


DATE: September 28, 2017

TYPE OF AGENDA ITEM: **ACTION ITEM**

TO: Stanley Rose III, Ed.D., Superintendent

FROM: Kathie Kanavel, Assistant Superintendent

PREPARED BY: Brenda Carrillo, Ed.D., Director, Educational Options 

SUBJECT: Contract for HiSet Testing at Santa Clara Adult Education

ADMINISTRATIVE SUMMARY:

Santa Clara Adult Education (SCAE) prepares adult students to take the HiSet Test, one of 3 high school equivalency tests recognized in California (the other tests are the TASC and the GED). Approximately 30 students take the HiSet Test every year.

Prior to June, 2017, SCAE students were able to take the official HiSet Test on the adult school campus through a satellite arrangement with the Santa Clara County Office of Education (SCCOE). SCCOE was authorized to provide the official HiSet Test. SCAE staff prefer the HiSet for students because, unlike the GED, it can still be offered as a paper and pencil test.

As of July 1, 2017, SCCOE has closed their HiSet Testing office, so their staff are no longer able to provide the tests at SCAE. In order to continue providing the HiSet Test for SCAE students, staff are now preparing the application paperwork in order to become our own authorized HiSet Testing site, as opposed to a satellite of another agency. The California Department of Education has approved SCAE's request to become a testing site; the next step in the process is the approval of the HiSet Testing contract.

RECOMMENDATION:

Approve the contract with Educational Testing Services (ETS) to provide HiSet Testing on the Santa Clara Adult Education campus.

FISCAL IMPACT:

This proposal is cost neutral with the potential to generate income for SCAE in the future.

Each student will pay \$40 per test subject (there are 5 test subjects: math, reading, writing, social studies and science). SCAE will receive \$10 per student per test of the \$40 fee. SCAE staff estimate that a total of 30 SCAE students will take and pass at least 5 tests per year generating a total of \$1500.

In addition, each SCAE student that receives the HiSet (passes the 5 tests) will generate approximately \$150 in reimbursement dollars for SCAE through Workforce Investment and Opportunity Act (WIOA) funding. Thirty students at \$150 per student is a total of \$4500. The total of the estimated fees and the WIOA income will cover the expense of the test examiner; the test examiner's time is expected to be \$5,000 per year.

Offering the HiSet test in the pencil and paper form also has the potential to generate income for SCAE. SCAE will be the only site in the area offering the HiSet in this format. Morgan Hill Adult School is the only other site in the area that offers the HiSet in the pencil and paper form. All of the other closer adult schools only offer the computerized version of the HiSet, which can be frustrating for students who are not comfortable with computers. Staff in those adult schools have already indicated that they will refer some of their students to SCAE to take the paper/pencil version, which would generate additional funds for the school.

**HISET AGREEMENT BETWEEN
SANTA CLARA ADULT EDUCATION
AND
EDUCATIONAL TESTING SERVICE
ETS COLLECTS FEES**

THIS HISET AGREEMENT (“Test Agreement”), effective as of _____, is by and between Educational Testing Service (“ETS”) (as defined below) and Santa Clara Adult 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 California State Board of Education 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) for California Test Takers; 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 these terms and conditions and any and all other written instructions, specifications, standards, terms and conditions posted on ETS’s designated website, provided on paper or online to the Test Center, and/or agreed to between the Parties in writing, all of which are incorporated herein by reference and made an integral part hereof.
- 1.2 “**CBT**” is an acronym for computer-based testing or the delivery of a HiSET test via the Internet.
- 1.3 “**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.
- 1.4 “**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.
- 1.5 “**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.
- 1.6 “**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.
- 1.7 “**HiSET®**” is the brand name for the ETS High School Equivalency Testing program owned by ETS.
- 1.8 “**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.
- 1.9 “PBT” is an acronym for paper-based testing or the delivery of a HiSET test via paper format.
- 1.10 “Returnable Test Materials” shall mean the paper version of all used and unused test booklets and answer sheets for the HiSET.
- 1.11 “Sales Tax” shall mean State and local sales, use or similar tax.
- 1.12 “Term” shall have the meaning specified in Section 8.1 hereof.
- 1.13 “Test(s)” shall mean the ETS-owned and copyrighted HiSET, developed and provided by ETS in paper and/or electronic format for use in the high school equivalency testing program in the State.
- 1.14 “Test Administrator” shall mean any staff member responsible for administering the Test at the Test Center.
- 1.15 “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.
- 1.16 “Test Taker(s)” shall mean the individual(s) sitting for a HiSET at the Test Center. Other titles for the Test Taker may be examinee or candidate.
- 1.17 “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 Guide*.

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:
- Meet or exceed the State’s minimum qualifications for a state-approved test center;
 - Meet ETS’s qualifications for offering computer-based testing (if the site is offering computer-based testing);
 - Have access to the ETS HiSET web-based portal to schedule and view Test Takers;
 - 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. Ship 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 intermittent Test Center audits by third party auditors.
- o. Pay HiSET invoice by payment due date.

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 information needed by Test Centers;
- 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 for third party 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.

- 6.1 As full and complete compensation for the services provided under this MOU, the Test Center will compensate ETS based on the number of tests scored at ETS on a monthly basis. ETS will invoice the Test Center in accordance with Exhibit 1 attached. Payment terms are net 30 days. ETS is not responsible for the payment of any State or local taxes that may be incurred

through the collection of Test Center or State fees. If such taxes are levied against ETS, the Test Center or the Test Center is responsible for payment.

- 6.2 The Test Center may collect or charge separate operational fees for the use of their facilities. These fees are not payable to or by ETS, and shall be incurred by the Test Center or the individual Test Takers. Advertising and establishing fees or expenses associated with the use of the Test Center's testing facilities are the responsibility of the Test Center and/or the Test Center. Test Center personnel who administer the Test are not employees of ETS.

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

- 7.1 Test Centers or other State-approved programs 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 [REDACTED] 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 Guide* and the statements in the *HiSET Agreement and Affidavit*. 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 Inbound Processing Center, 200 Ludlow Drive, Ewing, NJ 08638. 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

SANTA CLARA ADULT EDUCATION

By: _____
(signature)

By: _____
(signature)

Name: ANNE ROCKEY

Name: Stanley Rose

Title: VP of Operations

Title: Superintendent

Date: _____

Date: _____

Attached
Exhibit 1 – The California HiSET Fee Schedule

Exhibit 1
The California HiSET Fee Schedule TCA Model

In accordance with Paragraph 6.0 Compensation and Payment, ETS will collect payment from Test Centers as follows:

Description	Unit of Measure	Fee
As of August 1, 2016		
Paper-based subtest	Each	\$10.00 per test taker
Computer-based subtest	Each	\$10.00 per test taker
Retest Policy*		
In the year of 1 st test attempt of each subtest	Up to two additional attempts included in subtest fee	No additional cost*
Practice Tests		
Paper-based practice test	Each	\$10.00 per sub-test
California State Testing Fee: \$20.00 per Test Taker		

* The retest attempts must be completed within 12 months from the date of test purchase.

Practice Tests

Additional provisions regarding practice tests follow:

- ETS offers practice tests in all five subject areas (Subtests) at no additional charge as a downloadable PDF on the informational website.
- ETS also offers practice tests in each of the five subject areas (Subtests) which is available for purchase on the informational website.
- ETS will work with Test Center to enable them to be of assistance to Test Takers who are not able to download practice tests independently.

General Policies and Procedures

Collection and payment of Testing Fees will be guided by the following policies:

- ETS will not accept mail-in applications for scheduling.
- ETS will provide a Computer-based, online registration system for Test Taker registration.
- ETS will not collect individual fees that are payable to the Test Center for operational purposes.
- ETS will invoice the Test Center on a monthly basis for tests scored. Payment terms are net 30 days.

General Payment and refund policies are as follows:

- a) All fees are paid in U.S. dollars.
- b) Taxes must be included where acceptable.
- c) Refunds will be made in U.S. dollars.
- d) Services may be withheld for non-payment of fees.
- e) ETS reserves the right to add or remove criteria regarding online payment methods at its own discretion and without notice.