



Education & Skills
Funding Agency

**2017 to 2018
Conditions of Funding Agreement
(The Non Maintained Special School)
between**

**(i) the Secretary of State for Education
(acting through the Education and Skills
Funding Agency)**

and

(ii) [NMSS Name]

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This Funding Agreement is made on the 1 August 2017 between:

THE NMSS NAME
ADDRESS 1
ADDRESS 2
ADDRESS 3
ADDRESS 4
POSTCODE

SECRETARY OF STATE FOR EDUCATION
ACTING THROUGH THE EDUCATION AND
SKILLS FUNDING AGENCY (ESFA)
CHEYLESMORE HOUSE
QUINTON ROAD
COVENTRY
CV1 2WT

Hereinafter called
THE NON MAINTAINED SPECIAL
SCHOOL (“**THE NMSS**”)

Hereinafter called
THE EDUCATION AND SKILLS FUNDING
AGENCY (“**THE ESFA**”)

GENERAL TERMS AND CONDITIONS

1 Purpose of the Funding Agreement

- 1.1 THE ESFA is an executive agency of the Department for Education, exercising powers on behalf of the Secretary of State and is acting on behalf of the Crown. Under the Education Act 2002, the Secretary of State may give or make arrangements for the giving of grants to any person for or in connection with the provision in the UK of education or of educational services.
- 1.2 The funding for the supply of these Activities in respect of High Needs Pupils by THE NMSS is provided by both THE ESFA and the local authority which is responsible for meeting the pupil’s needs.
- 1.3 For High Needs Pupils THE ESFA will pay THE NMSS an amount equal to £10,000 per annum for each place allocated based on the October 2016 School Census data.
- 1.4 Top-up funding (Element 3) is funding the local authority and THE NMSS agree is required above place funding for each pupil to 19, to meet the total cost of education provision required by a High Needs Pupil as assessed by the commissioning local authority. The top-up funding will be agreed and contracted for directly between the local authority and THE NMSS.
- 1.5 This Funding Agreement sets out the terms and conditions under which grant funding and annual allocation funding is provided to THE NMSS by THE ESFA. This Funding Agreement is not a contract for services. The terms and conditions relating to annual allocation funding will be updated annually. THE ESFA has complete discretion in deciding the amount of funding that shall be paid in each funding year. In exercising this discretion THE ESFA shall consider all relevant

factors, including but not limited to, the Activities of THE NMSS in so far as they relate (in any way) to THE ESFA funding and/or the ESFA Conditions of Funding.

- 1.6 The Activities to be funded by THE ESFA and delivered pursuant to this Funding Agreement will be core education and support, up to the cost indicated by the per place funding thresholds specified in clause 1.2 for all High Needs Pupils. A separate agreement will be entered into by the local authority and THE NMSS, where appropriate, to specify the terms and conditions governing any top-up (Element 3) funding paid by the local authority to THE NMSS.

2 Definitions and Interpretation

2.1 For the purposes of this Funding Agreement:

- 2.1.1 **“Activities”** means the education and support activities of THE NMSS as set out in this Funding Agreement and THE NMSS’s obligations under this Funding Agreement and the Conditions of Funding;
- 2.1.2 **“Asset(s)”** shall mean any property, real or personal, tangible or intangible capable of being purchased for money or money’s worth which has a continuous useful life of one year or more, regardless of whether or not it is treated as such by THE NMSS’s accounting policy;
- 2.1.3 **“Commencement Date”** means 1 August 2017;
- 2.1.4 **“Conditions of Funding”** means as defined in clause 4.3;
- 2.1.5 **“Confidential Information”** means all confidential information of a party, including its business, finances, services, products or affairs, operations, processes, plans or intentions, product information, know-how, software, designs, trade secrets, market opportunities, the terms and conditions of this Funding Agreement and any other information of commercial value, whether disclosed in writing or verbally or by any other means (and which is either expressly stated to be confidential or which is by its nature implicitly confidential);
- 2.1.6 **“Crown”** means Queen Elizabeth II and any successor;
- 2.1.7 **“Crown Body”** means any department, office or agency of the Crown, including OFSTED, the Care Quality Commission, the Charity Commission, any and all Local Authority or Combined Authority bodies;
- 2.1.8 **“Deliverables”** means all reports, documents, works, products, databases, materials and other deliverables brought into existence, created or acquired by THE NMSS in whole or in part using funding provided under this Funding Agreement and/or as a result of the provision of the Activities including, but not limited to, Assets and Confidential Information;

- 2.1.9 “**Department**” means the Department for Education which incorporates its Executive Agency, THE ESFA;
- 2.1.10 “**THE ESFA**” means the Education and Skills Funding Agency an Executive Agency of the Department for Education;
- 2.1.11 “**Eligible Expenditure**” - Expenditure solely for the purpose of delivering the Activities set out and agreed in the Appendices and Annexes of this Conditions of Funding Agreement.
- 2.1.12 “**Exempt Information**” means any information or class of information (including but not limited to any document, report, agreement or other material containing information) relating to this Funding Agreement or otherwise relating to THE NMSS, which potentially falls within an exemption to FOIA (as set out therein);
- 2.1.13 “**FOIA**” means the Freedom of Information Act 2000 and all regulations made there under from time to time or any superseding or amending enactment and regulations, and words and expressions defined in the FOIA shall have the same meaning in this Funding Agreement;
- 2.1.14 “**FOIA notice**” means a decision notice, enforcement notice and/or an information notice;
- 2.1.15 “**Funding Agreement**” means this document including all schedules and appendices, and any other documents expressly incorporated by reference in this document;
- 2.1.16 “**Funds**” means the grant monies paid by THE ESFA to THE NMSS pursuant to this Funding Agreement and “**Funding**” shall have the same meaning;
- 2.1.17 “**High Needs Pupil**” means a pupil aged under 19 requiring education support costing more than £10,000 per annum in total and for whom the relevant local authority provides top-up funding;
- 2.1.18 “**Inspectorates**” means one, any or all of the inspectorates: Office for Standards in Education, Children’s Services and Skills (Ofsted), Her Majesty’s Inspectorate for Education and Training in Wales (Estyn) and the Care Quality Commission (CQC);
- 2.1.19 “**Intellectual Property Right**” means (a) copyright, rights related to or affording protection similar to copyright, rights in databases, patents and rights in inventions, trademarks, rights in Internet domain names and website addresses and other rights in trade names, designs, Know-How, trade secrets and other rights in Confidential Information;

(b) applications for registration, and the right to apply for registration, for any of the rights listed at (a) that are capable of being registered in any country or jurisdiction; and

(c) all other rights having equivalent or similar effect in any country or jurisdiction;

- 2.1.20 “**Local Authority**” means any local authority who also provides THE NMSS with top-up funding for the education and support of High Needs Pupils and Students;
- 2.1.21 “**NMSS Related Part(y) (ies)** ” means any employee, officer, consultant, agent or any other person whatsoever acting for or on behalf of THE NMSS or otherwise under THE NMSS'S control and direction (including but not limited to SUB-CONTRACTORs);
- 2.1.22 “**OFSTED**” means the Office for Standards in Education, Children’s Services and Skills;
- 2.1.23 “**Parties**” means THE ESFA, on behalf of the Secretary of State, and THE NMSS;
- 2.1.24 “**Planned Place**” means education and training funded by THE ESFA as set out in clause 1.2;
- 2.1.25 “**Premises**” means the location/s where the Activities are to be performed, as detailed in the Funding Agreement;
- 2.1.26 “**Pupil**” means any person aged 18 or under to whom THE NMSS is required to deliver any of the Activities;
- 2.1.27 “**SECRETARY OF STATE**” means the SECRETARY OF STATE for Education;
- 2.1.28 “**Top-up Funding**” means funding required by THE NMSS above the planned place funding to meet the total cost of education provision required by a High Needs Pupil as assessed by the commissioning local authority.
- 2.1.29 “**Working Day**” means any day (other than a Saturday or Sunday) on which banks in England are open for business.
- 2.2 Clause, schedule and paragraph headings shall not affect the interpretation of this Funding Agreement.
- 2.3 A **person** includes a natural person, corporate or unincorporated body (whether or not having separate legal personality) [and that person's legal and personal representatives, successors and permitted assigns].

- 2.4 The schedules and appendices form part of this Funding Agreement and shall have effect as if set out in full in the body of this Funding Agreement. Any reference to this Funding Agreement includes the schedules and appendices.
- 2.5 Words in the singular shall include the plural and vice versa.
- 2.6 A reference to a statute or statutory provision is a reference to it as it is in force for the time being, taking account of any amendment, extension, or re-enactment and includes any subordinate legislation for the time being in force made under it.
- 2.7 A reference to **writing** or **written** includes faxes but not e-mail.
- 2.8 Where the words **include(s)**, **including** or **in particular** are used in this Funding Agreement, they are deemed to have the words **without limitation** following them. Where the context permits, the words **other** and **otherwise** are illustrative and shall not limit the sense of the words preceding them.
- 2.9 Any obligation in this Funding Agreement on a person not to do something includes an obligation not to agree, allow, permit or acquiesce to that thing being done.
- 2.10 References to clauses, appendices and schedules are to the clauses, appendices and schedules of this Funding Agreement.

3 Commencement and Continuation

- 3.1 THE NMSS shall provide the Activities to THE ESFA on the terms and conditions of this Funding Agreement.
- 3.2 The Funding Agreement shall commence on 1 August 2017 (the “**Commencement Date**”) and shall finish on 31 July 2018 unless this Funding Agreement is terminated in accordance with clause 19.

4 Use of Funding

- 4.1 THE NMSS shall use the Funding to deliver the Activities and shall allocate sufficient resources, up to the limit of the combined resources contributed by THE ESFA and the relevant local authority in respect of each individual pupil to the Activities to enable it to comply with all obligations set out in this Funding Agreement. THE NMSS agrees and accepts that payments can only be made to the extent that THE ESFA has available funds.
- 4.2 THE NMSS shall not use the Funding for any purpose which would cause THE NMSS to be in breach of this Funding Agreement and it will ensure that all NMSS Related Parties do the same.

4.3 THE NMSS agrees to comply with the conditions of this Funding Agreement together with:

a. The Non-Maintained Special School (England) Regulations 2015 (the regulations).

<http://www.legislation.gov.uk/uksi/2015/728/made>

b. The Funding Guidance;

<https://www.gov.uk/16-to-19-education-funding-guidance>

c. The post-16 audit code of practice:

<https://www.gov.uk/government/publications/post-16-audit-code-of-practice>

d. Specification of the Individualised Learner Record;

<https://www.gov.uk/government/publications/ilr-specification-validation-rules-and-appendices-2017-to-2018>

e. Individualised Learner Record Provider Support Manual;

<https://www.gov.uk/government/publications/ilr-guides-and-templates-for-2017-to-2018>

f. Rigour and Responsiveness in Skills (April 2013, DfE/BIS publication);

<https://www.gov.uk/government/publications/rigour-and-responsiveness-in-skills>

g. Traineeships Framework for Delivery:

<https://www.gov.uk/delivering-traineeships-through-efa-funding>

h. Sub-contracting

<https://www.gov.uk/government/publications/funding-guidance-for-young-people-sub-contracting-controls>

i. Universal Infant Free School Meals

<https://www.gov.uk/guidance/universal-infant-free-school-meals-guide-for-schools-and-local-authorities>

j. Further Education Free Meals

<https://www.gov.uk/guidance/16-to-19-education-financial-support-for-students>

k. guidance published, from time to time, by the Secretary of State for Education which sets out the expectations in relation to safeguarding practice within further education institutions;

<https://www.gov.uk/government/publications/keeping-children-safe-in-education--2>
<https://www.gov.uk/government/publications/working-together-to-safeguard-children--2>

l. Special educational needs and disability code of practice: 0 to 25 years;

<https://www.gov.uk/government/publications/send-code-of-practice-0-to-25>

and, where appropriate

m. Residential Special Schools: National Minimum Standards (published under section 87C of the Children Act 1989)
<https://www.gov.uk/government/publications/residential-special-schools-national-minimum-standards>

the Conditions of Funding”.

These policies were correct at the Commencement Date, but may be updated from time to time.)

5 Payment

- 5.1 Subject to the Conditions of Funding, THE ESFA shall pay to THE NMSS the charges set out in the schedules and annexes of this Funding Agreement.
- 5.2 All payments by THE ESFA will be made via BACS or CHAPS, unless otherwise notified, and will be made on the 20th of each month or the prior Working Day.
- 5.3 Payment by THE ESFA shall be without prejudice to any claims or rights, which THE SECRETARY OF STATE may have against THE NMSS and shall not constitute any admission by THE SECRETARY OF STATE as to the performance by THE NMSS of its obligations hereunder. Prior to any such payment, THE SECRETARY OF STATE shall be entitled to make deductions or deferments in respect of any disputes or claims whatsoever with or against THE NMSS, arising from this Funding Agreement or any other agreement between THE NMSS and THE SECRETARY OF STATE.
- 5.4 Where THE ESFA or any other authority acting on THE SECRETARY OF STATE’s behalf including local authorities in accordance with the principles set out in Part 1 of the post-16 audit code of practice carries out a review or audit of a sample of the evidence which THE NMSS is required to provide under the Funding Agreement to support the payments made by THE ESFA and identifies errors in that evidence which it deems are material (as defined in the Funding Guidance 2017 to 18 <https://www.gov.uk/16-to-19-education-funding-guidance>) THE SECRETARY OF STATE reserves the right to recover from THE NMSS an amount based on the error rate identified and the total value of the Funding Agreement. Such amount may be recovered by making deductions from future payments due to THE NMSS under the Funding Agreement or any other agreement between the Parties. In all such reviews the decision of THE ESFA is final.

6 Quality Assurance

- 6.1 THE ESFA may share data and concerns with local authorities in relation to provision delivered to all pupils . This will include, but is not limited to, concerns highlighted by Inspectorates and THE ESFA.

- 6.2 THE NMSS shall have the necessary resources, skills and experience to carry out THE NMSS's obligations pursuant to this Funding Agreement.
- 6.3 THE NMSS shall comply and shall ensure that THE NMSS Related Parties comply with this Funding Agreement and all applicable Laws and the most recent policies which may from time to time be issued by the Department, THE ESFA, Inspectorates and awarding bodies of which THE NMSS is made aware including, but not limited to, being published on the relevant bodies website.
- 6.4 THE NMSS shall ensure that all activities carried out pursuant to this Funding Agreement shall be documented in accordance with the requirements of THE ESFA as notified to THE NMSS in writing from time to time and shall provide such documentation to THE ESFA, as THE ESFA shall request from time to time within any reasonable time period specified by THE ESFA.
- 6.5 THE NMSS shall have in place its own quality assurance arrangements that demonstrate that it can meet the terms and conditions of this Funding Agreement and evidence these arrangements if required to do so in a form and subject to any other conditions, as from time to time THE ESFA or the Department may specify.
- 6.6 If requested by THE ESFA, THE NMSS will make available to THE ESFA a report on its own assessment of the quality of the Activities provided by THE NMSS under this Funding Agreement in a form and subject to any other conditions, as from time to time THE ESFA may specify.

Assurance and Financial Health

- 6.7 THE NMSS shall provide the Activities and allocate sufficient resources to enable THE NMSS to comply with all obligations set out in this Funding Agreement together with High needs funding arrangements
<https://www.gov.uk/government/publications/high-needs-funding-arrangements-2017-to-2018>
- 6.8 THE ESFA will undertake a desk based assessment of financial health and control.
- 6.9 Should THE ESFA, in its sole discretion, consider that the outcome of any financial health and/or control assessments is inadequate, and/or the outcome of assurance undertaken by THE ESFA is deemed by THE ESFA as unsatisfactory, THE ESFA may, in its absolute discretion take one or more of the following actions:
- 6.9.1 require THE NMSS to, and THE NMSS shall, accept and comply with additional Funding Agreement obligations relating to the improvement of financial health and/or control arrangements;
- 6.9.2 require THE NMSS to, and THE NMSS shall, accept and comply with additional Funding Agreement obligations including addressing identified weaknesses through an action plan approved by THE ESFA;
- 6.9.3 require THE NMSS to suspend the recruitment of pupils and/or cap any growth in pupil numbers;

- 6.9.4 give consideration to what changes, if any, are required in its application of lagged pupil funding when finalising the amount of funding in any subsequent Funding Agreement between the parties; and/or
- 6.9.5 terminate in accordance with clause 19.
- 6.10 Where THE NMSS fails to comply with the requirements imposed under clause 6.9.1 and/or 6.9.2 and/or 6.9.3, THE ESFA shall consider termination under clause 19.

Inspectorates

- 6.11 When the NMSS receives notification from an Inspectorate that the Activities are to be inspected, THE NMSS shall provide THE ESFA with a copy of its quality improvement activity, and any other relevant information in accordance with the required timescale of the Inspectorate. THE NMSS must notify THE ESFA of the date of the meeting at which the Inspectorate give feedback on the inspection and allow THE ESFA's nominated representative to attend the meeting. THE NMSS must confirm to THE ESFA in writing the outcome of the inspection within 5 working days of receiving the feedback from the Inspectorate.
- 6.12 Where the Activities delivered under this Funding Agreement are subject to inspection by the Inspectorates and the inspection results in the Activities overall or in part thereof-being assessed as inadequate or not met, in accordance with the Inspectorates' published essential standards, THE ESFA may, following consultation with local authorities, in its absolute discretion, take one or more of the following actions:
- 6.12.1 require THE NMSS to, and THE NMSS shall, accept and comply with additional Funding Agreement obligations relating to the improvement of the Activities by both or either THE ESFA or local authority; and/or
- 6.12.2 require THE NMSS to suspend the recruitment of pupils to the Activities, and/or cap any growth in pupil numbers; and/or
- 6.12.3 give consideration to what changes, if any, are required in its application of lagged learner funding when finalising the amount of funding in any subsequent Funding Agreement between the parties; and/or
- 6.12.4 terminate in full or in part in accordance with clause 19.
- 6.13 The failure of THE NMSS, as assessed by THE ESFA, to comply with any requirements of 6.12 within such time as THE ESFA may deem reasonable may lead to THE ESFA terminating in accordance with clause 19.
- 6.14 THE ESFA will take action based on the Inspectorate's provisional and confirmed outcomes as in clause 6.12 above. Where THE ESFA is made aware that THE NMSS has made a complaint about the graded outcome of the overall assessment

by the Inspectorate, THE ESFA will continue to progress action under clause 6.12 but will be mindful of the implications arising from the outcome of a complaint. THE ESFA will review any decisions made at such time as outcomes of any complaint are made known.

7 Licenses and Third Party

- 7.1 THE NMSS shall obtain and maintain all appropriate licences to use third party software to allow it to deliver the obligations of the Funding Agreement including the Deliverables.
- 7.2 Unless otherwise agreed in advance in writing with THE ESFA, THE NMSS shall only use standard 'off the shelf' versions of any third party software.

8 Liability

- 8.1 The SECRETARY OF STATE, its servants, employees and agents accepts no liability for any consequences, whether direct or indirect, that may come about from THE NMSS carrying out the Activities, the use of the Funding or from withdrawal of the Funding. THE NMSS shall indemnify and hold harmless the SECRETARY OF STATE, its employees, agents, officers or SUB-CONTRACTORS with respect to all claims, demands, actions, costs, expenses, losses, damages and all other liabilities arising from or incurred by reason of the actions and/or omissions of THE NMSS in relation to the Activities, the non-fulfilment of obligations of THE NMSS under this Funding Agreement or its obligations to third parties.
- 8.2 Neither party excludes or limits its liability to the other for:
 - 8.2.1 death or personal injury caused by its own negligence;
 - 8.2.2 fraud or fraudulent misrepresentation;
 - 8.2.3 any breach of any obligations implied by section 12 of the Sale of Goods Act 1979 or Section 2 of the Supply of Goods and Services Act 1982; or
 - 8.2.4 any other liability which cannot be excluded or limited under the law of England and Wales.
- 8.3 THE NMSS warrants to THE SECRETARY OF STATE that to the best of its knowledge and belief all works carried out under the Funding Agreement will not infringe, in whole or in part, any Intellectual Property Right of any person and agrees to indemnify THE SECRETARY OF STATE against any and all claims, demands, proceedings, expenses and losses, including any of a consequential nature, arising directly or indirectly out of any act of the foregoing in relation to any works, where such act is, or is alleged to be, an infringement of a third party's Intellectual Property Right. This warranty and indemnity shall survive the termination of the Funding Agreement and shall exist for the life of the Intellectual Property Right.

- 8.4 The liability of THE NMSS under this clause shall not exceed twice the value of the Funding Agreement or £1,000,000 whichever is the greater save that this limit shall not apply to claims in respect of death or personal injury or any other liability which cannot be excluded or limited under the law of England and Wales.
- 8.5 THE ESFA shall not be liable to THE NMSS for any indirect or consequential loss, damage, injury or costs whatsoever.

9 Insurance

- 9.1 THE NMSS shall maintain at its own cost a policy or policies of insurance to cover the liability of THE NMSS in respect of any actual default for which it may become liable to indemnify THE ESFA under this Funding Agreement. THE NMSS should provide copies of any insurance certificates to THE ESFA including professional indemnity, employers' liability and public liability insurance following a written request from THE ESFA.

10 Freedom of Information

- 10.1 THE NMSS acknowledges and agrees that THE ESFA is subject to legal duties under FOIA, which may require THE ESFA to disclose on request information relating to this Funding Agreement or otherwise relating to THE NMSS.
- 10.2 THE NMSS acknowledges and agrees that THE ESFA is required by law to consider each and every request made under FOIA for information.
- 10.3 THE NMSS acknowledges and agrees that all decisions made by THE ESFA pursuant to a request under FOIA are solely a matter for and at the discretion of THE ESFA.
- 10.4 Notwithstanding anything in this Funding Agreement to the contrary (including without limitation any obligations of confidentiality), THE ESFA shall be entitled to disclose information in whatever form pursuant to a request made under FOIA, save that in relation to any information that is exempt information THE ESFA shall use reasonable endeavours (but shall not be obliged) to consult THE NMSS and shall not:
- a. confirm or deny that information is held by THE ESFA; or
 - b. disclose information requested;

to the extent that in THE ESFA's opinion the information is eligible in the circumstances for an exemption and therefore THE ESFA may lawfully refrain from doing either of the things described in parts (a) and (b) of this clause.

- 10.5 In relation to information relating to THE NMSS or this Funding Agreement which THE NMSS requests should be exempt under the FOIA, THE NMSS shall indemnify THE ESFA for any and all costs (including legal fees) incurred by THE ESFA in:
- a. assessing the application of any exemption under FOIA; and/or
 - b. responding to any FOIA notice; and/or
 - c. lodging any appeal against a decision of the Information Commissioner's Office in relation to disclosure;

where such costs are incurred pursuant to efforts by THE ESFA to withhold exempt information following a request from THE NMSS.

- 10.6 The Department shall in no event be liable for any loss, damage, harm or detriment, howsoever caused, arising from or in connection with the disclosure under FOIA of any exempt information or other information whether relating to this Funding Agreement or otherwise relating to THE NMSS.
- 10.7 THE NMSS shall assist THE ESFA as THE ESFA reasonably deems necessary to enable THE ESFA to comply with its obligations under FOIA.

11 Confidentiality

11.1 THE NMSS and THE ESFA hereby warrant that:

- 11.1.1 any person employed or engaged by it (in connection with this Funding Agreement or in the course of such/general employment or engagement) shall treat all Confidential Information belonging to THE ESFA as confidential, safeguard it accordingly and only use such Confidential Information for the purposes of this Funding Agreement; and
- 11.1.2 any person employed or engaged by it (in connection with this Funding Agreement or in the course of such/general employment or engagement) shall not disclose any Confidential Information to any third party without prior written consent of THE ESFA, except where disclosure is otherwise expressly permitted by the provisions of this Funding Agreement; and
- 11.1.3 THE NMSS shall take all necessary precautions to ensure that all Confidential Information obtained from THE ESFA or other Crown Body is treated as confidential and not disclosed (without prior written approval of THE ESFA) or used other than for the purposes of this Funding Agreement by any of its employees, servants, agents or SUB-CONTRACTORS or anyone else engaged by it generally or in connection with the Funding Agreement.

11.1.4 The provisions of clause 11 shall not apply to any information which is or

becomes public knowledge (other than by breach of this clause 11). This includes information published under clauses 11, 12 and 13:

- a. which was in the possession of the receiving party, without restriction as to its disclosure, before the date of receipt from the disclosing party;
- b. which must be disclosed pursuant to a statutory, legal or parliamentary obligation placed upon the party making the disclosure, including any requirements for disclosure under the Freedom of Information Act or the Environmental Information Regulations.

11.1.5 Nothing in this clause 11 shall be deemed or construed to prevent THE ESFA from disclosing any information, including Confidential Information obtained from THE NMSS:

- a. to any other Government Department, Non-Departmental or quasi Government authority or agency, central or local;
- b. to any consultant, THE NMSS or other person engaged by THE ESFA directly in connection with this Funding Agreement, provided that such information is treated as confidential by the receiving consultant, THE NMSS or any other person.

11.1.6 In order to ensure that no unauthorised person gains access to any Confidential Information or data obtained and/or processed in the course of the delivery of the Activities, THE NMSS undertakes to maintain adequate security arrangements that meet the requirements of professional standards and best practice in addition to those set out in clause 13 and information provided in completion of the Data Security Questionnaire.

11.1.7 THE NMSS will notify THE ESFA, without undue delay, of any breach of security in relation to Confidential Information and/or data obtained and/or processed in the course of the delivery of the Activities. THE NMSS shall use all reasonable endeavours to mitigate the possible adverse impacts of any such breach of security including any intrusion into individuals' privacy. THE NMSS will keep a record of such breaches a copy of which shall be provided to THE ESFA upon request. THE NMSS will use its best endeavours to recover such Confidential Information and/or data however it may be recorded. THE NMSS will co-operate with THE ESFA in any investigation that THE ESFA considers necessary to undertake as a result of any breach of security in relation to Confidential Information and/or data.

11.1.8 THE NMSS shall, at its own expense, alter any security systems at any time during the period of the Funding Agreement at THE ESFA's reasonable request if THE ESFA reasonably believes THE NMSS has failed to comply with clause 13.

11.1.9 The provisions of clauses 11 and 13 will apply for the duration of the Funding Agreement and after its termination.

11.1.10 THE ESFA and THE NMSS acknowledge that, except for any information which is exempt from disclosure in accordance with the provisions of the Freedom of Information Act (FOIA) and Data Protection Act 1998, the content of the Funding Agreement is not Confidential Information. THE ESFA shall be responsible for determining, in its absolute discretion, whether any of the content of the Funding Agreement is exempt from disclosure in accordance with the provisions of the FOIA and Data Protection Act 1998.

11.1.11 THE ESFA may consult with THE NMSS to inform its decision regarding any redactions but THE ESFA shall have the final decision in its absolute discretion.

11.1.12 THE NMSS shall assist and cooperate with THE ESFA to enable the Department to publish the allocation, any payments and Funding Agreement

12 Consent to Publication

12.1 THE ESFA reserves the right to share information related to THE NMSS under this Funding Agreement with any other government department, other public body or local authority.

12.2 The Government has set out the need for greater transparency of public data and its commitment to hold public bodies to account over the use of public funds.

12.3 In compliance with the Cabinet Office's transparency agenda THE ESFA is required to publish information about any payments made to THE NMSS under this Funding Agreement. Published information shall specifically exclude publication of bank account number and sort code.

12.4 THE NMSS hereby gives its consent for the Department to publish this Funding Agreement in its entirety, including from time to time agreed changes to the allocation, to the general public. The Department may consult with THE NMSS to inform its decision regarding any redactions to this Funding Agreement but the Department shall have the final decision in its absolute discretion.

12.5 THE NMSS shall assist and cooperate with the Department to enable the Department to publish the allocation and any Funding paid or payable to THE NMSS under this Funding Agreement.

12.6 The Department reserves the right to share information about THE NMSS with any other Crown Body.

12.7 THE ESFA may disclose any information, including the Confidential Information of THE NMSS:

12.7.1 on a confidential basis to any Crown Body for any proper purpose of THE ESFA or of the relevant Crown Body;

12.7.2 to Parliament and Parliamentary Committees or if required by any Parliamentary reporting requirement;

12.7.3 to the extent that THE ESFA (acting reasonably) deems disclosure necessary or appropriate in the course of carrying out its public functions;

12.7.4 on a confidential basis to a professional adviser, consultant, supplier or other person engaged by any of the entities described in clause 12.7.1 (including any benchmarking organisation) for any purpose relating to or connected with this Funding Agreement;

12.7.5 on a confidential basis for the purpose of the exercise **any** of its rights under this Funding Agreement and/or

12.7.6 on a confidential basis to a proposed Successor Body in connection with any assignment, novation or disposal of any of its rights, obligations or liabilities under this Funding Agreement, and

for the purposes of the foregoing, references to disclosure on a confidential basis shall mean disclosure subject to a confidentiality agreement or arrangement containing terms no less stringent than those placed on THE ESFA under this clause 12.

13 Data Protection and Protection of Personal Data including Pupil Information

13.1 The Parties shall ensure that they at all times comply with the provisions and obligations imposed by the Data Protection Act 1998 and the Data Protection Principles together with any subsequent re-enactment or amendment thereof in storing and processing personal data, and all personal data acquired by either party from the other shall be returned to the disclosing party on request. Both Parties hereby acknowledge that performance of a duty imposed by the Act shall not constitute a breach of any obligation in respect of confidentiality which may be owed to the other party.

13.2 With respect to the Parties' rights and obligations under this Funding Agreement the Parties agree that THE ESFA is the Data Controller and THE NMSS is the Data Processor within the meaning of the Data Protection Act.

13.3 THE NMSS shall:

- 13.3.1 process Personal Data only in accordance with reasonable instructions from THE ESFA (which may be specific instructions or instructions of a general nature as set out in the Funding Agreement or otherwise notified by THE ESFA to THE NMSS during the term of the Funding Agreement);
- 13.3.2 process the Personal Data only to the extent and in such manner as is necessary for the administration of the Funding Agreement, or as is required by Law or any Regulatory Body;
- 13.3.3 implement appropriate technical and organisational measures to protect the Personal Data against unauthorised or unlawful processing and against accidental loss, destruction, damage, alteration or disclosure and these measures shall be appropriate to the harm which might result from any unauthorised or unlawful Processing, accidental loss, destruction or damage to the Personal Data and having regard to the nature of the Personal Data which is to be protected;
- 13.3.4 take reasonable steps to ensure any SUB-CONTRACTORS or third Parties who process data covered by this Funding Agreement are aware of the obligations of this Funding Agreement, and in addition, understand their obligations imposed by the Data Protection Act 1998 together with any subsequent re-enactment or amendment thereof;
- 13.3.5 ensure that all employees, agents and associates do not publish, disclose or divulge any of the Personal Data to any third party unless directed in writing to do so by THE ESFA;
- 13.3.6 ensure that all Personal Data required to be sent to THE ESFA as part of this Funding Agreement is sent securely in keeping with the legal obligations under the Data Protection Act 1998 and related legislation so that all personal and sensitive information transmitted by email by THE NMSS to THE ESFA shall be encrypted and password protected and all personal and Personal Data/sensitive Personal Data transmitted by THE NMSS to THE ESFA in hard copy shall be double enveloped with the name of the intended recipient clearly marked on the inner envelope with dispatch by Special Delivery or using a secure courier service;
- 13.3.7 notify THE ESFA within 5 Working Days if it receives:
- a. request from a Data Subject to have access to that person's Personal Data; or
 - b. complaint or request relating to THE ESFA's obligations under the Data Protection Legislation;
- 13.3.8 provide THE ESFA with full co-operation and assistance in relation to any complaint or request made, including by:
- a. providing THE ESFA with full details of the complaint or request;

- b. complying with a data access request within the relevant timescales set out in the Data Protection Legislation and in accordance with THE ESFA's instructions;
 - c. providing THE ESFA with any Personal Data it holds in relation to a Data Subject (within the timescales required by THE ESFA); and
 - d. providing THE ESFA with any information requested by THE ESFA;
- 13.3.9 permit THE ESFA or THE ESFA's representative (subject to reasonable and appropriate confidentiality undertakings), to inspect and audit THE NMSS's data processing activities (and/or those of its agents and subsidiaries) and comply with all reasonable requests or directions by THE ESFA to enable THE ESFA to verify and/ or procure that THE NMSS is in full compliance with its obligations under this Funding Agreement;
- 13.3.10 provide a written description of the technical and organisational methods employed by THE NMSS for processing Personal Data (within the timescales required by THE ESFA); and
- 13.3.11 not process Personal Data outside the European Economic Area without the prior written consent of THE ESFA and, where THE ESFA consents to a transfer, to comply with:
- a. the obligations of a Data Controller under the Eighth Data Protection Principle set out in Schedule 1 of the Data Protection Act 1998 by providing an adequate level of protection to any Personal Data is transferred; and
 - b. any reasonable instructions notified to it by THE ESFA.

14 Pupil Health, Safety and Safeguarding

- 14.1 THE NMSS shall comply with all relevant health and safety legislation and Health and Safety Executive working regulations and good practice and shall ensure that learning takes place in safe, healthy and supportive environments, which meet the needs of pupil.
- 14.2 THE NMSS must make arrangements for safeguarding and promoting the health, safety and welfare of registered pupils (including those aged 18) at the school. Such arrangements must have regard to any guidance published, from time to time, by the Secretary of State for Education which sets out the expectations in relation to safeguarding and promoting the welfare of pupils within schools.
- 14.3 In providing the Activities THE NMSS must ensure it actively promotes the

fundamental British values of democracy, the rule of law, individual liberty, and mutual respect and tolerance of those with different faiths and beliefs, and promote principles that support equality of opportunity for all.

- 14.4 In providing the Activities THE NMSS must comply with the general duty on specified authorities in section 26 of the Counter-Terrorism and Security Act 2015 (the Prevent duty) and the duty on partners of a panel in section 38 of the Counter-Terrorism and Security Act 2015 (the Channel co-operation duty).
- 14.5 Where applicable, THE NMSS shall inform THE ESFA if THE NMSS provides residential accommodation for pupils, shall record this information on Edubase and shall comply with the requirements of the Residential Special Schools: National Minimum Standards published from time to time by the Secretary of State under section 87C of the Children Act 1989.
- 14.6 THE NMSS shall not employ or engage, or continue to employ or engage, any person who is subject to a prohibition order made under section 141B of the Education Act 2002 to carry out teaching work (as defined in regulation 3 of the Teachers' Disciplinary (England) Regulations 2012) in respect of any Pupils.
- 14.7 Before employing or engaging a person to carry out teaching work in respect of any Pupils, THE NMSS shall take reasonable steps to ascertain whether that person is subject to a prohibition order made under section 141B of the Education Act 2002.
- 14.8 THE NMSS and/or THE NMSS Related Parties must be able to demonstrate that they have robust record-keeping procedures in respect of health, safety and safeguarding through checks on record keeping undertaken.
- 14.9 Where THE NMSS makes a referral to any Local Authority (including referrals to social services) in respect of serious safeguarding concerns (in respect of all Pupils up to the age of 19), THE NMSS shall ensure that it notifies THE ESFA that a referral has been made.
- 14.10 Where THE NMSS makes a referral of an individual Pupil for the purposes of determining whether that Pupil should be referred to a panel for the carrying out of an assessment under section 36 of the Counter-Terrorism and Security Act 2015 of the extent to which that individual is vulnerable to being drawn into terrorism, the NMSS shall ensure it notifies the ESFA that a referral has been made.
- 14.11 Where THE NMSS has made a referral or provided information to the Disclosure and Barring Service in compliance with any duties of THE NMSS under the Safeguarding Vulnerable Groups Act 2006, in respect of serious safeguarding concerns, THE NMSS shall ensure that it informs the ESFA that a referral has been made / information has been provided.
- 14.12 The failure of THE NMSS, as assessed by THE ESFA, to comply with any requirements imposed under this clause 14 may lead to THE ESFA terminating in accordance with clause 19.

15 Access and Monitoring

- 15.1 THE ESFA shall give THE NMSS reasonable advance notice in writing of proposed visits to THE NMSS or its SUB-CONTRACTORS, to observe the delivery of the Activities, by any person who has taken or will take no direct part in the conduct or content of the Activities.
- 15.2 For audit, monitoring and evaluation purposes, THE ESFA, any person acting on behalf of the SECRETARY OF STATE, the Department, the Department for Work and Pensions, the National Audit Office, Representatives of the European Commission and the European Court of Auditors, the Inspectorates shall have the right to visit all or any site from which the Activities are provided and view operations relating to the Activities and to inspect relevant documents and interview pupil and THE NMSS's staff during these visits.
- 15.3 THE NMSS shall ensure that it, its SUB-CONTRACTORS or agents, shall, on reasonable advance notice in writing permit access at any reasonable time to any of the representatives listed at clause 15.2 in order to:
- a. examine, audit or take copies of any original or copy documentation, accounts, books and records of THE NMSS and its SUB- CONTRACTORS that relate to the Funding Agreement;
 - b. visit, view or assess the design, management and delivery relating to the Funding Agreement at any Premises where those operations are carried out (including those of SUB-CONTRACTORS) and conduct relevant interviews, including interviews with pupil , during these visits at any reasonable time; and/or
 - c. carry out examinations into the economy, efficiency and effectiveness with which THE NMSS has used THE SECRETARY OF STATE's resources in the performance of the Funding Agreement.
- 15.4 Where reasonably required, THE NMSS and its SUB-CONTRACTORS shall provide copies of any relevant documents required by any of the representatives listed at clause 15.2.
- 15.5 THE NMSS shall, if required by any of the representatives stated at clause 15.2 provide appropriate oral or written explanations.
- 15.6 THE ESFA reserves the right, at any reasonable time, and as it may deem necessary to require THE NMSS at its own cost to:
- a. provide evidence of financial resources and the level of turnover sufficient to enable it to continue to perform the Funding Agreement;

- b. obtain a report by an independent accountant of THE ESFA's choice on the financial systems and controls operated by THE NMSS in respect of payments claimed or received under the Funding Agreement;
 - c. provide a copy of THE NMSS's latest audited Accounts;
 - d. submit any claim for payment or management information provided to support a claim for payment to be audited by an independent auditor chosen by THE ESFA;
 - e. provide any additional evidence to support payments made under this Funding Agreement, as THE ESFA shall reasonably require.
- 15.7 THE ESFA shall be responsible for ensuring that it secures proportionate assurance about the regularity, propriety and value for money for its programme spend. A key source of evidence to inform THE ESFA's assurance over use of THE ESFA planned place funds will be obtained from LA arrangements to monitor individual placement agreements for pupils that they may hold with THE NMSS.
- 15.8 THE NMSS shall in providing the Activities comply fully with all relevant rules and regulations of THE ESFA in force from time to time.

16 Prohibited Activities

- 16.1 THE NMSS shall not offer, promise or give, a financial or any other advantage of any kind, to any member, employee or representative of THE ESFA intending the advantage to induce the person to, or reward them for, the improper performance of the relevant function or activity in relation to the obtaining, execution or conduct (including, but not limited to, the agreed Activities) of this or any other agreement with THE ESFA. THE NMSS's attention is drawn to the criminal offences set out in the Bribery Act 2010. Any offence by THE NMSS, its employees, representatives or anyone associated with THE NMSS under the Bribery Act 2010 in relation to this or any other agreement with THE ESFA or any Crown Body shall entitle THE ESFA to terminate the Funding Agreement and recover from THE NMSS the amount of any loss resulting from such termination and/or to recover from THE NMSS the amount of value of any gift, consideration or commission.
- 16.2 THE NMSS shall not enter into any arrangement or agreement with any political or religious organisation using any funding provided by THE ESFA under this Funding Agreement if the effect of that arrangement or agreement would be to promote a particular political or religious point of view.
- 16.3 THE NMSS shall not hold itself out as acting on behalf of THE SECRETARY OF STATE, the Department or THE ESFA without THE ESFA's written permission.
- 16.4 THE NMSS shall note the following costs are not Eligible Expenditure: - payments that support activity intended to influence or attempt to influence Parliament,

government or political parties, or attempting to influence the awarding or renewal of contracts and grants, or attempting to influence legislative or regulatory action. The NMSS costs of memberships for their Associations are eligible expenditure.

17 Fraud and Irregularity

17.1 THE NMSS shall notify THE ESFA within 48 hours where it becomes aware of any instance of suspected fraud or financial irregularity in the delivery of the Funding Agreement including, but not limited to, cases of:

17.1.1 collusion with members of the staff of THE ESFA, or employees of THE ESFA, the Department or other Crown Body;

17.1.2 internal fraud by staff of a value such that performance of the Funding Agreement is placed at material risk;

17.1.3 computer fraud;

17.1.4 the submission of school census data or other data and/or THE ESFA of inaccurate, incomplete, misleading or falsified management information;

17.1.5 fraud involving other Crown Bodies;

provided that nothing in this clause shall require THE NMSS to do anything, which may cause it to infringe any law.

17.2 Where THE ESFA has reasonable cause to suspect that fraud or irregularity has occurred in relation to the delivery of the Activities under the Funding Agreement and payments made hereunder, THE ESFA, and/or its appointed representative shall have the right of access to THE NMSS's premises at any reasonable time with or without notice to examine and remove or copy all relevant documents and records and to interview THE NMSS's servants or agents engaged with the delivery of the Activities under the Funding Agreement. Where appropriate, THE ESFA shall consult with local authorities before taking any action pursuant to this clause.

17.3 Where THE ESFA has reasonable cause to suspect that fraud or irregularity has occurred in relation to the delivery of the Activities under the Funding Agreement or any other agreement between THE ESFA and THE NMSS under which Activities are delivered and payments made thereunder, it shall have the right to suspend payments under this Funding Agreement and any other agreement between the Parties. Where appropriate, THE ESFA shall consult with local authorities before taking any action pursuant to this clause.

17.4 The Parties shall co-operate in the identification of pupils who may be unlawfully claiming benefits. THE ESFA may from time to time brief THE NMSS as to the co-operation and assistance it reasonably requires including the provision of information regarding fraud by pupils. THE ESFA shall provide a named contact,

named email address, or telephone answering machine for receiving such information.

18 Withholding, Suspending and Repayment of Funding

18.1 THE ESFA's intention is that the Funding will be paid to THE NMSS in full. However, without prejudice to THE ESFA's other rights and remedies, THE ESFA may at its discretion exercise the remedies in clause 18.2 with immediate effect if any of the issues set out in clauses 18.1.1- 18.1.5 occur:

18.1.1 THE NMSS uses the Funding for purposes other than those for which they have been awarded;

18.1.2 there is a breach of security that adversely affects the Personal Data or privacy of an individual;

18.1.3 there is failure to comply with the Law, or acts or omissions by THE NMSS that endanger the health or safety of pupil;

18.1.4 the delivery of the Activities, including but not limited to quality assurance in clause 6, is adversely, materially or substantially affected, in part or in full;

18.1.5 there is failure to provide a safe, healthy and supportive learning environment.

18.2 If any of the issues set out in clause 18.1 occur, THE ESFA may, subject to notification to local authorities:

18.2.1 serve written notice on THE NMSS giving full details of the issues and requiring THE NMSS to resolve the issues specified within a specified time period;

18.2.2 require THE NMSS to suspend recruitment of pupil, and cap growth of learning programmes in future years to the Activities to which the issues relate;

18.2.3 give consideration to the issues in its application of lagged learner funding when finalising the amount of funding in any subsequent Funding Agreement(s) between the Parties;

18.2.4 withhold or suspend payment of the Funding (and/or require repayment of all or part of the Funding);

18.2.5 terminate, in accordance with clause 19, in full or in respect of that part of the Activities to which the issues relates.

19 Termination

- 19.1 On the occurrence of any of the issues set out in this clause 18.1, THE ESFA shall be entitled to terminate this Funding Agreement, in respect of that part of the Activities to which the issues relates, by notice to THE NMSS with immediate effect.
- 19.2 THE ESFA shall be entitled to terminate this Funding Agreement on written notice in the circumstances as detailed in clause 6. The period of notice shall be that which, in all the circumstances, THE ESFA deems reasonable.
- 19.3 THE ESFA shall be entitled to terminate this Funding Agreement on written notice with immediate effect in case of THE NMSS entering administration, entering a Company Voluntary Arrangement (CVA) or the insolvency, liquidation or dissolution of THE NMSS.
- 19.4 THE ESFA shall be entitled to terminate this Funding Agreement upon such period of notice which THE ESFA deems reasonable where:
- 19.4.1 the outcome of any financial health and/ or control assessment is inadequate; or
- 19.4.2 an inspection by an Inspectorate results in the Activities in part thereof being assessed as inadequate or not met; or
- 19.4.3 an inspection by an Inspectorate results in the Activities being assessed as overall inadequate or not met; or
- 19.4.4 THE NMSS fails to comply with any of the requirements imposed under clauses 6, 11, 14, 17 or any of the requirements in Schedule 3 Special Conditions; or
- 19.4.5 if THE ESFA considers in its absolute discretion that on receipt of a notice pursuant to clause 20.3 the change in ownership of THE NMSS would prejudice THE NMSS's ability to deliver the Activities.
- 19.5 THE ESFA shall be entitled to terminate this Funding Agreement on written notice if THE NMSS does not recruit or data returns reveal that no pupils have been enrolled for the academic year to which this Funding Agreement relates. Where THE ESFA terminates the Funding Agreement under this clause 19.5, THE ESFA will withdraw the allocation of Funding for the academic year and will take action to recover Funds where payments have already occurred.
- 19.6 In addition to the rights of termination under any other clauses of this Funding Agreement, either party shall be entitled to terminate this Funding Agreement in respect of all or part of the Activities delivered under this Funding Agreement by giving to the other not less than three months' notice, in writing, to that effect without the need to give a reason for termination. Where this right is exercised by THE NMSS it shall be implemented at no cost to THE ESFA.

- 19.7 Termination under this clause 19 shall not prejudice or affect any right of action or remedy, which shall have accrued or shall thereupon accrue to the Parties under this Funding Agreement.
- 19.8 On termination or expiry of this Funding Agreement for any reason, THE NMSS shall do its utmost to minimise disruption caused to pupils and to assist the implementation of any contingency plan proposed by THE ESFA either prior to or after the termination or expiry of this Funding Agreement, to deal with the effects of such termination or expiry in so far as it is practicable to do so. THE ESFA will not be liable for any additional costs incurred by the NMSS in complying with this clause 19.8.
- 19.9 THE NMSS shall, within 2 Working Days of termination of this Funding Agreement cease using any marks of THE ESFA and deliver up to THE ESFA all correspondence, documents, pupil data relevant to continuation of the Activities, specification papers and other property belonging to THE ESFA, which may be in its possession or under its control.
- 19.10 On termination of this Funding Agreement (however arising) THE ESFA may withhold any payments due to THE NMSS until such time that final reconciliation of the Parties' liabilities are concluded.
- 19.11 On termination of this Funding Agreement (however arising) the accrued rights and liabilities of the Parties at termination shall survive and continue in full force.
- 19.12 Due to the linked nature of this Funding Agreement and the local authority agreement, where appropriate, THE ESFA shall notify local authorities of any actions taken pursuant to clause 19. Further, where appropriate, THE ESFA shall consult with local authorities before taking any actions taken pursuant to clause 19.

20 Assignment and Sub-Contracting

- 20.1 Where THE NMSS fails to apply the necessary management, monitoring and control over sub-contracted delivery, or fails to seek the necessary approval in advance in respect of whole programmes of study delivered at distance, as set out in the sub-contracting control regulations <https://www.gov.uk/government/publications/funding-guidance-for-young-people-sub-contracting-controls> THE ESFA may move the pupil numbers and associated funding away from the directly funded institution and/or also require the institution to discontinue the sub-contracting arrangement either with immediate effect or from the end of the current funding year.
- 20.2 THE ESFA may at any time assign, transfer, charge, subcontract or deal in any other manner with all or any of its rights under the Funding Agreement and may subcontract or delegate in any manner any or all of its obligations under the Funding Agreement to any third party or agent.
- 20.3 THE NMSS shall not without the prior written consent of THE ESFA assign, otherwise dispose of or deal in any other manner (including by means of change in

ownership of THE NMSS) with any or all of its rights, obligations or liabilities under this funding agreement. THE NMSS shall give THE ESFA at least 12 weeks' notice of any such plans. THE ESFA reserves the right to take whatever actions it deems necessary, including but not limited to terminating the agreement if it considers in its absolute discretion that any, or any proposed, assignment, disposal or other dealing, including change in ownership of THE NMSS, may or would:

- a. put public funds at risk,
- b. put at risk the delivery of provision to pupils, and/or
- c. THE ESFA has any other material concerns about the proposed assignment, disposal or other dealing.

20.4 Sub-contracting any part of the Funding Agreement shall not relieve THE NMSS of any obligation or duty attributable to THE NMSS under the Funding Agreement.

20.5 The Activities under this Funding Agreement may only be sub-contracted to one level.

20.6 Where THE NMSS has sub-contracted any duties or obligations arising out of this Funding Agreement, THE NMSS shall send copies of the sub-contract to THE ESFA if requested in writing to do so. Where THE NMSS enters into a sub-contract for the purpose of performing all or part of the obligations under the Funding Agreement, THE NMSS shall cause a term to be included in such sub-contract which requires payment to be made to the supplier within a specified period not exceeding 30 days from receipt of a valid invoice as defined by the sub-contract requirements.

21 Force Majeure

21.1 Neither party shall be liable for any delay or failure to meet its obligations under this Funding Agreement due to any cause outside its reasonable control, including (without limitation) acts of God, war, riot, malicious acts of damage, civil commotion, strike, lockout, industrial dispute, refusal of licence, power failure or fire. If performance of the Activities is substantially prevented for a continuous period of 6 months by virtue of any of the aforesaid events, then either Party may terminate this Funding Agreement by written notice to the other.

22 Public Reputations of the Parties/Press Releases

22.1 Both Parties recognise their respective public reputations and legal responsibilities. Each Party shall use all reasonable endeavours not to harm or compromise these.

22.2 The text of any press release or other communication to be published by or in the media concerning the subject matter of this Funding Agreement shall require the approval of each Party which shall not be unreasonably withheld or delayed.

23 Status of Funding Agreement

23.1 Nothing in this Funding Agreement shall have the effect of making THE NMSS the servant of THE ESFA. THE NMSS (if an individual) represents that he is regarded by both HM Revenue and Customs and THE Department for Work and Pensions as self-employed and accordingly shall indemnify THE ESFA against tax, national insurance contributions or similar imposed for which THE ESFA may be liable in respect of THE NMSS by reason of this Funding Agreement.

24 Waiver

24.1 No failure or delay on the part of either Party hereto to exercise any right or remedy under this Funding Agreement shall be construed or operate as a waiver thereof nor shall any single or partial exercise of any right or remedy as the case may be. The rights and remedies provided in this Funding Agreement are cumulative and are not exclusive of any rights or remedies provided by law.

25 Severance

25.1 If any court or competent authority finds that any provision of this Funding Agreement (or part of any provision) is invalid, illegal or unenforceable, that provision or part-provision shall, to the extent required, be deemed to be deleted, and the validity and enforceability of the other provisions of this Funding Agreement shall not be affected.

25.2 If any invalid, unenforceable or illegal provision of this Funding Agreement would be valid, enforceable and legal if some part of it were deleted, the Parties shall negotiate in good faith to amend such provision such that, as amended, it is legal, valid and enforceable, and, to the greatest extent possible, achieves the Parties' original intention.

26 Third Party Rights

26.1 None of the terms of this Funding Agreement are intended to be enforceable by any pupil or other third party not party to this Funding Agreement.

27 Notice

27.1 Any notice or other document to be given under this Funding Agreement shall be in writing and shall be deemed to have been duly given if left at or sent by first class post by Royal Mail Special Delivery or other fast postal service to a Party at the address or relevant telecommunications number for such Party or such other address as the Party may from time to time designate by written notice to the other.

27.2 All such notices and documents shall be in the English language. Any notice or other document shall be deemed to have been received by the addressee two Working Days following the date of despatch of the notice or other document by post or, where the notice or other document is sent by hand or on the day of delivery or where notice is given by facsimile or other electronic media, on the Working Day following the delivery or transmission provided that a printed report is

obtained confirming successful transmission or if the addressee acknowledges receipt. To prove the giving of a notice or other document it shall be sufficient to show that it was despatched.

28 Agreement

28.1 This Funding Agreement represents the entire agreement between the Parties and shall not be varied except by an instrument in writing signed by the Parties. This Funding Agreement supersedes all prior negotiations between the Parties and representations and undertakings made by one Party to another, whether or not written or oral, except that this clause shall not exclude liability in respect of fraud or fraudulent misrepresentation.

29 Governing Law and Jurisdiction

29.1 This Funding Agreement shall be governed by and construed in accordance with English Law.

29.2 The parties irrevocably agree that the courts of England and Wales shall have exclusive jurisdiction to settle any dispute or claim that arises out of or in connection with this Funding Agreement or its subject matter or formation (including non-contractual disputes or claims).

30 Dispute Resolution

30.1 Due to the linked nature of this Funding Agreement and the local authority agreement, where appropriate, THE ESFA shall notify local authorities of any actions taken pursuant to clause 30. Further, where appropriate, THE ESFA shall consult with local authorities before taking any actions taken pursuant to clause 30. The Parties note that where they agree in writing, local authorities may be invited to participate in any stage of the Dispute Resolution process.

30.2 Any dispute, difference or question arising between the Parties either during the term of this Funding Agreement or afterwards shall be referred to the relevant ESFA Territorial team who will nominate a member of staff to lead discussion and review with a nominated representative of THE NMSS in order to try to resolve the same.

30.3 In the event that the nominated representatives are unable to resolve the dispute, difference or question, either of the Parties may (subject to clause 30.4 below), by written notice to the other party, refer the matter to a Dispute Resolution Panel ("the Panel") to attempt to reach a mutually acceptable resolution. The Panel shall be made up of one of THE ESFA's Territorial Directors and a senior representative from THE NMSS. The date of reference to the Panel will be agreed by the Panel themselves. The Panel shall meet within 14 days of the date of reference to them and the Panel shall use best endeavours to identify a mutually acceptable resolution.

30.4 In the event of the Dispute Resolution Panel failing to identify a mutually acceptable

resolution within 28 days of the date of reference , then any dispute, difference or question arising out of or in connection with this Funding Agreement including any question regarding its existence, validity or termination, save for any matter or thing as to which the decision of THE ESFA is under this Funding Agreement deemed to be final and conclusive, shall be referred to and settled as far as possible by mediation in accordance with the Centre for Effective Dispute Resolution (CEDR) Model Mediation Procedure.

- 30.5 If the Parties agree in writing, the dispute, difference or question that the nominated representatives were unable to resolve may be referred to directly to mediation, in accordance with clause 30.4 above, without reference to the Panel.
- 30.6 No party may commence any court proceedings/arbitration in relation to any dispute arising out of this Funding Agreement until they have attempted to settle it by mediation, but any such mediation may be terminated by either party at any time of such party wishing to commence court proceedings/arbitration.
- 30.7 If Mediation does not reach a conclusion satisfactory to the Parties the dispute, difference or question shall be referred to and finally resolved by arbitration and the provisions of the Arbitration Act 1996 (or any statutory modification or re-enactment thereof) shall apply to such arbitration.
- 30.8 The arbitration will be conducted by a sole arbitrator, jointly agreed by THE NMSS and THE ESFA. In the event of the Parties being unable to agree the identity of the arbitrator within 14 days of the service of the Notice of Arbitration, either THE NMSS or THE ESFA may request the Chairman of the Chartered Institute of Arbitrators to make the appointment.
- 30.9 The place of arbitration shall be within England.

31 Entire Agreement / Amendments

- 31.1 This Agreement constitutes the entire Agreement between the Parties and shall not be varied except by an instrument signed by the parties or accepted electronically via the Skills Funding Service (SFS).
- 31.2 By accepting this Funding Agreement via the Skills Funding Service (SFS) the person taking this action on behalf of the NMSS represents and warrants that the NMSS has read and understood this Funding Agreement, the NMSS agrees to be bound by this Funding Agreement and that he/she is duly authorised to accept this Funding Agreement and legally bind the NMSS.

Please note that the Contract **must be:**
accepted by a member of staff that is authorised to legally bind the NMSS;

Contract acceptance via SFS shall bind the NMSS as set out in sub-clauses 31.1 and 31.2.

Schedule 1 – Activities

Contents

1. Definitions

2. The Activities

Appendices and Annexes: Included as required

Appendix 1 – Payment Schedule

Annex 1 – 16 to 18 Residential Bursaries

Annex 6 – 16 to 19 Bursary Fund and Free Meals in FE

1 Definitions

1.1 “**Funding Guidance 2017 to 18**” means the documents <https://www.gov.uk/16-to-19-education-funding-guidance> which set out the detailed requirements with which THE NMSS must comply under this Funding Agreement. This includes Funding Regulations, Funding Rates and Formula, ILR Funding returns and Sub-contracting control regulations and any other guidance issued from time to time by THE ESFA.

2. The Activities

2.1 The maximum value as shown in Appendix 1 – Payment Schedule may not be exceeded for any reason except by an agreed variation in writing to the Funding Agreement. THE ESFA will not be liable to make any payment in excess of the maximum values set out in Appendix 1 – Payment Schedule or as varied in writing. Where the Funding Agreement period is longer than one year, funding for subsequent years is subject to funds being made available to THE ESFA.

2.2 The Activities are to be provided in accordance with any specific requirements submitted by THE NMSS and the Appendices and Annexes to this Schedule which sets out the activity and/or scheduled payment profiles for the Activities agreed by the Parties, which all form part of the terms and conditions of the Funding Agreement.

2.3 THE NMSS agrees to deliver learning to the number of pupil detailed in the Appendices, which shall have the same total number of pupil. For the avoidance of doubt the overall maximum value shown at Appendix 1 may not be exceeded and should the calculated value of the volumes provided exceed the maximum Funding Agreement value then THE ESFA is under no obligation to provide any additional funding.

- 2.4 Where THE ESFA identifies that THE NMSS is failing to deliver learning to the volume of pupil for any Learning Programme set out in Appendices of Schedule 1 of this Funding Agreement it reserves the right in its absolute discretion to reduce the overall maximum value for that Learning Programme.
- 2.5 Unless otherwise stated the Funding and Activity described in the Appendices of Schedule 1 of this Funding Agreement relate exclusively to the 2017 to 2018 Academic Year.

Schedule 2 – Finance, Volume and Data Capture

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- 1 Funding Agreement Details
- 2 Payment, Review and Reconciliation
- 3 Payment Process
- 4 Evidence

1 Funding Agreement Details

- 1.1 THE NMSS shall deliver the Activities specified in Schedule 1 of this Funding Agreement and subject to the terms and conditions of the Funding Agreement as detailed and in accordance with the Funding Guidance 2017 to 18 at <https://www.gov.uk/16-to-19-education-funding-guidance>

2 Payment, Review and Reconciliation

- 2.1 THE ESFA agrees to pay to THE NMSS the amounts set out in the Payments Schedule on condition that THE NMSS delivers the Activities in accordance with the terms and conditions of the Funding Agreement provided that THE NMSS is not assessed as being at serious risk of failure to deliver the Activities under this Funding Agreement by THE ESFA following any review of the quality of the Activities.
- 2.2 Payments from THE ESFA will be reconciled to the volume of pupils delivered and cash earned by actual delivery of the Activities for the period to the timetable published in the Funding Guidance 2017 to 18 at <https://www.gov.uk/16-to-19-education-funding-guidance>. Where THE NMSS's actual delivery will result or has already resulted in an overpayment to THE NMSS by THE ESFA, THE ESFA reserves the right to deduct the amount owed from payments due to THE NMSS under this Funding Agreement or any other agreement between the Parties, for current or subsequent months or years accordingly.
- 2.3 Where THE NMSS's actual delivery has resulted in an underpayment to THE NMSS by THE ESFA, THE ESFA is under no obligation to provide additional funding or to adjust the amount due to THE NMSS accordingly. Any adjustment shall not exceed the overall maximum value set out in Appendix 1 that forms part of Schedule 1 of this Funding Agreement.
- 2.4 A review will take place at the end of the period of this Funding Agreement in respect of the Activities specified in Schedule 1 of this Funding Agreement. THE ESFA will notify THE NMSS of the volume of learning and actual amount of money, which has been earned against the Activities, delivered and compare this to the total profile payments made and to the overall maximum value specified in

Schedule 1 above. At this stage THE ESFA reserves the right to conduct a final cash reconciliation. Any overpayment made to THE NMSS by THE ESFA will be repayable within 30 days of receiving an invoice. THE ESFA reserves the right to reduce future payments to recover any overpayments. THE ESFA is under no obligation to pay any additional funding above the overall maximum value specified in Schedule 1 of this Funding Agreement.

3 Payment Process

- 3.1 All payments by THE ESFA will be made via BACS or CHAPS unless otherwise notified.
- 3.2 The maximum sum payable under this Funding Agreement, as set out in Appendix 1, that forms part of Schedule 1 includes the cost of the Activities and any other VAT or taxes to be charged, where they apply.
- 3.3 Under the Provision of Item 5A to Group 6 of Schedule 9 of the VAT Act 1994, the supply of education or vocational training funded by THE ESFA, and the supply by the person providing that education or vocational training, of any good or Provision essential to that Provision, is considered to be an exempt supply for VAT purposes.

4 Evidence

- 4.1 The evidence requirements in respect of each Learning Programme are set out in the Funding Guidance 2017 to 18 at <https://www.gov.uk/16-to-19-education-funding-guidance> and THE NMSS must retain such evidence for inspection on demand.

Schedule 3 - Special Conditions

Contents

- 1 **Retention of Documents**
- 2 Disposal of Assets and Change of Use
- 3 Supply of Data
- 4 Feedback and Complaints
- 5 Branding and logos
- 6 Information, Advice and Guidance

1 Retention of Documents

- 1.1 THE NMSS and THE NMSS Related Parties shall maintain original invoices; management information returns and all other documents necessary to verify the Activities provided by itself or by THE NMSS Related Parties in relation to this Funding Agreement for 6 years from the end of the financial year in which the last payment by is made.

2 Disposal of Assets and Change of Use

- 2.1 In respect of Assets whose value exceeds £2,500 including VAT the following provisions shall apply.
- 2.2 For the purposes of this paragraph 2:
 - a) an Asset shall be considered to have been financed by THE ESFA if it has been acquired wholly or partly with funds provided by THE ESFA;
 - b) the use of any Asset shall be considered to have changed if THE NMSS uses it for any purpose other than for the delivery of the Activities under the Funding Agreement;
 - c) 'the appropriate proportion thereof' shall be the proportion represented by the amount of funding provided by THE ESFA to acquire, develop or improve an asset in relation to the entire price paid for its acquisition, or its market value when its development or improvement have been completed.
- 2.3 THE NMSS shall ensure that any Asset financed by THE ESFA is adequately insured.
- 2.4 THE NMSS shall inform THE ESFA if it proposes to dispose of, or change the use of, any Asset that has been financed by THE ESFA.

- 2.5 THE NMSS shall not dispose of any Asset financed by monies provided by THE ESFA unless it has first obtained the written consent of THE ESFA to such a disposal.
- 2.6 Where THE NMSS disposes of the Asset it shall pay to THE ESFA whichever is the greater of either the amount of funding provided by THE ESFA in respect of the Asset or the net proceeds of any disposal of an Asset, or the appropriate proportion thereof, unless otherwise agreed with THE ESFA.
- 2.7 If THE NMSS changes the use of any such Asset it will be treated as a disposal and THE NMSS shall make a payment to THE ESFA in accordance with clause 2.6 above.
- 2.8 In the event of THE NMSS undergoing a change of control or in case of the insolvency, liquidation or dissolution of THE NMSS, all Assets financed by THE ESFA, or the equivalent portion of their market value, will become the property of THE ESFA.
- 2.9 The provisions of this paragraph 2 shall apply during the continuance of this Funding Agreement and after its termination howsoever arising. THE ESFA shall reserve the right to decide when its interest in Assets financed by THE ESFA under the terms of the Funding Agreement shall cease.

3. Supply of Data

- 3.1 THE NMSS must supply data on each individual student in accordance with the data collection framework set out in the School Census 2017 to 2018 as amended and updated.
- 3.2 The NMSS shall transmit data for each part of the Activities, described in the Appendices as specified in the [School Census 2017 to 2018](#) at.
- 3.3 Data collected must be transmitted through [COLLECT](#), the Department's centralised data collection and management system. COLLECT is restricted and THE NMSS confirms it has agreed to comply with conditions of use regarding the supply of data to COLLECT.
- 3.4 The ESFA reserves the right to require THE NMSS, at its own cost, to carry out such work as the ESFA deems necessary to make a material improvement to the quality of data.
- 3.5 The ESFA reserves the right to suspend payments to THE NMSS under the Funding Agreement where data quality gives rise to a material impact (in the view of the ESFA) upon the accuracy of the data provided by THE NMSS.
- 3.6 THE NMSS shall register with [UKRLP](#) and maintain contact details on an on-going basis.

- 3.7 At times the ESFA will need to share information with THE NMSS. The ESFA will where applicable do this securely via COLLECT. By accessing and using this system THE NMSS agrees to the terms and conditions detailed at the site governing how it accesses and use the portal. THE NMSS will need to ensure that it has the right hardware, operating system and browser.

4 Feedback and Complaints

- 4.1 The primary responsibility for receiving feedback and investigating complaints promptly and thoroughly in respect of the Activities shall rest with THE NMSS. THE NMSS shall have procedures in place, which are acceptable to THE ESFA, to gather and act upon feedback and complaints from pupil and/or their representatives and employers and the wider community.
- 4.2 THE ESFA may issue guidance for THE NMSS on dealing with feedback and handling complaints, and will set out the minimum standards expected.
- 4.3 THE NMSS shall be responsible for resolving complaints in accordance with its own procedures and any guidance issued by THE ESFA.
- 4.4 Where a complaint has not been resolved to the satisfaction of the complainant THE NMSS will advise the complainant of his or her right to complain to THE ESFA and co-operate with any investigation carried out by THE ESFA.

5 Branding and logos

- 5.1 THE NMSS shall when receiving funding from THE ESFA for any programme, meet the requirements of the endorsement branding guidelines, available on THE Department's website at <https://www.gov.uk/government/organisations/department-for-education> on all and any promotional materials or activities. This shall include but not be limited to prospectuses, direct mail advertising, TV and radio advertising, merchandising or any other literature or products. Failure to meet with this requirement could lead to a reduction in the amount of funding given.
- 5.2 THE NMSS shall be given access to the current ESFA logos and statements, which are to be used. This requirement may include but not subject to the use of logos from other co-branding or co-funding participants. Details will be available from THE ESFA's website or communications team and this access, when granted, shall be limited to the use of the current logos and statements and under no circumstances will THE NMSS be allowed to amend or alter the logo on statements, nor use it for anything not covered by this Funding Agreement. Failure to comply with the requirements of this clause shall permit THE ESFA to terminate this Funding Agreement under clause 19.
- 5.3 All the terms of this clause 5 shall also apply to THE NMSS'S SUB-CONTRACTORS in carrying out its responsibilities under this Funding Agreement.

6 Information, Advice and Guidance

- 6.1 As part of providing the Activities, THE NMSS will have to provide high quality, impartial and easily accessible information and advice in helping pupils to understand the opportunities and support available to them about education, training or connected matters (including employment).
- 6.2 Where one of the main objectives of the Activities to be provided under this Funding Agreement is to deliver information and advice, THE NMSS will have to have or attain the matrix Standard accreditation within six months of the Funding Agreement being awarded; and
- 6.3 If the information and advice is embedded as part of the provision of the Activities, The NMSS should work towards achieving the matrix Standard Accreditation within a reasonable period.