forth in the administration manual, provided that the ACT Materials are stored and secured at the Participating Testing Site when they are not being administered, and provided that the Customer abides by the terms and conditions set forth in this Agreement.

6. Confidentiality. Customer agrees that neither it nor its employees shall at any time during or following the term of the Agreement, 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 as part of the Assessments provided hereunder. Customer shall protect the ACT Materials in accordance with ACT's policies and procedures and using a standard of care appropriate for secure test materials, but in no event less than a reasonable standard of care. All ACT Materials are and remain the property of ACT notwithstanding the subsequent termination of this Agreement. Customer shall not store and must return any unused Assessments (and all copies, if any) in accordance with ACT's policies and procedures. In the event Customer receives a Freedom of Information Act, public record, or open record request for any confidential information covered by this Agreement, Customer agrees to immediately notify ACT of such request in writing. Customer shall immediately notify ACT in writing in the event of any unauthorized use or disclosure of the ACT Materials and assist in remedying such unauthorized use or disclosure, as requested by ACT (which shall not limit other remedies of ACT as provided in this Agreement or by applicable law). Customer acknowledges and agrees that damages may not be adequate to compensate for the breach of this section and accordingly, Customer agrees that, in addition to any and all other remedies available, ACT is entitled to obtain relief by way of a temporary or permanent injunction to enforce the obligations described in this section.

7. 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.

Testing Procedures. Customer and its Participating Testing Sites agree to administer the Assessments in accordance with all policies and procedures established by ACT, as may be updated from time to time.

Customer agrees to store ACT Materials in secure location(s) approved by ACT. Customer agrees that all used and unused ACT Materials (and copies, if any) will be returned to ACT, in accordance with the policies and procedures established by ACT. In the event of a test security incident or use of the ACT Materials which conflicts with the requirements of this Agreement or ACT policies and procedures, Customer and all Participating Testing Sites agree to fully cooperate with ACT, and shall cause those individuals involved in the administration of or preparation for the Assessments to fully cooperate with ACT. In the event ACT identifies testing irregularities, which may include but is not limited to the 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, ACT reserves the right, in its sole and absolute discretion, to cancel all related or impacted test scores.

9. Updates and Modifications. The Assessments and Services may be modified or updated from time to time at ACT's sole discretion. ACT shall make such modification and updates available to Customer as they are developed. ACT reserves the right to charge a fee for any new functionalities available through the revised Assessments and Services.

10. Computer Requirements, Compatible Platforms and Hardware, and System Maintenance. Customer acknowledges and agrees that the computer configuration requirements are required to properly access and use the Assessments and Services and that ACT shall have no liability for matters relating to the failure to comply with these computer requirements. ACT may, in its sole discretion, revise these configuration requirements from time to time. Customer is responsible for obtaining and maintaining an appropriate operating environment with the necessary hardware, operating system software, network configurations, and other items required to use and access Assessments and Services. ACT is not responsible for any incompatibility between ACT Assessments and Services, and any versions of operating systems, hardware, browsers, inadequate network configurations, or other products not specifically approved by ACT for Customer's use with the ACT Assessments and Services. Assessments and Services are subject to recurring maintenance windows, and occasionally unscheduled maintenance, during which servers may be taken offline. ACT shall not be responsible for any damages or costs incurred by Customer, if any, for such down time. The applicable computer configuration requirements are available at <http://www.act.org/content/act/en/products-and-services/state-and-district-solutions/act-online-testing.html>.

11. Username and Passwords. Access to the Assessments and Services to only those Customer and Participating Testing Site staff and students that have been authorized to use the services by Customer. Each authorized staff member and student will be required to use a unique username and password to access the online platforms provided as part of the Assessments and Services. Staff and students may not share or otherwise divulge their password with any other person. Access to the online platform is personal to the individual authorized staff member or student. Customer and Participating Testing Site staff accessing the online platforms may not impersonate any person or entity or falsely state or otherwise misrepresent their identity or affiliation with a person or entity to ACT.

12. 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.

13. Warranty and Limitations: ACT WARRANTS THAT THE ASSESSMENTS HAVE BEEN DEVELOPED 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.

14. 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.

15. 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.

16. 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.

17. 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.

18. 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.

19. 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.

20. 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.

21. Entire Agreement: This Agreement, including all incorporated or referenced Supplemental Terms and Conditions and Customer's Enrollment Form, 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.

22. 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.

23. 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.

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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, as applicable. Under this 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 and examinee information in MyACT. The ACT taken with the Writing assessment is included, if selected by Customer on the ACT District Testing Enrollment Form ("Enrollment Form"), for an additional fee (collectively "Services"). 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. To the extent Customer also receives ACT assessment services pursuant to an agreement between ACT and a State education agency, the terms of the agreement between ACT and the State education agency will govern the provision of services under that State Agreement.

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 ACT paper answer documents processed, plus the total number of ACT online assessments launched (collectively, the total "Enrollment"). If an examinee starts any one of the ACT sub-tests, it will count as an Enrollment, regardless of whether the entire ACT test is completed.
- b. Fee Calculation. ACT will charge Customer the Enrollment Fee per student, as indicated on the Enrollment Form, for the total Enrollment for the applicable assessment option selected by Customer (ACT with Writing or ACT without Writing). To the extent the Enrollment Form does not reference the Enrollment Fee, or Customer orders an assessment option that is not available at a special rate, the applicable standard pricing/rates will apply. ACT standard pricing is available on the Website.
- c. Invoicing and Payment. ACT will submit an invoice to Customer for all Enrollment Fees owed under this Agreement after the last day of the Makeup Accommodations Test Window. The invoice will reflect the Fee Calculation. Customer shall make payment as set forth in the Payment Terms. ACT is not obligated to 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.
- e. FRLP Tiers. ACT's standard Enrollment Fee is based on the Customer's percentage of students eligible for the Free and Reduced Lunch Program (FRLP), across all Schools in the Customer's territory or jurisdiction. Customer shall identify its applicable FRLP percentage on its Enrollment Form, and ACT may verify the accuracy of the applicable percentage based on federally reported data.

8. Non-College Reportable Program (*Limited Availability*): To the extent Customer has enrolled in a Non-College Reportable ("NCR") administration of the ACT assessments to its eligible 10th, 11th, and/or 12th grade students, ACT will provide NCR Services as detailed at https://content.act.org/ncr_only/ ("NCR Website"). Customer is obligated to complete the District Testing Program requirements detailed on the NCR Website in order to participate in each applicable NCR test session. To the extent Customer has elected to enroll for three years, this Agreement will remain effective to govern all Assessments and Services provided through the full enrollment period and Customer must enroll in at least one test session during each year. ACT will not report scores earned through the NCR administration of the ACT to colleges, scholarship agencies, or any other entities. The test coordinator must notify examinees that NCR scores are for district assessment purposes only. Students must read and agree to the terms and conditions of testing with NCR materials provided on the front cover of the test booklet by breaking the seal on the test booklet at the time of test administration.