

ACT® District Testing Program Terms and Conditions

These terms and conditions are a binding legal Agreement (“Agreement”) between ACT Education Corp. (“ACT”), a Delaware corporation and wholly owned indirect subsidiary of Gateway Impact Corp., a Delaware public benefit corporation, having a principal place of business at 500 ACT Drive, Iowa City, IA 52243, and FAYETTE COUNTY PUBLIC SCHOOLS, having a principal place of business at 450 PARK PL, LEXINGTON, KY 40511-1829 (“Customer”) enrolling, placing an order, and using the ACT assessments and services, including test administration, and scoring and reporting services for the ACT (as applicable, “Assessments” and “Services”).

1. **ACT District Testing.** ACT offers the Assessments and Services to Customer under the standard ACT District Testing Program to its eligible 9th, 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. 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. Customer may administer the ACT during the available ACT testing windows (“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 Assessments and Services pursuant to ACT’s standard delivery specifications and requirements to Customer for each Testing 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 in the schedule of events provided by ACT. In the event Customer fails to provide required information and data by the key deadlines, ACT will be unable to provide Assessments and Services, and may terminate this Agreement or require Customer to reschedule for an alternate Testing Window.
3. **Non-College Reportable Program (*Limited Availability*).** To the extent ACT offers an available Non-College Reportable (“NCR”) administration of the ACT assessments to Customer for its eligible 9th, 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. ACT will not report scores earned through the NCR administration of the ACT to colleges, scholarship agencies, or any other entities other than the Customer placing the order. The test coordinator must notify examinees that NCR scores are for district assessment purposes only. Students must read the terms and conditions of testing with NCR materials provided on the front cover of the test booklet and agree to such terms and conditions by breaking the seal on the test booklet at the time of test administration. To the extent Customer does not enroll for NCR administration of the ACT assessment, the terms and conditions in this section shall not apply.
4. **Term.** This Agreement shall commence on the date Customer enrolls and accepts these terms and conditions for the Assessments and Services and shall remain in effect for the period of time indicated on the Enrollment Form. 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.

5. Fees and Invoicing.

- a. Fees Calculation. The fees owed by Customer for the Assessments and Services provided under the ACT District Testing Program will be based on the total number of ACT paper answer documents processed and the total number of ACT online assessments launched, regardless of whether the entire ACT test is completed. To the extent Customer is eligible to receive special rates for Assessments and/or Services, ACT will automatically apply those special rates to Customer's invoices. If Customer orders an Assessment option that is not available at a special rate, ACT will charge Customer fees owed for each applicable Assessment option (ACT with Writing or ACT without Writing) at the applicable standard pricing/rates. ACT standard pricing is available on the Website.

Program Price Tier	Assessment Options			
	Paper ACT w/o Writing	Online ACT w/o Writing	Paper ACT with Writing	Online ACT with Writing
State or Special Rate	\$39.00	\$38.00	see box below	see box below

- b. FRLP Tiers. ACT's standard pricing/rates are based on the Customer's percentage of students eligible for the Free and Reduced Lunch Program (FRLP) across all of Customer's Designated schools, campuses, facilities, or other training or administrative locations where Assessments may be taken ("Participating Testing Sites"). 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.

Program Price Tier	Assessment Options			
	Paper ACT w/o Writing	Online ACT w/o Writing	Paper ACT with Writing	Online ACT with Writing
FRLP 0-49%	\$55.50	\$53.25	\$70.25	\$68.00
FRLP 50-74%	\$53.50	\$51.25	\$69.25	\$67.00
FRLP 75-100%	\$51.50	\$49.25	\$67.25	\$65.00

- c. Invoicing. ACT will provide an invoice to Customer for all fees owed under this Agreement after the last day of each Test Window(s) for fall and/or spring testing, as applicable.
- d. Fee Waivers. Student fee waivers and vouchers are not accepted as a form of payment for the ACT District Testing Program.
6. Payment Terms. Customer agrees to pay ACT the amounts set forth in the invoice for the delivery of Assessments and Services selected by Customer. 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 billing address provided by Customer. 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. ACT reserves the right to discontinue access to the electronic systems for Assessments and Services if payments are delinquent. ACT has no obligation to re-issue invoices, provide credits, or issue refunds.

7. **Grant and Scope of License.** Subject to the terms and conditions of this Agreement, ACT hereby grants to Customer a revocable, non-exclusive, and non-transferable license during the Term of this Agreement to (a) access the Assessments and Services, as applicable, solely for the purpose of assessing the authorized examinees, (b) administer the Assessments and Services, as applicable, to authorized examinees and students, and (c) use the ACT materials presented to Customer by ACT pursuant to this Agreement, including but not limited to Assessments and Services and other materials as described herein (the "ACT Materials") in connection with an authorized use of the Assessments and Services. Customer may administer the Assessments and Services, as applicable, provided Customer abides by the terms and conditions set forth in this Agreement.
8. **U.S. Government Licenses.** The online components of the Assessments and Services are "commercial items," 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 Assessments and Services with only those rights set forth herein.
9. **Ownership of Materials.** ACT owns or has license rights for the Assessments and Services, including but not limited to, the skill definitions on which assessments are based, paper-based or online assessment documents, paper-based or online testing materials, test questions, answer choice, administration and registration materials, publications, data, text, images, graphics, button icons, illustrations, graphics, photographs, audio clips, music, sounds, pictures, videos; software, code; look-and-feel, design, layout, organization, presentation, user interface, navigation, trade dress, and stylistic convention thereof or contained therein; the score resulting from the assessment, reports; documentation, training materials, course materials; related materials, and all intellectual property rights therein, including any and all derivatives or modifications thereof (collectively, included within "ACT Materials"). ACT owns copyrights in the ACT Materials. The ACT Materials are licensed on a limited, revocable, non-exclusive, and non-sublicensable manner, not sold to Customer. Except as expressly granted in this Agreement, Customer does not acquire any right, title, or interest in or to the ACT Materials. Customer shall not and shall not assist or permit any third party to (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 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, (e) seek to register or protect, anywhere in the world, the ACT Materials (or seek to register or protect any designation confusingly similar to the ACT Materials), (f) challenge ACT's ownership in or the validity of the ACT Materials, (g) store the ACT Materials in any location other than a Customer-controlled location, or (h) retain excess paper test booklets after administration of a secure assessment. 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.
10. **Confidentiality.** Customer agrees that neither it nor its employees, representatives, or agents shall at any time during or following the term of this 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 and/or Services 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) as directed by ACT and 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.

11. Testing Procedures. Customer and its Participating Testing Sites agree to administer the Assessments and Services 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) as defined and described 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 that conflicts with the requirements of this Agreement or ACT policies and procedures, Customer and its Participating Testing Sites agree to fully cooperate with ACT, and shall cause those individuals involved in the preparation, administration, or return of the Assessments to fully cooperate with ACT. In the event ACT identifies testing irregularities, which may include but are not limited to the use of a compromised test form, falsification by an examinee of their 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 and notify Customer of that cancellation.
12. Data. The parties acknowledge and agree that ACT may use and disclose the data collected from the administration of the Assessments and Services as set forth in ACT's Privacy Policy available at www.act.org/privacy, as amended from time to time. Examinees may activate their online account after completion of the testing process and select their data privacy preferences in such account. ACT will honor the data sharing and privacy requests as selected by each examinee.
13. Customer Required Actions. Customer is responsible for regularly reviewing the Website and administration platform to identify any changes to the schedule of events, key deadlines, and other actions required of Customer. To the extent Customer fails to complete any required actions by the key deadlines, ACT may not provide the Assessments and Services to Customer for the selected Testing Window(s).
14. 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 modifications and updates available to Customer as they are developed. ACT reserves the right to charge a fee for any new functionalities available through revised Assessments and Services.
15. Computer Requirements, Compatible Platforms and Hardware, and System Maintenance. ACT will provide Customer with computer configuration and other requirements as applicable. 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.

16. **Username and Passwords.** Access to the Assessments and/or Services shall be granted to only those Customer and Participating Testing Site staff and students that have been authorized to use the Assessments and/or Services by Customer. Each authorized staff member and examinee will be required to use a unique username and password to access the online platforms provided as part of the Assessments and/or Services. Staff and examinees may not share with or otherwise divulge their password to any other person. Access to the online platform is personal to the individual authorized staff member or examinee. Customer and Participating Testing Site staff accessing the online platforms must log in using an email address having a domain affiliated with Customer or Authorized Customer Location and may not impersonate any person or entity or falsely state or otherwise misrepresent to ACT their identity or affiliation with a person or entity.
17. **Use of Third Parties.** In the event ACT Assessments and/or Services are administered by a third party on behalf of Customer ("Third Party"), Customer enters into this Agreement on its own behalf and on behalf of the Third Party. Customer represents and warrants that it has the authority to bind the Third Party to this Agreement and that such Third Party is hereby bound by the terms and conditions of this Agreement as if it were Customer. Customer agrees that it shall be jointly and severally liable for all obligations of the Third Party.
18. **Trademarks.** ACT owns the "ACT" trademark Except as specifically granted in this Agreement, Customer does not acquire any right, title, or interest in or to the Trademark. The Trademark may not be used without ACT's prior written consent, and any authorized use of the Trademark shall be governed by ACT's Trademark Use Guidelines.
19. **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, or in the event the term is multiple years, the most recent year of the term. In no event shall ACT be liable to Customer for special, indirect, incidental, punitive, exemplary, or consequential damages.
20. **Warranty and Limitations.** EXCEPT FOR WARRANTIES EXPRESSLY SET FORTH HEREIN, ACT EXPRESSLY DISCLAIMS ANY AND ALL REPRESENTATIONS AND WARRANTIES OF ANY KIND OR NATURE, EXPRESS OR IMPLIED, INCLUDING WITHOUT LIMITATION WARRANTIES REGARDING GUARANTEED UPTIME, WARRANTIES ARISING BY STATUTE OR OTHERWISE IN LAW OR FROM A COURSE OF DEALING OR USE OF TRADE, AND WARRANTIES OF MERCHANTABILITY OR FITNESS FOR PURPOSE. CUSTOMER SHALL HAVE THE SOLE RESPONSIBILITY FOR ASSURING THAT ITS USE OF THE ASSESSMENTS OR SERVICES COMPLIES WITH FEDERAL, STATE AND LOCAL LAWS AND REGULATIONS AND ALL LABOR, EMPLOYEE, OR OTHER CONTRACTS OR PRACTICES TO WHICH IT IS A PARTY.

21. **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. Notwithstanding the above, if Customer fails to provide student registration information and organizational files to ACT by the deadline required by ACT, Customer's participation in the Assessments and Services, as applicable, will be automatically cancelled and this Agreement will be deemed terminated without further notice. 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 Terms, Ownership of Materials, Confidentiality, Testing Procedures, Data, Limitation on Damages, and Warranty and Limitations.
22. **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, this Agreement may be terminated by either party upon notice to the other.
23. **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.
24. **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.
25. **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.
26. **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 this Agreement shall remain in full force and effect. Headings used in this 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~~ **KY**.
27. **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, 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.

28. Entire Agreement. This Agreement, including Customer's Enrollment Form, constitutes the entire agreement between the parties with respect to the Assessments and Services, as applicable, 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 this Agreement, ACT expressly objects to and rejects any different or additional terms included in any request for proposal, quotation, purchase order, acknowledgment form, or other documents provided by Customer that purport to bind the parties. No waiver, consent, modification, or amendment to this Agreement shall be binding unless in writing and signed by both parties.

29. Customer Authorization. The Customer's named representative completing this Enrollment Form, and agreeing to the terms and conditions, represents and warrants that (a) it has the requisite authority to enter into this Agreement; and (b) the individual(s) agreeing to 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 this Agreement.

ACT EDUCATION CORP.

FAYETTE COUNTY PUBLIC SCHOOLS

Signature: _____

Name: C. Blake Curwen

Title: Vice President

Date:

Signature: Brooke Stinson

Name: Brooke Stinson

Title: Director of Assessment and MTSS

Date: 7-15-24

gdc

(ma)