

## ACT ASPIRE TERMS AND CONDITIONS

Effective Date: June 20, 2019

ACT, Inc. ("ACT") and Customer agree as follows:

### 1. Definitions.

As used in this Agreement, the following terms shall mean:

- (i) "Agreement" means these terms and conditions.
- (ii) "Assessments" means the ACT Aspire assessments provided as part of the Assessment Services.
- (iii) "Assessment Services" means the services provided by ACT for the registration, administration, scoring, longitudinal tracking, and reporting of the Assessments, as ordered, purchased and/or selected by Customer.
- (iv) "Customer" means the party being granted access to the Assessment Services pursuant to this Agreement.

### 2. Grant of Use Rights to the Assessment Services.

ACT grants to Customer the right to use the Assessment Services and Assessments solely under the terms and conditions set forth herein and in the attached Annex A to these Terms and Conditions, which Annex A is applicable if the Assessments and Assessment Services include ACT Aspire periodic assessments.

### 3. ACT Aspire Materials.

ACT owns or has license rights in the Assessments and Assessment Services, including all testing materials, documentation, related materials, and all intellectual property rights therein (collectively, the "ACT Aspire Materials"). Customer does not acquire any right, title, or interest in or to the ACT Aspire Materials. Customer shall not copy, modify, enhance, reverse engineer, or make any addition to the ACT Aspire Materials. Customer acknowledges and agrees that the ACT Aspire Materials are not sold to Customer. Customer shall not (and shall not assist or permit any third party to): (i) seek to register or protect, anywhere in the world, the ACT Aspire Materials (or seek to register or protect any designation confusingly similar to the ACT Aspire Materials; or (ii) challenge ACT's or its licensors' ownership in or the validity of the ACT Aspire Materials. Customer shall promptly notify ACT, in writing, of any known, threatened, or suspected infringement or unauthorized use of the ACT Aspire Materials by any third party. Customer's rights to the ACT Aspire Materials expressly terminate upon the termination of this Agreement as set forth in Section 9 below. Customer may not sell, provide access to, or otherwise transfer the ACT Aspire Materials to any other person, provided however that Customer may provide the Assessment Services to authorized Customer examinees, employees, and personnel solely for testing and interpretation purposes consistent with the terms of this Agreement and any related agreement for the use of the Assessment Services. Customer shall be further obligated to administer the Assessments in accordance with all policies and procedures provided by ACT or its licensors, as updated from time to time.

### 4. Confidentiality.

Customer agrees that neither it nor its employees or personnel shall at any time, either directly or indirectly, publish, display or otherwise disclose to any person, organization, or entity in any manner whatsoever any ACT Aspire Materials, except as strictly necessary for Customer to use the ACT Aspire Materials as part of the Assessment Services. Customer shall protect the ACT Aspire Materials in accordance with ACT's procedure and using a standard of care appropriate for secure test materials, but in no event less than a reasonable standard of care. All ACT Aspire Materials shall be and remain the property of ACT or its licensors notwithstanding the subsequent termination of this Agreement. The ACT Aspire Materials shall, within ten (10) days of ACT's written request, be returned to ACT (including any copies thereof). In the event that Customer receives a FOIA, 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 acknowledges and agrees that damages may not be an adequate remedy to compensate for the breach of this Section 4, and accordingly Customer agrees that in addition to any and all other remedies available, ACT shall be entitled to obtain relief by way of a temporary or permanent injunction to enforce the obligations described in this Section 4.

### 5. Payment.

Customer orders submitted to ACT will be invoiced in full following submission and acceptance by ACT. All amounts reflected on such invoices will be due and payable thirty (30) days from the receipt of the invoice. 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. In the event Customer wishes to cancel an order placed for Assessments, notice of such cancellation must be provided to ACT by September 1 for the fall administration or March 1 by the spring administration. Failure to notify ACT of such cancellation by these deadlines for each Spring and Fall assessment administration, respectively, will result in a cancellation fee of \$5 per student. In the event that ACT is required to expedite materials, ACT may charge the Customer an expedited shipping fee of \$75 per box. Customer agrees to pay for actual Assessments administered, including reconciling administered versus ordered computer or paper test and applicable fees as described herein. If necessary, ACT will issue an invoice for additional compensation owed or a credit for any overpayment once actual Assessments administered is known for each Spring and Fall administration.

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## 6. Testing Procedures.

Customer agrees to administer the Assessments in accordance with all policies and procedures provided by ACT or any ACT licensor, as updated from time to time. Customer agrees that failure to follow the Assessment set-up policies and procedures provided by ACT may result in additional fees. Customer agrees that all ACT Aspire Materials will be returned in accordance with the policies and procedures provided by ACT. Customer agrees to fully cooperate with, and cause those individuals involved in the administration of the Assessments 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 its licensors and may require ACT or its licensors to develop a replacement form or replacement items. Accordingly if through the fault of Customer, the security of an Assessment is compromised, Customer agrees to pay ACT the costs of developing a new form or item in addition to any other remedies under the law. ACT or its licensors may, in their 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. Data.

The parties acknowledge and agree that ACT and its affiliates may use and disclose the data collected from the administration of the Assessments, as set forth in ACT's data usage policies, as amended from time to time. ACT's data usage policies are available at [www.act.org](http://www.act.org).

Without limiting the foregoing, to the extent that information collected in connection with the administration of the Assessments is subject to the Family Educational Rights and Privacy Act, 12 U.S.C. § 1232g et. seq. ("FERPA") and its implementing regulations or similar state law, Customer agrees that ACT and its affiliates may use and disclose such information for the provision of Assessment Services. Customer further agrees that ACT and its affiliates, to the extent permitted by FERPA, may use such information for research purposes, including longitudinal research, in identifiable, de-identified, aggregated, and/or coded form. Customer further agrees that ACT and its affiliates may create and disclose coded information, consistent with FERPA requirements for educational research, and that de-identified information, including aggregate information, may be created and disclosed for any purpose.

Without limiting the foregoing, to the extent that personal information collected in connection with the administration of the Assessments is subject to the Children's Online Privacy Protection Act, 5 U.S.C. § 6501 et. seq. ("COPPA") and its implementing regulations or similar state law, Customer consents to the use and disclosure of such information by ACT and its affiliates for educational purposes, including the research purposes described above in the preceding subsection (i), by ACT and its affiliates.

Customer understands and agrees that among the purposes of the Assessments are facilitating the ability to assess the effectiveness of the Assessments and the progress of examinees, individually and collectively, over time. To facilitate the ability to research and assess the progress of examinees over time, Customer agrees that ACT and its affiliates may retain information collected through the Assessments in identifiable form, for a period of twenty years from the end of the year in which the Assessment was administered and that such retention is consistent with the purposes for which such information originally will be collected. Customer understands and agrees that de-identified information is not subject to the above retention limitation.

Further, the online order form by which Customer accepts and agrees to this Agreement includes an opt-in for sharing of Customer data with schools, schools districts, state entities and/or their agents or representatives for educational and reporting purposes. If Customer has opted-in to such sharing, ACT may share data as so authorized. If Customer has not opted-in to sharing of data with schools, schools districts, state entities and/or their agents or representatives for educational and reporting purposes, ACT will share data only as otherwise permitted in this Section 7.

## 8. Compatible Platforms and Hardware.

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 the ACT Aspire Materials and Assessment Services. Neither ACT nor any of its licensors will be responsible for any incompatibility between ACT Aspire Materials and Assessment 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 Aspire Materials and Assessment Services.

## 9. Passwords.

Each user identification, access code, and password is personal to the authorized user to which it is issued. Customer and the authorized users Customer identifies are responsible for maintaining the confidentiality and security of all user identifications, access codes, and passwords issued, and ensuring that each such user identification, access code, and

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password is only used by its identified authorized users. To the extent ACT assigns Customer with administrative rights to create user identifications, access codes, and passwords for its authorized users, Customer shall be wholly responsible for each such issuance.

## 10. 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 ASPIRE OR ANY ACT AFFILIATE OR LICENSOR 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 ASSESSMENT 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.

## 12. Termination.

ACT reserves the right to reject orders it reasonably determines were made in bad faith or in unreasonably low or high volumes, or for any reason at ACT's discretion. ACT may terminate this Agreement on not less than forty-five (45) days' prior written notice. Further, this Agreement will terminate (a) one year after execution of this Agreement or (b) upon Customer's breach of this Agreement and failure to cure such breach within 30 days of receiving notice of said breach from ACT. The obligations of Sections 3, 4, 5, 6, 7, and 8 survive termination of this Agreement.

## 13. 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. There are no third party beneficiaries to this Agreement.

## 14. Third Party Rights.

Except for the rights and benefits provided to and for ACT's affiliates and licensors in this Agreement, including, without limitation, rights and benefits contemplated in Section 6 of this Agreement, nothing in this Agreement is intended, nor will be deemed, to confer rights or remedies upon any person or legal entity not a party to this Agreement.

## 15. Force Majeure.

Neither ACT nor its licensors shall 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, national emergencies, fire, flood, epidemics, or catastrophe, inclement weather, acts of God, governmental authorities, or parties not under the control of ACT or its licensors, insurrection, war, riots, or failure of transportation, communication, or power supply. ACT and/or ACT licensors shall exercise commercially reasonable efforts to mitigate the extent of the excusable delay or failure and its adverse consequences.

## 16. Assignment; Subcontracts.

This Agreement may not be assigned by Customer without the express prior written consent of ACT. No permitted assignment shall relieve Customer hereto of its obligations prior to the assignment. ACT is expressly permitted to assign this contract to its corporate affiliates, and may subcontract with its affiliates or licensors for the delivery of the Assessment Services.

## 17. Entire Agreement.

This Agreement (including any order form to which this Agreement applies, all exhibits to this Agreement and agreements referenced herein) constitutes the entire agreement between the parties with respect to the subject matter hereunder 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 ACT Aspire Materials, Assessments, and delivery of the Assessment Services. ACT and its licensors expressly object to and reject any different or additional terms included in Customer's request

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for proposal, quotation, purchase order, acknowledgment form, or other documents 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.

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## ANNEX A – ADDITIONAL TERMS RELEVANT TO PERIODIC ASSESSMENTS

The following additional terms and conditions apply in the event that the Assessments and Assessment Services include ACT Aspire periodic assessments. Capitalized terms not otherwise defined herein have the meanings ascribed such terms in the Terms and Conditions to which this Annex A is attached.

A. Term of Periodic Access. ACT will provide access to periodic assessments comprising Assessments upon receipt of payment for such Assessments and following registration of the Customer and its permitted users into the system by which ACT makes such Assessments available, and access will continue thereafter until the earlier to occur of the close of business on the next June 30 to occur or termination of the Agreement.

B. Grant and Scope of Access. Subject to the terms and conditions of this Agreement, ACT hereby grants to the Customer a non-exclusive and non-transferable right for the period of access noted in Clause A above, to use periodic Assessments for the assessment of Authorized Users at Customer-supervised Authorized Locations only. The periodic Assessments are in no way intended as a high-stakes assessment or as a replacement for summative Assessments. The Assessments made available under this Agreement are licensed, not sold.

C. Restrictions. Except as expressly permitted herein, Customer may not (1) assign, license, sell, resell, distribute, loan, lease, or otherwise transfer any periodic Assessments or any related materials in whole or in part, (2) authorize or allow a third party to use any periodic Assessments, (3) copy, or allow anyone else to copy, in whole or in part, any periodic Assessments, (4) modify, reverse engineer, decompile, or disassemble any periodic Assessments, or (5) store any Assessment Materials at any location other than the Authorized Location(s). For purposes of this Agreement, "Authorized Users" means the Customer's then-enrolled students and "Authorized Locations" means Customer owned and controlled locations that comply with all policies and procedures provided by ACT or any ACT licensor, as updated from time to time.

D. Customer's Responsibilities. Customer shall (1) appoint an administrator who shall have the sole authority to distribute passwords, and to set up additional accounts, (2) assure proper machine configuration, a compatible Internet browser, and Internet access, in each case, as applicable, (3) use periodic Assessments in conformance with any then-current manuals and/or administration materials as published and updated from time to time, (4) restrict access to the periodic Assessments and related Assessment Materials to those individuals who have a "need to know" for the authorized purpose, (5) control the use of the periodic Assessments, and assure that only Authorized Users are provided access, (6) comply with all other terms and conditions of this Agreement, including, but not limited to, paying, when due, all fees owed ACT, and (7) assume full responsibility for the selection of the Assessments to achieve any Customer purpose.

E. Effect of Termination. Notwithstanding anything in this Agreement, at law, or in equity to the contrary, other than pursuant to Customer's claim for actual damages caused by ACT's breach of this Agreement, ACT will be entitled to retain all amounts paid hereunder for periodic Assessments and will have no obligation to refund or return to Customer any portion (prorated or otherwise) of compensation paid hereunder for periodic Assessments regardless of any early termination (regardless of the reason therefore).