

Board Office Use: Legislative File Info.	
File ID Number	19-2174
Introduction Date	11/13/19
Enactment Number	19-1683
Enactment Date	11/13/19 lf



**OAKLAND UNIFIED
SCHOOL DISTRICT**

Community Schools, Thriving Students

Memo

To Board of Education

From Kyla Johnson-Trammell, Superintendent
Sondra Aguilera, Chief Academic Officer
Christian Nelson, Director, Adult and Career Education Nave

Board Meeting Date November 13, 2019.

Subject Memorandum of Understanding - Educational Testing Service (ETS), HiSET Test -
Adult and Career Education

Action Requested and Recommendation Approval of a Memorandum of Understanding between the District and Educational Testing Service (ETS), Princeton, NJ, for the latter to provide high school equivalency and testing services for the period beginning July 1, 2019, coinciding with the term of ETS's HiSet agreement with the State which currently expires on December 31, 2019, but will likely be renewed, at no cost to the District.

Background Oakland Adult and Career Education has provided high school equivalency testing through GED testing. This MOU will establish a relationship between Educational Testing Service (ETS), HiSET Test, for the administration of the HiSET Test Program at the Adult and Career Education Program site. ETS will allow the District to provide an additional option for high school equivalency with the HiSET. The HiSET Test will be an alternative and available to the greater Oakland community.

Fiscal Impact No fiscal impact to the District.

Attachments

- Memorandum of Understanding between the Oakland Unified School District, Adult and Career Education Department and Educational Testing Service.

HiSET (State) MOU
CSS – (Test takers register with ETS)

**HiSET® AGREEMENT BETWEEN
AND
OAKLAND ADULT AND CAREER EDUCATION
EDUCATIONAL TESTING SERVICE**

THIS HiSET AGREEMENT (“Test Agreement”), effective as of July 1, 2019, is by and between Educational Testing Service (“ETS”) (as defined below) and Oakland Unified School District/Adult and Career Education (the “Test Center”), a State-approved test center selected by the State of California, for the delivery of a high school equivalency examination in the state. ETS and the Test Center may be referred to herein individually as a “Party” and/or collectively as “Parties”.

WHEREAS, the State has approved Educational Testing Service, a non-stock, non-profit organization with principal offices in Princeton, New Jersey, as a preferred provider of the HiSET™ (High School Equivalency Test) in the State; and

WHEREAS, the State will select and approve test centers to administer the ETS-owned HiSET test; and

WHEREAS, this Agreement defines the terms and conditions for the use and administration of the HiSET test;

NOW, THEREFORE, in consideration of the mutual covenants and undertakings hereinafter set forth, the Parties hereby agree as follows:

1. Definitions.

- 1.1 “Agreement” shall mean together, the terms, conditions, written instructions, specifications, standards, terms and conditions set forth herein and any terms and conditions posted on ETS’s HiSET website, specifically in the HiSET® Program Manual, https://hiset.ets.org/s/pdf/program_manual.pdf
- 1.2 “Approved Fee” shall mean the state-approved fee charged to each Test Taker for the use of the facilities and for the administration of the Test.
- 1.3 “CBT” is an acronym for computer-based testing or the delivery of a HiSET test via the Internet.

- 1.4 **“Confidential Information”** shall mean any information or data that is disclosed by one party (a disclosing party) to the other party (a receiving party) pursuant to this Agreement. “Confidential Information,” however, does not include information that the receiving party can demonstrate by documents that (i) is or becomes publicly known or available without breach of this Agreement; (ii) is received by a receiving party from a third party without breach of any obligation of confidentiality by such other third party; (iii) was previously known by the receiving party as demonstrated by its written records; or (iv) is independently developed by the receiving party without access to or use of such Confidential Information as demonstrated by contemporaneously prepared documentation.
- 1.5 **“ETS”** is a trade name for Educational Testing Service, a non-profit, non-stock research and testing organization that is the contractor for the State’s high school equivalency testing program.
- 1.6 **“ETS-owned Technologies”** shall mean ETS’s pre-existing hardware and software systems used to deliver Test Materials to the Test Center and/or record Test Taker’s responses, including but not limited to the ETS portal for registering Test Takers and for delivering final score reports.
- 1.7 **“ETS Proprietary Materials”** shall mean all HiSET test materials, including but not limited to, test booklets, test items, reports, data, answer sheets, instructional manuals and directions, ETS pre-existing proprietary software, and all derivative works of such ETS Proprietary Materials adapted for use in the high school equivalency program in the State, provided by ETS to the Test Center for the delivery and/or administration of the HiSET test in the state.
- 1.8 **“HiSET®”** is the brand name for the ETS High School Equivalency Testing program owned by ETS.
- 1.9 **“Intellectual Property Rights”** shall mean (i) copyrights and copyright applications or registrations, including any renewals, in either the United States or any other country; (ii) trademarks, service marks, trade names, and applications or registrations for any of the foregoing in the United States or any other country; (iii) trade secrets or any data or information which provides value or a competitive advantage to its holder by not being publicly known; and (iv) patents, patent applications, continuations, divisionals, reexaminations, reissues, continuations-in-part, and foreign equivalents of the foregoing, in the United States or any other country.

- 1.10 "PBT" is an acronym for paper-based testing or the delivery of a HiSET test via paper format.
- 1.11 "Returnable Test Materials" shall mean the paper version of all used and unused test booklets and answer sheets for the HiSET test.
- 1.12 "Sales Tax" shall mean State and local sales, use or similar tax.
- 1.13 "Settlement Amounts" shall mean the sum of all fees collected by ETS that are settled over to Test Centers.
- 1.14 "Term" shall have the meaning specified in Section 8.1 hereof.
- 1.15 "Test(s)" shall mean the ETS-owned and copyrighted HiSET test, developed and provided by ETS in paper and/or electronic format for use in the high school equivalency testing program in the state.
- 1.16 "Test Administrator" shall mean any staff member responsible for administering the Test at the Test Center.
- 1.17 "Test Materials" shall mean all HiSET test materials, including test booklets, test items, reports, data, answer sheets, and related materials including administration instruction manuals and directions provided to the Test Center by ETS in print, electronic, or other format.
- 1.18 "Test Taker(s)" shall mean the individual(s) sitting for a HiSET test at the Test Center. Other titles for the Test Taker may be examinee or candidate.
- 1.19 "Test Taker Data" shall mean any and all information obtained/accessed by, or disclosed to the Test Center about the Test Taker, including (i) information regarding a Test Taker's name, addresses, or other personally identifiable information (e.g., passport or social security numbers); (ii) any list or grouping of Test Takers, regardless of whether such list also includes publicly available information; and (iii) test scores.

2. Grant of Rights; Restrictions on Use.

ETS hereby grants to Test Center a nonexclusive, nontransferable, limited right to use the Test Materials made available to it by ETS in PBT and/or CBT formats, solely for the administration and delivery of the Test to Test Takers in the state. Test Center is granted the right to provide access to the Test Materials to Test Administrators for the sole purpose of administering the Test. Except as otherwise expressly set forth in this Section 2, Test Center shall not copy, reproduce, share, distribute, disclose, or create derivative works from any of the Test Materials provided to the Test Center under this Agreement, or otherwise provide access to, or use of such Test

Materials to any third party for any purpose. Test Center acknowledges that except for the right to use the Test Materials in accordance with the terms of this Agreement, no proprietary rights in or to the Test Materials is granted to the Test Center under this Agreement. Test Center acknowledges that access to the Test Materials is granted for a limited time period, which shall end immediately after the Test Taker's scheduled testing period, at which time all used answer sheets must be immediately shipped to ETS in New Jersey using the pre-printed shipping materials and pre-paid return labels. Test Center has one full year to utilize the test booklets/forms for that year. Test Center must return all used and unused test booklets to ETS at the conclusion of the testing year. All Test Materials provided under this Agreement are owned and copyrighted by ETS. Test Center will adhere to all security guidelines provided in Section 9, and all obligations regarding the receipt, monitoring and return of Test Materials as specified in Section 4 and in the *HiSET® Program Manual* https://hiset.eis.org/s/pdf/program_manual.pdf.

3. Test Center Obligations.

- 3.1 Test Center warrants and represents that it has been approved by the State to administer and deliver the Test and will:
- a. Meet or exceed the State's minimum qualifications for a state-approved test center;
 - b. Meet ETS's qualifications for offering computer-based testing (if the site is offering computer-based testing);
 - c. Have access to the ETS HiSET web-based portal to view scheduled Test Takers;
 - d. Store and administer the ETS-owned and proprietary paper-based Test in a secure testing environment;
 - e. Administer paper and/or computer-based testing, as appropriate, and notify the State regarding the testing format;
 - f. Provide special testing accommodations as instructed by ETS;
 - g. Follow the ETS guidelines for uniform test administrations;
 - h. Maintain the State's test admission policies by reviewing and validating Test Takers' documentation in accordance with the State's required admission guidelines;
 - i. Using the pre-printed, pre-paid mailing labels provided by ETS, return completed answer sheets to ETS within 24 hours of a Test Taker completing a Test;

- j. Immediately report to ETS any incidents which may result in a compromise of Test Materials;
- k. Return all Returnable Test Materials to ETS;
- l. Ensure appropriate test center staff attend training provided by ETS and complete the HiSET e-learning administrator training as required by state policy;
- m. Test booklets can be used unlimited times, as long as they do not contain any answers and/or stray marks. It is the obligation of the Test Center to review test booklets before and after administration of the Test to determine their usability; and
- n. Permit third party, independent audits of Test Center.

4. ETS Obligations.

- 4.1 Under the terms of this Agreement, ETS will:
- a. Schedule and provide training for Test Administrators;
 - b. Provide access to the ETS HiSET web-based portal with Test Takers' scheduling information by Test Center and date;
 - c. Ship secure paper-based Test Materials to the Test Center;
 - d. Provide computer-based testing as appropriate;
 - e. Provide pre-printed, pre-paid return mailing labels for the secure return of used paper answer sheets and other Returnable Test Materials; and
 - f. Arrange intermittent Test Center audits.

5. Limitation of Liability.

ETS WILL NOT BE LIABLE TO THE TEST CENTER OR TO ANY TEST TAKER FOR ANY DAMAGES ARISING OUT OF THE TEST CENTER'S ACCESS TO OR INABILITY TO ACCESS OR USE THE TEST MATERIALS LICENSED HEREIN, INCLUDING DIRECT, INDIRECT, SPECIAL, CONSEQUENTIAL, INCIDENTAL OR PUNITIVE DAMAGES, AND WITHOUT LIMITATION DAMAGES FOR LOST PROFITS, LOSS OF PRIVACY, SECURITY OF DATA, FAILURE TO MEET ANY DUTY (INCLUDING BUT NOT LIMITED TO NEGLIGENCE OR LACK OF PROFESSIONAL EFFORT), OR FOR ANY OTHER INDIRECT DAMAGES WHATSOEVER, THAT ARISE OUT OF OR ARE RELATED TO THE ETS PROPRIETARY MATERIALS, THE ETS-OWNED TECHNOLOGIES, OR THE TEST ADMINISTRATIONS, EVEN IF ETS (OR AN AFFILIATE, SERVICE

PROVIDER, OR AGENT) HAS BEEN ADVISED OF THE POSSIBILITY OF SUCH DAMAGES AND EVEN IN THE EVENT OF FAULT, TORT (INCLUDING NEGLIGENCE), OR STRICT OR PRODUCT LIABILITY OR MISREPRESENTATION. ETS IS NOT RESPONSIBLE FOR PHYSICAL INJURY OR PROPERTY DAMAGE SUFFERED BY OR CAUSED BY A TEST TAKER SITTING FOR THE TEST. ETS DOES NOT WARRANT THAT THE TEST OR ANY TEST MATERIALS WILL BE UNINTERRUPTED OR ERROR FREE AT THE TEST CENTER.

6. Compensation and Payment.

ETS shall collect fees from each Test Taker in accordance with the fee schedule and conditions set forth in the Memorandum of Understanding between ETS and the State. The Test Center may charge a state-approved fee to each Test Taker for the use of the Test Center facilities and for the administration of the Test (the "Approved Fee"). If agreed to by ETS and the Test Center, ETS will collect the Approved Fee on behalf of the Test Center. The Approved Fee shall be inclusive of all costs or charges that the Test Center may incur or for which it may be liable. ETS will remit Approved Fees to the Test Center 30 days after the end of a reporting period (monthly or quarterly as the State may determine and require (such aggregate amounts referred to as ("Settlement Amounts"). Advertising and requesting payment of the Approved Fee shall be the responsibility of the Test Center. ETS shall not collect any state or local sales, use or similar tax (collectively, the "Sales Tax"). It shall be the sole responsibility of the Test Center to remit any applicable Sales Tax to the appropriate state or local taxing authority. If any State or local taxing authority assesses ETS tax, penalty or interest for uncollected or unremitted Sales Tax, the Test Center shall indemnify ETS for the full amount of such assessment. In the event that ETS has any outstanding credits with the Test Center, ETS will apply credits issued on account to the original invoice to which the credit applies. If the original invoice does not have a balance, the credit will be applied to the oldest invoice open on account first, then to the remaining open invoices needed to use the credit in full.

7. Test Taker Registration; Order; Delivery; Return of Materials.

7.1 Test takers shall register and schedule testing using the ETS HiSET portal. The Test Taker will select the State-approved Test Center at which he/she wishes to take the Test:

- 7.2 ETS shall provide the Test Center access to the HiSET registration and scheduling website so authorized personnel can see relevant information such as Test Takers' schedules at their selected Test Center(s), form assignments, approved accommodations, and transcripts.
- 7.3 Test Takers shall be admitted to the Test Center and shall be approved by Test Center staff for testing provided the candidate meets all of the State's eligibility requirements, including the candidate's provision of appropriate documentation and certification.
- 7.4 The Test Center may order Test Materials effective each November 1 (of the year prior to the year in which the Test will be used).
- 7.5 The Test Center shall return all Returnable Test Materials to ETS. Used paper answer sheets must be returned to ETS using the pre-printed, pre-paid return label provided by ETS within 24 hours of a candidate completing testing.
- 7.6 The Test Center shall comply with all ETS and state-mandated security and test administration instructions (or test instructions for a secure test administration).

8. Term and Termination.

- 8.1 Term. This Agreement shall be effective from July 1, 2019, and continue through and coincide with the term of ETS's HiSET agreement with the State, including through the State's options for renewal terms (the "Term"). Should ETS and the State end their agreement at any time, this MOU shall automatically end.
- 8.2 Termination for Cause. This Agreement may be terminated by ETS: (i) in the event of a breach of any material provision of this Agreement by the Test Center that is not cured within thirty (30) days after written notice by ETS; (ii) immediately upon written notice to the Test Center if the Test Center fails to perform any of its obligations hereunder.
- 8.3 Security Violations; Intellectual Property Misappropriation. This Agreement may be immediately suspended or terminated by ETS upon written notice to the Test Center, if (i) ETS has reason to believe that the Test Center has breached its security obligations with respect to the Test and the administration of the Test under this Agreement; (ii) ETS has reason to believe that the Test Center has misappropriated any Intellectual Property Rights of ETS; or (iii) any provision of this Agreement is deemed by a court of competent jurisdiction to be invalid or unenforceable.

8.4 Effect of Termination. Upon termination of this Agreement, the Test Center shall immediately: (i) cease to display or use any ETS Proprietary Materials, or any signs, labels, logos, trademarks, copyrighted materials, or other indications identifying the Test Center in connection with ETS or the Test; (ii) cease all use of the Test Materials; and (iii) return to ETS all Test Materials and all other materials related to the administration of the Test, including without limitation, advertising, promotional and instructional materials, and all ETS Confidential Information. Termination of this Agreement shall not constitute a waiver of any rights that either Party may have for any breach by the other Party prior to the termination date. All obligations to perform under this Agreement shall continue in effect and be duly observed and complied with by both Parties until the effective date of termination of the Agreement.

9. Test Security and Verification.

The Test Center agrees that it will return all used and unused test booklets and other designated Test Materials marked as "SECURE" to ETS at the conclusion of each testing year. Used paper-based answer sheets will be returned to ETS within 24 hours of a Test Taker's completion of the Test. The Test Center agrees to abide by all ETS security measures that are part of the HiSET Program, including control of electronic devices such as cameras and smart phones. All Test Materials must be handled in strict accordance with the instructions in the HiSET[®] Program Manual and the statements in the *HiSET Agreement*. The Test Center warrants that every person at the Test Center who has access to the Test Materials shall maintain the security and confidentiality of the Test Materials. The Test Center further acknowledges and agrees that it will not copy or reproduce Test Materials.

10. Compliance with Laws.

The Test Center agrees that, throughout the Term of this Agreement, it will abide by all applicable district, local, state, Federal, and/or community laws, including without limitation laws applicable to Test Takers with disabilities, and will obtain and maintain in effect any and all necessary authorizations, licenses, and permits for the provision of services hereunder.

11. Confidentiality.

- 11.1 All financial, statistical, personal, technical, and other data developed or used by the Parties in carrying out the services under this Agreement will be protected from unauthorized use and disclosure. The Parties agree to protect each other's Confidential Information using the same degree of care, but no less than a reasonable degree of care, that it would when protecting its own Confidential Information of a like nature.
- 11.2 The Test Center agrees to protect the privacy of the confidential personally identifiable information contained in the Test Taker Data such as, but not limited to, names, addresses, telephone numbers, dates of birth, test scores, and any other information provided by the Test Takers in strictest confidence, in accordance with the requirements of the Family Educational Rights and Privacy Act (FERPA) (20 U.S.C. § 1232g; 34 CFR Part 99), the Federal law that protects the privacy of student education records.

12. Ownership.

- 12.1 The Test Center understands and acknowledges that ETS retains ownership of all right, title and interest in and to the ETS Proprietary Materials and the ETS-owned Technologies, including all associated Intellectual Property Rights therein. Except for the right to use the Test Materials in accordance with the terms of this Agreement, no proprietary rights in or to the Test Materials are granted to the Test Center under this Agreement. The Test Center acknowledges that access to the Test Materials is granted for a limited time ending five (5) days after the close of the Test Center's designated test date, at which time all materials must be returned to ETS, Ewing NJ. All Test Materials provided under this Agreement are owned and copyrighted by ETS. The Test Center will adhere to all security guidelines provided in Section 9 herein.
- 12.2 The Test Center understands and acknowledges that the State retains ownership of all right, title and interest in and to the Test Taker Data.

12.No Modifications.

The Test Center acknowledges and agrees that it will not change or modify the ETS Proprietary Materials in any way.

13. ETS Trademarks.

The Test Center acknowledges and agrees that ETS, EDUCATIONAL TESTING SERVICE, and the ETS logo are trademarks and/or service marks of ETS. The Test Center agrees not to use, reproduce, copy or create materials for promotional purposes or to register and use any Internet Domain Name bearing the ETS name, trademarks or service marks, or the marks of ETS clients or service providers, whether such marks or names now exist or may exist during the Term of this Agreement, without the prior written approval and review of such materials by the Office of the General Counsel of ETS. Notwithstanding anything to the contrary in this Agreement, no trademark license is hereby granted to the Test Center.

14. Infringement.

The Test Center will exercise reasonable diligence to discover infringements of the ETS-owned Technologies and/or ETS Proprietary Materials, and any associated Intellectual Property Rights therein. The Test Center will promptly notify ETS of any infringement of ETS's intellectual property rights of which it becomes aware; and in the event ETS decides that a proceeding should be brought relative to such infringement, the Test Center will cooperate fully with ETS to prosecute such action. ETS will fully control prosecution of such infringements and will assume the related cost. If a third party asserts a claim against the Test Center that the use by Test Center of the ETS-owned Technologies and/or ETS Proprietary Materials infringes on such third party's intellectual property rights, the Test Center will immediately notify ETS of such claim and ETS will have the right (but not the obligation) to control any litigation or negotiation arising as a result of such claim.

15. Insurance.

The Test Center is responsible for any and all liability arising, directly or indirectly, as a result of the operations conducted at the Test Center.

16. Governing Law.

These terms and conditions shall be governed by the laws of the State, without regard to its conflict of laws and principles. The Parties agree and

hereby submit to the exclusive personal jurisdiction and venue of the state and federal courts in the state for the resolution of any disputes arising from these terms and conditions.

17. Injunctive Relief.

The Test Center understands and agrees that its breach (or threatened breach) of any of the intellectual property rights of ETS and/or the Test Center's confidentiality obligations under this Agreement would cause irreparable harm to ETS for which monetary damages, even if awarded, would not constitute adequate compensation. Accordingly, the Test Center agrees that, notwithstanding anything to the contrary in this Agreement, ETS and/or its' client, the State, is entitled to equitable relief by way of temporary and permanent injunctions, without bond to the fullest extent allowed by law, and such other and further relief as any court of competent jurisdiction may deem just and proper.

18. Independent Contractors:

ETS and the Test Center are, at all times throughout the term and/or renewal term hereof, independent contractors and nothing herein will be construed as creating any other kind of relationship whatsoever between the Parties. Further, Test Administrators who administer the Test are not employees of ETS.

19. Notice.

Any notice given pursuant to this Agreement will be in writing and sent by fax (with transmission confirmation), e-mail with receipt confirmation, and/or overnight courier (with delivery confirmation), and will be deemed duly given on the first business day of receipt, as evidenced by such fax transmission or courier delivery confirmation.

20. Force Majeure.

Any delay or failure of performance by either Party pursuant to this Agreement shall not be considered a breach of this Agreement if and to the extent caused by an event of Force Majeure, including without limitation fire, flood, earthquake, tsunami, or other natural disaster, any regulation or law of any applicable governmental authority, terrorist act, act of war, civil

commotion, labor disturbance, epidemic, sabotage, or failure of the public utilities or international carriers. A Party experiencing an event of Force Majeure shall, as promptly as reasonable under the circumstances, notify the other Party of the occurrence of said event and make every commercially reasonable effort to find a work-around solution.

21. Entire Agreement.

This Agreement (as defined herein) constitutes the entire understanding and agreement between the Parties as to the subject matter hereof and supersedes any prior terms and conditions, agreements, and understandings, whether oral or written. Any modification or amendment of any provisions of this Agreement shall not be binding on either Party unless in writing and signed by the authorized representatives of both Parties.

IN WITNESS WHEREOF, the parties hereby intending to be legally bound have caused this Agreement to be executed by their duly authorized representatives.

EDUCATIONAL TESTING SERVICE

OAKLAND ADULT AND CAREER EDUCATION

BY: *Anne J. Rockey*
(SIGNATURE)

BY: *Aimee Eng*
(SIGNATURE)

11/14/19

Aimee Eng
President, Board of Education

NAME: ANNE ROCKEY

NAME: *Kyla Johnson-Trammell*

11/14/19

Kyla Johnson-Trammell
Secretary, Board of Education

TITLE: VICE PRESIDENT OF OPERATIONS

TITLE: _____

DATE: 10/7/19

DATE: _____

OAKLAND UNIFIED SCHOOL DISTRICT
Office of the General Counsel
APPROVED FOR FORM & SUBSTANCE
By: *Andrea Epps*
Andrea Epps, Attorney at Law

9.17.19

State Authorization:

(Signature)

Name:

(Printed)

Date: