

STATE OF MICHIGAN
COURT OF APPEALS

KENNY KOZA,

Plaintiff-Appellant,

v

ACT, INC., f/k/a AMERICAN COLLEGE
TESTING, INC.,

Defendant-Appellee.

UNPUBLISHED

December 10, 1999

No. 206007

Oakland Circuit Court

LC No. 97-540172 CK

Before: Collins, P.J., and Jansen and White, JJ.

PER CURIAM.

Plaintiff appeals as of right the circuit court's order compelling arbitration and granting summary disposition in favor of defendant pursuant to MCR 2.116(C)(7). We affirm the circuit court's grant of defendant's motion to compel arbitration, but order that arbitration be held in Michigan, in the metropolitan Detroit area.

I

Plaintiff took the college entrance examination known as the ACT in June 1996, in his junior year of high school.¹ Plaintiff received a composite score of nineteen² on a scale of one to thirty-six and decided to retake the examination in October 1996. Plaintiff enrolled in an ACT tutoring program from July to October 1996 and attended an ACT Math class at Bloomfield Hills Model High School, earning an A- in the class.

At the October 1996 exam students were allowed, for the first time, to use a calculator for the math portion of the test. There were two monitors present at all times in the room in which the testing took place. During the October 1996 exam, plaintiff was seated at the front of the room, directly in front of a person monitoring the test. The other monitor walked between the aisles during the examination. A row of empty desks separated each row of examinees from other examinees.

Plaintiff received a composite score of twenty-four³ out of thirty-six when he retook the exam in October 1996. Plaintiff's overall grade point average for ninth through twelfth grade was 3.2. Plaintiff's

extracurricular activities included being captain of the hockey team, and a member of the debate team, chamber choir, and Japanese Club. Defendant forwarded plaintiff's October test scores to the universities to which plaintiff applied for admission for the fall of 1997. Plaintiff was accepted by the Universities of Maryland, Colorado and Wisconsin, as well as Indiana University. All of those universities required the ACT test or an equivalent test.

In late December 1996, defendant wrote plaintiff that his October test scores had been invalidated. Defendant stated that it reviewed "all unusual score increases," and provided the following reasons for invalidating plaintiff's scores: 1) the increase from the June score was in the top five percent of score increases achieved by examinees who tested previously and who tested again in October, 2) plaintiff's mathematics and science reasoning tests had many responses that were identical to those of an examinee seated near plaintiff who had the same test form, 3) plaintiff's math test responses were not supported by work inside his test booklet, and 4) all but one answer sheet erasure on plaintiff's mathematics test resulted in responses identical to those of the other examinee. Defendant gave plaintiff three options: (1) retake the examination through a private testing session defendant would arrange and, if the results were more than three points lower than the October composite score, the October scores would be cancelled, (2) cancel the October scores and receive the standard five dollar refund, or (3) provide a statement in his own words that could help establish the validity of the October scores. Defendant's letter stated that if the October scores were canceled, defendant would notify the universities to which plaintiff applied of the cancellation but would not inform them of the reason therefor. Plaintiff's complaint alleged that defendant's position that it would not inform the universities of the reason for the score cancellation was no consolation to plaintiff, since cancellation of the scores would result in the universities revoking plaintiff's admission because taking the ACT is a condition precedent to admission of their applicants, and the universities would undoubtedly contact plaintiff upon being notified that his scores were cancelled, and when they learned that the scores were cancelled because defendant accused plaintiff of cheating on the exam, his admission to the universities would be rescinded.

By letter dated January 20, 1997, plaintiff wrote defendant explaining the increase in his scores, thereby choosing the third option.⁴ By letter dated January 31, 1997, defendant responded that plaintiff's statement and documentation were insufficient to establish the validity of the scores, and provided him the first two options provided earlier, as well as a third option of challenging defendant's decision to cancel his scores in binding AAA arbitration, through written submissions only.⁵

By letter dated February 4, 1997, plaintiff wrote defendant that he chose the arbitration option and again explained that he had enrolled in an ACT tutor program from July to October 1996 that was specifically aimed at preparing him for the ACT, that in August and September 1996 he attended an ACT Math class and received an A-, that he was able to use a calculator on the October exam and there was thus no need for him to make long hand calculations in his test booklet, that the exam was monitored at all times, that the students were sitting at least five feet from each other and it was thus impossible to see the next person's exam, that the test was on a scantron form consisting of small circles and was thus not visible to other persons in the testing room, that he and other students were under the

impression that they were each given different versions of the exam, and that his high school academic achievement sufficiently demonstrated his ability to achieve a good score on the ACT.⁶

By letter dated February 12, 1997, defendant wrote to plaintiff:

Thank you for your signed option form. You have chosen to challenge our cancellation decision through binding arbitration under the auspices of the American Arbitration Association (AAA). The AAA is a public service, not-for-profit organization dedicated to promoting the use of arbitration for the resolution of disputes. To initiate the arbitration process, please sign and return the enclosed Arbitration Agreement, in which you agree to abide by the arbitration rules and to be bound by the Arbitration Award.

Our arbitrations are conducted through the submission of written statements to the Dallas office of the AAA. In our written submission, we will present the evidence on which the cancellation decision is based. You should present the evidence that you believe rebuts that decision. You may prepare your statement yourself, or you may ask a parent, friend, or attorney to prepare it for you. You must maintain the confidentiality of our written submissions and return your copy of our submissions after the Arbitration Award has been entered.

We will pay the \$500 AAA administrative fee. However, you must pay any other associated costs you may incur. If, after signing the enclosed Arbitration Agreement, you do not send the AAA a written submission, we will ask you to reimburse us for the \$500 fee. If the arbitrator finds your case to be frivolous, you may also be required to pay other costs.

Please read and sign the enclosed Arbitration Agreement, indicating that you agree to abide by the AAA rules and to be bound by the Arbitration Award. Mail the original Agreement to ACT Test Security (53); you may keep the copy for your files. We will send the signed Agreement, along with our \$500 check, to the AAA to initiate the arbitration process. You will then receive a letter from the AAA telling you when and where to send your written submission.

If you do not send us the signed Arbitration Agreement by February 26, 1997, your October 1996 ACT scores may be cancelled and any institutions that have received official reports of those scores will be notified. The institutions will not be informed of the reason for the cancellation.

If you have any questions, please call ACT Test Security at 319/337-1371.

The enclosed "Arbitration Agreement" form provided:

We, the undersigned Parties, hereby agree to submit our dispute to binding arbitration under the auspices of the American Arbitration Association (AAA). The issue in dispute is:

Whether ACT acted reasonably and in good faith in deciding to cancel Kenny Koza's October 1996 ACT Assessment scores.

The dispute is submitted under the terms of ACT's agreement with examinees in *Registering for the ACT Assessment*, which states that, in all instances, the final and exclusive remedy available to examinees who want to appeal or otherwise challenge a decision by ACT to cancel their test scores shall be binding arbitration through written submissions to the American Arbitration Association

We further agree to abide by the following Rules of Arbitration:

1. **The dispute shall be presented through written submissions to the Dallas office of the AAA.** We agree to maintain absolute confidentiality of the written submissions, and shall return the briefs to the submitting party immediately upon receipt of the Arbitration Award.

2. The AAA will choose the arbitrator who will preside in the case from a list of arbitrators compiled by the AAA after ACT and the examinee have deleted the names of any unacceptable arbitrators and have ordered their preferences among those remaining.

3. AAA deadlines shall be honored by ACT and the examinee. Any request for an extension of a deadline will be granted by the AAA only when the request is received prior to the expiration of the deadline and when unusual circumstances have been shown by the party requesting the extension. The arbitrator's decision on any request shall be binding. Any submission postmarked later than the AAA deadline will not be considered by the arbitrator.

4. ACT shall pay the \$500 administrative fee. ACT and the examinee shall pay their own expenses, fees and costs. However, if an examinee does not present a written submission to the AAA after signing this Agreement, then the examinee agrees to reimburse ACT for the \$500 administrative fee paid to the AAA. The arbitrator may impose additional costs if a case is found to be frivolous.

We further agree that we shall observe this Agreement faithfully, that we shall abide by any award rendered by the arbitrator, and that a judgement [sic] of the court having jurisdiction may be entered upon the award.

[Lines for signatures.]

If the examinee is under 18 years of age on the date of the signing, the examinee's parent or guardian must also sign: [Emphasis added].

By letter dated February 28, 1997, defendant wrote plaintiff:

We have received no response to our letter of February 12, 1997. We again ask that you sign and return the enclosed choice of option sheet.

If you do not return the signed option sheet by March 14, 1997, ACT will withdraw the options offered in our previous letter. The score review will proceed and your October 1996 test scores may be cancelled. If your scores are cancelled, your college and scholarship agency choices will be notified. They will not be informed of the reason for the cancellation.

Plaintiff did not sign and return the Arbitration Agreement to defendant at any time. Plaintiff filed the instant action in circuit court on March 13, 1997, alleging breach of contract, promissory estoppel, state and federal constitutional violations, fraud/misrepresentation, and unjust enrichment. The circuit court entered an ex-party order enjoining defendant from canceling plaintiff's October scores. After defendant removed the case to federal district court, the parties dismissed the constitutional claims without prejudice by joint stipulation and order. The case was remanded to circuit court.

Defendant filed a motion to compel arbitration pursuant to the Federal Arbitration Act (FAA), 9 USC § 1 *et seq.*, and to dismiss the case pursuant to MCR 2.116(C)(7) in circuit court. Defendant argued that the ACT registration booklet plaintiff received and signed clearly stated that any disputes concerning the cancellation of scores would be submitted to binding arbitration, the final and exclusive remedy for the test taker. Defendant argued that the issue for the court's determination was not whether plaintiff cheated on the exam, but, rather, whether the court should enforce the parties' agreement to arbitrate pursuant to the FAA.

Plaintiff argued in response to defendant's motion that there was no written arbitration agreement between the parties, there was no meeting of the minds regarding the terms of any proposed arbitration, that the inclusion of an unexplained binding arbitration provision in a registration booklet test-takers were required to sign without choice or alternative in order to take a required college entrance exam constituted an illegal adhesion contract that was unenforceable as a matter of law, the required arbitration procedure violated fundamental fairness and due process principles, and factual issues remained that precluded summary disposition. Plaintiff argued at the hearing on defendant's motion that he did not agree to arbitrate pursuant to terms and conditions of which he had no notice at the time he signed the registration booklet, including that arbitration was to be held in Dallas, Texas. Plaintiff further argued that the registration booklet said that the arbitration would be on written submissions only, but did not say whether any discovery would be allowed, and that he did not agree to arbitrate without having opportunity for discovery. Plaintiff further argued that he would likely lose at arbitration because it would be in Texas, on written submissions only, and because of the low burden of proof defendant had to show—that it acted reasonably and in good faith in canceling his scores. Plaintiff noted that he would willingly submit to arbitration in Michigan before the American Arbitration Association, where he would be permitted to present his side of the story through witnesses and evidence.

The circuit court granted defendant's motion. Plaintiff's counsel asked the court whether he could conduct discovery:

MR. SHERMAN [*plaintiff's counsel*]: . . . we did not agree to arbitrate on the terms and conditions that subsequently came down through this written arbitration agreement.

Number one, we didn't agree to arbitrate in Dallas, Texas even though my client and his family lives [sic] here in Michigan and the test . . . was taken in Michigan. We didn't say the registration booklet doesn't say written submissions only. It discusses written submissions but doesn't say what those are. Are those interrogatories? Can we take depositions? Is any discovery at all allowed? Can I find out who was monitoring the room, why they didn't catch Kenny cheating, if he cheated on the exam? Can I find out who the kid supposedly was sitting next to him? Whether he saw anyone cheating on the exam?

What counsel indicated is he wants something cheap and quick; mainly, they're going to submit their documents to Dallas, Texas and there's going to be no right to cross-examine any witnesses, to confront any of the evidence, and it's going to be cheap and quick. They're going to take the ACT's version of it and then my client's scores are going to be cancelled.

This is . . .

THE COURT: (Interposing) Well, wait a minute. Why do you come to that conclusion? How can you jump to that conclusion? Your client may win, too.

MR. SHERMAN: Well, I'll tell you why he can't win, because of the burden of proof. The burden of proof in this arbitration, which we didn't agree to either, is did they act reasonable, and did they act in good faith cancelling his scores? That is such a low burden of proof that it essentially makes us prove that, number one, we didn't cheat and we're limited by written submissions only, and we don't have any discovery at all in the case.

* * *

We are bound to lose this arbitration because the arbitration is written submissions only, it's in another state, and the burden of proof is low. And we never agreed to that, Your Honor. I indicated to counsel I'd be happy to arbitrate this case. But let's have a legitimate arbitration here in the State of Michigan with the American Arbitration Association, and let's have a hearing where they can hear Kenny's side and he can do whatever he needs to do on the case; not to send this boy, 18 years old, to Dallas, Texas. The test was given here in this State, he took it here in this State, and there's no reason why we should have to fight this in some other state.

MR. DAAR [*defendant's counsel*]: With respect to the Dallas issue, Your Honor, we're talking about a postage stamp. According to the terms of the agreement, it's written submissions to Dallas means you've got to put it in a mailer and send to Dallas.

MR. SHERMAN: It didn't say Dallas, Texas. It didn't say where we had to go. And it's the postage stamp issue that I'm objecting to. We didn't agree that there would be no discovery; that there would – that it would simply be ACT's analysis against what we've already sent in to them.

In all of the cases that he cited to this Court, none of them deal with the issue of the Motion to Compel Arbitration.

MR. DAAR: What the cases deal with, Your Honor, every single one of them is the nature of the binding and enforceable contract that the registration booklet forms in a case such as this.

Finally, Your Honor, Mr. Sherman, while he is cynical about the arbitration process, can argue to the arbitrator about procedures that he thinks are necessary to get a fair hearing.

THE COURT: Well, he can also submit any documents he wants to submit. I'm going to grant the motion.

* * *

I'm going to require arbitration.

MR. SHERMAN: Your Honor, is – relative to your ruling, Your Honor, is there anything regarding arbitration procedure? It's still unclear what the arbitration procedure is going to be? Written submissions, can I take depositions? Can I send out interrogatories?

THE COURT: I would think you would be able to submit any letters you wish to submit

* * *

I'm not going to determine the rules of arbitration. All I'm saying is that you can submit written documentation.

MR. DAAR: Thank you, Your Honor.

The parties agreed that the circuit court's previous order enjoining defendant from canceling plaintiff's scores would remain in effect pending arbitration. This appeal ensued.

I

Plaintiff first argues that the circuit court improperly granted defendant's motion for summary disposition without making a finding of fact or rendering a conclusion of law regarding whether the parties entered into a valid arbitration agreement.

We review a circuit court's grant of summary disposition de novo. *Johnson v Wayne Cty*, 213 Mich App 143, 148-149; 540 NW2d 66 (1995). In reviewing a motion for summary disposition brought under MCR 2.116(C)(7), all well-pleaded allegations in the complaint must be accepted as true unless specifically contradicted by affidavits or other appropriate documentation submitted by the moving party. *Sewell v Southfield Public Schools*, 456 Mich 670, 674; 576 NW2d 153 (1998).

When deciding whether the parties agreed to arbitrate a certain matter, courts should generally apply ordinary state-law principles that govern the formation of contracts. *First Options of Chicago v Kaplan*, 514 US 938, 944; 115 S Ct 1920; 131 L Ed 2d 985 (1995); *Kaleva-Norman-Dickson School District v Kaleva-Norman-Dickson School Teachers' Assoc*, 393 Mich 583, 587; 227 NW2d 500 (1975) ("arbitration is a matter of contract."). A party cannot be required to arbitrate an issue he has not agreed to submit to arbitration. *Id.* "The initial question whether contract language is ambiguous is a question of law." *Port Huron Ed Assoc v Port Huron Area School District*, 452 Mich 309, 323; 550 NW2d 228 (1996). If contractual language is clear and unambiguous, its meaning is a question of law. *Id.*

Although the circuit court did not state a determination on the record that the parties had agreed to arbitrate, such a finding is implicit in its ruling, quoted above, and proper as a matter of law, given the clear and unambiguous language present. Plaintiff signed the following certification clause in the ACT registration booklet:

I certify that I am the person whose name and signature appear on this folder and that the information is accurate to the best of my knowledge. I understand and hereby agree to abide by all procedures and requirements stated in *Registering for the ACT Assessment*, including those concerning test score cancellation and binding arbitration.

The pertinent provisions in the "Registering For the ACT Assessment" booklet were set forth in a section entitled "**What Test Security Procedures Apply:**"

Test Security Procedures

To ensure that examinees have an equal opportunity to demonstrate their academic achievement and skills, and that examinees who do their own work are not unfairly disadvantaged by examinees who do not, ACT's security procedures include the following. **Examinees will be dismissed and their answer documents will not be scored if they are found:**

- looking back at a previous test on which time has already been called
- looking ahead in the test booklet
- looking at another examinee's test booklet or answer document
- giving or receiving assistance

- using calculators to share or exchange information during the test
- using calculators on any test other than the Mathematics Test
- attempting to use their calculator's memory to remove test materials, including test questions or answers, from the testing room
- using scratch paper, notes, or dictionaries
- filling in ovals after time is called on a previous test, during a later test, or when the test booklet is closed

Cancellation of Scores by ACT

ACT reserves the right to cancel test scores when there is reason to believe the scores are invalid. Cases of irregularities in the test administration process - falsifying one's identity, impersonating 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, including but not limited to examinee misconduct - may result in ACT's canceling the test scores. When ACT plans to cancel an examinee's test scores, it always notifies the examinee prior to taking that action. This notification includes information about the options available regarding the planned score cancellation, including procedures for appealing the decision. In all instances, the final and exclusive remedy available to examinees who want to appeal or otherwise challenge a decision by ACT to cancel their test scores shall be binding arbitration through written submissions to the American Arbitration Association. The issue for arbitration shall be whether ACT acted reasonably and in good faith in deciding to cancel the scores. [Emphasis in original.]

By signing the certification clause of the registration booklet, plaintiff entered into a contract with defendant. See *Dalton v Educational Testing Service*, 87 NY2d 384, 389; 663 NE2d 289; 639 NYS2d 977 (1995) (noting that "[b]y accepting ETS' standardized form agreement" the plaintiff entered into a contract with ETS); *Cortale v Educational Testing Service*, 674 NYS2d 753, 755; 251 AD2d 528 (NY App, 1998) (noting that "applicants who take examinations administered by ETS are obligated to abide by its rules concerning investigations into questionable examination results," and that pursuant to the contract between ETS and examinees ETS has the right to question test results it deems suspicious and to undertake an investigation.) Several cases involving a testing agency's cancellation of test scores pursuant to provisions in registration materials similar to the instant case have held that such provisions, in combination with an examinee's signature after a certification or attestation clause, evince the examinee's consent to the testing agency's authority to investigate and cancel scores if the scores' validity is questionable. See *Langston v ACT*, 890 F2d 380, 381, 385-386, 387 n 11 (CA 11, 1989) (noting that the cancellation provision "empowered ACT to cancel scores if it had a good faith doubt as to the validity of plaintiff's scores."); *Dalton*, supra at 390 (noting that the parties "agreed to the provisions in the Registration Bulletin, which expressly permit cancellation of a test score

so long as ETS found “reason to question” its validity after offering the test-taker the five specified options.”); and *Yaeger v Educational Testing Service*, 551 NYS2d 574, 576-577; 158 AD 2d 602 (NY App, 1990) (noting that “the petitioner consented to ETS’ authority to investigate and cancel scores once ETS determined that the validity of the scores was questionable.”)⁷

Plaintiff argues that by presenting him with the written “Arbitration Agreement” that accompanied the February 12, 1997 letter, defendant acknowledged that there was no written agreement to submit this dispute to arbitration, and further notes that he never signed the “Arbitration Agreement” form. Plaintiff argues that defendant’s correspondence stated that if he did not sign and return the Arbitration Agreement by a specified date, his scores would be cancelled, in effect acknowledging that plaintiff would not be bound by arbitration.

This argument fails. Before defendant sent plaintiff the “Arbitration Agreement” form, which plaintiff never signed, plaintiff had signed the registration booklet clause certifying that he agreed to “abide by all procedures and requirements stated in *Registering for the ACT Assessment*, including those concerning test score cancellation and binding arbitration.” By doing so, plaintiff agreed that the final and exclusive remedy available to him if he appealed or otherwise challenged defendant’s decision to cancel his test scores would be binding arbitration through written submissions to the American Arbitration Association, and that the issue for arbitration would be whether defendant acted reasonably and in good faith in deciding to cancel the scores. See *Yaeger, supra*, and *Langston, supra*. The “Arbitration Agreement” form that defendant sent plaintiff well after plaintiff signed the registration booklet would have served to initiate the arbitration process had plaintiff signed it. We conclude that a valid agreement to arbitrate disputes regarding score cancellations existed between the parties based on the registration materials.

II

Plaintiff next argues that even if the arbitration provision in the registration booklet constitutes an agreement to arbitrate, defendant cannot force him to arbitrate based on unilaterally imposed terms and conditions that are contrary to the Michigan Court Rule governing arbitration. Plaintiff argues that the absence of a hearing and permitting only written submissions contravene MCR 3.602, the court rule governing arbitration, which contemplates that the arbitrator will hear testimony, grants the arbitrator the power to administer oaths to witnesses, gives the arbitrator discretion to permit the taking of depositions for use as evidence of witnesses who cannot be subpoenaed or are unable to attend the hearing, and provides that a party has the right to be represented by an attorney at a proceeding or hearing.

The court rule plaintiff relies on applies only to statutory arbitration, which is not involved in the instant case. We agree with defendant that federal law applies to the instant agreement. Defendant filed its motion to compel arbitration pursuant to MCR 2.116(C)(7) and the FAA, which governs actions in both federal and state courts arising out of contracts involving interstate commerce. *DeCaminada v Coopers & Lybrand*, 232 Mich App 492, 496; 591 NW2d 364 (1998). Defendant is an Iowa corporation and plaintiff is a Michigan resident. Pursuant to agreement between the parties, defendant sent plaintiff’s scores to universities in various states. See 7 Williston on Contracts, § 15.11, pp 210-212 (noting that “contracts between parties located in different states will typically have a ‘substantial effect’ on interstate commerce, and even contracts between parties located in the same state

‘substantially affect’ interstate commerce if the subject matter of the contract or the means necessary to perform the contract have any significant relationship to interstate commerce, citing *Allied-Bruce Terminix Cos v Dobson*, 513 US 265; 115 S Ct 834; 130 L Ed 2d 753 (1995), in which the Court applied a broad reading to the FAA’s language “affecting commerce.”). State courts are bound under the Supremacy Clause, US Const, art VI, to enforce the FAA’s substantive provisions. *Burns v Olde Discount Corp*, 212 Mich App 576, 580; 538 NW2d 686 (1995). Section 2 of the FAA provides in pertinent part:

A written provision in any . . . contract evidencing a transaction involving commerce to settle by arbitration a controversy . . . arising out of such contract . . . or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract. [9 USC § 2.]

“[T]he text of § 2 declares that state law may be applied ‘if that law arose to govern issues concerning the validity, revocability, and enforceability of contracts generally.’” *Doctor’s Assoc v Casarotto*, 517 US 681; 116 S Ct 1652; 134 L Ed 2d 902, 908 (1996).

Thus, generally applicable contract defenses such as fraud, duress or unconscionability, may be applied to invalidate arbitration agreements without contravening § 2.

Courts may not, however, invalidate arbitration agreements under state laws applicable *only* to arbitration provisions. [*Id.* at 909.]

Plaintiff’s argument fails. Under *Casarotto*, *supra*, even if MCR 3.602 applied, this Court could not invalidate the arbitration agreement on the basis that it contravened MCR 3.602.

III

Plaintiff next argues that the arbitration provision in the registration materials amounted to an adhesion contract and should not be enforced. Plaintiff argues that the circuit court improperly granted summary disposition because it failed to make findings of fact or render conclusions of law regarding whether a contract could be valid to consumers who are seventeen and eighteen years of age with no bargaining strength and who can not obtain the desired services without consenting. Plaintiff argues that defendant is the only company that administers the ACT and that he and millions of other students are required to take the test for admission to college. Plaintiff argues that the registration booklet containing the binding arbitration provision is presented on a take-it-or-leave-it basis; students have no choice whether to accept the provision, and that it is thus an adhesion contract.

General state contract principles, as opposed to state laws applicable only to arbitration provisions, may regulate, and in appropriate cases, invalidate arbitration clauses. *The Andersons, Inc, v Horton Farms, Inc*, 166 F3d 308, 322 (CA 6, 1998). To determine whether a provision is an unenforceable contract of adhesion, Michigan applies a two-prong test of procedural and substantive unconscionability:

(1) What is the relative bargaining power of the parties, their relative economic strength, the alternative sources of supply, in a word, what are their options?; (2) Is the challenged term substantively reasonable? [*Rehmann, Robson & Co v McMahan*, 187 Mich App 36, 43; 466 NW2d 325 (1991).]

“Where goods and services can only be obtained from one source (or several sources on non-competitive terms) the choices of one who desires to purchase are limited to acceptance of the terms offered or doing without.” *Allen v Michigan Bell Telephone Co*, 18 Mich App 632, 637; 171 NW2d 689 (1969). “Merely because the parties have different options or bargaining power, unequal or wholly out of proportion to each other, does not mean that the agreement of one of the parties to a term of a contract will not be enforced against him; if the term is substantively reasonable it will be enforced.” *Id.*

The party seeking to invalidate the provision must show both types of unconscionability. *Id.* at 43-44. Unconscionability is a question of law for the court. *Andersons, Inc, supra* at 323, citing *Northwest Acceptance Corp v Almont Gravel, Inc*, 162 Mich App 294, 300; 412 NW2d 719 (1987). The issue is determined based on the facts and circumstances that existed when the contract was made, not those extant at the time of the suit. *Id.*

The record supports and defendant does not dispute that plaintiff, a high school student, had no relative bargaining power or economic strength in comparison to defendant corporation and that plaintiff had to consent to the arbitration provision, which was contained in a standardized form prepared by defendant, in order to register for the ACT, an exam that only defendant administers. Plaintiff thus presented evidence of procedural unconscionability. *Northwest Acceptance, supra* at 303-304; *The Andersons, Inc, supra* at 324. However, plaintiff has provided no authority to support that the provision is substantively unconscionable. We see no substantive unconscionability on the face of the arbitration agreement. Arbitration itself is not unconscionable, nor is the acted-reasonably-and-in-good-faith standard established by the agreement.

IV

Plaintiff further argues that by forcing him to arbitrate a dispute based on unilaterally imposed terms and conditions, defendant violated his right to due process. Defendant responds that plaintiff's claim fails because he has not alleged state action.

Plaintiff properly states that if the challenged conduct is not directly that of the government, there must be a sufficiently close nexus between the state and the action so that the conduct may be fairly treated as that of the state. *Christensen v Michigan State Youth Soccer Ass'n*, 218 Mich App 37, 43; 553 NW2d 638 (1996).

Plaintiff cites no authority to support his argument that, by virtue of many public institutions relying on defendant's scores to make decisions about admission, scholarship awards and course placement, there was a sufficient nexus between defendant's conduct and the state. The authority we have found addressing due process challenges to testing agency determinations to cancel examinee scores has held to the contrary. See *Yaeger, supra* at 577; *Langston, supra* at 383-384; see also

Scott v Educational Testing Service, 252 NJ Super 610; 600 A2d 500 (1991) (noting that, assuming that the defendant’s conduct was “state action” subject to the due process clause of the Fourteenth Amendment, the court still rejected the argument that ETS should not be permitted to cancel the plaintiff’s scores solely upon a finding of substantial evidence to question their validity.) Plaintiff’s due process claim thus fails.

V

Throughout his brief, plaintiff argues that defendant unilaterally imposed the condition that arbitration be conducted in Dallas, Texas. We agree. Defendant neither addresses nor disputes plaintiff’s assertion that the arbitration provisions in the registration materials did not state that the arbitration was to take place in Dallas, Texas. In fact, defendant sought to unilaterally impose this condition on the arbitration agreement in the “Arbitration Agreement” form it enclosed with its February 12 letter to plaintiff. This was the first time arbitration in Dallas was mentioned. Thus, while plaintiff agreed to abide by the terms and conditions set forth in defendant’s registration materials, including that the arbitration would be on written submissions only, and in accordance with the standard set forth in the materials, the record is clear that plaintiff did not agree to submit the dispute to an arbitration tribunal in Dallas. Plaintiff never signed the “Arbitration Agreement” form defendant sent him on February 12, 1997. Further, the registration materials did not define the scope of allowable written submissions or address whether and to what extent plaintiff would have the opportunity to conduct discovery.

Under these circumstances, we uphold the circuit court’s grant of summary disposition in favor of defendant, but direct that the arbitration be held in Michigan, in the metropolitan Detroit area. The AAA will determine the scope of allowable written submissions and the extent to which plaintiff may engage in discovery.

Affirmed in part, reversed in part and remanded for further proceedings. We do not retain jurisdiction.

/s/ Jeffrey G. Collins

/s/ Kathleen Jansen

/s/ Helene N. White

¹ Plaintiff attended Andover High School in the City of Bloomfield Hills.

² Plaintiff’s complaint states that he scored 19 in English, 16 in Mathematics, 20 in Reading, 19 in Science Reasoning and received a composite score of 19.

³ Plaintiff’s complaint states that he scored 20 in English, 28 in Mathematics, 22 in Reading, 26 in Science Reasoning, and received a composite score of 24.

⁴ The letter stated:

Dear Ms. Semel:

In response to your letter to me December 27, 1996 [sic] I would like to offer the following explanations for my mathematics score discrepancy between June 1996 and October 1996 and thereby choose option 3.

For starters, when I took the ACT in June 1996, I was in Andover High School's new math program: Visualizing and Relationships. This innovative math curriculum teaches story problems and critical thinking. The consensus among my teachers and peers is that Visualizing and Relationships is not preparing students for the kinds of questions asked on the ACT.

Secondly, Because [sic] I had never taken an ACT test before June 1996 I was not sure what to expect. So when I received my score of 16 – the lowest of the four scores – I immediately began tutoring sessions.

From July through October, 1996, I was privately tutored twice - three a week [sic] through the Birmingham Reading Clinic. This tutoring was specifically geared toward the ACT's I would be take [sic] in October. I have asked the director of the BRC to enclose a statement validating my tutoring.

Thirdly, I attended Bloomfield Hill's Model School commencing August 26, 1996, where I took math from Ms. Ross. She, as well, taught her students "ACT math." I earned an A- for my semester grade.

Finally, I know you specifically ask that character references not be sent to you; hence, I stand on my own word that my score reflects all my own work. And in a final word, I was extremely happy that my new math score (with the aid of a calculator, which I could not use in June) validated the number of hours of tutoring and MHS instruction.

Attached were letters from plaintiff's math teacher and the clinic at which plaintiff was tutored in math, stating that plaintiff had developed expertise in working with the TI-82 calculator and that he had been tutored two to three hours a week.

⁵ Defendant's letter stated:

The ACT Test Security Review Panel considered your response to ACT's letter concerning your October 1996 ACT Assessment scores and found your statement and documentation insufficient to establish the validity of your scores. In reaching this conclusion, the Review Panel made the following observations:

- It is highly unlikely that the unusually large number of identical responses on your answer sheet and the answer sheet of an examinee near you who used the same test form occurred purely by chance. The identical responses are:

	Total	Identical	Identical Incorrect
<u>Test</u>	<u>Items</u>	<u>Responses</u>	<u>Responses</u>
Mathematics	60	49	3
Science Reasoning	40	34	4

- Sixteen of your erasures on the mathematics and science reasoning tests resulted in responses identical to those of the other examinee.
- The other examinee's October 1995 ACT Assessment scores are all higher than your October 1996 scores.
- The math section of your October 1996 ACT Assessment test booklet contains only one computation that leads to your responses on the math test.
- Test preparation of the type described can lead to some improvement on the ACT Assessment from one test date to the next. Because the ACT Assessment is designed to measure academic skills developed over many years of study, however, test scores rarely change dramatically even with intensive test preparation.

Given these observations, the Review Panel recommended that your October 1996 scores be cancelled. Therefore, we ask you to select one of the following options:

OPTION 1 - Retest at our expense to confirm your October 1996 scores through a private testing to be arranged by us. If your Composite score on the private test is no more than three points lower than your October 1996 Composite score, we will consider the private to have confirmed the October 1996 scores. Both the October 1996 and the new scores will remain on file, and no further action will be taken. However, we reserve the right to cancel scores from a private testing if a testing irregularity is discovered.

If the new scores do not confirm your October 1996 scores, your October 1996 scores will be cancelled and the new scores will be entered in our records. Any institutions that have received copies of your October 1996 scores will be advised that these scores have been cancelled. They will not be informed of the reason for the cancellation.

* * *

OPTION 2 - Cancel your October 1996 scores and receive the standard \$5 refund (unless the original test fee was waived). Any institutions that have received copies of

your October 1996 scores will be advised that these scores have been cancelled. They will not be informed of the reason for the cancellation.

OPTION 3 - Challenge ACT's cancellation decision in binding arbitration through written submissions to the American Arbitration Association (AAA). If you choose Option 3, you must do so while your score review is pending; you may not choose binding arbitration after your scores have been cancelled. If you choose arbitration, but then fail to file a written submission, you will be asked to reimburse ACT for the administrative fee paid to the AAA.

In selecting one of these options, you necessarily waive the right to choose any of the other options.

The details of ACT's score review are confidential. No specific information about this matter has been or will be provided to any other party without your consent.

⁶ Plaintiff's February 4, 1997 letter to defendant consisted of the same first five paragraphs as the January 20, 1997, letter. See n 5 *supra*. It additionally stated:

I think it is very likely for the number of identical responses to be the same when two students score so high, leaving little room for mistakes not to be similar. I also think that it is ACT's fault that I am being falsely accused. I was not aware that every test sheet was similar. This could of [sic] all been avoided if they all had been different. Then we [sic you] wouldn't have such a problem believing that this occurred purely by chance. And what about the four ladies watching both rooms. Could they be so blind not to see that someone may be coping [sic copying] 49 identical problems within the time of 60 minutes. I don't think so, [sic] maybe more effort should be put in hiring people in running these test [sic] if these types of incidents can occur. I'm trying to prove that it is merely impossible to copy 49 identical problems in math and 34 identical problems in science when your [sic] sitting in a five feet radius; in addition, how would it be possible to see what that person had marked from such a distant [sic]. The only I could of [sic] cheated of a scan tron test [sic], is if I had stood up and walked over to the person next to me. There is no way that I am going to allow the ACT's to destroy my integrity. I can tell you that it is very easy to jump up from a 16 to a 28 on the ACT's under my circumstance. When taking the ACT in June I was not aware on how [sic] my score may effect [sic] my college choices. I was also unaware weather [sic] or not I even wanted to attend college. My first score was a mindless effort. This resulted from someone who didn't care about his score and didn't think it mattered.

The 2nd time around [sic] realizing its importance, I was well prepared. I wasn't just well prepared because of tutors, I was well prepared because math is a subject that comes easy to me. I have told you that I received an A- in math this semester, and I also received a B+ last year in math. But if you look at my math grade 3 semesters ago,

I almost failed. Now how can I go from almost failing one semester to almost having an A the next semester in the same math class; don't you need the math skills from one semester to go on to the next? Yes, you would normally in most cases, but I'm not most people. Tutoring came in handy, because it allowed me to polish off my skills. My academic level has always been this high. It shouldn't come to ACT as a surprise [sic] that someone can drastically change their score so easily.

From the letters I've received from ACT, I've gathered the notion that you clearly think that someone could never go from a low score of 16 to a high of 28. Why even bother allowing students to retake the test up to 3 times if this is how you respond. Maybe ACT should consider that the one I scored so similar to, could have cheated off of me. I wish you could ask the four ladies watching both rooms if they ever saw my head leave my test sheet, because it never did. I took the test with confidence and ease. The reason I never had to use scratch paper was because I had the advantage of being able to use a calculator. I was able to make short cuts with my TI-82 calculator and cut the amount of time I spent on problems in half. Allowing me to complete every answer with 7 minutes left to spare. I remember being the first one done. So I keep asking myself how could I of [sic] been the one falsely accused of cheating. I am startled at the fact that someone near me had scored similar to me purely by chance, and I am also angered at the fact that I had to make you believe that an honest teenager as myself [sic] has to prove that he did his own work. I did my own work. I stand by this 100% because I will not stand for being called a cheater.

I am a second semester senior now at Andover High School. I've long awaited my college exceptence [sic] letters. This can or will effect [sic] my college exceptence [sic] if cancelled. Because I stand by my work 100%, it only leaves me to bring this matter in to legal hands if my score is cancelled. This is not a threat, but it is the choice I have to go with when being falsely accused of cheating. I hope that this letter clearly shows that these things can occur purely by chance.

⁷ None of these cases involved the enforceability of an arbitration provision.