

MEMORANDUM OF UNDERSTANDING  
BETWEEN  
EDUCATIONAL TESTING SERVICE  
AND  
MT. DIABLO ADULT EDUCATION/MT. DIABLO USD

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This Memorandum of Understanding (MOU) is between Educational Testing Service (ETS), a non-stock, non-profit corporation organized and existing under the Education Law of New York with principal offices located at Rosedale Road, Princeton, New Jersey 08541, and Mt. Diablo Adult Education/Mt. Diablo USD, located at Mt. Diablo Adult Education, Loma Vista Adult Center, 1266 San Carlos Avenue, Concord, California 94518-1199, together known as the Parties. This MOU establishes the understandings of the Parties as related to the services provided by ETS in support of the California High School Equivalency Certification Program.

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 one of the providers of the HiSET™ High School Equivalency Test for California Test Takers; and

WHEREAS, the California Department of Education recommended and approved Test Center to administer the ETS-owned HiSET assessments; and

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

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

1. Definitions.

- 1.1 “**Administration**” shall mean the Test Center’s responsibilities related to the administration of the ETS-owned HiSET to Test Takers in California.
- 1.2 “**Alternate Test Forms**” shall mean the HiSET forms in alternative formats such as Braille, large print, or audio.
- 1.3 “**Agreement**” shall mean the terms and conditions agreed to between the Parties in writing, all of which are incorporated herein by reference and made an integral part hereof.
- 1.4 “**CBT**” is an acronym for computer-based testing or the delivery of a HiSET via the Internet.
- 1.5 “**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.
- 1.6 “**ETS**” is a trade name for Educational Testing Service, a non-profit, non-stock research and testing organization that is providing HiSET, the high school equivalency testing program.
- 1.7 “**ETS-owned Technologies**” shall mean ETS’s pre-existing hardware and software systems used to deliver HiSET test materials to the Test Center and/or record test taker responses, including but not limited to the ETS portal for registering HiSET Test Takers and for delivering final score reports.
- 1.8 “**ETS Proprietary Materials**” shall mean all HiSET test materials, including but not limited to, test books, 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 for the high school equivalency program provided by ETS to the Test Center for the delivery and/or administration of the HiSET.
- 1.9 “**ETS Trademarks**” shall mean the trademarks and/or service marks of ETS, including without limitation ETS®, HiSET® and the modernized ETS logo.
- 1.10 “**Equipment**” shall mean any equipment necessary for the administration of the HiSET tests at the Test Center, including but not limited to an appropriate testing room, accommodations, desks, lighting, pens/pencils, etc. Such Equipment shall be dedicated solely to the administration of the HiSET test for the duration of the HiSET test.
- 1.11 “**HiSET®**” is the brand name for the ETS High School Equivalency Testing program owned and licensed for use by ETS.
- 1.12 “**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, divisional, reexaminations, reissues, continuations-in-part, and foreign equivalents of the foregoing, in the United States, or any other country.
- 1.13 “**PBT**” is an acronym for paper-based testing or the delivery of a HiSET test via paper format.
- 1.14 “**Returnable Test Materials**” shall mean the paper version of all used and unused test booklets and answer sheets for the HiSET test.
- 1.15 “**Subtests**” shall mean the content area (or subject area) tests that constitute the full HiSET battery of assessments.
- 1.16 “**Term**” shall have the meaning specified in Section 2.1 hereof.

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- 1.17 “**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.
- 1.18 “**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.
- 1.19 “**Test Center**” shall mean facilities selected and approved by the California Department of Education to deliver the HiSET tests in CBT and/or PBT formats to pre-registered Test Takers.
- 1.20 “**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.
- 1.21 “**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.
- 1.22 “**Testing Fees**” shall have the meaning specified in Section 6.1 hereof.

2. Term and Termination of Agreement.

2.1 This Memorandum of Understanding shall be effective from **XXXX**, 2014 through December 31, 2016 (the “**Term**”), with the option for negotiated renewals every year thereafter. The policies and procedures for the newly-introduced HiSET program are in development and changes to such policies and procedures during their development will not impact the prices specified in this MOU.

2.2 This MOU may be terminated as follows:

- (a) In the event of a material breach by either Party that is not cured within 30 days after written notice by the non-breaching party; and
- (b) For convenience, upon 120 days prior written notice, provided that in the event of such termination the Parties agree to complete all services that are in progress pursuant to the terms and conditions set forth in this MOU.

3. ETS Responsibilities.

3.1 Under the terms of this MOU, ETS is responsible for:

- a. Providing the ETS-owned Test (in PBT and CBT formats, including Alternate Test Forms) as one of the high school equivalency tests approved by CDE for California residents seeking an equivalency high school diploma;
- b. Delivering the Test to the approved Test Center in PBT and CBT formats for testing purposes;
- c. Scheduling and providing training for appropriate staff and approved test administrators;

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- d. Providing access to the ETS web-based portal for Test Takers and the pre-approved Test Center with appropriate user identification and password permissions;
- e. Providing access via an ETS-managed, web-based portal for Test Takers registering for PBT or CBT assessments (based on individual Test Taker choice)
- f. Retaining Test Taker Data online on the web-based site;
- g. Invoicing the Test Center on a monthly basis for the number of tests completed based on the pricing schedule provided in Exhibit 1, attached hereto and hereby made part of this MOU;
- h. Shipping secure PBT Test Materials to the Test Center;
- i. Reviewing and approving or denying requests for accommodations from Test Takers with disabilities, and confirming the details (including test date and location) and accommodation requirements with the Test Taker based on your approval;
- j. Providing Alternate Test Form(s) (including Braille, large print, audio versions) and/or additional testing time, and communicating approved accommodations for Test Takers with disabilities to the Test Center;
- k. Providing pre-paid return mailing labels and envelopes to the Test Center for the secure return to ETS of Returnable Test Materials;
- l. Notifying CDE of any incident occurring at the Test Center within 3 business days of ETS becoming aware of the incident;
- m. Pending receipt of a properly submitted answer sheet at ETS for PBT and receipt of electronic answers for CBT, providing results of multiple choice test scoring within 3 to 5 business days, with constructed response results within 5 to 10 business days;
- n. Posting final score report data online for Test Taker and Test Center access;
- o. Collecting the required California \$20.00 per test taker fee and remitting to the State in conformance with California regulations; and
- p. Conducting Test Center compliance audits.

3.2 ETS will not be responsible for:

- a. Paying or subsidizing the Test Center for the use of facilities and personnel;
- b. Hiring or managing Test Center personnel or compensating them in any way;
- c. Printing or mailing individual score reports directly to Test Takers;
- d. Any actions taken by Test Center personnel or occurring at the Test Center;
- e. Any delays, accidents, incidents, any actions by Test Takers or other unforeseen circumstances occurring at the Test Center;
- f. Any security breaches, directly or indirectly caused by Test Takers or Test Center personnel and/or by the failure of equipment at the Test Center; and
- g. Collecting or paying for any operational costs that may be imposed for use of the Test Center facilities.

4. The Mt. Diablo Adult Education/Mt. Diablo USD Responsibilities.

4.1 Under the terms of this MOU, the Test Center is responsible for:

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- a. Establishing policies for the admission of Test Takers at the Test Center in conformance with applicable ETS and State policies;
- b. Hiring, training, and paying all salaries or fees associated with Test Center personnel;
- c. Establishing testing guidelines and policies, including ADA compliance policies and procedures, and conducting Test Center compliance audits in accordance with State requirements;
- d. Enforcing ETS's guidelines for secure test administrations;
- e. Notifying ETS of a Test Center incident, security breach, Equipment failure, or other related incident impacting testing within 24 hours of its occurrence;
- f. Notifying ETS of a Test Center closing; and
- g. Within 30 days of the receipt of the monthly ETS invoice, paying ETS in accordance with Exhibit 1.
- h. Participating and cooperating with ETS when ETS conducts 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 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 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 HISET ASSESSMENT. ETS DOES NOT WARRANT THAT THE HISET 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 Retest Policy.

Test Takers who register for all five Subtests in one purchase will be permitted to take the full battery Test again at no additional cost up to two times in a 12 month period beginning on the date of the original battery purchase. After the 12 month expiration, a \$15 subtest fee will apply, if a Test Taker is taking individual Subtests. Test Takers have the option to purchase a new test battery after expiration of the original battery period.

8. Intellectual Property.

- 8.1 ETS shall own all right, title and interest in and to the ETS Proprietary Materials and the ETS-owned Technologies, including all Intellectual Property Rights therein.
- 8.2 The California Department of Education shall own all right, title and interest in and to the Test Taker Data.
- 8.3 Except as permitted in section 10.1 of this MOU, neither Party may use the other Party's trade name, trademark, service mark, logo or other designations for promotional or marketing activities without the express written permission of the other Party. However, the Parties may list each other as clients or vendors respectively.

9. Confidentiality.

- 9.1 The Parties agree to keep Confidential Information, including but not limited to performance, financial, contractual and technical information which may be exchanged during the Term of this MOU, in confidence at least to the extent it uses to protect its own confidential information. Such Confidential Information shall not be disclosed to any third party without the prior written approval of the Party whose Confidential Information may be disclosed. Restrictions as to the disclosure and use of Confidential Information shall continue for five years beyond the expiration date of this MOU.
- 9.2 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

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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.

10. ETS Trademarks.

10.1 Notwithstanding the limitations set forth in Section 8.2 of this MOU, ETS grants to the Test Center a limited, non-exclusive, non-transferable, revocable license to use the ETS Trademarks in order to fulfill its responsibilities to the Mt. Diablo Adult Education/Mt. Diablo USD in this MOU, and to reproduce or create promotional materials and signage to inform the public about the Test and the locations of Test Center, provided that (i) the Test Center shall comply with all ETS standards for quality in delivering and administering the Test, (ii) the Test Center shall comply with all trademark and branding guidelines developed for use of the ETS Trademarks, and (iii) the Test Center shall submit all promotional materials for review and prior approval by the Office of the General Counsel of ETS before production and distribution of such promotional materials. The Test Center shall submit such promotional materials for review and approval by email to [mshpherd@ets.org](mailto:mshpherd@ets.org), or by mail or fax to: Mary Shepherd, Senior Trademark Administrator, Office of the General Counsel – TDI Group, 660 Rosedale Rd, MS 05-C, Princeton, NJ 08541; Fax: +1 (609) 734-1700.

10.2 Except for ETS-approved promotional materials and/or signage provided to authorized Test Center by ETS the Test Center, the Test Center acknowledges and agrees that (i) its Test Center are not authorized 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 or its 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, and (ii) that the Test Center will assist ETS in taking corrective action in the event ETS identifies a violation of ETS's trademark rights by any Test Center. Notwithstanding anything to the contrary in this Agreement, no trademark license is hereby granted to any Test Center.

11. Rights upon Expiration or Termination.

Upon expiration or termination of this MOU, the Test Center shall return to ETS all ETS Confidential Information in its control and/or possession, or destroy the Confidential Information and provide ETS with a confirmation signed by a duly authorized officer or representative of the Test Center.

12. Force Majeure.

Neither Party shall be liable to the other for delays in performance caused by fires, floods, civil riots, strikes, labor controversies, acts of God, acts of war, acts of terrorism,

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governmental restrictions, or inability to obtain transportation or transmission facilities or other circumstances similar or dissimilar which are beyond the control of the Parties. In the event of any delay in performance due to any such event, the Parties shall promptly notify each other and give a date for completion of services as reasonably extended to overcome the effects of such cause.

13. Governing Law.

The terms and conditions of this MOU shall be governed by the laws of California, without regard to its conflict of laws and principles. The Parties agree and hereby submit to the exclusive personal jurisdiction and venue of Test Center and federal courts in California for the resolution of any disputes arising from this MOU's terms and conditions.

14. Entire Agreement.

This MOU 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.

This MOU has been entered into by the Parties by signature of each Party's respective duly authorized representative.

EDUCATIONAL TESTING SERVICE

MT. DIABLO ADULT  
EDUCATION/MT. DIABLO USD

By: \_\_\_\_\_

By: \_\_\_\_\_

Name: Diane Bailey

Name: \_\_\_\_\_

Title: VP Production & Logistics

Title: \_\_\_\_\_

Date: \_\_\_\_\_

Date: \_\_\_\_\_

Attached  
Exhibit 1 – The California HiSET Fee Schedule



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Exhibit 1  
The California HiSET Fee Schedule

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

<b>Description</b>	<b>Unit of Measure</b>	<b>Fee</b>
Paper-based full test battery*	Each	\$50.00 per test taker
Computer-based full test battery*	Each	\$50.00 per test taker
Paper-based sub-test*	Each	\$15.00 per test taker
Computer-based sub-test* (including Alternate Test Forms at no additional fee)	Each	\$15.00 per test taker
<b>California State Testing Fee: \$20.00 per Test Taker</b>		
<b>Retest Policy</b>		
In the year of 1 <sup>st</sup> test attempt	Up to two additional attempts included in full test battery fee	No additional cost*
	Sub-test fee	\$15.00 per test taker per sub-test
<b>Practice Tests</b>		
Paper-based practice test	Each	\$7.50 per sub-test
Computer-based practice test	Each	Purchased directly from Aztec Software, not ETS

\*The retest attempts must be completed within 12 months from the date of test battery purchase. The retest fee waiver is only applicable to Test Takers purchasing the full battery. Individuals purchasing Subtests rather than full battery testing cannot take advantage of the retest fee waiver.

Practice Tests

Additional provisions regarding practice tests follow:

- a) ETS will offer one practice test in all five subject areas (Subtests) at no additional charge as a downloadable PDF on the informational website.
- b) ETS will offer a second practice test in each of the five subject areas (Subtests) which is available for purchase on the informational website.
- c) 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:

- a) ETS will not accept mail-in applications for scheduling.
- b) ETS will provide a Computer-based, online registration system for Test Taker registration.
- c) ETS will not collect individual fees that are payable to the Test Center for operational purposes.
- d) 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.