

## ON SITE COVID-19 LFD TESTING - ADVICE TO SCHOOLS (LEGAL RISKS AND IMPLICATIONS)

The following is a summary of the key legal responsibilities of schools/colleges/trusts (**Providers**) carrying out COVID-19 testing using Lateral Flow Devices (**LFD**) provided by the Department for Health & Social Care through its executive agency the Medicine & Healthcare products Regulatory Agency (**MHRA**). Testing using LFD looks for a protein called antigen which is present when a person has COVID-19. This is contrasted with the standard polymerase chain reaction (**PCR**) test for COVID-19 which is a lab based test looking for the DNA signatures of COVID-19.

The Department for Education and the Department for Health & Social Care have together produced a “How to” Guide for rapid testing in schools and colleges to support the return to school of students and staff in the Easter term 2021. This How to Guide is designed to be the first port of call for schools and colleges. The How to Guide contains “**Terms and Conditions**” for rapid COVID-19 testing. These Terms & Conditions are in effect the contract between the MHRA and the school/trust and they incorporate the “Schools and Colleges Clinical Standard Operating Procedure” (**SOP**) which must be followed. Schools and colleges are of course also encouraged to follow Government guidance and comply with any regulations and further advice can be obtained from us on the application and implementation of COVID-19 regulations.

This summary is not intended to be an exhaustive summary of the legal risks and responsibilities flowing from rapid testing in schools and in particular the Terms and Conditions document and more detailed advice on specific issues including HR/employment issues, trustee/governor liability, pupil behaviour and GDPR can be obtained from our School Support teams, details in the footer. This summary has not been provided to address any given set of circumstances and we accept no responsibility for any steps taken or not taken in light, or not, of any advice contained in this summary.

	<b>Context/Contract Provision</b>	<b>Legal Obligations</b>	<b>WS Commentary</b>	<b>Further Advice</b>
1	Commencement Date	Date the Provider is supplied with testing equipment.	In most cases, this is likely to have already occurred and therefore the contract is already operative.	As testing is a national priority and Government guidance, a refusal to test is likely to a breach of statutory duty.
2	Expiry Date	The contract expires on the last day of the Easter Term but can be extended by agreement.	Providing specific contractual notice in writing to extend to all Providers is unlikely to be feasible and so any extension is likely to be imposed by regulation (or guidance).	It's unclear whether any individual Provider could seek to extend unilaterally. Further guidance may be issued in due course.

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3	Termination	Either party may terminate the contract on the service of 14 days' written notice or with immediate effect in the event of an un-remedied breach.	We would expect termination to be a last resort, albeit it's hard to see how normal contract management procedures would work in this case. The SOP asks Providers to feed back any issues through the reporting regime.	Supply chain issues are likely to be well documented. It may be appropriate for trusts and LAs to monitor issues across their areas of responsibility and raise concerns through national channels and education bodies.
4	SOP	<p>Provider agrees to carry out testing of secondary age and further education students in all settings including special and AP in accordance with the SOP.</p> <p>Provider also agrees to carry out testing of all staff attending school/college.</p>	The SOP is a "live document" which means it will be regularly updated by the MHRA and any changes will bind the Provider. The contract allows the Provider to terminate on immediate notice if any changes result in significant detriment.	It will be important to monitor changes and we recommend that a single point of contact in school or in the trust is responsible for the testing operation.
5	Asymptomatic Testing	Provider is required to test those who are asymptomatic i.e. who are not displaying any of the usual COVID-19 symptoms. Those testing positive following a LFD test are required to get a PCR test via the usual routes.	Students and staff who are displaying symptoms or who test positive should be sent home in the usual way in accordance with your COVID-19 policies.	We can review your general COVID-19 policies to ensure they comply with the current guidance.
6	Testing Frequency	<p>Provider is required to test as follows:</p> <ul style="list-style-type: none"> <li>All students initially on return to school/college (this will only be</li> </ul>	The contract does not stipulate any minimum number of tests to be carried out. As testing is voluntary (for the individual), this is logical. Whilst MHRA must provide test kits and periphery	Providers may wish to stipulate that testing is compulsory for those who are volunteering to attend school as part of the rota to support the learning of vulnerable children and children

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		<p>vulnerable children and those of key workers during the period of lockdown when schools/colleges are providing remote learning and supported learning to vulnerable children and children of key workers);</p> <ul style="list-style-type: none"> <li>• Staff on return and on a weekly basis for those attending school/college;</li> <li>• Students daily in the event of close contact with an individual who has tested positive for COVID-19.</li> </ul> <p>Test kits and periphery equipment such as PPE will be provided by the MHRA.</p>	<p>equipment, this is subject to availability and its possible testing will need to be halted if there are delays or shortages in sending equipment. Its hard to see therefore how Providers can be in breach of the contract providing they make reasonable efforts to meet the aims of the contract (i.e. testing to ensure schools remain safe places) and any tests they do carry out are done properly. We would expect Providers to encourage students and staff to participate fully and certainly in the case of staff to lead by example.</p>	<p>of key workers. We can advise further on any policy or arrangements for those continuing to attend school/college. Some further consideration may also be needed for staff whose responsibilities involve outreach and home or hospital provision.</p> <p>Providers may also be of the view that there is insufficient testing and that Providers may want to carry out additional random testing of students after return to school/college (or indeed after a period of absence unrelated to COVID-19). Whilst the contract does not provide for this, it does not expressly forbid it and we are of the view that this may be possible if there are available supplies. We can advise further if this is contemplated.</p>
7	Testing Facilities	The SOP outlines how the testing site should be set up and manned, as well as how to manage students undergoing testing.	A risk assessment must be undertaken and a risk log maintained.	A template Site Risk Assessment is provided as a part of the How to Guide.
8	Communication and Consent	The Provider is responsible for communicating with students and	Records should be maintained of consents (as usual) and	A template consent form and privacy statement are contained

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		<p>their families and to obtain appropriate consents. These are required as follows:</p> <ul style="list-style-type: none"> <li>• 11 – 15 yr olds – parental consent if test is to be supervised by school rather than parent</li> <li>• 16 – 17 yr olds – self consent</li> <li>• 16 – 25 yr olds with SEND – self consent if “Gillick competent” otherwise by responsible adult</li> </ul> <p>As testing is self administered, any student who is incapable of doing so can be tested by a parent, a trained member of staff or a trained swab taking person with parental consent.</p>	Providers should be mindful of the usual GDPR responsibilities.	<p>in the How to Guide.</p> <p>We can provide more detailed advice on GDPR and assistance with drafting the communications with staff and parents.</p>
9	Staff to administer tests	<p>The Provider is obliged to procure and train staff to administer the tests. The SOP outlines a number of roles, as follows:</p> <ul style="list-style-type: none"> <li>• COVID Coordinator/Project Lead</li> <li>• Quality Lead</li> <li>• Queue Coordinator</li> <li>• Registration Assistant</li> </ul>	Whilst a number of roles can be undertaken by the same person and the contract envisages these roles being capable of being undertaken by school staff, it is clear the implementation of this is likely to require some additional resource or as a minimum some additional responsibility for existing staff.	For further advice on safer recruiting, please contact our SchoolsHR helpdesk. We have developed a contract toolkit containing model contracts for new staff, both paid and unpaid, and a model contract addendum for existing staff taking on new responsibilities. This will be provided free on request to School Support Service clients
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		<ul style="list-style-type: none"> <li>• Test Assistant</li> <li>• Processing Operative</li> <li>• Results Recorder</li> <li>• Cleaner</li> </ul> <p>There are also requirements in respect of the bagging of waste:</p> <ul style="list-style-type: none"> <li>• Domestic – black bags</li> <li>• Chemical e.g. used swabs and test kits – yellow or clear bags</li> <li>• Offensive e.g. used PPE – “tiger” bags i.e. yellow and black striped bags</li> </ul>	<p>Our advice is that all roles except for the Processing Operative can be undertaken by school staff (both teaching and support) under their normal contracts/job descriptions. As the Processing Operative is clearly carrying out a medical procedure, its unlikely school staff will be qualified to do this unless their normal role envisages some medical intervention.</p> <p>All staff to be engaged in the administering of the tests will need to be trained and any new member of staff (whether paid or non-paid) will need to be recruited having regard to the Provider’s safer recruiting obligations.</p> <p>We understand that schools’ normal waste collector will be required to collect all bags.</p>	<p>and for a small charge for schools and colleges who instruct us on an ad hoc basis.</p> <p>Whilst a grant will be provided to support the cost of testing, this is not on the basis of a reimbursement of cost and Providers will need to assess whether there is likely to be a shortfall. There is no reason why different Providers cannot collaborate with testing and this may of course happen naturally in a multi academy trust or within an LA. We can provide further advice on options for collaboration.</p>
10	Outcomes and other contract matters	<p>The contract obliges Providers to keep a Test Register and to notify the MHRA/PHE using the web supported “Results Recorder”.</p> <p>The usual provisions regarding confidentiality, GDPR (noting that both the MHRA and the Provider</p>	<p>Provider liability to the MHRA is capped at £100,000, though it’s hard to see what loss the MHRA would suffer in the event of Provider breach.</p> <p>The provision of testing kits is subject to availability so again it’s</p>	<p>We are mindful that Providers (and their trustees and governors) will be anxious about any liability for students and staff as a consequence of testing (or possibly the adequacy of testing). In general there is some protection for Providers if they</p>
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		are data controllers for this purpose) and liability are set out in the contract.	<p>hard to see what damages the Provider may be able to pursue against the MHRA.</p> <p>The ESFA's RPA (risk protection arrangement) scheme will cover any claims arising from testing. Providers who insure through commercial insurers should check with their broker whether cover is extended and what if any requirements insurers might have.</p>	<p>simply follow Government guidance and take all reasonable steps to manage and mitigate risks, including infection risk from school attendance. We can provide more detailed advice in the event of any complaint or claim and assist with any review of procedures and policies. More information about managing issues arising from COVID-19 can be found on our COVID-19 resource hub on our website.</p>

For more information or general support, please contact:

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