




Agreement Type	Non-Maintained Special Schools
Funding Period	1 st August 2019 to 31 st July 2020
Between	the Secretary of State for Education (acting through the Education and Skills Funding Agency)
And	«ProviderName»
Funding for	«FSPGroupList»
Master Agreement Number	«MasterContractRef»

ACCEPTANCE BY PROVIDER

BY ACCEPTING THIS AGREEMENT VIA THE MANAGE YOUR EDUCATION & SKILLS FUNDING SERVICE THE PERSON TAKING THIS ACTION ON BEHALF OF THE PROVIDER REPRESENTS AND WARRANTS THAT THE PROVIDER HAS READ AND UNDERSTOOD THIS AGREEMENT, THE PROVIDER AGREES TO BE BOUND BY THIS AGREEMENT AND THAT HE/SHE IS DULY AUTHORISED TO ACCEPT THIS AGREEMENT AND LEGALLY BIND THE PROVIDER.

SIGNED FOR AND ON BEHALF OF THE SECRETARY OF STATE FOR EDUCATION

acting through the Education and Skills Funding Agency
by Eileen Milner, Chief Executive of the Education & Skills Funding Agency



This Agreement is made on the date the Agreement is digitally signed by the Provider on the Manage Your Education & Skills Funding Service between:

«ProviderName»

«ProviderAddress»

«ProviderCompanyNo»

AND

THE SECRETARY OF STATE FOR
EDUCATION ACTING THROUGH
THE EDUCATION AND SKILLS
FUNDING AGENCY, AN
EXECUTIVE AGENCY OF THE
DEPARTMENT OF EDUCATION
CHEYLESMORE HOUSE
QUINTON ROAD
COVENTRY
CV1 2WT

Hereinafter called
the Provider

Hereinafter called
the Department

CONTENTS

PART 1: PRELIMINARIES

1 DEFINITIONS

PART 2: THE SERVICES

2 COMMENCEMENT AND DURATION

3 SERVICE DELIVERY

4 EMERGENCIES AND SIGNIFICANT INCIDENTS

5 PERFORMANCE MONITORING

6 CHANGES

7 HEALTH & SAFETY

8 LEARNER WELFARE

9 EQUALITY OF OPPORTUNITY

10 QUALITY ASSURANCE AND RAISING STANDARDS

11 FINANCIAL HEALTH

12 INSPECTIONS

13 MINIMUM STANDARDS

14 FRAUD AND IRREGULARITY

PART 3: AGREEMENT GOVERNANCE

15 RELATIONSHIPS

16 REPRESENTATIVE

17 DISPUTE RESOLUTION

PART 4: IPR DATA AND CONFIDENTIALITY

18 ASSIGNMENT OF IPR IN DATABASES

19 DEPARTMENT DATA

20 DATA PROTECTION AND PROTECTION OF PERSONAL DATA

21 SUBMISSION OF LEARNER DATA

22 SECURITY

23 FREEDOM OF INFORMATION AND CONFIDENTIALITY

PART 5: WORKFORCE

24 EMPLOYEES

25 RE-PROVISION OF THE SERVICES

PART 6: PAYMENT AND AUDIT

26 PAYMENT AND AUDIT

27 REVIEW OF CONTRACTUAL PERFORMANCE AND RECONCILIATION OF AGREEMENTS

28 PROVIDER'S RECORDS AND AUDIT

29 STATE AID

PART 7: CORPORATE GENERAL

30 ASSIGNMENT AND SUB-CONTRACTING

31	INDEMNITIES AND LIABILITY
32	INSURANCE
33	CHANGE IN CONTROL
34	PROHIBITED ACTS
PART 8: TERMINATION AND EXIT MANAGEMENT	
35	MINOR AND SERIOUS BREACH
36	TERMINATION
37	CONSEQUENCES OF TERMINATION AND EXPIRY
38	EXIT ARRANGEMENTS
PART 9: GENERAL PROVISIONS	
39	PROVISION OF INFORMATION
40	SERVICE OF NOTICES
41	ENTIRE AGREEMENT
42	NO AGENCY
43	EXERCISE OF STATUTORY AUTHORITY
44	PUBLIC RELATIONS AND PUBLICITY
45	AMENDMENTS TO THIS AGREEMENT
46	WAIVER
47	SEVERABILITY
48	LAW AND JURISDICTION
49	INTEREST ON LATE PAYMENTS
50	MITIGATION
51	FURTHER ASSURANCE
52	THIRD PARTY RIGHTS
53	CONTINUING OBLIGATIONS
SCHEDULE 1: SPECIFICATION & MONITORING	
SCHEDULE 2: PAYMENT	
SCHEDULE 3: NOT USED	
SCHEDULE 4: NOT USED	
SCHEDULE 5: NOT USED	
SCHEDULE 6: GDPR	
SCHEDULE 7: SECURITY & DEPARTMENT POLICIES	
SCHEDULE 8: EXIT ARRANGEMENTS	

PART 1: PRELIMINARIES

1 DEFINITIONS

“Account Manager”	the person appointed by the Provider in accordance with Clause 16.2 (Account Manager);
“Agreement”	means the Agreement between the above named parties consisting of these Terms and Conditions, the Specification and any other documents (or parts thereof) specified in the Agreement and any variations to the Agreement agreed in writing and signed by both Parties;
“Agreement Date”	The date of this Agreement;
“Agreement Manager”	the person appointed by the Department in accordance with Clause 16.1 (Agreement Manager);
“Agreement Period”	means the period between the Agreement Date and the Expiry Date, unless terminated earlier on the Termination Date;
“ASBOs”	an anti-social behaviour order as defined in the Crime and Disorder Act 1998;
“Awarding Organisation”	an organisation that is regulated by Ofqual or is recognised by QAA as an access validating agency;
“Business Continuity Plan”	any plan prepared pursuant to Clause 4.1 (Business Continuity), as may be amended from time to time;
“Change”	any change to the Services as advised by the Department;
“Change in Control”	any event where any single person or group of persons acting in concert (within the meaning of The City Code on Takeovers and Mergers) acquires any direct or indirect legal and/or beneficial interest in the share capital (as defined in Section 545 of the Companies Act 2006) of the Provider as a result of which that person or group of persons has a direct or indirect interest in more than 25% of the share capital of the Provider. It shall also include any change in the top two tiers of the management team;
“Child” or “Children”	shall have the meaning given to it in Section 60 of the Safeguarding Vulnerable Groups Act 2006;

“Combined Authority”	means an authority established under section 103(1) of the Local Democracy, Economic Development and Construction Act 2009 or an authority to which a delegation of the Secretary of State’s functions has been made under section 39A of the Greater London Authority Act 1999;
“Confidential Information”	means any information, including Personal Data as defined by the Data Protection Act 2018, and any information, however it is conveyed, that relates to the business, affairs, developments, trade secrets, know-how, personnel, and suppliers of the Parties including all IPRs, together with all information derived from any of the above, and any other information clearly designated as being confidential or which ought reasonably be considered to be confidential (whether or not it is marked "confidential");
“Contracts Finder”	means the Government’s publishing portal for public sector procurement opportunities;
“Controller”	takes the meaning given in the GDPR;
“Convictions”	other than for minor road traffic offences, any previous or pending prosecutions, convictions, cautions and binding over orders (including any spent convictions as contemplated by section 1(1) of the Rehabilitation of Offenders Act 1974 by virtue of the exemptions specified in Part II of Schedule 1 of the Rehabilitation of Offenders Act 1974 (Exemptions) Order 1975 (SI 1975/1023) or any replacement or amendment to that Order, or is a Barred person in accordance with section 3 of the Safeguarding Vulnerable Groups Act 2006;
“Crown Body”	means any department, office or agency of the Crown, including Ofsted, the Care Quality Commission, the Charity Commission, the Office for Students, Ofqual, any and all local authority or Combined Authority bodies;
“Database”	the rights in or to the data held in the Provider’s system in accordance with the Specification;
“Data Loss Event”	any event that results, or may result, in unauthorised access to Personal Data held by the Processor under this Agreement, and/or actual or potential loss and/or destruction of Personal Data in breach of this Agreement, including any Personal Data Breach;

“Data Protection Impact Assessment”	an assessment by the Controller of the impact of the envisaged processing on the protection of Personal Data;
“Data Protection Laws”	means the Data Protection Act 2018 and Electronic Communications (EC Directive) Regulations 2003 and any other data protection laws and regulations applicable in the UK (or in any relevant part thereof), including the General Data Protection Regulation (EU) 2016/679 or similar and any codes of practice, guidelines and recommendations issued by the Information Commissioner, any replacement body or other relevant supervisory authority, all of which are current at the time of any Data processing by the Provider (and in the event of any conflict between the Data Protection Laws and Law, Data Protection Laws shall take precedence);
“Data Protection Officer”	takes the meaning given in the GDPR;
“Data Subject”	takes the meaning given in the GDPR;
“Data Subject Access Request”	a request made by, or on behalf of, a Data Subject in accordance with rights granted pursuant to the Data Protection Laws to access their Personal Data;
“Department”	means the Secretary of State for Education (acting through the Education and Skills Funding Agency);
“Department Data”	Means any data (including metadata), record, document or information howsoever stored which is either: (a) communicated by the Department, its staff, sub-contractors and agents to the Provider in writing, orally, electronically or by any other means relating to the Learners and/or Services provided to the Learners; or (b) is obtained, gleaned, compiled or processed by the Provider during the course of the Provider providing the Services relating to or provided to the Learners including but not limited to ILR Data and e-portfolios;
“Department Policies”	the policies of the Department referred to in Schedule 7 (Security & Department Policies) in force as at the Agreement Date and amended from time to time;

“Department System”	means the Department’s computing environment (consisting of hardware, software and/or telecommunications networks or equipment) used by the Department or the Provider in connection with this Agreement which is owned by or licensed to the Department by a third party and which interfaces with the Provider System or which is necessary for the Department to receive the Services;
“Disclosure and Barring Service or DBS”	means the non-departmental public body established pursuant to the Protection of Freedoms Act 2012;
“Dispute Resolution Procedure”	means the procedure for resolving disputes as set out in Clause 17 (Dispute Resolution);
“DPA 2018”	Data Protection Act 2018;
“Employment Regulations”	means the Transfer of Undertakings (Protection of Employment) Regulations 2006 (SI 2006/246) as amended or replaced or any other Regulation implementing the Acquired Rights Directive 77/187/EC;
“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 Agreement or otherwise relating to the Provider, which potentially falls within an exemption to FOIA (as set out therein);
“Expiry Date”	means 31st July 2020;
“Financial Year”	means a period of 12 months starting on 1 April and ending on 31 March;
“FOIA”	means the Freedom of Information Act 2000 and all regulations made thereunder 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 Clause 23 (Freedom of Information and Confidentiality);
“FOIA Notice”	means a decision notice, enforcement notice and/or an information notice;
“Funding Agreement”	Means the table as set out in Schedule 2 (Payment);
“Funding Rules”	means the documents produced by the Department which set out the detailed requirements with which the Provider must comply in respect of the Services delivered under this Agreement as may be amended

	by the Department from time to time and as referred to in the Specification (Schedule 1).
“Funding Year”	means a period of 12 months starting on 1 August and ending on 31 st July;
“Future Transferring Employees”	those employees of the Provider and/or the Provider’s sub-contractors to whom the Employment Regulations will apply on the Service Transfer Date;
“GDPR”	General Data Protection Regulation (Regulation (EU) 2016/679);
“Good Industry Practice”	that degree of skill, care, prudence, foresight and operating practice which would reasonably and ordinarily be expected from time to time of a skilled and experienced operator (engaged in the same type of undertaking as that of the Provider) or any sub-contractor under the same or similar circumstances;
“Guidance”	any applicable guidance or directions with which the Provider is bound to comply;
“High Needs Learner”	means a Learner aged 16 to 18 with high levels of SEND, supported with top-up funding from the high needs budget, or any young person aged 19 to 25 subject to an Education Health and Care Plan, who requires additional support costing over £6,000;
“ICT Environment”	means the Department System and the Provider System;
“Incident Response Plan”	means each Party’s operational plan for response to and recovery from Significant Incidents or Emergencies as identified in national, local and community risk registers and in accordance with the requirements of the Civil Contingencies Act 2004;
“Indirect Losses”	means loss of profits, loss of production, loss of business, loss of business opportunity, or any claim for consequential loss or for indirect loss of any nature;
“ILR Data”	Means individualised learner record data;
“Insolvency Event”	means, in respect of the Provider: (a) a proposal is made for a voluntary arrangement within Part I of the Insolvency Act 1986 or of any other composition scheme or arrangement with, or assignment for the benefit of, its creditors; or

	<p>(b) a shareholders' meeting is convened for the purpose of considering a resolution that it be wound up or a resolution for its winding-up is passed (other than as part of, and exclusively for the purpose of, a bona fide reconstruction or amalgamation); or</p> <p>(c) a petition is presented for its winding up (which is not dismissed within 14 Working Days of its service) or an application is made for the appointment of a provisional liquidator or a creditors' meeting is convened pursuant to section 98 of the Insolvency Act 1986; or</p> <p>(d) a receiver, administrative receiver or similar officer is appointed over the whole or any part of its business or assets; or</p> <p>(e) an application order is made either for the appointment of an administrator or for an administration order, an administrator is appointed, or notice of intention to appoint an administrator is given; or</p> <p>(f) it is or becomes insolvent within the meaning of section 123 of the Insolvency Act 1986; or</p> <p>(g) being a "small company" within the meaning of section 382(3) of the Companies Act 2006, a moratorium comes into force pursuant to Schedule A1 of the Insolvency Act 1986;</p>
<p>“Inspectorates”</p>	<p>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), the Quality Assurance Agency for Higher Education, the Office for Students, the Care Quality Commission (CQC) and the Local Government Ombudsman;</p>
<p>“Intellectual Property Rights”</p>	<p>means any patent, registered design, copyright, database right, design right, topography right, trade mark, trade name, application to register any of the aforementioned rights, trade secret, inventions, right in unpatented know-how, right of confidence and any other intellectual or industrial property right of any nature whatsoever in any part of the world including, without limitation:</p> <p>(a) any renewals, revisions and extensions created or provided by the laws of any country;</p>

	<p>(b) all rights of action and remedies (including but not limited to an injunction, damages and/or an account of profits) in relation to past infringements; and</p> <p>(c) the right to apply for registration of any such rights in any country of the world;</p>
“Law”	means any law, subordinate legislation within the meaning of Section 21(1) of the Interpretation Act 1978, bye-law, enforceable right within the meaning of Section 2 of the European Communities Act 1972, regulation, order, regulatory policy, mandatory guidance or code of practice, judgment of a relevant court of law, or directives or requirements with which the Provider is bound to comply;
“Learner”	means any third party including any student, trainee or similar to whom the Provider is required to deliver any of the Services;
“Learner Files” / “Evidence Packs”	means any information relating to a Learner generated by the Provider, the Learner or a third party for the purpose of the delivery of the Learning Programme;
“Learning Programme”	means a programme of education and/or training delivered by the Provider under this Agreement;
“LED”	means the Law Enforcement Directive (Directive (EU) 2016/680);
“Local Enterprise Partnership (LEP)”	means a legal relationship between two or more local authorities by way of partnership or otherwise, created for the purposes of identifying, determining and facilitating economic opportunities that generate economic growth, prosperity and job creation in a particular area;
“Malicious Software”	any software program or code intended to destroy, interfere with, corrupt, or cause undesired effects on program files, data or other information, executable code or application software macros, whether or not its operation is immediate or delayed, and whether the malicious software is introduced wilfully, negligently or without knowledge of its existence;
“Minor Breach”	shall mean a delay or non-performance by either Party of its obligations under the Agreement which does not materially, adversely or substantially affect the performance or delivery of the Service or the provision of a safe, healthy and supportive learning environment;

“New Provider Monitoring Visit”	means a type of visit carried out by Ofsted, which explores one or more specific themes, with the purpose of assessing progress against these themes, promoting improvement and assessing risk. Such inspections may apply to Provider that are newly providing Provision funded by the Department.
“Occasion of Tax Non-Compliance”	<p>(a) any tax return of the Provider submitted to a Relevant Tax Authority on or after 1 October 2012 is found on or after 1 April 2013 to be incorrect as a result of:</p> <p>(i) a Relevant Tax Authority successfully challenging the Provider under the General Anti-Abuse Rule or the Halifax Abuse Principle or under any tax rules or legislation that have an effect equivalent or similar to the General Anti-Abuse Rule or the Halifax Abuse Principle;</p> <p>(ii) the failure of an avoidance scheme which the Provider was involved in, and which was, or should have been, notified to a Relevant Tax Authority under the DOTAS or any equivalent or similar regime; and/or</p> <p>(b) any tax return of the Provider submitted to a Relevant Tax Authority on or after 1 October 2012 gives rise on or after 1 April 2013 to a criminal conviction in any jurisdiction for tax related offences which is not spent at the Agreement Date or to a civil penalty for fraud or evasion;</p>
“Offender Manager”	means an officer from Her Majesty’s Prison and Probation Service who is working directly with an offender serving their sentence in the community;
“Ofsted”	means the Office for Standards in Education, Children’s Services and Skills;
“Parties”	means the Department acting on behalf of the Crown and the Provider;
“Personal Data”	takes the meaning given in the GDPR;
“Personal Data Breach”	takes the meaning given in the GDPR;
“Premises”	means the location(s) where the Services are to be performed;
“Processor”	takes the meaning given in the GDPR;
“Processor Personnel”	means all directors, officers, employees, agents, consultants and Agreementors of the Processor and/or

	of any Sub-Processor engaged in the performance of its obligations under this Agreement;
“Prohibited Acts”	means the acts specified in Clause 34 (Prohibited Acts);
“Protective Measures”	appropriate technical and organisational measures which may include: pseudonymising and encrypting Personal Data, ensuring confidentiality, integrity, availability and resilience of systems and services, ensuring that availability of and access to Personal Data can be restored in a timely manner after an incident, and regularly assessing and evaluating the effectiveness of the such measures adopted by it including those outlined in this Agreement;
“Provider Personnel”	means all persons employed or engaged by the Provider together with the Provider’s servants, agents, consultants and sub-contractors (and all persons employed by any sub-contractor together with the sub-contractor’s servants, consultants, agents, Provider’s and sub-contractors) used in the performance of its obligations under this Agreement;
“Provider Related Party”	means any officer, agent, employee of the Provider acting in the course of his office or employment including any sub-contractors supplied by the Provider in relation to the Services;
“Provider System”	the information and communications technology system used by the Provider in performing the Services including the Provider’s equipment and related cabling (but excluding the Department System);
“Regulated Qualification Framework” or “RQF”	a system for cataloguing all qualifications regulated by Ofqual;
“Regulatory Body”	means those government departments and regulatory, statutory and other entities, committees, ombudsmen and bodies which, whether under statute, rules, regulations, codes of practice or otherwise, are entitled to regulate or investigate the matters dealt with in this Agreement or any other affairs of the Provider or the Department, including, without limitation Ofsted, the European Commission and the European Court of Auditors;
“Relevant Authority”	any court with the relevant jurisdiction and any local, national or supra-national agency, inspectorate, minister, ministry, officer or public or statutory person

	of the Government of the United Kingdom or of the European Union;
“School Census”	Means the data collection framework set out at https://www.gov.uk/guidance/school-census
“Serious Breach”	shall mean any breach defined as a Serious Breach in the Agreement or any breach or breaches which adversely, materially or substantially affect the performance or delivery of the Services or compliance with the terms and conditions of the Agreement or the provision of a safe, healthy and supportive learning environment. Failure to comply with Law, or actions or omissions by the Provider that endanger the Health or Safety of Learners would constitute a Serious Breach;
“Service Transfer”	any transfer of the Services (or any part of the Services), for whatever reason, from the Provider or any sub-contractor to a Successor Provider;
“Service Transfer Date”	the date of a Service Transfer or, if more than one, the date of the relevant Service Transfer as the context requires;
“Services”	means the services to be provided as set out in the Funding Rules and the Specification (Schedule 1);
“Services Start Date”	means the date as set out in the Specification (Schedule 1);
“Significant Incident or Emergency”	an event or occurrence which: (i) constitutes an emergency for the purposes of the Civil Contingencies Act 2004; and/or (ii) constitutes an emergency under local and community risk registers; and/or (iii) is designated as a significant or emergency incident under the Incident Response Plan;
“Skills Advisory Panel” or “SAP”	means a sub-board of a Combined Authority or Local Enterprise Partnership, which brings together local employers and skills providers to establish the skills need for the local area and to ensure alignment of skills provision with that local need;
“SME”	means an enterprise falling within the category of micro, small and medium-sized enterprises defined by the Commission Recommendation of 6 May 2003

	concerning the definition of micro, small and medium-sized enterprises;
“Specification”	means the documents contained in Schedule 1 setting out the Department’s requirements for the Services to be provided under this Agreement;
“Staffing Information”	<p>in relation to all persons identified on the Supplier's Provisional Supplier Personnel List or Supplier's Final Supplier Personnel List, as the case may be, such information as the Department may reasonably request (subject to all applicable provisions of the DPA), but including in an anonymised format:</p> <p>(a) their ages, dates of commencement of employment or engagement, gender and place of work;</p> <p>(b) details of whether they are employed, self employed contractors or consultants, agency workers or otherwise;</p> <p>(c) the identity of the employer or relevant contracting Party;</p> <p>(d) their relevant contractual notice periods and any other terms relating to termination of employment, including redundancy procedures, and redundancy payments;</p> <p>(e) their wages, salaries, bonuses and profit sharing arrangements as applicable;</p> <p>(f) details of other employment-related benefits, including (without limitation) medical insurance, life assurance, pension or other retirement benefit schemes, share option schemes and company car schedules applicable to them;</p> <p>(g) any outstanding or potential contractual, statutory or other liabilities in respect of such individuals (including in respect of personal injury claims);</p> <p>(h) details of any such individuals on long term sickness absence, parental leave, maternity leave or other authorised long term absence;</p> <p>(i) copies of all relevant documents and materials relating to such information, including copies of relevant Agreements of employment (or relevant standard Agreements if applied generally in respect of such employees); and</p>

	(j) any other “employee liability information” as such term is defined in regulation 11 of the Employment Regulations;
“Sub-Contractor Declaration”	the declaration that the Department requires a Provider complete specifying whether or not the Provider is sub-contracting any of the Services and if so, what Services and the amount of funding that represents;
“Sub-Processor”	any third Party appointed to process Personal Data on behalf of that Processor related to this Agreement;
“Successor Provider”	means the person nominated by the Department to undertake the services substantially the same as the Services after the termination of this Agreement;
“Termination Date”	means any date on which this Agreement terminates in accordance with Clause 36 (Termination);
“Voluntary Community and Social Enterprise” or “VCSE”	means a non-governmental organisation that is value-driven and which principally reinvests its surpluses to further social, environmental or cultural objectives;
“Working Day”	a day (other than a Saturday or Sunday) on which banks are open for domestic business in the City of London.

- 1.1 In this Agreement, unless the context otherwise requires, capitalised expressions shall have the meanings set out in Clause 1 above or the relevant Schedule in which that capitalised expression appears. If a capitalised expression does not have an interpretation in Clause 1 or the relevant Schedule, it shall have the meaning given to it in this Agreement.
- 1.2 In this Agreement except where the context otherwise requires:-
- 1.2.1 the masculine includes the feminine and vice-versa;
 - 1.2.2 the singular includes the plural and vice-versa;
 - 1.2.3 a reference to any clause, sub-clause, paragraph, schedule or annex is, except where it is expressly stated to the contrary, a reference to such clause, sub-clause, paragraph, schedule or annex of this Agreement;
 - 1.2.4 any reference to this Agreement or to any other document shall include any permitted variation, amendment or supplement to such document;
 - 1.2.5 any reference to any enactment, order, regulation, code, guidance or other similar instrument shall be construed as a reference to the enactment, order, regulation, code, guidance or instrument (including any EU instrument) as amended, replaced, consolidated or re-enacted;
 - 1.2.6 references to any documents being "in the agreed form" means such documents have been initialled by or on behalf of each of the Parties for the purpose of identification;

- 1.2.7 a reference to a person includes firms, partnerships and corporations and their successors and permitted assignees or transferees;
 - 1.2.8 headings are for reference only;
 - 1.2.9 words preceding "include", "includes", "including" and "included" shall be construed without limitation by the words which follow those words;
 - 1.2.10 the Schedules to this Agreement form part of this Agreement;
 - 1.2.11 references to the Parties shall be to the parties to this Agreement; and
 - 1.2.12 references to months shall mean calendar months.
- 1.3 No review, comment or approval by the Department under the provisions of this Agreement shall operate to exclude or limit the Provider's obligations or liabilities under this Agreement or the Department's rights under this Agreement.
- 1.4 Precedence of Documentation
- In the event of any inconsistency between the provisions of the Terms and Conditions and the Schedules, or between any of the Schedules, the conflict shall be resolved according to the following descending order of priority:
- 1.4.1 the Terms and Conditions,
 - 1.4.2 Schedule 1 (the Specification);
 - 1.4.3 the remaining Schedules,

for the avoidance of doubt, in the event of any inconsistency between this Agreement and the Funding Rules, this Agreement will take precedence.

PART 2: THE SERVICES

2 COMMENCEMENT AND DURATION

- 2.1 The Agreement Period will commence on the Agreement Date and terminate or expire on the earlier of:
- 2.1.1 the Expiry Date; or
 - 2.1.2 the Termination Date.

3 SERVICE DELIVERY

- 3.1 The Services to be delivered under this Agreement are those as set out in Schedule 1 (Specification). The detailed requirements in respect of the Services are also set out in the Funding Rules as amended from time to time by the Department and which form part of the terms and conditions of this Agreement.
- 3.2 The Services are to be delivered in accordance with the Specification, specific requirements of the Department, and all other Schedules, which all form part of the terms and conditions of the Agreement.
- 3.3 The Provider will comply (and will ensure that any sub-contractor complies) with the Department Policies.

- 3.4 The Provider will ensure that data relating to Learners including Learner records is held and saved in a format that can be reasonably accessed by the Department on request.

4 EMERGENCIES AND SIGNIFICANT INCIDENTS

- 4.1 The Provider must have and maintain an up-to-date Business Continuity Plan. https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/376381/Expecting_the_Unexpected_Reviewed.pdf
- 4.2 The Provider must at the request of the Department provide whatever support and assistance may reasonably be required by the Department in response to any national, regional or local emergency or incident including at any premises identified by the Department.
- 4.3 The Provider will ensure that Learners have access to portfolios, e-portfolios, learning materials and other evidence at all times.

5 PERFORMANCE MONITORING

5.1 Provider Monitoring

- 5.1.1 The Provider must put in place the necessary internal control framework, including an internal audit function to ensure that it meets its obligations and those of its sub-contractors under this Agreement.

5.2 Department Monitoring

- 5.2.1 The Department will undertake its own performance monitoring, as set out in Schedule 1 (Specification) and may elect, at its own cost, to undertake further monitoring at any stage during the Agreement Period for any purpose, including ensuring that the Services are being provided in accordance with this Agreement.
- 5.2.2 The Provider must use its reasonable endeavours to assist the Department in any performance monitoring exercise under Clause 5.2.1. The Department may notify the Provider of the outcome of the performance monitoring exercise and the Provider must have due regard to the Department's comments in relation to the future provision of the Services.
- 5.2.3 Without prejudice to the Department's rights under Clauses 35 (Minor and Serious Breach) and 36.1 and to any other express rights under this Agreement, where the Provider has been found to be fraudulent or have recklessly submitted erroneous reports, claims and/or learner data, or the Department reasonably believes such reports to be fraudulent or erroneous the Department may, by notice to the Provider, increase the level of its monitoring of the Provider, or (at the Department's option), of the Provider's monitoring of its own performance of its obligations under this Agreement in respect of the relevant Services the subject of such fraudulent, erroneous or misleading reporting until such time as the Provider must have demonstrated to the reasonable satisfaction of the Department that it will perform (and is capable of performing) its

obligations under this Agreement, in which case, the following provisions will apply:

- (a) any such notice to the Provider will specify in reasonable detail the additional measures to be taken by the Department or by the Provider (as the case may be) in monitoring the performance of the Provider;
- (b) if the Provider (acting reasonably) objects to any of the specified measures on the grounds that they are excessive it will notify the Department in writing within five (5) Working Days of the receipt of the notice of the measures objected to (and of any Changes necessary in order to prevent prejudice to the Provider's performance of its obligations under this Agreement);
- (c) the measures to be taken by the Department and the Provider (as the case may be) will be agreed between the Parties or, in the absence of agreement within ten (10) Working Days of the Department's receipt of the Provider's objection, determined pursuant to the Dispute Resolution Procedure; and
- (d) the Provider will bear its own costs and indemnify and keep the Department indemnified at all times from and against all costs and expenses reasonably and properly incurred by or on behalf of the Department in relation to such increased level of monitoring save where there is no evidence that the Provider has been found to have been fraudulent or to have submitted erroneous reports and the Provider has been exonerated.

5.3 Provider Responsible

5.3.1 The Provider acknowledges and agrees that, notwithstanding any provision of this Agreement which contemplates that the Department will or may from time to time:

- (a) monitor or inspect any performance of the Services;
- (b) check compliance by the Provider with its obligations; or
- (c) confirm or indicate approval of or non-objection to proposals made by the Provider,

it will always be fully the responsibility of the Provider, and not the responsibility of the Department, to ensure that the Services are performed in all respects in accordance with the Provider's obligations under this Agreement and no such action by or on behalf of the Department will in any way limit or affect such obligations.

5.4 Quality Management Systems

5.4.1 The Department will have the right upon reasonable notice and at reasonable times to audit the Provider's quality management systems (for example ISO 9000 or equivalent standard) and/or any other quality management system to which the Specification refers, including examining and inspecting services and activities on or off the premises owned or occupied by the Provider to establish the adequacy or accuracy

of the quality management system documentation. The Provider will use all reasonable endeavours to assist the Department in such exercise.

6 CHANGES

- 6.1 The Department may implement a Change to the Services during the Agreement Period.
- 6.2 The Department may implement a Change by communicating the change through the Department's publications, Update or Inform, or through updates to Funding Rules and other related documents on GOV.UK. The Provider will subscribe to alerts from GOV.UK so they are made aware of Changes.

7 HEALTH & SAFETY

- 7.1 The Provider must comply with all health and safety legislation and Health and Safety Executive working regulations, adopt and maintain safe operating systems of work and appropriate safety policies in order to protect the health and safety of Provider Personnel, Learners and all other persons including members of the public.
- 7.2 Where part of the Services are provided in an environment outside the direct control of the Provider, the Provider must take all reasonable steps to ensure that adequate arrangements are in place to ensure the health and safety of Learners. This will include but not be limited to, co-ordinating and co-operating with other organisations/bodies with responsibilities being clearly identified and documented as appropriate, to ensure understanding.
- 7.3 The Provider must report all incidents that are reportable under the Reporting of Injuries, Diseases and Dangerous Occurrences Regulations 2013 ("RIDDOR") in accordance with those regulations and must investigate or assess the circumstances of all Learner incidents within the scope of RIDDOR and follow HSE guidance 'Investigating accidents and incidents: A workbook for employers, unions, safety representatives and safety professionals' (HSG245) ISBN 0717628272. The Provider must only use persons competent to investigate/assess Learner incidents with a view to identifying the causes of any incident and lessons to be learned.
- 7.4 The Provider must inform the Department of the death of any Learner during the provision of the Services. This will be done by informing the Department's representative by telephone or email immediately upon the Provider becoming aware of the death.
- 7.5 The Provider will, in circumstances where it sub-contracts the management and/or delivery of the Services under this Agreement, ensure that all the provisions in respect of health and safety in this Clause 7 are included in the sub-contract with each sub-contractor.

8 LEARNER WELFARE

- 8.1 In addition to its statutory health and safety responsibilities as referred to in Clause 7 (Health and Safety) above, the Provider must ensure that the Services

are delivered in safe, healthy and supportive environments, which meet the needs of Learners in accordance with this Clause 8 and Clause 24 (Employees).

- 8.2 Where the Provider provides residential accommodation for Learners, the Provider must inform the Department of the provision of such residential accommodation, must record this information on Get Information about Schools and must 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.
- 8.3 In providing the Services, the Provider 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.
- 8.4 Where, by virtue of being a 'children's home' within the meaning of the Care Standards Act 2000, the person carrying on or managing the non-maintained special school ("NMSS") is required to be registered with Ofsted, the Provider must comply with the Children's Homes (England) Regulations 2015 (or such successor secondary legislation as may replace those Regulations) in respect of the NMSS.
- 8.5 In providing the Services, the Provider must comply with the general duty on specified authorities in section 26 of the Counter-Terrorism and Security Act 2015 (the Prevent duty) and must have regard to statutory guidance issued under section 29 of the Counter-Terrorism and Security Act 2015 (https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/445915/Prevent_Duty_Guidance_For_Further_Education_England_Wales_-_Interactive.pdf).
- 8.6 In providing the Services, the Provider must comply with the duty on partners of a panel in section 38 of the Counter-Terrorism and Security Act 2015 (the Channel co-operation duty).
- 8.7 The Provider will also monitor, and act on, any other harm to Learners to the extent that the Provider could reasonably be expected to do so and/or where the harm could affect the quality of the learning experience. Harm includes (but is not limited to) incidents that cause absence from learning, any loss to the Learner of any physical or mental faculty or any disfigurement and incidents of bullying and harassment.
- 8.8 The Provider will co-operate with the Department and Department for Work and Pensions for the purposes of the Industrial Injuries Disablement Benefit (IIDB) in respect of those Learners to which it applies.
- 8.9 The Provider and/or the Provider 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.
- 8.10 The Provider will ensure it notifies the Department via the Contact Form: General Enquiries at <https://www.gov.uk/government/organisations/education-and-skills-funding-agency> where a referral has been made by the Provider or one of the Provider Related Parties in either of the following circumstances (such notification must include the name of the institution, a high level summary of the nature of the incident (without sharing personal information about victims or

alleged perpetrators) and confirmation of whether it is, or is scheduled to be, investigated by the Local Authority and/or the police):

8.10.1 a safeguarding concern related to sexual violence to Local Authority children's social care/adult social care and/or the police, or

8.10.2 an allegation of abuse made against a teacher, lecturer or other member of staff to the designated officer(s) (at the local authority).

8.11 The Provider will ensure it notifies the Department via the Contact Form: General Enquiries at <https://www.gov.uk/government/organisations/education-and-skills-funding-agency> of incident(s) and/or a referral has been made, where the Provider or one of the Provider Related Parties:

8.11.1 is aware of an incident, or pattern of incidents, which undermines the promotion of British fundamental values as referred to in Clause 8.3 or the ability of the Provider or the Provider Related Parties to comply with the Prevent duty, or

8.11.2 makes a referral of an individual member of Provider Personnel for the purposes of determining whether that member of Provider Personnel 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.

8.12 The Provider will, in circumstances where it sub-contracts the management and/or delivery of the Services under this Agreement, ensure that all the provisions in respect of learner welfare in this Clause 8 are included in the sub-contract with each sub-contractor.

9 EQUALITY OF OPPORTUNITY

9.1 The Provider must not unlawfully discriminate within the meaning and scope of the provisions of the Equality Act 2010 or any statutory modification or re-enactment thereof or any other statutory provision relating to discrimination in employment or the provision of services. The Provider must take all reasonable steps to ensure the observance of these provisions by all servants, employees or agents of the Provider and all sub-contractors employed in the execution of the Agreement. The Provider will comply with the detailed requirements in relation to equality of opportunity set out in Clauses 9.2 to 9.4.

9.2 The Provider will, in delivering the Services under this Agreement, demonstrate that it has had regard to the duties placed on the Department and the Provider by the Equality Act 2010. The Provider will take all reasonable steps to ensure the observance of these provisions by all servants, employees or agents of the Provider and all sub-contractors engaged in the delivery of the Services.

9.3 The Provider must ensure that equality of opportunity is built into all aspects of Services; the business planning process; and the self-assessment process. The Provider must use analysis of data to inform future planning to improve the representation, participation and success of underrepresented and underachieving groups and challenge stereotyping. The Provider must use appropriate, specific and measurable objectives. These will be proportionate, relevant and aligned to the Services the Provider is funded to deliver.

- 9.4 The Department may use a variety of equality information and data to support judgements about quality and eligibility for funding. These may include, but are not limited to: inspection judgements for equality and diversity, judgements from the Equality and Human Rights Commission, and the success and participation rates of different groups of Learners.

10 QUALITY ASSURANCE AND RAISING STANDARDS

- 10.1 The Provider undertakes to the Department that it and any Provider Related Party has the resources and skills necessary to carry out the Provider's obligations pursuant to this Agreement.
- 10.2 The Provider must comply with the Funding Rules published by the Department as amended from time to time and any other requirements, which may from time to time be issued by the Department, Inspectorates, the Awarding Organisations and other Regulatory Bodies and of which the Provider is made aware.
- 10.3 The Provider must ensure that all activities carried out pursuant to this Agreement will be documented in accordance with any requirements of the Department and must provide such documentation as the Department may request from time to time to ensure compliance with this Clause 10.3.
- 10.4 The Provider will continuously seek to improve the Services and raise standards to benefit the Learner. The Provider will have the primary responsibility for improving standards and will need to demonstrate to the Department's satisfaction that it has an effective quality assurance system based on the implementation of its own quality improvement process. The Department reserves the right to require the Provider to provide the Department or Ofsted evidence to support the quality improvement processes.
- 10.5 The Provider must use all reasonable endeavours to:
- (a) minimise dropout rates and deliver high completion and achievement rates and appropriate progression;
 - (b) offer equality of access to learning opportunities and close equality gaps in learning and outcomes;
 - (c) provide good management and leadership of the learning process;
 - (d) deliver value for money and financial probity; and
 - (e) ensure all sub-contractors delivering Services under the Agreement on behalf of the Provider comply with the requirements set out in Clauses 10.5(a) to 10.5(d) above.
- 10.6 Failure to meet the requirements set out in Clauses 10.5(a) to 10.5(e) may result in the Department assessing the Provider to be in Serious Breach of the Agreement under Clause 35 (Minor and Serious Breach) of the Agreement.
- 10.7 Where appropriate, the Provider must confirm in writing to the Department that their (including Provider Related Parties) Centre Approval Status for the relevant Services is still current. The written statement will need to confirm approved centre status for the specific Regulated Qualification Framework ("RQF") titles and levels, including Awarding Organisation name(s). The Provider must notify the Department immediately in writing via the Contact Form: General Enquires

at <https://www.gov.uk/government/organisations/education-and-skills-funding-agency> if it receives any sanction from an Awarding Organisation.

- 10.8 The Department can request any Awarding Organisation reports, assessments and notices from the Provider at any time.
- 10.9 The Department may assess the quality and delivery of the Services and the Provider's compliance with the requirements in Clauses 10.5(a) to 10.5(e) during the Agreement Period. The Provider will be informed of the outcome of that process. Where the Department assesses the Provider to be in Serious Breach of Agreement following such assessment the Department will issue a notice in accordance with Clause 35.3.1 of the Agreement which, where the Department is not terminating, may:
- (a) require the Provider to meet improvement indicators to improve the quality of its Services. The Department will meet with the Provider to discuss and reach agreement on implementation of these actions and improvement indicators and to agree arrangements for monitoring and reviewing progress. In such cases reviews will take place at the frequency specified by the Department and in agreement with the Provider;
 - (b) agree detailed improvement plans and measures that set out clearly the expected timescale for improvement;
 - (c) agree arrangements for more frequent monitoring of quality improvement plans.

11 FINANCIAL HEALTH

- 11.1 The Department will undertake an assessment of financial health and control (<https://www.gov.uk/government/publications/esfa-financial-health-assessment>). Should the Department, at its absolute discretion, consider that the outcome of any financial health and/or control assessment is inadequate the Department may, in its absolute discretion take one or more of the following actions:
- (a) require the Provider to, and the Provider will, accept and comply with additional Agreement obligations relating to the improvement of financial health and/or control arrangements;
 - (b) require the Provider to suspend the recruitment of Learners to the Services and/or cap any growth in Learner numbers;
 - (c) give consideration to what changes, if any, are required in its allocations when finalising the amount of funding in any subsequent Agreement between the parties; and/or
 - (d) terminate the Agreement in accordance with Clause 36.3.2.
- 11.2 Where the Provider fails to comply with requirements imposed under Clauses 11.1(a) and/or 11.1(b) the Department will consider termination under Clause 36.3.2.
- 11.3 Failure to submit accounts for assessment when requested will automatically deem the assessment under clause 11.1 as 'inadequate' and clauses 11.1(a) to 11.1(d) will apply.

- 11.4 Where the outcome of a financial assessment illustrates a deterioration from the previous assessment the Department may in its absolute discretion request such further assurance or information from the Provider as it deems necessary.
- 11.5 The Provider must notify the Department immediately if it, or any Provider Related Party, is experiencing or forecasting any financial difficulties and the Department may ask for additional financial information to obtain assurance of continuity of delivery of the Services.
- 11.6 The Department may require the Provider to carry out an independent business review at the Provider's cost (or for the Department to procure and recharge to the Provider at its sole discretion) if the Department has concerns over the financial health of the Provider.
- 11.7 The Department can at any time require the Provider at its own cost to provide a copy of the Provider's latest accounts, any historic accounts as requested, and submit further copies of the accounts as soon as they become available and to provide, upon request:
- 11.7.1 the Provider up to date management accounts, including financial performance against delivery;
 - 11.7.2 financial forecasts of the Provider's financial position for the next 12 months;
 - 11.7.3 cash flow forecasts for the next 12 months;
 - 11.7.4 any additional financial information the Department deems necessary.
- 11.8 Where the further information required from the Provider under Clauses 11.4, 11.5, 11.6 and 11.7 does not provide adequate assurance to the Department then the Department may in its absolute discretion take one or more of the actions set out in Clauses 11.1(a) to 11.1(d).
- 11.9 The Department reserves the right to request that the Provider provide a guarantee or other form of security on terms that will be notified to the Provider.

12 INSPECTIONS

- 12.1 When the Provider receives notification from an Inspectorate that the Services are to be inspected, the Provider will, on request, provide the Department with details of its quality improvement activity, and any other relevant information in accordance with the required timescale of the Inspectorate. The Provider must notify the Department via the Contact Form: General Enquires at <https://www.gov.uk/government/organisations/education-and-skills-funding-agency> of the date of the meeting at which an Inspectorate gives feedback on the inspection and allow the Department's nominated representative to attend the meeting. The Provider must confirm to the Department in writing the outcome of the inspection within 5 Working days of receiving the feedback from the Inspectorate.
- 12.2 Ofsted may, at any time during the Agreement Period, undertake an inspection of the Provider. The Department will consider the outcome of any such inspection in the manner set out in Clauses 12.3 to 12.8.

Inadequate in part

12.3 Where Ofsted has assessed the Services to be inadequate in any graded sub-judgement, the Department may, in its absolute discretion take one or more of the following actions:

12.3.1 require the Provider to accept and comply with additional Agreement obligations relating to the improvement of the Services assessed as inadequate and/or additional Funding conditions; and/or

12.3.2 require the Provider to suspend the recruitment of Learners to, and/or to cap any growth in, the Services which is assessed as inadequate; and/or

12.3.3 give consideration to the Services which are assessed as inadequate in its allocations when finalising the amount of Funding in any subsequent Agreements between the Parties; and/or

12.3.4 reduce, suspend or recover payment to the Provider in respect of that part of the Services assessed as inadequate; and/or

12.3.5 terminate the Agreement in accordance with Clause 36.3.4.

Inadequate overall

12.4 Where the Department is made aware that Ofsted has provisionally assessed the Services to be inadequate overall, the Department may, in its absolute discretion take one or more of the following actions:

12.4.1 require the Provider to accept and comply with temporary additional Agreement obligations relating to the improvement of the overall Services, including but not limited to, requiring the Provider to temporarily suspend the recruitment of Learners and/or temporarily cap any growth in those Learning Programmes which are assessed as inadequate;

12.4.2 commence discussions with the Provider, and the local authority and/or Combined Authority where appropriate, within whose area the Provider is located, either with the Inspectorate or not, as part of considering what actions as specified in Clauses 12.5.1 to 12.5.4 inclusive may be taken.

12.5 Where Ofsted has confirmed its assessment that the Services are inadequate overall, the Department may, in its absolute discretion take one or more of the following actions:

12.5.1 require the Provider to accept and comply with additional Agreement obligations relating to the improvement of the overall Services; and/or

12.5.2 require the Provider to suspend the recruitment of Learners to, and/or to cap any growth in, those Learning Programmes which are assessed as inadequate; and/or

12.5.3 give consideration to the assessment of inadequate in its allocations when finalising the amount of Funding in any subsequent Agreements between the Parties; and/or

12.5.4 reduce, suspend or recover payment to the Provider; and/or

12.5.5 terminate this Agreement in accordance with Clause 36.3.4 (Termination).

12.6 The failure of the Provider, as assessed by the Department, to comply with any requirements of Clauses 12.5.1 to 12.5.2 inclusive within such time as the Department may deem reasonable may lead to the Department taking such actions as it deems appropriate which may include, but is not limited to, terminating the Agreement in accordance with Clause 36.3.3 (Termination).

12.7 The Department will take action based on the Inspectorate's provisional and confirmed outcomes as in Clauses 12.4 to 12.5 above. Where the Department is made aware that the Provider has made a complaint about the graded outcome of the overall assessment by Ofsted, the Department will continue to progress action under Clauses 12.4 to 12.5 but will be mindful of the implications arising from the outcome of a complaint. The Department will review any decisions made at such time as outcomes of any complaint are made known.

12.8 If an Inspectorate rating is given based on incorrect or fraudulent information or data from the Provider this will constitute a Serious Breach and the Department may, at its sole discretion, terminate the Agreement.

Monitoring Visits

12.9 Where the Department is made aware that Ofsted has assessed the Provider as having made "insufficient progress" during their programme of monitoring visits, the Department may, in its absolute discretion take the following actions:

- (a) require the Provider to temporarily suspend the recruitment of Learners;
- (b) require the Provider to inform all of their existing employers about the outcome of the Inspectorate visit;
- (c) require the Provider to stop working with new Learners via a subcontracting arrangement with another main provider or employer-provider;
- (d) require the Provider to inform all of their existing main providers or employer-providers about the outcome of the Inspectorate visit;
- (e) terminate this Agreement in accordance with Clause 36.3.5 where Learners may be at immediate risk on the grounds of safeguarding issues and/or the quality of leadership and/or training provision is such that one or more Learner has no reasonable prospect of achieving his or her training objective.

12.9.1 Where the Department is made aware that Ofsted has assessed a sub-contractor to the Provider as having made "insufficient progress" during their programme of monitoring visits, the Provider is required to ensure that the sub-contractor suspends the recruitment of Learners until further notice.

New Providers Monitoring Visits

12.10 Where the Department is made aware that Ofsted has assessed the Provider as having made "insufficient progress" during their programme of new Provider

Monitoring Visits, the Department may, in its absolute discretion take the following actions:

12.10.1 require the Provider to, and the Provider shall, accept and comply with additional conditions of funding relating to the improvement of the Services. Such conditions will include complying with the published recommendations of Ofsted. These conditions will apply until a full Ofsted inspection of the Provider has taken place; and/or

12.10.2 require the Provider to temporarily suspend the recruitment of Learners;

12.10.3 require the Provider to stop working with new Learners via a sub-contracting arrangement with another main provider or employer-provider;

12.10.4 require the Provider to inform all of their existing main providers or employer-providers about the outcome of the Ofsted visit;

12.10.5 terminate this Agreement in accordance with Clause 36.3.5 where Learners may be at immediate risk on the grounds of safeguarding issues and/or the quality of leadership and/or training provision is such that one or more Learner has no reasonable prospect of achieving his or her training objective.

12.11 If an Inspectorate rating is given based on incorrect or fraudulent information or data from the Provider this will constitute a Serious Breach and the Department may, at its sole discretion, terminate the Agreement.

13 MINIMUM STANDARDS

NOT USED

14 FRAUD AND IRREGULARITY

14.1 The Provider must notify the Department immediately where it becomes aware of any instance of suspected fraud or financial irregularity in the delivery of the Agreement including, but not limited to, cases of:

14.1.1 collusion with members of the staff of the Department or employees of the Department for Education;

14.1.2 computer fraud;

14.1.3 the submission to the Department of inaccurate, incomplete, misleading or falsified information for the purpose of a claim for funding;

14.1.4 fraud involving Awarding Organisations;

14.1.5 fraud involving sub-contractors;

provided that nothing in this Clause 14 (Fraud and Irregularity) will require the Provider to do anything, which may cause it to infringe any Law.

14.2 Where the Department has reasonable cause to suspect that fraud or irregularity has occurred in relation to the delivery of the Agreement and payments made hereunder, the Department and/or its agents will have the right of access to the Provider's Premises (or that of any of its sub-contractors) at any reasonable time with or without notice to examine and remove or copy all relevant documents and

records including electronic records and to interview the Provider's servants or agents engaged with the delivery of the Agreement.

- 14.3 Where the Department has reasonable cause to suspect that fraud or irregularity has occurred in relation to the delivery of the Agreement and payments made hereunder, the Department may require the Provider to procure the services of an independent accountant (or other equivalent/appropriate professional) to investigate at the Provider's cost (or the Department will procure and recharge to the Provider at its sole discretion).
- 14.4 Where the Department has reasonable cause to suspect that fraud or irregularity has occurred in relation to the delivery of the Agreement or any other Agreement between the Department and the Provider and payments made there under, the Department will have the right to suspend payments and/or require the Provider to suspend recruitment of Learners under this Agreement and any other Agreement between the Parties.
- 14.5 Where the Provider is a registered or exempt charity, the Provider will inform the Department of any schemes, orders or official warnings issued to them by the Charities Commission. Failure to inform the Department will constitute a Serious Breach of this Agreement.
- 14.6 The Parties will co-operate in the identification of Learners who may be unlawfully claiming benefits. The Department may from time to time brief the Provider as to the co-operation and assistance it reasonably requires including the provision of information regarding fraud by Learners. The Department will provide a named contact or telephone answering machine for receiving such information.

PART 3: AGREEMENT GOVERNANCE

15 RELATIONSHIPS

15.1 Information and Assistance

15.1.1 Subject to any obligation in respect of confidentiality, the DPA 2018 and Confidential Information, the Parties will use all reasonable endeavours to provide and share information and data reasonably required by the other:

- (a) to enable it to perform its obligations under this Agreement; and/or
- (b) (in the case of the Provider) which is reasonably necessary to enable the Department to perform its statutory obligations and other functions insofar as such provision forms part of the Services.

15.1.2 Neither Party will hinder, delay or prevent the other Party in the performance of the other Party's obligations under this Agreement.

15.2 Enquiries, Investigations and Inspections

15.2.1 The Provider must and will ensure that its sub-contractors will at all times during the Agreement Period and for a period of six (6) years, or such other time period as stated in the Specification (Schedule 1), afterwards fully co-operate with any enquiry, investigation or inspection (whether routine or specific) which in any way concerns, affects or relates to the

Services, or any sum claimed or charged in relation to this Agreement or to any other Agreement of the Department. Such enquiry, investigation or inspection may be by, inter alia:-

- (a) the Department;
- (b) the Department's auditors (whether internal or external);
- (c) Regulatory Bodies; and/or
- (d) the Inspectorates.

15.2.2 Such co-operation will include (but not be limited to) the following:-

- (a) providing access to or copies of such files, documents, letters, emails, notes, minutes, records, accounts or any other information (whether held or stored electronically, in hard copy format or otherwise) which relate to the subject or Service (in whole or in part) under investigation;
- (b) providing access to the premises, equipment (including IT hardware and software) or other assets used by the Provider and/or its sub-contractors in the performance of this Agreement, such access to be supervised at all times unless the nature of the investigation requires the parties defined at Clause 15.2.1 to be unsupervised, such parties acting reasonably in making such assessment;
- (c) providing access to Provider Personnel (of whatever seniority) involved in this Agreement (including managerial or supervisory staff) or who may be the subject of, or be named in, any enquiry or investigation by the auditors or the ombudsmen (including providing suitable facilities for interviewing such staff);
- (d) maintaining the confidentiality of the enquiry or investigation when requested to do so;
- (e) making such explanations (whether written or oral) as may be necessary for the enquiry or investigation to be satisfied that the terms and conditions of this Agreement, the Funding Rules and the Law are being complied with;
- (f) at all times and without notice allow access to the Inspectorates, in connection with any complaint, investigation or inspection relating to this Agreement or the Services. This will extend to the Provider's Premises; and to all documentation and information relating to this Agreement to which the Provider has access; and to the Provider's agents, employees and sub-contractors.

15.2.3 Where the Department has undertaken an investigation or received a report from an independent accountant or otherwise, in relation to the Provider it may, as a consequence of that investigation or report, require the Provider to, and the Provider will, accept and comply with additional contractual obligations and will meet the cost of such investigation.

15.2.4 Where the Provider fails to comply with the contractual obligations imposed under Clause 15.2.3, within such time as the Department

deems reasonable, the Department may take such actions as it deems appropriate which may include, but is not limited to, under Clause 35 (Minor Breach and Serious Breach).

- 15.2.5 The Provider will in performing the Services comply fully with all relevant rules and regulations of the Department in force from time to time.
- 15.2.6 The Provider will, if requested by the Department, co-operate with the Department, at its own expense, in connection with any legal proceedings, adjudication, arbitration, court proceedings or ombudsmen enquiries in which the Department may become involved, arising from breaches of the Department's duties under the Equalities Legislation due to the alleged acts or omissions of the Provider, its employees, sub-contractors or agents.
- 15.2.7 The Provider will ensure that the terms of any sub-contract include identical provisions to this Clause 15 and will indemnify the Department against any Losses, damages or claims it suffers in consequence of a failure to ensure the inclusion of such identical items.

15.3 Complaints and Feedback

- 15.3.1 The primary responsibility for receiving feedback and investigating complaints promptly and thoroughly in respect of the Services will rest with the Provider. The Provider will have procedures in place including but not limited to a complaints framework, which are acceptable to the Department, to gather and act upon feedback and complaints from Learners and/or their representatives and employers and the wider community. The Provider must also keep a log of the complaints received which will be accessible to the Department upon request.
- 15.3.2 The Provider must ensure that Learners are made aware of its procedure for dealing with complaints and that the procedure is clear and accessible to Learners who wish to complain. The complaints procedure must be published on the Provider's website and be provided to the relevant parties as part of the Provider's onboarding process.
- 15.3.3 The Provider will be responsible for resolving complaints in accordance with its own procedures and any guidance issued by the Department. Once the Provider has concluded its investigations, including any appeal, it must inform the complainant in writing of the outcome.
- 15.3.4 Where a complaint has not been resolved to the satisfaction of the complainant the Provider will advise the complainant of his or her right to complain to the Department (<https://www.gov.uk/government/organisations/education-and-skills-funding-agency/about/complaints-procedure>) and co-operate with any investigation carried out by the Department and act on any recommendations made by the Department following the investigation.

16 REPRESENTATIVE

16.1 Agreement Manager

- 16.1.1 Without limiting the Department's obligations or rights in respect of such matters the Department will appoint an Agreement Manager who may subject to Clause 16.1.2 exercise the rights and powers conferred by this Agreement upon the Department.
- 16.1.2 Except pursuant to Clause 45 (Amendments to this Agreement), or unless specifically authorised for that purpose, the Agreement Manager does not have authority to amend the Agreement or to relieve the Provider of any express obligations under the Agreement.

16.2 Account Manager

- 16.2.1 The Provider will notify the Department in writing of the name, telephone number, e-mail address and the postal address of the person appointed as the Account Manager.
- 16.2.2 The Account Manager may exercise the functions, rights and powers conferred by this Agreement upon the Provider.
- 16.2.3 In the event that the Provider wishes to change the identity of the Account Manager, it will, subject to Clause 16.2.4 give to the Department not less than 5 Working Days notice in writing of such change which notice will inform the Department of the name, telephone number e-mail address and postal address of the new Account Manager.
- 16.2.4 In the event that it is not possible or practical for any reason for the Provider to give notice to the Department in accordance with Clause 16.2.3 the Provider will notify the Department by whatever means the Provider considers appropriate and will confirm such notification in writing within 5 Working Days.

16.3 User Role Management System

- 16.3.1 The Provider must ensure that those senior members of staff who are authorised to agree and sign Agreements on behalf of the Provider, submit Funding claims and return data are registered as users of the user role management system at <https://logon.fasst.org.uk>. It is the Provider's responsibility to maintain appropriate user roles on an on-going basis.

17 DISPUTE RESOLUTION

- 17.1.1 Any dispute will be dealt with in accordance with this Clause 17.
- 17.1.2 In the first instance, a representative of each Party will each use their reasonable endeavours to resolve the dispute. If the dispute cannot be resolved by such representatives within 15 days of the dispute arising, it will be referred to a senior representative of each Party, who will each use their reasonable endeavours to resolve the dispute.
- 17.1.3 If a dispute cannot be resolved by negotiation as referred to in Clause 17.1.2 within 30 days of the dispute arising, either Party may refer the dispute for determination in accordance with the mediation procedure

administered by the Centre for Effective Dispute Resolution, the costs of the mediator being split equally between the Parties, who will otherwise bear their own costs.

PART 4: IPR DATA AND CONFIDENTIALITY

18 ASSIGNMENT OF IPR IN DATABASES

- 18.1 The Provider hereby assigns to the Department, with full title guarantee, title to and all rights and interest in the information contained in or stored on the Database or will procure that the first owner of the Database assigns it to the Department on the same basis.
- 18.2 The assignment under Clause 18.1 will either take effect on the Agreement Date or as a present assignment of future rights that will take effect immediately on the coming into existence of the Database, as appropriate.
- 18.3 The Provider will waive or procure a waiver of any moral rights in the Database assigned to the Department under this Agreement.
- 18.4 To the extent that it is necessary for the Department to obtain the full benefits of ownership of the Database, the Provider hereby grants to the Department and will procure that any relevant third party licensor will grant to the Department an irrevocable, non-exclusive and global licence to use the Database.

19 DEPARTMENT DATA

- 19.1 The Provider acknowledges that the Department Data is the property of the Department and the Department hereby reserve all Intellectual Property Rights which may subsist in the Department Data.
- 19.2 The Provider must perform secure back-ups of all the Department Data and must ensure that up-to-date back-ups are stored off-site in accordance with the Business Continuity Plan. The Provider must ensure that such back-ups are available to the Department at all times upon request and are delivered to the Department at no less than monthly intervals when requested.
- 19.3 The Provider must take all necessary steps to ensure that any Department Data which comes into its possession or control is protected in accordance with the DPA 2018 and appropriate security procedures and in compliance with Good Industry Practice (having regard to the nature of its other obligations under this Agreement and under the DPA 2018).
- 19.4 In the event that the Department Data used in the provision of the Services is corrupted or lost by the Provider as a result of a breach by the Provider of Clause 22 (Security), the Department will have the option, in addition to any other remedies that may be available to them either under this Agreement or otherwise, to elect either of the following remedies:-
 - 19.4.1 the Department may require the Provider at its own expense to restore or procure the restoration of such the Department Data using the back-up copy referred to in Clause 19.2; or

- 19.4.2 the Department may itself restore or procure restoration of such the Department Data using the back-up copy referred to in Clause 19.2 and will be repaid by the Provider any reasonable expenses so incurred.
- 19.5 In the event that the Department Data used in the provision of the Services is corrupted or lost solely as a result of an act or omission by the Department the Department will, at its own expense,
 - 19.5.1 Require the Provider to restore or procure the restoration of the Department Data using the back-up copy referred to in Clause 19.2; or
 - 19.5.2 the Department may itself restore or procure the restoration of the Department Data.
- 19.6 The Provider must:-
 - 19.6.1 not use the Department Data, except as may be required to provide the Services or as instructed by the Department;
 - 19.6.2 not disclose the Department Data to any third party, other than in accordance with the requirements of the DPA 2018 for the purposes of fulfilling its obligations under this Agreement, except with the prior written consent of the Department or as required by this Agreement;
 - 19.6.3 undertake its obligations under this Agreement in such a manner as to preserve so far as reasonably possible the integrity and prevent any loss, disclosure, theft, manipulation or interception of the Department Data; and/or
 - 19.6.4 upon request provide the Department with full access to the relevant area of any systems of the Provider or its sub-contractors where the Department Data is stored or held for the purpose of viewing, retrieving, copying or otherwise dealing with the Department Data.

20 DATA PROTECTION AND PROTECTION OF PERSONAL DATA

- 20.1 The Parties acknowledge that for the purposes of the Data Protection Laws, the Department on behalf of the Secretary of State for Education is the Controller and the Provider is the Processor only for the processing set out in Schedule 6 (i.e. submission of Learner data to the Department). Any other processing of Personal Data undertaken by the Provider (e.g. Learner enrolment or delivering education & training, e.g. e-portfolios) will be as a Data Controller and not on behalf of the Department. Clauses 20.2 to 20.15 below apply only in relation to the processing of Personal Data on behalf of the Department as set out in Schedule 6, and the only processing that the Processor is authorised to do on behalf of the Department is listed in Schedule 6 by the Department and may not be determined by the Processor.
- 20.2 The Processor must notify the Controller immediately if it considers that any of the Controller's instructions infringe the Data Protection Laws.
- 20.3 The Processor must provide all reasonable assistance to the Controller in the preparation of any Data Protection Impact Assessment prior to commencing any processing. Such assistance may, at the discretion of the Controller, include:

- (a) a systematic description of the envisaged processing operations and the purpose of the processing;
- (b) an assessment of the necessity and proportionality of the processing operations in relation to the Services;
- (c) an assessment of the risks to the rights and freedoms of Data Subjects; and
- (d) the measures envisaged to address the risks, including safeguards, security measures and mechanisms to ensure the protection of Personal Data.

20.4 If requested by the Department's Agreement Manager, the Processor must, in relation to any Personal Data processed in connection with its obligations under this Agreement:

20.4.1 process that Personal Data only in accordance with Schedule 6, unless the Processor is required to do otherwise by Law. If it is so required the Processor will promptly notify the Controller before processing the Personal Data unless prohibited by Law;

20.4.2 ensure that it has in place Protective Measures, which are appropriate to protect against a Data Loss Event, which the Controller may reasonably reject (but failure to reject will not amount to approval by the Controller of the adequacy of the Protective Measures), having taken account of the:

- (a) nature of the data to be protected;
- (b) harm that might result from a Data Loss Event;
- (c) state of technological development; and
- (d) cost of implementing any measures;

20.4.3 ensure that:

- (a) the Processor Personnel do not process Personal Data except in accordance with this Agreement (and in particular Schedule 6);
- (b) it takes all reasonable steps to ensure the reliability and integrity of any Processor Personnel who have access to the Personal Data and ensure that they:

20.4.4 are aware of and comply with the Processor's duties under this clause;

20.4.5 are subject to appropriate confidentiality undertakings with the Processor or any Sub-processor;

20.4.6 are informed of the confidential nature of the Personal Data and do not publish, disclose or divulge any of the Personal Data to any third Party unless directed in writing to do so by the Controller or as otherwise permitted by this Agreement; and

20.4.7 have undergone adequate training in the use, care, protection and handling of Personal Data; and

- 20.4.8 not transfer Personal Data outside of the EU unless the prior written consent of the Controller has been obtained and the following conditions are fulfilled:
- (a) the Controller or the Processor has provided appropriate safeguards in relation to the transfer (whether in accordance with GDPR Article 46 or LED Article 37) as determined by the Controller;
 - (b) the Data Subject has enforceable rights and effective legal remedies;
 - (c) the Processor complies with its obligations under the Data Protection Laws by providing an adequate level of protection to any Personal Data that is transferred (or, if it is not so bound, uses its best endeavours to assist the Controller in meeting its obligations); and
 - (d) the Processor complies with any reasonable instructions notified to it in advance by the Controller with respect to the processing of the Personal Data;
- 20.4.9 at the written direction of the Controller, delete or return Personal Data (and any copies of it) to the Controller on termination of the Agreement unless the Processor is required by Law to retain the Personal Data.
- 20.5 Subject to Clause 20.6, the Processor must notify the Controller immediately if it:
- 20.5.1 receives a Data Subject Request (or purported Data Subject Request) in relation to processing their data under this Agreement only (submission of learner data data);
 - 20.5.2 receives a request to rectify, block or erase any Personal Data processed through the submission of learner data. Notification in such cases should be given via the submission of learner data for changes in-year and via the Agreement Manager for closed years;
 - 20.5.3 receives any other request, complaint or communication relating to either Party's obligations under the Data Protection Laws;
 - 20.5.4 receives any communication from the Information Commissioner or any other Regulatory Body in connection with Personal Data processed under this Agreement;
 - 20.5.5 receives a request from any third Party for disclosure of Personal Data where compliance with such request is required or purported to be required by Law; or
 - 20.5.6 becomes aware of a Data Loss Event.
- 20.6 The Processor's obligation to notify under Clause 20.5 will include the provision of further information to the Controller in phases, as details become available.
- 20.7 Taking into account the nature of the processing, the Processor will provide the Controller with full assistance in relation to either Party's obligations under Data Protection Laws and any complaint, communication or request made under Clause 20.5 (and insofar as possible within the timescales reasonably required by the Controller) including by promptly providing:

- 20.7.1 the Controller with full details and copies of the complaint, communication or request;
 - 20.7.2 such assistance as is reasonably requested by the Controller to enable the Controller to comply with a Data Subject Request within the relevant timescales set out in the Data Protection Laws;
 - 20.7.3 the Controller, at its request, with any Personal Data it holds in relation to a Data Subject;
 - 20.7.4 assistance as requested by the Controller following any Data Loss Event;
 - 20.7.5 assistance as requested by the Controller with respect to any request from the Information Commissioner's Office, or any consultation by the Controller with the Information Commissioner's Office.
- 20.8 The Processor must maintain complete and accurate records and information to demonstrate its compliance with this clause. This requirement does not apply where the Processor employs fewer than 250 staff, unless:
- 20.8.1 the Controller determines that the processing is not occasional;
 - 20.8.2 the Controller determines the processing includes special categories of data as referred to in Article 9(1) of the GDPR or Personal Data relating to criminal convictions and offences referred to in Article 10 of the GDPR; or
 - 20.8.3 the Controller determines that the processing is likely to result in a risk to the rights and freedoms of Data Subjects.
- 20.9 The Processor will allow for audits of its Data Processing activity by the Controller or the Controller's designated auditor.
- 20.10 Each Party will designate its own data protection officer if required by the Data Protection Laws.
- 20.11 Before allowing any Sub-processor to process any Personal Data related to this Agreement (submission of learner data data), the Processor must:
- 20.11.1 notify the Controller's Agreement Manager in writing of the intended Sub-processor and processing;
 - 20.11.2 obtain the written consent of the Controller's Agreement Manager;
 - 20.11.3 enter into a written agreement with the Sub-processor which give effect to the terms set out in this Clause 20 such that they apply to the Sub-processor; and
 - 20.11.4 provide the Controller with such information regarding the Sub-processor as the Controller may reasonably require.
- 20.12 The Processor will remain fully liable for all acts or omissions of any of its Sub-processors.
- 20.13 The Controller may, at any time on not less than 30 Working Days' notice, revise this clause by replacing it with any applicable controller to processor standard clauses or similar terms forming part of an applicable certification scheme (which will apply when incorporated by attachment to this Agreement).

- 20.14 The Parties agree to take account of any guidance issued by the Information Commissioner's Office. The Controller may on not less than 30 Working Days' notice to the Processor amend this Agreement to ensure that it complies with any guidance issued by the Information Commissioner's Office.
- 20.15 Where the Provider is providing the Services to Learners claiming out of work benefits, the Secretary of State for Work and Pensions (or their successor) is the Data Controller in relation to Personal Data which the Provider is required to provide to the Secretary of State for Work and Pensions. This Clause 20 will be enforceable by the Secretary of State for Work and Pensions in relation to any Personal Data processed by the Provider on its behalf.
- 20.16 Where the Provider is providing the Service to Learners who are subject to active management by the Offender Manager in respect of an order or licence, the Secretary of State for Justice (or their successor) is the Data Controller in relation to Personal Data, which the Provider is required to provide to the Secretary of State for Education.
- 20.17 Where the Provider is providing the Services to Learners who are subject to claiming Industrial Injuries Disablement Benefit (IIDB), the Department for Work and Pensions (or their successor) is the Data Controller in relation to Personal Data, which the Provider is required to provide to the Secretary of State for Education. This Clause 20 will be enforceable by the Secretary of State for Work and Pensions in relation to any Personal Data processed by the Provider on its behalf.

21 SUBMISSION OF LEARNER DATA

21.1 General

- 21.1.1 The Provider must supply the Department with data in accordance with the following:
- (a) in line with agreed audit arrangements;
 - (b) in adherence with the Data Protection Act 2018;
 - (c) to support payments to be made;
 - (d) to enable reconciliation to take place; and
 - (e) to support the Agreement management and allocation processes.
- 21.1.2 The Provider undertakes to the Department to submit accurate data.
- 21.1.3 Where the Department is concerned about the quality of the data, including the completeness or accuracy of the data, provided by the Provider, the Department may require the Provider to supply data more frequently for such a period as the Department will require and the Department may audit, or instruct a third part to audit, at the Provider's cost, the Provider's data and controls to gain assurance that the quality improvements have been made.
- 21.1.4 The Department reserves the right to require the Provider, at its own cost, to carry out such work as the Department deems necessary to improve the quality of data.

- 21.1.5 The Department reserves the right to suspend payments to the Provider under the Agreement where data quality gives rise to concern about the accuracy of the data provided by the Provider.
- 21.1.6 Where the Provider is providing the Services to Learners claiming out of work benefits, it must provide data to the Secretary of State with responsibility for unemployment or their nominated representative in accordance with the requirements notified to the Provider. Failure to transmit complete and accurate data under this Clause 21 will constitute a Serious Breach of Agreement in accordance with Clause 35 (Minor and Serious Breach) of this Agreement and may result in payments for this part of the Services to be delayed or withheld.
- 21.1.7 The Provider must update the information for the course(s) funded by the Department at www.coursedirectoryproviderportal.org.uk in accordance with the course directory data requirements which can be found at <https://coursedirectoryproviderportal.org.uk/Help>.
- 21.1.8 The Provider must register with UKRLP and maintain contact details on an on-going basis (<http://www.ukrlp.co.uk/>).
- 21.1.9 The Provider must publish online the set of information as set out at <https://www.gov.uk/guidance/what-academies-free-schools-and-colleges-should-publish-online>.
- 21.1.10 The Provider must submit data about any member of its workforce delivering GCSE English and Maths in the format and to the timescales as required by the Department.
- 21.1.11 Failure to transmit complete and accurate data to the Department in accordance with this Clause 21 will constitute a Serious Breach of Agreement in accordance with Clause 35 (Minor and Serious Breach) of this Agreement.

21.2 School Census Submission

- 21.2.1 The Provider must supply data on each individual Learner in accordance with the data collection framework set out in the School Census <https://www.gov.uk/guidance/school-census> as amended and updated.
- 21.2.2 The Provider shall transmit data for each part of the Activities (as defined in the Appendices to the School Census <https://www.gov.uk/guidance/school-census>).
- 21.2.3 Data collected must be transmitted through COLLECT <https://services.signin.education.gov.uk/> the Department's centralised data collection and management system. COLLECT is restricted and the Provider confirms it has agreed to comply with conditions of use regarding the supply of data to COLLECT.
- 21.2.4 At times the Department will need to share information with the Provider. The Department will where applicable do this securely via COLLECT. By accessing and using this system the Provider agrees to the terms and conditions detailed at the site governing how it accesses and use the portal. The Provider will need to ensure that it has the right hardware, operating system and browser.

22 SECURITY

22.1 The Provider must comply, and will ensure compliance by the Provider Personnel, with the provisions of Schedule 7 (Security & Department Policies).

23 FREEDOM OF INFORMATION AND CONFIDENTIALITY

23.1 Freedom of Information

23.1.1 The Department and Provider acknowledge that both the Department and Provider are subject to legal duties under FOIA, which may require them to disclose on request information relating to this Agreement or otherwise relating to themselves.

23.1.2 The Department and Provider acknowledge and agree that both are required by Law to consider each and every request made under FOIA for information.

23.1.3 The Department and Provider acknowledge and agree that all decisions made by the other pursuant to a request under FOIA are solely a matter for and are at the discretion of the Department or the Provider respectively.

23.1.4 Notwithstanding anything in this Agreement to the contrary (including without limitation any obligations of confidentiality), the Department and Provider will 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 Department and/or Provider will use reasonable endeavours (but will not be obliged) to consult the other and will not:

- (a) confirm or deny that information is held by them; or
- (b) disclose information requested

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

23.1.5 In relation to information relating to the Department or Provider or the Agreement which the Department or Provider requests should be exempt under the FOIA. The Department or Provider will indemnify the other for any and all costs (including legal fees) incurred by the other 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 in relation to disclosure

where such costs are incurred pursuant to efforts by the Department or Provider to withhold Exempt Information.

- 23.1.6 Neither the Department nor the Provider will on any account 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 Agreement or otherwise relating to the Department or Provider.
- 23.1.7 The Department and Provider will assist each other as reasonably necessary to enable the Department and Provider to comply with its obligations under FOIA.

23.2 Confidentiality

- 23.2.1 The Provider hereby warrants that:
- (a) any person employed or engaged by it (in connection with this Agreement in the course of such employment or engagement) will treat all Confidential Information belonging to the Department as confidential, safeguard it accordingly and only use such Confidential Information for the purposes of this Agreement; and
 - (b) any person employed or engaged by it (in connection with this Agreement in the course of such employment or engagement) will not disclose any Confidential Information to any third party without prior written consent of the Department, except where disclosure is otherwise expressly permitted by the provisions of this Agreement.
- 23.2.2 The Provider must take all necessary precautions to ensure that all Confidential Information obtained from the Department is treated as confidential and not disclosed (without prior approval) or used other than for the purposes of this Agreement by any of its employees, servants, agents or sub-contractors.
- 23.2.3 The provisions of Clauses 23.2.1 and 23.2.2 will not apply to any information:
- (a) which is or becomes public knowledge (other than by breach of Clauses 23.2.1 and 23.2.2);
 - (b) which was in the possession of the receiving party, without restriction as to its disclosure, before the date of receipt from the disclosing party;
 - (c) 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 FOIA or the Environmental Information Regulations.
- 23.2.4 Nothing in this Clause 23.2.4 will be deemed or construed to prevent the Department from disclosing any Confidential Information obtained from the Provider:
- (a) to any other Central Government Body, Non-Departmental or Quasi Government Body or agency, central or local;
 - (b) to Parliament and Parliamentary Committees or if required by any Parliamentary reporting requirement;

- (c) to any professional adviser, consultant, contractor or other person engaged by the Department directly in connection with this Agreement, provided that such information is treated as confidential by the receiving consultant, contractor or any other person;
 - (d) on a confidential basis to any proposed successor body in connection with any assignment disposal of its rights, obligations or liabilities under this Agreement.
- 23.2.5 In order to ensure that no unauthorised person gains access to any Confidential Information or any data obtained in the course of the Services, the Provider undertakes to maintain adequate security arrangements that meet the requirements of professional standards and best practice.
- 23.2.6 The Provider will immediately notify the Department of any breach of security in relation to Confidential Information and all data obtained in the course of the Services and will keep a record of such breaches. The Provider will use its best endeavours to recover such Confidential Information or data however it may be recorded. The Provider will cooperate with the Department in any investigation that the Department considers necessary to undertake as a result of any breach of security in relation to Confidential Information or data.
- 23.2.7 The Provider must, at its own expense, alter any security systems at any time during the Agreement Period at the Department's request if the Department reasonably believes the Provider has failed to comply with Clause 23.2.6.
- 23.2.8 The Department reserves the right to publish details of this Agreement and the payments made under it to comply with the Government's transparency requirements.
- 23.2.9 The provisions of this Clause 23 will apply for the Agreement Period and after its termination.

PART 5: WORKFORCE

24 EMPLOYEES

- 24.1 The Provider must 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, or an interim prohibition order made under regulation 14 of the Teachers' Disciplinary (England) Regulations 2012, to carry out teaching work (as defined in regulation 3 of the Teachers' Disciplinary (England) Regulations 2012), in respect of any Learners under the age of 19 and High Needs Learners aged 19 to 25 (as if those Learners were pupils for the purposes of the definition of teaching work in regulation 3 of the Teachers' Disciplinary (England) Regulations 2012).
- 24.2 Before employing or engaging a person to carry out teaching work in respect of any Learners under the age of 19 and High Needs Learners aged 19 to 25 (as if

those Learners were pupils for the purposes of the definition of teaching work in regulation 3 of the Teachers' Disciplinary (England) Regulations 2012), the Provider will take reasonable steps to ascertain whether that person is subject to a prohibition order made under section 141B of the Education Act 2002 or an interim prohibition order made under regulation 14 of the Teachers' Disciplinary (England) Regulations 2012.

- 24.3 The Provider will make arrangements for ensuring that the Services are provided with a view to safeguarding and promoting the welfare of Children receiving education or training at the institution or under the auspices of the Provider in an environment outside the direct control of the Provider. This must include the adoption of safer recruitment procedures. In doing so, the Provider will 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 practice within NMSS.
- 24.4 The Provider will make arrangements for ensuring that the Services are delivered with a view to safeguarding and promoting the welfare of High Needs Learners aged 18 to 25 receiving education or training at their institution or under the auspices of the Provider in an environment outside the direct control of the Provider. This must include the adoption of safer recruitment procedures. In doing so, the Provider will make those arrangements as if such Learners were Children and will 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 practice within further education institutions as if it applied to those Learners as if they were Children. References to 'must' in any such guidance will be treated as 'should' for the purposes of this Agreement, save for any references to legal requirements arising from the Safeguarding Vulnerable Groups Act 2006 in respect of referrals to the Disclosure and Barring Service.
- 24.5 The Provider must ensure it takes the following action in respect of all Provider Personnel and potential Provider Personnel whom in connection with the Provider's provision of the Services will or is likely to be in contact with Learners or who will have access to Learners information (other than Department Employees):
- 24.5.1 They are questioned as to whether he has any Convictions or Asbos;
 - 24.5.2 the results are obtained of a background check with the DBS of the most extensive kind available;
 - 24.5.3 to the extent permitted by Law, a copy of the results of such a background check as is referred to in Clause 24.5.2 are provided to the Department on request;
 - 24.5.4 in respect of potential Provider Personnel from overseas the Provider must comply with the following guidance <https://www.gov.uk/government/publications/criminal-records-checks-for-overseas-applicants>,
- the Provider must take the above action before the relevant Provider Personnel or potential Provider Personnel commences any activities in relation to the Services.

- 24.6 The Provider must carry out appropriate disclosure and barring service checks on all applicants for employment where such applicants would be employed to work in regulated activity relating to vulnerable adults and children (as defined by the Safeguarding Vulnerable Groups Act 2006) if successful, and must seek additional information about an applicant's conduct. The Provider must also ensure that:
- 24.6.1 no person who appears on a Barred List following the results of a DBS background check will be employed or engaged in the performance of the Services; and
 - 24.6.2 it and all its sub-contractors will comply with all reporting requirements to the DBS.
- 24.7 In so far as permitted by Law, where the Provider has made a referral or provided information to the Disclosure and Barring Service in compliance with any duties of the Body under the Safeguarding Vulnerable Groups Act 2006, the Provider will ensure that it informs the Department via the Contact Form: General Enquires at <https://www.gov.uk/government/organisations/education-and-skills-funding-agency> that a referral has been made/information has been provided.
- 24.8 In the event that any Provider Personnel or any employee of any sub-contractor is added to a Barred List, the Provider must ensure that such member of staff will cease to be engaged in the Services.
- 24.9 The Provider will require Provider Personnel to declare annually whether there has been a change in their circumstances relating to the background checks referred to in this clause 24. Where the self-declaration indicates a change in circumstances relating to those background checks, the Provider will:
- 24.9.1 assess the risk of continuing to engage such member of Provider Personnel in the delivery of the Services;
 - 24.9.2 request new background checks of such member of Provider Personnel as required by this clause 24;
 - 24.9.3 put in place appropriate actions to ensure Learners are safeguarded, including, but not limited to, extra supervision of the member of Provider Personnel, re-assignment to an area of the delivery of the Services that does not bring the member of Provider Personnel into regular contact with Learners, or removal from the delivery of the Services of the member of Provider Personnel, until such time as the Provider has received the outcome of the background checks required under clause 24.9.2 and has taken any action required as a result of the outcome of such background checks.
- 24.10 Pending the receipt by the Provider of the results of the background checks referred to in this clause Provider Personnel will not be used in the provision of the Services.
- 24.11 Failure by the Provider to comply with Clauses 24.5.1 to 24.10 will constitute a Serious Breach.
- 24.12 The Provider will provide details of its policies and procedures for recruitment, training, development, supervision and other employment-related policies when requested to do so.

- 24.13 The Provider will ensure that it has in place and complies with an effective whistleblowing procedure whereby staff may raise in confidence concerns about possible malpractice without fear of victimisation, subsequent discrimination or disadvantage.
- 24.14 Unless Provider Personnel transfer to the Department and/or a Successor Provider under TUPE at expiry or termination of the Agreement, the Provider will retain employment records (or retain the right to access employment records) for seven (7) years following the last day such Provider Personnel were engaged in providing Services save for Provider Personnel in contact with Children and/or with access to information about Children where such records will be retained for fifteen (15) years following such date.
- 24.15 When requested by the Department on reasonable grounds, the Provider will cease to use any Provider Personnel specified by the Department in the provision of the Services. For the purposes of this clause Provider Personnel will include external members of the board.
- 24.16 The Provider must ensure that:
- 24.16.1 there will be at all times a sufficient number of staff (including all relevant grades of supervisory staff) engaged in the provision of the Services with the requisite level of skill and experience. This obligation will include ensuring that there are sufficient staff to cover periods of holiday, sickness, other absences and anticipated and actual peaks in demand for each of the Services; and
 - 24.16.2 all Provider Personnel receive such training and supervision as is necessary to ensure the proper performance of the Services under this Agreement.
- 24.17 The Provider must inform the Department if directors, or any other person who has powers of representation, decision or control, meet the characteristics set out in the Funding higher-risk organisations and sub-contractor document. https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/599126/Funding_Higher_Risk_Organisations_and_Subcontractors_March_2017.pdf. Failure to inform the Department will be a Serious Breach of the Agreement.
- 24.18 Where the Agreement value is greater than £10,000,000, the Provider will consider the use of apprenticeships in the delivery of the Services.
- 24.19 The Provider must ensure that there are set up and maintained by it and by all sub-contractors involved in the provision of the Services, personnel policies and procedures covering all relevant matters (including discipline, grievance, equal opportunities and health and safety). The Provider must ensure that the terms and implementation of such policies and procedures comply with Law and Good Industry Practice and that they are published in written form. The Provider must provide copies of such policies to the Department, on the Department's request.

25 RE-PROVISION OF THE SERVICES

- 25.1 The Department and the Provider will act on the basis that TUPE applies on expiry or termination of the Agreement where the Department is proposing re-

provision for services which are substantially the same as the Services. For the avoidance of doubt this Clause 25 does not apply where the Provider will be providing the Services in the following Funding Year.

- 25.2 During the period of three (3) months preceding the expiry of the Agreement or within 21 days after the Department or the Provider has given notice to terminate the Agreement, the Provider will disclose to the Department and will permit the Department to disclose to any new provider or potential new provider of the services which are substantially the same as the Services, the Staffing Information provided that prior to so doing any such provider will have executed in writing a confidentiality undertaking in favour of the Provider.
- 25.3 During the period of three months preceding the expiry of this Agreement or within 21 days after the Department or the Provider has given notice to terminate the Agreement, the Provider must, subject to the provisions of the Data Protection Act 2018, provide and thereafter keep updated at monthly intervals, to the Department and to the Successor Provider information equivalent to the Relevant Personnel Documentation and the Staffing Information in respect of each employee whom the Provider reasonably believes will be a Future Transferring Employee provided that prior to so doing the Successor Provider nominated by the Department will have executed in writing a confidentiality undertaking in favour of the Provider.
- 25.4 The Provider must make reasonable endeavours to assist the Successor Provider to communicate with, meet and inform and consult with the employees whom the Provider reasonably believes will be a Future Transferring Employee and their trade union or other employee representatives for the purposes of complying with TUPE.
- 25.5 The Provider must immediately prior to the Service Transfer Date provide to the Department or the Successor Provider a complete and accurate list of the Staffing Information and Identification Details of all employees whom it reasonably believes will be Future Transferring Employees.
- 25.6 Within a period of 21 days following the expiry or termination of this Agreement the Provider must provide to the Department or the Successor Provider in writing Final Pay Details of the Future Transferring Employees.
- 25.7 The Provider warrants that it will supply complete and accurate information pursuant to Clauses 25.2, 25.3, 25.5 and 25.6 in all material respects and the Provider will indemnify and keep the Department indemnified fully now and in the future in respect of all or any costs whether arising in Agreement or under any relevant Law suffered or incurred by the Department or the Successor Provider nominated by the Department by reason of any proceeding, claim or demand arising from or in connection with the provision of information and/or the failure to provide complete and accurate information under Clauses 25.2, 25.3, 25.5, and 25.6, and/or the provision of assistance and/or failure to provide assistance under Clause 25.4 of this Agreement.
- 25.8 After receiving notice of the termination of this Agreement and for six (6) months preceding expiry of this Agreement the Provider will promptly notify the Department or the Successor Provider:

- 25.8.1 Of the period of notice given by the employment of any employee whom the Provider reasonably believes will be a Future Transferring Employee; and
- 25.8.2 Of any other change to any employee whom the Provider reasonably believes will be a Future Transferring Employee and their terms and conditions of employment, their Staffing Information and their Relevant Personnel Documentation.
- 25.9 The Provider warrants that it will supply the Required Information completely and accurately in all respects at the time of supply and will indemnify and keep the Department and/or any Successor Provider indemnified in respect of all and any costs suffered or incurred by the Department or the Successor Provider by reason of any proceedings, claim or demand arising out of or in connection with:
- 25.10 Any claim against the Department or the Successor Provider by any Future Transferring Employee so far as it relates to any act or omission of the Provider after the Employee Transfer Date and prior to the Service Transfer Date; and
- 25.11 Any claim against the Department or the Successor Provider by any Future Transferring Employee whose name is not included on the list provided by the Provider pursuant to Clause 25.5 so far as it relates to the dismissal of such Future Transferring Employee within two Months of the Department or Successor Provider becoming aware of the transfer of such Future Transferring Employee.
- 25.12 For the purposes of Clause 25.9, in the event that the Department or the Successor Provider incurs costs, liabilities or expenditure in respect of Future Transferring Employees which is greater than would have been the case if the Required Information supplied by the Provider had been accurate and complete, then such (net) greater costs, liabilities or expenditure will be deemed to be costs suffered or incurred by the Department or Successor Provider and included within the indemnity provided by the Provider.
- 25.13 The Department or Successor Provider will be entitled to recover from the Provider in full any legal, accountancy and other costs actually and reasonably incurred by the Department or Successor Provider in connection with the costs and liabilities indemnified by the Provider.
- 25.14 This Clause 25 will continue in effect for six months following the expiry or termination of this Agreement.

PART 6: PAYMENT AND AUDIT

26 PAYMENT AND AUDIT

26.1 Funding and Payment

- 26.1.1 In consideration of the Services to be provided by the Provider, the Department agrees to pay the Provider the amounts set out in Schedule 2 of this Agreement on condition that the Provider delivers the Services in accordance with the terms and conditions of this Agreement.
- 26.1.2 The Provider must use the Funding solely for the purpose of delivering the Services as set out in this Agreement.

- 26.1.3 The Provider will comply with the Funding Rules published by the Department as amended from time to time.
- 26.1.4 The Department reserves the right to impose additional conditions of funding where it considers it is necessary to do so to secure the delivery of education and training of a reasonable quality by the Provider, or to ensure that the resources provided by the Department are being used effectively and efficiently or to require the Provider to address concerns about its financial viability.
- 26.1.5 Payment by the Department will be without prejudice to any claims or rights, which the Department may have against the Provider and will not constitute any admission by the Department as to the performance by the Provider of its obligations hereunder. Prior to any such payment, the Department will be entitled to make deductions or deferments in respect of any disputes or claims whatsoever with or against the Provider, arising from this Agreement or any other Agreement between the Provider and the Department.
- 26.1.6 The Department shall be entitled to terminate, pursuant to Clause 36.3.8 this Agreement on written notice if the Provider does not recruit and/or data returns reveal that no Learners have been enrolled for the academic year to which this Agreement relates. Where the Department terminates the Agreement under this Clause 26.1.6, the Department will withdraw the allocation of Funding for the academic year and will take action to recover Funds where payments have already occurred.
- 26.1.7 Where the Department carries out a review, investigation or audit of a sample of the evidence which the Provider is required to provide under this Agreement, or its preceding Agreement where applicable, to support the payments made by the Department and identifies errors in that evidence which it deems are material, the Department reserves the right at its absolute discretion to require the Provider, or the Department may (itself or via a third party) at the Provider's cost, to carry out 100% audit of all or part of the Services and/or to recover from the Provider an amount based on the error rate identified and the total value of the Agreement. Such amounts may be recovered by making adjustments to data submitted by the Provider under the Agreement, or by raising an invoice for payment by the Provider, or making deductions from future payments due to the Provider under the Agreement in the timescales as advised by the Department. Failure to settle such amounts by the Provider will constitute a Serious Breach under Clause 35 (Minor and Serious Breach) of the Agreement. The decision of the Department as to the amount of recovery under this clause is final.
- 26.1.8 Where the Department, in accordance with Clause 26.1.7, identifies errors it may at its discretion review the controls and processes to gain assurance the errors will not occur again. Where further assurance work is required this will be at the Provider's cost (or the Department will procure and recharge to the Provider at its sole discretion). Where a full funding audit results in a "qualified" rating this will constitute a Minor Breach.

26.1.9 The Department may implement a reduction in funding as set out in the Funding Rules through a notification and not a variation pursuant to Clause 45 (Amendments to this Agreement).

26.1.10 All payments by the Department will be made via BACS.

Tax Compliance

26.1.11 The Department may ask the Provider to provide information which demonstrates how the Provider complies with the Income Tax (Earnings and Pensions) Act 2003 and all other statutes and regulations relating to income tax in respect of that consideration.

26.1.12 The Department may terminate this Agreement if:

- (a) in the case of a request mentioned in Clause 26.1.11 the Provider:
 - (i) fails to provide information in response to the request within a reasonable time; or
 - (ii) provides information which does not demonstrate either how the Provider complies with Clauses 26.1.11 and 26.1.13 or why those clauses do not apply to it;
 - (iii) it receives information which demonstrates that is not complying with its obligations under the Income Tax (Earnings and Pensions) Act 2003 and all other statutes and regulations relating to income tax.

26.1.13 The Department may supply any information which it receives under Clause 26.1.11 to HMRC.

26.1.14 If, during the Agreement Period, an Occasion of Tax Non-Compliance occurs, the Provider will:

- (a) notify the Department in writing of such fact within 5 Working Days of its occurrence; and
- (b) promptly give the Department:
 - (i) details of the steps it is taking to address the Occasion of Tax Non-Compliance and to prevent the same from recurring, together with any mitigating factors it considers relevant; and
 - (ii) such other information in relation to the Occasion of Tax Non-Compliance as the Department may reasonably require.

27 REVIEW OF CONTRACTUAL PERFORMANCE AND RECONCILIATION OF AGREEMENTS

27.1 In-Year Reconciliation

27.1.1 Reviews of contractual performance and reconciliation will be carried out in accordance with part 1B of Schedule 1 (Specification and Monitoring).

27.1.2 The evidence required in respect of each Learning Programme is set out in the Funding Rules and the Provider must retain such evidence for inspection on demand.

27.2 Performance

27.2.1 Performance will be monitored in accordance with the provisions of part 1B of Schedule 1 (Specification and Monitoring).

27.2.2 The Department will be able to share allocations and performance information with Combined Authorities, Crown Bodies and LEPs.

28 PROVIDER'S RECORDS AND AUDIT

28.1 Maintenance of Records

28.1.1 The Provider must, and will procure that any Provider Related Parties, maintain a full record of all incidents relating to health, safety and security, including CCTV, which occur during the Agreement Period. The Provider will make the aforementioned records available for inspection by the Department upon reasonable notice, and will present a report of them to the Department as and when requested.

28.2 Auditor

28.2.1 The Department (in accordance with <https://www.gov.uk/government/publications/post-16-audit-code-of-practice>), the European Commission, the European Court of Auditors and/or a Crown Body may at any time conduct audits for the following purposes:-

- (a) to establish that the Provider has used the Funding (and proposed or actual variations to the Funding in accordance with this Agreement) in the delivery of the Services and/or the costs of all suppliers (including sub-contractors) of the Services;
- (b) to verify the Provider's claims for Funding;
- (c) to review the integrity, confidentiality and security of the Department Data as well as the Department's access to the Department Data;
- (d) to review the Provider's and/or a Provider Related Party's (compliance with the DPA 2018, the FOIA in accordance with Clauses 19 (Department Data) and 23 (Freedom of Information and Confidentiality));
- (e) and any other Law applicable to the Services;
- (f) to carry out the audit and certification of the Department's accounts;
- (g) to verify the accuracy and completeness of any management information delivered or required by this Agreement;
- (h) to ensure that the Provider and/or a Provider Related Party is complying with the Department Policies and any British or equivalent European standards; and
- (i) any other audit that may be required by any Relevant Authority, such audits may be based on current or preceding years or preceding Agreements.

- 28.2.2 The Department will use its reasonable endeavours to ensure that the conduct of each audit does not unreasonably disrupt the Provider or delay the provision of the Services.
- 28.2.3 Subject to the Department's obligations of confidentiality, the Provider and/or a Provider Related Party must on demand provide the Department (and/or its agents or representatives) with all reasonable co-operation and assistance in relation to each audit, including:-
- (a) all information requested by the Department within the permitted scope of the audit;
 - (b) reasonable access to any premises and any equipment used (whether exclusively or non-exclusively) in the performance of the Services;
 - (c) access to the Provider's and/or a Provider Related Party's systems; and
 - (d) access to Provider Personnel.
- 28.2.4 The Provider will implement all measurement and monitoring tools and procedures necessary to measure and report on the Provider's (including for the avoidance of doubt a Provider Related Party's) performance of the Services.
- 28.2.5 The Department will endeavour to (but is not obliged to) provide at least ten (10) Working Days' notice of its intention to conduct an audit. The Department may carry out audit visits with or without prior notice at its discretion.
- 28.2.6 The Parties agree that they will bear their own respective costs and expenses incurred in respect of compliance with their obligations under this clause, unless the audit identifies a material breach or malpractice by the Provider and/or a Provider Related Party in which case the Provider will reimburse the Department for all the Department's reasonable costs incurred in the course of the audit.
- 28.2.7 If the findings of an audit conducted pursuant to this Clause 28 results in the requirement for ILR data to be corrected and re-submitted the Provider must re-submit the data to the Department, as set out in Clause 23 (Freedom of Information and Confidentiality);, within two months. Failure to do so will be a Minor Breach of this Agreement.
- 28.2.8 If the Department identifies that:-
- (a) the Provider has failed to perform its obligations under this Agreement in any material manner, without prejudice to any other remedy that the Department has, the Parties will agree and implement a remedial plan. If the Provider's failure relates to a failure to provide any information to the Department about the Funding, proposed Funding or the Provider's costs, then the remedial plan will include a requirement for the provision of all such information;
 - (b) there has been any under or over payment it will be dealt with in accordance with Clause 26.1 (Funding and Payment).

28.2.9 The Provider must permit records referred to in this Clause 28 to be examined and copied from time to time by the Department's auditor and inspectors and their representatives and other representatives of the Department.

28.3 Retention

28.3.1 The records referred to in this Clause 28 will be retained for a period of at least six (6) years, subject to any requirements for a longer retention period set out in the Funding Rules, after the end of the Agreement Period.

28.4 Information on Termination or Expiry

28.4.1 Upon termination or expiry of this Agreement the Provider must (and will ensure that the sub-contractors will) comply with all reasonable requests of the Department to provide information relating to the Provider's costs of providing the Services.

28.5 Confidentiality of Information

28.5.1 All information referred to in this Clause 28 is subject to the obligations set out in Clause 23.2 (Confidentiality) and Clause 23.1 (Freedom of Information).

28.5.2 For the purposes of the examination and certification of the Department's accounts and/or any examination of the economy, efficiency and effectiveness with which the Department has used its resources, the National Audit Office, internal or external auditor may examine such documents premises, systems and staff as he may reasonably require which are owned, held or otherwise within the control or employ of the Provider or sub-contractors (who must ensure that any person acting on its behalf who has such documents and/or other information will also provide access) and may require the Provider to produce such oral or written explanation as he considers necessary.

28.5.3 Where the Department appoints an independent third party to undertake, exercise or carry out any of the rights or powers contained in this Clause 28 the Department must ensure that such independent third party enters into a Confidentiality Agreement with the Provider simultaneously with its appointment.

29 STATE AID

29.1 The Provider should satisfy itself, if the European rules on State Aid apply to the Services delivered under this Agreement. These can be accessed at <https://www.gov.uk/guidance/state-aid>.

29.2 Where the rules on State Aid apply, the Provider will collect and retain appropriate records and will supply those records to the Department on its request.

29.3 The Department reserves the right to require the Provider to obtain a contribution towards the cost of the Services delivered under this Agreement from the

employer of any participant. Where a contribution is required, the Department will confirm to the Provider in writing the exact percentage of the contribution.

- 29.4 Where Department requires the Provider to obtain a contribution towards the cost of the Services under Clause 29.3 above, the Provider must provide evidence that the contribution has been received.
- 29.5 In the event that any funding paid under this Agreement is deemed to constitute unlawful state aid the Department reserves the right to require immediate repayment of any such funding.

PART 7: CORPORATE GENERAL

30 ASSIGNMENT AND SUB-CONTRACTING

- 30.1 Notwithstanding any sub-contract the Provider has entered into, the Provider will remain primarily and directly liable for the Provider's obligations under this Agreement.
- 30.2 The Provider must ensure that any sub-contract it enters into includes terms and conditions which will not differ materially from those in this Agreement. This includes references to the Funding Rules and other documents herein referred to.
- 30.3 Where the Provider has sub-contracted any duties or obligations arising out of this Agreement, the Provider must ensure that there is a legally binding sub-contract in place with the sub-contractor and send copies of the sub-contract to the Department if requested in writing to do so.
- 30.4 The Provider must ensure that sub-contractors are selected fairly and have sufficient capacity, capability, quality and financial standing to deliver the Services that are to be sub-contracted.
- 30.5 The Provider must carry out its own due diligence checks when appointing sub-contractors and must take account of the criteria set out in the Funding High-Risk Organisations and sub-contractors document which is published at <https://www.gov.uk/government/publications/sfa-financial-assurance-higher-risk-providers-and-subcontractors>. The Provider must have both the process it has followed for selecting and appointing sub-contractor(s) available for inspection by the Department. This process must consider non-financial as well as financial issues.
- 30.6 The Provider must make payment to any sub-contractor within 30 days of receiving a valid claim for payment and must ensure that any sub-contract entered into contains a term giving effect to this requirement.
- 30.7 The Department reserves the right to require the Provider not to enter into, or to terminate, any sub-contract to deliver the Services under this Agreement.
- 30.8 The Provider must provide a fully completed Sub-Contractor Declaration by the deadline given to them by the Department in the Department's request. This will be at least twice a year. If the Provider is not sub-contracting then a nil return must be received by the relevant deadline. The Provider must update its Sub-Contractor Declaration if its sub-contracting arrangements change during the year.

- 30.9 Unless specifically authorised in writing by the Department, the Provider may only sub-contract the Services to one level. For the avoidance of doubt the sub-contractor must not further sub-contract the Services that have been sub-contracted to it. This is to ensure that the Provider retains clear and transparent control of the quality of training provision, and that proper and appropriate measures are in place to manage the learner experience.
- 30.10 The Provider must manage and monitor its sub-contractors in accordance with the relevant sub-contract to ensure that the sub-contractors deliver the sub-contracted Services to the standard set out in Clause 3 (Service Delivery) of this Agreement.
- 30.11 Where a sub-contract expires or is terminated for whatever reason, the Provider must make sure that there is continuity of Services for existing Learners.
- 30.12 Where the annual value of this Agreement exceeds £5 million per annum and the Provider wants to sub-contract one or more of the Services, the following provisions apply:
- 30.12.1 The Provider will advertise on Contracts Finder all sub-contract opportunities arising from or in connection with the provision of the Services above a minimum threshold of £25,000 that arise during the Agreement Period.
- 30.12.2 Once a sub-contract has been awarded, the Provider will update the notice on Contracts Finder with the details of the successful sub-contractor.
- 30.12.3 In addition to any other management information requirements set out in this Agreement, the Provider agrees and acknowledges that it will, at no charge, provide timely, full, accurate and complete SME Management Information ("MI") Reports to the Department which incorporate the following:
- (a) the total revenue received directly from the Agreement;
 - (b) the total value of Services under the Agreement that have been sub-contracted (including revenues for non-SMEs/non-VCSEs); and
 - (c) the total value of sub-contracted revenues to SMEs and VCSEs.
- 30.12.4 The SME Management Information Reports will be provided on a Manage Your Education & Skills Funding return and in the correct format as required by the Department and any guidance issued by the Department from time to time.

31 INDEMNITIES AND LIABILITY

31.1 Provider Indemnity

- 31.1.1 The Provider will be responsible for, and will release and indemnify the Department, its employees and agents on demand from and against all liability from:
- (a) death or personal injury caused by its negligence or that of its employees, agents or sub-contractors (as applicable);
 - (b) breach of statutory duty;

- (c) third party actions, claims or demands brought against the Department as a direct consequence of the Provider's breach of this Agreement;
- (d) fraud or fraudulent misrepresentation by it, its employees, agents or sub-contractors (as applicable);
- (e) loss of or damage to property;
to the extent which the same may arise out of, or in consequence of:
- (f) the performance or non-performance by the Provider of its obligations under this Agreement; and
- (g) In all other respects, any negligent act, default or breach of statutory duty in connection with the performance or non-performance by the Provider of its obligations under this Agreement.

31.2 Provider Not Responsible

- 31.2.1 The Provider will not be responsible for or obliged to indemnify the Department for any injury, loss, damage, cost and expense caused by the negligence or wilful misconduct of the Department or by the breach by the Department of its obligations under this Agreement.

31.3 Limitation of Indemnity

- 31.3.1 An indemnity by either Party under any provision of this Agreement will be without limitation to any indemnity by that Party under any other provision of this Agreement.

31.4 Responsibility for Related Parties

- 31.4.1 The Provider will be responsible as against the Department for the acts or omissions of the Provider Related Parties as if they were the acts or omissions of the Provider and the Department will be responsible as against the Provider for the acts or omissions of Department Related Parties as if they were the acts or omissions of the Department.

31.5 Notification of Claims

- 31.5.1 Where either Party (the "Indemnified Party") wishes to make a claim under this Clause 31 against the other (the "Indemnifying Party") in relation to a claim made against it by a third party (a "Third Party Claim"), the Indemnified Party will give notice of the relevant claim as soon as reasonably practicable setting out full particulars of the claim.

31.6 Conduct of Claims

- 31.6.1 The Indemnifying Party may at its own expense and with the assistance and co-operation of the Indemnified Party have the conduct of the Third Party Claim including its settlement and the Indemnified Party will not, unless the Indemnifying Party has failed to resolve the Third Party Claim within a reasonable period (and the Indemnified Party has notified the Indemnifying Party in writing that it is of the opinion that such reasonable period has expired), take any action to settle or pursue the Third Party Claim

31.7 Costs of Claims

- 31.7.1 The Indemnifying Party may, if it wishes to have conduct of any claim, give reasonable security to the Indemnified Party for any cost or liability arising out of the conduct of the claim by the Indemnifying Party.
- 31.7.2 The Provider's liability to the Department pursuant to this Clause 31 will be, for the avoidance of doubt, without prejudice to any other right or remedy available to the Department under this Agreement.

31.8 No Limit on Liability

- 31.8.1 Neither Party excludes or limits its liability to the other Party for:
- 31.8.2 death or personal injury caused by its negligence, or that of its employees, agents or sub-contractors (as applicable); or
- 31.8.3 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
- 31.8.4 fraud by it, fraud by its employees, fraud by its agents or sub-contractors (as applicable); or
- 31.8.5 sums due under Clause 25 (Re-provision of the Services); or
- 31.8.6 any breach of the DPA 2018.

31.9 Provider Limit on Liability

- 31.9.1 Subject to Clause 31.2 (Provider Not Responsible) and 31.8 (No Limit on Liability) the liability of the Provider will be Ten Million Pounds (£10,000,000) in aggregate in respect of all claims, losses or damages, whether arising under any indemnity from tort (including negligence), breach of Agreement or otherwise under or in connection with this Agreement.

31.10 Provider Aggregate Liability

- 31.10.1 If the aggregate liability of the Provider under Clause 31.9 (Provider Limit on Liability) is equalled or exceeded at any time during the Agreement Period, it will entitle the Department at its discretion to terminate this Agreement pursuant to Clause 36.4.

31.11 Department Limit on Liability

- 31.11.1 With regard to the Department the total aggregate liability will be one million pounds (£1,000,000) and for the avoidance of doubt, this will be in addition to:
 - (a) its obligation to pay the Funding as and when it falls due in accordance with this Agreement.

31.12 Indirect Loss

- 31.12.1 Neither Party will be liable to the other Party for any Indirect Loss or indirect damage.

31.13 Additional Clauses

- 31.13.1 The Parties expressly agree that if any limitation or provision contained or expressly referred to in this Clause 31 is held to be invalid under any

Law, it will be deemed omitted to that extent, and if any party becomes liable for loss or damage to which that limitation or provision applied, that liability will be subject to the remaining limitations and provisions set out in this Clause 31.

31.13.2 Nothing in this Clause 31 will act to reduce or affect a Party's general duty to mitigate its loss and for the avoidance of doubt including any circumstances under which a party has the benefit of an indemnity under this Agreement.

31.14 No Double Recovery

31.14.1 Neither the Department nor the Provider will be entitled to recover compensation or make a claim under this Agreement in respect of any loss that it or they has or have incurred to the extent that the Party has already been compensated in respect of that loss pursuant to this Agreement or otherwise.

32 INSURANCE

32.1 Requirement to Maintain

32.1.1 Without prejudice to its liability to indemnify the Department under Clause 31 (Indemnities and Liability) the Provider must take out and maintain in force or procure the taking out and maintenance of the Required Insurances and any other insurances as may be required by Law. The insurances will be effective in each case no later than the date on which the relevant risk commences.

32.1.2 The Required Insurances referred to in Clause 32.1.1 will amount to:

- (a) ten million pounds (£10 million) in respect of public liability cover in respect of each and every occurrence;
- (b) ten million pounds (£10 million) in respect of employer's liability cover in respect of each and every occurrence; and
- (c) five million pounds (£5 million) in respect of professional indemnity cover in respect of each and every claim.

32.1.3 The Department reserves the right, at any time, to request evidence that the Required Insurances are in force.

33 CHANGE IN CONTROL

33.1 The Provider represents and warrants to the Department that at the Agreement Date the legal and beneficial ownership of the Provider is as set out in any tender information or register information supplied by the Provider and that no arrangements are in place that have or may have or result in any sale, transfer or disposal of any legal, beneficial, equitable or other interest in any or all of the shares in the Provider.

33.2 The Provider will inform the Department in writing if there is a change in its name at least one month prior to the change taking effect unless to do would put the Provider in breach of the Law. If that is the case the Provider will inform the

Department of the change in name within 10 Working Days of it becoming lawful to do so.

- 33.3 The Provider will inform the Department as soon as reasonably practicable and, in any event 12 weeks before any Change in Control of the Provider takes effect unless to do would put the Provider in breach of the Law. If that is the case the Provider will inform the Department of the Change in Control within 10 Working Days of it becoming lawful to do so.
- 33.4 For the avoidance of doubt if there is a Change in Control in the Provider, this will be considered under Regulation 72 of the Public Contracts Regulations 2015 as it could potentially constitute a contract modification. The Department will, upon receipt of a notification under Clause 33.3 consider if the requested change is permissible under Regulation 72 of the Public Contracts Regulations 2015. The Department may terminate this Agreement under Clause 36.3.7 where the Change in Control is not permissible.
- 33.5 The Department may, at any time, request that the Provider informs them of details of any Change in Control and the Provider will comply with such a request as soon as reasonably practicable and in any event within twenty (20) Working Days of receipt of the Department's request.
- 33.6 The Department will consider any Change in Control in the context of all available information including that provided by the Provider. The Department will consider the criteria set out in the Funding higher-risk organisations and sub-contractors document which is published on the Department's website <https://www.gov.uk/government/publications/sfa-financial-assurance-higher-risk-providers-and-subcontractors> .
- 33.7 If the Change in Control or change in name breaches this Agreement or any policies referred to in this Agreement, the Department reserves the right to take action against the Provider in accordance with Part 8 of this Agreement (Termination and Exit Management).
- 33.8 If there is a Restricted Share Transfer of the Provider:
- 33.8.1 the Provider will give the Department notice of such Restricted Share Transfer at the earliest possible time that it is lawful for the Provider to do so;
 - 33.8.2 the Department reserves the right to take whatever actions it deems necessary; and
 - 33.8.3 the Department may terminate this Agreement under Clause 36.3.7 (Termination) within three (3) months of the Restricted Share Transfer taking place.

34 PROHIBITED ACTS

- 34.1 The Provider will not offer or give, or agree to give, to any member, employee or representative of the Secretary of State for Education any gift or consideration of any kind as an inducement or reward for doing or refraining from doing, or for having done or refrained from doing, any act in relation to the obtaining or execution of this Agreement or any other Agreement with the Department or for

showing or refraining from showing favour or disfavour to any person in relation to this Agreement or any such Agreement.

- 34.2 The Provider's attention is drawn to the criminal offences created by the Bribery Act 2010. Any offence by the Provider or its employees or by anyone acting on its behalf under the Bribery Act 2010 in relation to this Agreement or any Agreement with the Department or Her Majesty's Government will entitle the Department to terminate the Agreement and recover from the Provider the amount of any loss resulting from such termination and/or to recover from the Provider the amount of value of any gift, consideration or commission.
- 34.3 The Provider will not enter into any contract with any political or religious organisation using any funding provided by the Department under this Agreement if the effect of that contract would be to promote a particular political or religious point of view.
- 34.4 The Provider will not hold itself out as acting on behalf of the Department without the Department's permission.

PART 8: TERMINATION AND EXIT MANAGEMENT

35 MINOR AND SERIOUS BREACH

35.1 For the avoidance of doubt:

- (a) This Clause 35 is subject at all times to the provision of Clause 36 (Termination) below;
- (b) neither Party will be liable for any Minor Breach or Serious Breach under this clause, which occurs as a direct result of any act or omission by the other Party, its staff or agents;
- (c) in the event of a breach the Party not in breach may enforce the clauses in the Agreement relating to breach even if it has not done so in the event of earlier breaches.

Minor Breach

35.2 Without prejudice to any other remedy, in the event of a Minor Breach, the Parties will adopt the following procedure:

- 35.2.1 The Party not in breach will be entitled to serve written notice on the Party in breach, giving full details of the breach and requiring the other Party to remedy the breach within a specified period. In addition, where the Provider is in breach, the Department may require the Provider to suspend the recruitment of Learners, and/or may cap any growth while the breach is being remedied.
- 35.2.2 If the Party in breach fails to remedy the Minor Breach within the time specified in a notice served under Clause 35.2.1 or such other period as may be agreed between the Parties it will constitute a Serious Breach by the Party in breach. In addition, where the Provider is in breach, the Department may require the Provider to suspend the recruitment of Learners, and/or may cap any growth while the breach is being remedied.

Serious Breach

- 35.3 Without prejudice to any other remedy, in the event of a Serious Breach, which is capable of remedy, the Parties will adopt the following procedure:
- 35.3.1 The Party not in breach will be entitled to serve written notice on the other Party giving full details of the breach and requiring the Party in breach to remedy the breach within a specified time period.
 - 35.3.2 Where the Department has served a notice under Clause 35.3.1 the Department has the right to require the Provider to suspend the recruitment of Learners and/or to suspend payments to the Provider until the Department has confirmed that the breach has been remedied.
 - 35.3.3 In the event that a Serious Breach of the Agreement by the Provider cannot be remedied within the period specified in the notice served under Clause 35.3.1 or such other period as may be agreed between the Parties the Department may cease funding the Provider in respect of that part of the Service to which the Serious Breach relates.
 - 35.3.4 In the event that any Serious Breach cannot be remedied at all or within the period specified in the notice served in accordance with Clause 35.3.1 or such other period as may be agreed between the Parties, the Party not in breach may at its sole discretion terminate the Agreement or that part of the Service to which the breach relates with immediate effect on notice in writing to the other Party.

36 TERMINATION

- 36.1 On the occurrence of any of the events described in this Clause 36 the Department will be entitled to terminate this Agreement by notice to the Provider with immediate effect.
- 36.2 Either Party may terminate this Agreement with immediate effect in the event that in the reasonable opinion of the Party wishing to terminate this Agreement, the conduct of the other in performing its obligations under this Agreement amounts to a Serious Breach of the Agreement, which is incapable of remedy. For the avoidance of doubt this will include but not be limited to:
- 36.2.1 an Insolvency Event affecting the Provider occurs; or
 - 36.2.2 if Regulation 73(1) (b) of The Public Contracts Regulations 2015 applies to the Provider; or
 - 36.2.3 the Provider commits one or more Prohibited Acts; or
 - 36.2.4 any other Provider breach has occurred that is incapable of remedy.
- 36.3 The Department reserves the right to terminate this Agreement with immediate effect by giving notice in writing if the Provider:
- 36.3.1 The Provider fails to comply with requirements imposed under Clauses 10.9(a) and/or 10.9(b); and/or
 - 36.3.2 The outcome of any financial health and/or control assessment undertaken in relation to the Provider is inadequate; and/or

- 36.3.3 The Provider fails to comply with requirements imposed under Clauses 12.3, 12.4 or 12.5; and/or
 - 36.3.4 An inspection results in the Services in part or overall thereof being assessed as inadequate; and/or
 - 36.3.5 In accordance with Clauses 12.9(e) and 12.10.5 an Inspectorate monitoring visit results in the Services being assessed as having made “insufficient progress” and in the reasonable view of the Department Learners may be at immediate risk on safeguarding grounds, and/or the quality of leadership and/or training provision is such that one or more Learner has no reasonable prospect of achieving his or her training objective; and/or
 - 36.3.6 Receives a “qualified” rating in two consecutive full funding audits; and/or
 - 36.3.7 A Change in Control is proposed or has taken place which is not permissible under Regulation 72 of the Public Contracts Regulations 2015; and/or
 - 36.3.8 In accordance with Clause 26.1.6 does not recruit and/or data returns reveal that no Learners have been enrolled for the academic year to which this Agreement relates; and/or
 - 36.3.9 the Provider fails to provide information as set out in Clause 26.1.12 and/or the Department receives information which demonstrates that the Provider is not complying with its obligations under the Income Tax (Earnings and Pensions) Act 2003 and all other statutes and regulations relating to income tax.
- 36.4 The Department will be entitled to terminate this Agreement forthwith on the grounds set out in Clause 31.10. In the event of any termination in accordance with Clause 31.10, the Exit Arrangements set out in Clause 38 (Exit Arrangements) and Schedule 8 (Exit Arrangements) will apply.
- 36.5 This Agreement will be voidable where, following an evaluation of the last three (3) years’ Data Submissions relating to any other Agreement with the Department, the Department concludes that the Provider was in Serious Breach of that Agreement or Agreements and if the Department had known at the time of awarding and/or entering into this Agreement that the Provider had committed a Serious Breach, it would not have awarded and/or entered into this Agreement.
- 36.6 If the circumstances set out in Clause 36.5 arise and the Agreement is declared void, the parties will be deemed to have subsequently entered into a new legally binding agreement that includes the provisions set out in the table at Clause 53.1.2.
- 36.7 If the Department terminates another Agreement with the Provider this Agreement will be terminated forthwith unless the Department confirms in writing that the Agreement is to remain in force.
- 36.8 In addition to the rights of termination under any other clauses of this Agreement, either Party will be entitled to terminate this Agreement in respect of all or part of the Service provided under the Agreement by giving to the other not less than three months’ notice to that effect.

- 36.9 Termination under this Clause 36 will not prejudice or affect any right of action or remedy, which will have accrued or will thereupon accrue to the Parties under this Agreement.
- 36.10 Where the Provider goes into administration or liquidation, the Department must be assumed to be a creditor of the Provider. The Provider must take steps to ensure that the Department is provided with details of the administrator or liquidator and receives notification of any creditors meetings. The Department will confirm whether in fact it is a creditor within 12 weeks of being notified that the Provider is in administration or liquidation.
- 36.11 The Provider must upon termination of the Agreement make available upon request to the Department all Learner files (including but not limited to e-portfolios), correspondence, documents, specification papers and other property belonging to the Department, which may be in its possession or under its control.
- 36.12 The Provider must not recruit new Learners after notice of termination of the Agreement has been given. The Department will not be liable to make payments in respect of any Learners recruited in breach of this clause.

37 CONSEQUENCES OF TERMINATION AND EXPIRY

37.1 Accrued Rights

- 37.1.1 The termination of this Agreement howsoever arising is without prejudice to the rights, duties and liabilities of either Party accrued prior to termination. The clauses of this Agreement which expressly or impliedly have effect after termination or expiry will continue to be enforceable notwithstanding termination in accordance with Clause 53 (Continuing Obligations).
- 37.1.2 On or before the Expiry Date (except where the Provider will be responsible for delivering the Services in the subsequent Funding Year) or Termination Date, the Provider must ensure that all documents or computer records in its possession, including but not limited to e-portfolios, custody or control which contain information relating to the Services including any documents in the possession, custody or control of a sub-contractor are made available upon request to the Department.
- 37.1.3 For the avoidance of doubt, after notice of termination and/or an Insolvency Event affecting the Provider, the Provider must not share any information about Learners, including but not limited to Department Data, with another Organisation unless the Department provides written authorisation for the Provider to do so. In addition, the Provider shall not recruit Learners from another provider that has been issued with a notice of termination and/or in relation to whom an Insolvency Event has occurred, without the permission of the Department.
- 37.1.4 The Provider hereby grants the Department a non-exclusive licence to access the Provider's Premises from the date of a notice of termination for such periods as may be reasonably necessary to enable the Department to retrieve the information referred to in Clause 37.1.2. The Department will exercise the rights provided under this clause where the

Provider has failed to comply with Clause 37.1.2 and the obligations set out in Schedule 8 (Exit Arrangements).

38 EXIT ARRANGEMENTS

38.1 The Department and the Provider must, unless the Provider will be responsible for delivering the Services in the following Funding Year, comply with the exit arrangements set out in Schedule 8 (Exit Arrangements) and any current Exit Plan.

38.2 NOT USED

38.3 Unless the Department otherwise requires, during the time between service of a notice of termination of this Agreement in whole or in part and such termination taking effect, the Provider must take all steps, which are necessary and consistent with its continuing obligations, to mitigate any losses, costs, liabilities and expenses which the Provider may incur as a result of the termination, including to:

38.3.1 cancel all capital and recurring cost commitments in connection with the provision of the Services on the most cost-effective terms without fettering the Department's access to Department Data and the Database;

38.3.2 terminate all relevant Agreements or the relevant parts of relevant Agreements with its sub-contractors in connection with the provision of Services on the most favourable terms as can be achieved in the particular circumstances, having first ascertained from the Department whether such Agreements are required to be transferred to the Department or any Successor Provider instead; and

38.3.3 reduce labour costs by the redeployment or release of Provider's Personnel to the extent possible in the circumstances.

38.4 If the Provider does not fulfil its obligations in accordance with Clause 38.3, the Department will not pay any sums in excess of those which the Department would have paid had such action been taken.

PART 9: GENERAL PROVISIONS

39 PROVISION OF INFORMATION

39.1 The Department may share information provided by the Provider under this Agreement and information about the Provider or Agreement, with other Government departments, Crown Bodies, Inspectorates, Combined Authorities and local authorities.

39.2 In addition to the other requirements to provide information set out in this Agreement, the Department reserves the right to request information from the Provider in order to exercise its responsibilities and/or to fulfil requirements to provide information to the Secretary of State, to account to Parliament and to meet European funding requirements (where applicable). On occasion, the Department will require urgent information from the Provider.

- 39.3 The Provider must provide the Department or agents acting on its behalf with the information it requires under Clause 39.2 at the times and in the formats specified. This information will be of sufficient quality to meet the purposes for which it has been requested.
- 39.4 Failure to comply with any request for information under this clause, at all or in the required timescales, will constitute a Minor / Serious Breach of this Agreement.

40 SERVICE OF NOTICES

- 40.1 Any notice or other document to be given under this Agreement must be in writing and will 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 or electronic media (including but not limited to the Manage Your Education & Skills Funding 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.
- 40.2 All such notices and documents must be in the English language. Any notice or other document will 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 on the day of delivery or where notice is given by electronic media, on the working day following transmission. To prove the giving of a notice or other document it will be sufficient to show that it was despatched.

41 ENTIRE AGREEMENT

41.1 Prior Representations Superseded

- 41.1.1 Except where expressly provided in this Agreement, this Agreement constitutes the entire agreement between the Parties in connection with its subject matter and supersedes all prior representations, communications, negotiations and understandings concerning the subject matter of this Agreement.

41.2 Acknowledgements

- 41.2.1 Each of the Parties acknowledges that:
- (a) it does not enter into this Agreement on the basis of and does not rely, and has not relied, upon any statement or representation (whether negligent or innocent) or warranty or other provision (in any case whether oral, written, express or implied) made or agreed to by any person (whether a Party to this Agreement or not) except those expressly repeated or referred to in this Agreement and the only remedy or remedies available in respect of any misrepresentation or untrue statement made to it will be any remedy available under this Agreement; and
 - (b) this clause will not apply to any statement, representation or warranty made fraudulently, or to any provisions of this Agreement

which was induced by fraud, for which the remedies available will be all those available under the Law governing this Agreement.

42 NO AGENCY

42.1 No Partnership or Employment

42.1.1 Nothing in this Agreement will be construed as creating a partnership or as an Agreement of employment between the Department and the Provider.

42.2 Power to Bind

42.2.1 Save as expressly provided otherwise in this Agreement, the Provider must not be, or be deemed to be, an agent of the Department and the Provider will not hold itself out as having authority or power to bind the Department in any way.

43 EXERCISE OF STATUTORY AUTHORITY

43.1 Nothing in this Agreement will be construed as a fetter or restriction on the exercise by the Department of its statutory functions.

44 PUBLIC RELATIONS AND PUBLICITY

44.1 The Provider must not by itself, its employees or agents and procure that its sub-contractors must:

44.1.1 Inform the Department of any communications with representatives of the press, television, radio or other communications media on any matter concerning this Agreement; and

44.1.2 Not use or make use of the Department's name, logo or other branding without the prior written approval of the Department, which should not be unreasonably delayed or withheld.

45 AMENDMENTS TO THIS AGREEMENT

45.1 This Agreement will not be amended unless such amendment has been agreed in writing. For the avoidance of doubt this will include any amendments required to effect a Change agreed in accordance with Clause 6 (Changes).

46 WAIVER

46.1 No term or provision of this Agreement will be considered as waived by any Party to this Agreement unless a waiver is given in writing by that Party.

46.2 No waiver under Clause 46.1 will be a waiver of a past or future default or breach, nor will it amend, delete or add to the terms, conditions or provisions of this Agreement unless (and then only to the extent) expressly stated in that waiver.

47 SEVERABILITY

47.1 If any term, condition or provision contained in this Agreement is held to be invalid, unlawful or unenforceable to any extent, such term, condition or provision will not affect the validity, legality or enforceability of the remaining parts of this Agreement.

48 LAW AND JURISDICTION

48.1 This Agreement is governed by the Laws of England and Wales and, subject to Disputes which are properly referred to and resolved in accordance with the Dispute Resolution Procedure, the Parties submit to the exclusive jurisdiction of the courts of England and Wales.

49 INTEREST ON LATE PAYMENTS

49.1 The Parties will pay interest on any amount payable under this Agreement not paid by the required date, from that date to the date of payment at the rate of 4% above the base lending rate published by the Bank of England. The Parties agree that this clause constitutes a substantial remedy for the purposes of the Late Payments of Commercial Debts (Interest) Act 1998. For the avoidance of doubt, the Provider will have no right to claim interest on corrections issued by the Department.

50 MITIGATION

50.1 The Department and the Provider will at all times take all reasonable steps to minimise and mitigate any loss for which the relevant Party is entitled to bring a claim against the other Party pursuant to this Agreement and to take all reasonable steps to minimise and mitigate any effects or circumstances and/or events adversely affecting the performance of its obligations under this Agreement which would otherwise entitle that Party to relief and/or to claim compensation hereunder.

51 FURTHER ASSURANCE

51.1 Each Party must do all things and execute all further documents necessary to give full effect to this Agreement.

52 THIRD PARTY RIGHTS

52.1 No term of this Agreement is enforceable under the Agreements (Rights of Third Parties) Act 1999 by a person who is not a party to this Agreement.

53 CONTINUING OBLIGATIONS

53.1 Save as otherwise expressly provided in this Agreement:-

- 53.1.1 the termination or expiry of this Agreement will be without prejudice to any accrued rights and obligations under this Agreement as at the Expiry Date or the Termination Date; and
- 53.1.2 the termination or expiry of this Agreement will not affect the continuing rights or obligations of the Department and the Provider under the clauses in the table below and/or under any other provision of this Agreement which is expressed to survive expiry or termination or which is required to give effect to such expiry or termination or the consequences of such expiry or termination for a period of six (6) years, or such time period as set out in the Specifications (Schedule 1) for European Social Fund direct and match funding, after such expiry or termination:

Clause	Description
14	Fraud and Irregularity
15.3	Complaints and Feedback
17	Dispute Resolution
18	Assignment of IPR in Databases
19	Department Data
20	Data Protection and Protection of Personal Data
23	Freedom of Information and Confidentiality
24	Employees
25	Re-Provision of Services
26.1.7	Audit Recovery
28	Provider's Records & Audit
31	Indemnities and Liability
32	Insurance
37	Consequences of Termination and Expiry
38	Exit Arrangements
44	Public Relations and Publicity
Schedule 6	GDPR
Schedule 7	Security & Department Policies

Clause	Description
Schedule 8	Exit Arrangements

Schedule 1: Specification & Monitoring

Schedule 2: Payment

SCHEDULE 3: NOT USED

SCHEDULE 4: NOT USED

SCHEDULE 5: NOT USED

SCHEDULE 6: GDPR

PROCESSING, PERSONAL DATA AND DATA SUBJECTS

Description	Details
Subject matter of the Processing	<p>The subject matter is the personal data of Learners on education or training programmes administered by the Department that are subject to this Funding Agreement as defined in the Department privacy notice and School census: guide to submitting data.</p> <p>https://www.gov.uk/government/publications/esfa-privacy-notice</p> <p>https://www.gov.uk/guidance/school-census</p>
Duration of the Processing	<p>The duration of the Processing covers the academic year data returns to the Department as defined in School census: guide to submitting data to enable funding and audit of the learning programmes defined in this Agreement.</p> <p>https://www.gov.uk/guidance/school-census</p>
Nature and purposes of the Processing	<p>The nature and purposes of the processing is defined in the Department privacy notice.</p> <p>https://www.gov.uk/government/publications/esfa-privacy-notice</p> <p>THE NMSS will be required to submit the data to the Department as set out in Clause 21.2.</p> <p>The processing of data in the Agreement refers to the submission of census data to the Department only. The processing does not include the processing of personal data collected from the learners by the Contractor for the purposes of enrolling learners onto programmes or delivering education or training, e.g. e-portfolios.</p>
Type of personal data	<p>The personal data to be processed is defined in the School census: guide to submitting data</p> <p>https://www.gov.uk/guidance/school-census</p>
Categories of data subject	<p>The data subjects are Learners on education or training programmes administered by the Department that are subject to this Funding Agreement.</p>

Description	Details
<p>Retention and destruction of the data once the processing is complete UNLESS requirement under union or member state law to preserve that type of data</p>	<p>Information on how the data must be supplied to the Department is detailed in the School census: guide to submitting data.</p> <p>https://www.gov.uk/guidance/school-census</p> <p>For the purposes of the Department as a data controller of the data, THE NMSS is required to retain the data for the funding and audit purposes set out in this Funding Agreement for 6 years from the end of the financial year in which the last payment is made under this Funding Agreement.</p> <p>THE NMSS (and any other data controller) is responsible for determining any further need to process the data, including its retention, prior to secure destruction.</p>

SCHEDULE 7: SECURITY & DEPARTMENT POLICIES

Part A: Security

<p>“BPSS” “Baseline Personnel Security Standard”</p>	<p>a level of security clearance described as pre-employment checks in the National Vetting Policy. Further information can be found at: https://www.gov.uk/government/publications/government-baseline-personnel-security-standard</p>
<p>“CCSC” “Certified Cyber Security Consultancy”</p>	<p>is NCSC's approach to assessing the Services provided by consultancies and confirming that they meet NCSC's standards. This approach builds on the strength of CLAS and certifies the competence of suppliers to deliver a wide and complex range of cyber security consultancy Services to both the public and private sectors. See website: https://www.ncsc.gov.uk/scheme/certified-cyber-consultancy</p>
<p>“CCP” “Certified Professional”</p>	<p>is a NCSC scheme in consultation with government, industry and academia to address the growing need for specialists in the cyber security profession and are building a community of recognised professionals in both the UK public and private sectors. See website: https://www.ncsc.gov.uk/scheme/certified-professional</p>
<p>“CC” “Common Criteria”</p>	<p>the Common Criteria scheme provides assurance that a developer's claims about the security features of their product are valid and have been independently tested against recognised criteria.</p>
<p>“CPA” “Commercial Product Assurance” [formerly called “CESG Product Assurance”]</p>	<p>is an ‘information assurance scheme’ which evaluates commercial off the shelf (COTS) products and their developers against published security and development standards. These CPA certified products can be used by government, the wider public sector and industry. See website: https://www.ncsc.gov.uk/scheme/commercial-product-assurance-cpa</p>

<p>“Cyber Essentials” “Cyber Essentials Plus”</p>	<p>Cyber Essentials is the government backed, industry supported scheme to help organisations protect themselves against common cyber-attacks. Cyber Essentials and Cyber Essentials Plus are levels within the scheme.</p> <p>There are a number of certification bodies that can be approached for further advice on the scheme; the link below points to one of these providers: https://www.iasme.co.uk/apply-for-self-assessment/</p>
<p>"Department's Data" “Department's Information”</p>	<p>is any data or information owned or retained in order to meet departmental business objectives and tasks, including:</p> <p>(a) any data, text, drawings, diagrams, images or sounds (together with any repository or database made up of any of these components) which are embodied in any electronic, magnetic, optical or tangible media, and which are:</p> <ul style="list-style-type: none"> (i) supplied to the Provider by or on behalf of the Department; or (ii) which the Provider is required to generate, process, store or transmit pursuant to this Agreement; or <p>(b) any Personal Data for which the Department is the Data Controller;</p>
<p>“Department”</p>	<p>as defined in Clause 1 (Definitions) of the Agreement.</p>
<p>“Departmental Security Standards”</p>	<p>means the Department's security policy or any standards, procedures, process or specification for security that the Provider is required to deliver.</p>
<p>“Digital Marketplace / GCloud”</p>	<p>the Digital Marketplace is the online framework for identifying and procuring cloud technology and people for digital projects. Cloud services (e.g. web hosting or IT health checks) are on the G-Cloud framework.</p>
<p>“FIPS 140-2”</p>	<p>this is the Federal Information Processing Standard (FIPS) Publication 140-2, (FIPS PUB 140-2), entitled ‘Security Requirements for Cryptographic Modules’. This document is the de facto security standard used for the accreditation of cryptographic modules.</p>

<p>“Good Industry Practice” “Industry Good Practice”</p>	<p>as defined in Clause 1 (Definitions) of the Agreement.</p>
<p>“Good Industry Standard” “Industry Good Standard”</p>	<p>means the implementation of products and solutions, and the exercise of that degree of skill, care, prudence, efficiency, foresight and timeliness as would be expected from a leading company within the relevant industry or business sector.</p>
<p>“GSC” “GSCP”</p>	<p>means the Government Security Classification Policy which establishes the rules for classifying HMG information. The policy is available at: https://www.gov.uk/government/publications/government-security-classifications</p>
<p>“HMG”</p>	<p>means Her Majesty’s Government</p>
<p>“ICT”</p>	<p>means Information and Communications Technology (ICT) is used as an extended synonym for information technology (IT), used to describe the bringing together of enabling technologies used to deliver the end-to-end solution</p>
<p>“ISO/IEC 27001” “ISO 27001”</p>	<p>is the International Standard for Information Security Management Systems Requirements</p>
<p>“ISO/IEC 27002” “ISO 27002”</p>	<p>is the International Standard describing the Code of Practice for Information Security Controls.</p>
<p>“ISO 22301”</p>	<p>is the International Standard describing for Business Continuity</p>
<p>“IT Security Health Check (ITSHC)” “IT Health Check (ITHC)” “Penetration Testing”</p>	<p>means an assessment to identify risks and vulnerabilities in systems, applications and networks which may compromise the confidentiality, integrity or availability of information held on that IT system.</p>
<p>“Need-to-Know”</p>	<p>the Need-to-Know principle is employed within HMG to limit the distribution of classified information to those people with a clear ‘need to know’ in order to carry out their duties.</p>
<p>“NCSC”</p>	<p>The National Cyber Security Centre (NCSC) formerly CESG is the UK government’s National Technical Authority for Information Assurance. The NCSC website is https://www.ncsc.gov.uk</p>

<p>“OFFICIAL” “OFFICIAL-SENSITIVE”</p>	<p>the term ‘OFFICIAL’ is used to describe the baseline level of ‘security classification’ described within the Government Security Classification Policy (GSCP) which details the level of protection to be afforded to information by HMG, for all routine public sector business, operations and Services.</p> <p>the ‘OFFICIAL–SENSITIVE’ caveat is used to identify a limited subset of OFFICIAL information that could have more damaging consequences (for individuals, an organisation or government generally) if it were lost, stolen or published in the media, as described in the Government Security Classification Policy.</p>
<p>“Secure Sanitisation”</p>	<p>Secure sanitisation is the process of treating data held on storage media to reduce the likelihood of retrieval and reconstruction to an acceptable level. Some forms of sanitisation will allow you to re-use the media, while others are destructive in nature and render the media unusable. Secure sanitisation was previously covered by “Information Assurance Standard No. 5 - Secure Sanitisation” (“IS5”) issued by the former CESG. Guidance can now be found at: https://www.ncsc.gov.uk/guidance/secure-sanitisation-storage-media</p> <p>The disposal of physical documents and hardcopy materials advice can be found at: https://www.cpni.gov.uk/secure-destruction</p>
<p>“Security and Information Risk Advisor” “CCP SIRA” “SIRA”</p>	<p>the Security and Information Risk Advisor (SIRA) is a role defined under the NCSC Certified Professional (CCP) Scheme. See also: https://www.ncsc.gov.uk/articles/about-certified-professional-scheme</p>
<p>“SPF” “HMG Security Policy Framework”</p>	<p>This is the definitive HMG Security Policy which describes the expectations of the Cabinet Secretary and Government’s Official Committee on Security on how HMG organisations and third parties handling HMG information and other assets will apply protective security to ensure HMG can function effectively, efficiently and securely.</p> <p>https://www.gov.uk/government/publications/security-policy-framework</p>

<p>”Tailored Assurance” [formerly called “CTAS”, or, ”CESG Tailored Assurance”]</p>	<p>is an ‘information assurance scheme’ which provides assurance for a wide range of HMG, MOD, Critical National Infrastructure (CNI) and public sector customers procuring IT systems, products and services, ranging from simple software components to national infrastructure networks.</p> <p>https://www.ncsc.gov.uk/documents/ctas-principles-and-methodology</p>
---	--

- 1.1. The Provider will comply with Departmental Security Standards for Contractors which include but are not constrained to the following clauses.
- 1.2. Where the Provider will provide ICT products or Services or otherwise handle information at OFFICIAL on behalf of the Department, the requirements under Cabinet Office Procurement Policy Note – Use of Cyber Essentials Scheme certification - [Action Note 09/14](#) 25 May 2016, or any subsequent updated document, are mandated; that “contractors supplying products or services to HMG will have achieved, and retain certification at the appropriate level, under the HMG Cyber Essentials Scheme”. The certification scope must be relevant to the Services supplied to, or on behalf of, the Department.
- 1.3. The Provider shall be able to demonstrate conformance to, and show evidence of such conformance to the ISO/IEC 27001 (Information Security Management Systems Requirements) standard, including the application of controls from ISO/IEC 27002 (Code of Practice for Information Security Controls). The Provider shall work towards certification for future funding years.
- 1.4. The Provider will follow the UK Government Security Classification Policy (GSCP) in respect of any Departmental Data being handled in the course of providing this Service, and will handle this data in accordance with its security classification. (In the event where the Provider has an existing Protective Marking Scheme then the Provider may continue to use this but must map the HMG security classifications against it to ensure the correct controls are applied to the Departmental Data).
- 1.5. Departmental Data being handled in the course of providing an ICT solution or Service must be segregated from all other data on the Provider’s or sub-contractor’s own IT equipment to protect the Departmental Data and enable the data to be identified and securely deleted when required. In the event that it is not possible to segregate any Departmental Data then the Provider and any sub-contractor will be required to ensure that it is stored in such a way that it is possible to securely delete the data in line with Clause 1.15.
- 1.6. The Provider will have in place and maintain physical security, in line with those outlined in ISO/IEC 27002 including, but not limited to, entry control mechanisms (e.g. door access) to premises and sensitive areas
- 1.7. The Provider will have in place and maintain an access control policy and process for the logical access (e.g. identification and authentication) to ICT systems to ensure only authorised personnel have access to Departmental Data.

- 1.8 The Provider will have in place and will maintain procedural, personnel, physical and technical safeguards to protect Departmental Data, including but not limited to: physical security controls; good industry standard policies and process; anti-virus and firewalls; security updates and up-to-date patching regimes for anti-virus solutions; operating systems, network devices, and application software, user access controls and the creation and retention of audit logs of system use.
- 1.9 Any data in transit using either physical or electronic transfer methods across public space or cyberspace, including mail and couriers systems, or third party provider networks must be protected via encryption which has been certified to FIPS 140-2 standard or a similar method approved by the Department prior to being used for the transfer of any Departmental Data.
- 1.10 Storage of Departmental Data on any portable devices or media will be limited to the absolute minimum required to deliver the stated business requirement and will be subject to Clauses 1.11 and 1.12 below.
- 1.11 Any portable removable media (including but not constrained to pen drives, flash drives, memory sticks, CDs, DVDs, or other devices) which handle, store or process Departmental Data to deliver and support the Service, will be under the control and configuration management of the Provider or sub-contractors providing the Service, will be both necessary to deliver the Service and will be encrypted using a product which has been certified to FIPS140-2 standard or another encryption standard that is acceptable to the Department.
- 1.12 All portable ICT devices, including but not limited to laptops, tablets, smartphones or other devices, such as smart watches, which handle, store or process Departmental Data to deliver and support the Service, will be under the control and configuration management of the Provider or sub-contractors providing the Service, and will be necessary to deliver the Service. These devices will be full-disk encrypted using a product which has been certified to FIPS140-2 standard or another encryption standard that is acceptable to the Department.
- 1.13 Whilst in the Provider's care all removable media and hardcopy paper documents containing Departmental Data must be handled securely and secured under lock and key when not in use and will be securely destroyed when no longer required, using either a cross-cut shredder or a professional secure disposal organisation.
- 1.14 When necessary to hand carry removable media and/or hardcopy paper documents containing Departmental Data, the media or documents being carried will be kept under cover and transported in such a way as to ensure that no unauthorised person has either visual or physical access to the material being carried. This clause will apply equally regardless of whether the material is being carried inside or outside of company premises.

- 1.15 At the end of the Agreement or in the event of equipment failure or obsolescence, all Departmental information and data, in either hardcopy or electronic format, that is physically held or logically stored on the Provider's ICT infrastructure must be securely sanitised or destroyed and accounted for in accordance with the current HMG policy using a NCSC approved product or method. Where sanitisation or destruction is not possible for legal, regulatory or technical reasons, such as a Storage Area Network (SAN) or shared backup tapes, then the Provider or sub-contractor will protect the Department's information and data until the time, which may be long after the end of the Agreement, when it can be securely cleansed or destroyed.
- 1.16 Access by Provider or sub-contractor staff to Departmental Data will be confined to those individuals who have a "need-to-know" in order to carry out their role; and have undergone mandatory pre-employment screening, to a minimum of HMG Baseline Personnel Security Standard (BPSS); or hold an appropriate National Security Vetting clearance as required by the Department. All Provider or sub-contractor staff must complete this process before access to Departmental Data is permitted.
- 1.17 All Provider or sub-contractor employees who handle Departmental Data must have annual awareness training in protecting information.
- 1.18 The Provider will, as a minimum, have in place robust Business Continuity arrangements and processes including IT disaster recovery plans and procedures that conform to ISO 22301 to ensure that the delivery of the Agreement is not adversely affected in the event of an incident. An incident will be defined as any situation that might, or could lead to, a disruption, loss, emergency or crisis to the Services delivered. If a ISO 22301 certificate is not available the supplier will provide evidence of the effectiveness of their ISO 22301 conformant Business Continuity arrangements and processes including IT disaster recovery plans and procedures. This should include evidence that the Provider has tested or exercised these plans within the last 12 months and produced a written report of the outcome, including required actions.
- 1.19 Any suspected or actual breach of the confidentiality, integrity or availability of Departmental Data being handled in the course of providing this Service, or any non-compliance with these Departmental Security Standards for Contractors, or other Security Standards pertaining to the solution, will be investigated immediately and escalated to the Department by a method agreed by both parties.
- 1.20 The Provider will ensure that any IT systems and hosting environments that are used to handle, store or process Departmental Data will be subject to independent IT Health Checks (ITHC) using a NCSC approved ITHC provider before go-live and periodically (at least annually) thereafter. The findings of the ITHC relevant to the Service being provided are to be shared with the Department and all necessary remedial work carried out. In the event of significant security issues being identified, a follow up remediation test may be required.

- 1.21 The Provider or sub-contractors providing the Service will provide the Department with full details of any storage of Departmental Data outside of the UK or any future intention to host Departmental Data outside the UK or to perform any form of ICT management, support or development function from outside the UK. The Provider or sub-contractor will not go ahead with any such proposal without the prior written agreement from the Department.
- 1.22 The Department reserves the right to audit the Provider or sub-contractors providing the Service within a mutually agreed timeframe but always within seven days of notice of a request to audit being given. The audit will cover the overall scope of the Service being supplied and the Provider's, and any sub-contractors, compliance with the clauses contained in this Section.
- 1.23 The Provider will contractually enforce all these Departmental Security Standards for Contractors onto any third-party suppliers, sub-contractors or partners who could potentially access Departmental Data in the course of providing this Service.
- 1.24 The Provider and sub-contractors will undergo appropriate security assurance activities as determined by the Department. Provider and sub-contractors will support the provision of appropriate evidence of assurance and the production of the necessary security documentation such as completing the DfE Security Assurance Model (DSAM) process or the Business Service Assurance Model (BSAM). This will include obtaining any necessary professional security resources required to support the Provider's and sub-contractor's security assurance activities such as: a NCSC Certified Cyber Security Consultancy (CCSC) or NCSC Certified Professional (CCP) Security and Information Risk Advisor (SIRA).

Part B: Department Policies

The following code outlines the standards and behaviours expected from suppliers and grant recipients, and reiterate the government's approach to working with suppliers.

<https://www.gov.uk/government/publications/supplier-code-of-conduct>

SCHEDULE 8: EXIT ARRANGEMENTS

1 DEFINITIONS

- "Exit Manager"** the person appointed by each party pursuant to paragraph 3.3 of this Schedule 8 (Exit Arrangements) for managing the Provider's obligations under Schedule 8 (Exit Arrangements);
- "Exit Plan"** the plan produced and updated by the Provider during the Agreement Period in accordance with paragraph 5 of this Schedule 8 (Exit Arrangements);

2 OVERVIEW

- 2.1 The Provider is required to ensure it performs its obligations to assist in the orderly transition of the Services from the Provider to the Department and/or any Successor Provider in the event of termination (including partial termination) or expiry of this Agreement. This will include the transition of the Services to a follow-on agreement with the same Provider if applicable. This schedule sets out the principles of the exit and service transfer arrangements that are intended to achieve such orderly transition. For the avoidance of doubt, the Provider will be responsible for the overall management of the exit and service transfer arrangements.

3 CONTRACT LIFE OBLIGATIONS

- 3.1 The Provider will draw up an Exit Plan in accordance with Paragraph 5.1.
- 3.2 The Provider will (unless otherwise agreed by the Department in writing) procure that all sub-contracts and other agreements with third parties used exclusively to deliver the Services to the Department, which are necessary to enable the Department and/or any Successor Provider to perform the Services in accordance with this Agreement or to enable re-provision of the Services, will be assignable and/or capable of novation at the request of the Department to the Department (and/or its nominee) and/or any Successor Provider upon the Provider ceasing to provide the Services (or part of them) without restriction (including any need to obtain any consent or approval) or payment by the Department. Where the Provider uses sub-contracts and other agreements to deliver the Services and these agreements are part of framework agreements that the Provider has with its third party suppliers, the Provider will provide sufficient information and assistance to enable the Successor Provider or the Department to enter into an agreement with such supplier directly.
- 3.3 The Provider will appoint an Exit Manager. The Provider's Exit Manager will be responsible for ensuring that the Provider and its personnel, agents and sub-contractors comply with this schedule. The Provider will ensure that its Exit Manager has the requisite authority to arrange and procure

any resources of the Provider as are reasonably necessary to enable the Provider to comply with the requirements set out in this schedule.

4 OBLIGATIONS TO ASSIST ON RE-PROVISION OF SERVICES OR TRANSFER BACK TO THE DEPARTMENT

4.1 On reasonable notice, the Provider will on request provide to the Department and/or to its potential Successor Provider, the following material and information in order to facilitate the preparation by the Department of any invitation to tender and/or to facilitate any potential Successor Provider undertaking due diligence:

- 4.1.1 details of the Services;
- 4.1.2 an inventory of Department Data (including but not limited to e-portfolios and any other Learner Files) in the Provider's possession or control; and
- 4.1.3 all information relating to Transferring Employees required to be provided by the Provider under this Agreement.

5 EXIT PLAN

5.1 The Provider will within three (3) months after the Services Start Date maintain an Exit Plan which sets out the Provider's proposed methodology for achieving an orderly transition of Services from the Provider to the Department and/or its Successor Provider on the expiry or termination of this Agreement and which complies with the requirements set out in paragraphs 5.2 and 5.3 below.

5.2 The Exit Plan will:

- 5.2.1 document how the Services will transfer to the Successor Provider (which will need to be agreed between the Provider and the Successor Provider) and/or the Department, including details of the processes to transfer documentation, Department Data (including e-portfolios and other Learner records), systems migration, security and the segregation of the Department's technology components from any technology components operated by the Provider or its sub-contractors (where applicable);
- 5.2.2 set out procedures to deal with requests made by the Department and/or a Successor Provider for staffing information pursuant to Clause 25 of the Agreement (Re-Provision of the Services);
- 5.2.3 address each of the issues set out in this schedule to facilitate the transition of the Services from the Provider to the Successor Provider and/or the Department with the aim of ensuring that there is no disruption to or degradation of the Services;
- 5.2.4 list software agreements and licence agreements required to deliver the Services.

5.3 The Provider will review and (if appropriate) update the Exit Plan each year to reflect changes in the Services.

6 TERMINATION OBLIGATIONS

- 6.1 In addition to the obligations as set out in Clauses 36 (Termination) and 37 (Consequences of Termination and Expiry) of the Agreement, the Provider will comply with all of its obligations contained in the Exit Plan.
- 6.2 Within six (6) months of the Expiry Date (except where the Service will be rolled over to the following Funding Year) or Termination Date:
- 6.2.1 the Provider will, subject to the requirement to retain one copy for the purpose of compliance with Clause 53 (Continuing Obligations) and the retention requirements of this Agreement, erase from any computers, storage devices and storage media that are to be retained by the Provider, all Department Data;
 - 6.2.2 the Provider will return or make available for the Successor Provider or the Department to use such of the following as is in the Provider's possession or control:
 - 6.2.2.1 all materials created by the Provider under this Agreement, the IPRs in which are owned by the Department;
 - 6.2.2.2 details of work volumes and staffing requirements over the twelve (12) month period immediately prior;
 - 6.2.3 the Provider will:
 - 6.2.3.1 with respect to learning or training in progress, document the current status and stabilising for continuity during transition;
 - 6.2.3.2 provide assistance and expertise as necessary to examine all governance and reports in place for the provision of the Services;
 - 6.2.3.3 answer all reasonable questions from the Department and/or its Successor Provider regarding the Services;
 - 6.2.3.4 agree with the Department and/or the Successor Provider a plan for the migration of the Department Data to the Department and/or the Successor Provider. The Provider will fully co-operate in the execution of the agreed plan, providing skills and expertise of a reasonably acceptable standard; and
 - 6.2.4 each party will return to the other party all Confidential Information of the other party and will certify that it does not retain the other party's Confidential Information save to the extent (and for the limited period) that such information needs to be retained by the party in question for the purposes of providing or receiving any Services.
- 6.3 Except where this Agreement provides otherwise, all licences, leases and authorisations granted by one party to the other in relation to the Services will be terminated with effect from the Expiry Date or Termination Date.

7 KNOWLEDGE TRANSFER

- 7.1 Three (3) months prior to the Expiry Date of the Agreement (or where the Agreement is terminated within the timescale notified by the Department) the Provider will upon request:
- 7.1.1 provide for transfer to the Department and/or the Successor Provider of all knowledge reasonably required for the provision of the Services which may, as appropriate, include information, records and documents including that relating to configuration of software; and
 - 7.1.2 provide the Department and/or Successor Provider with reasonable access to such members of the Provider's or its sub-contractors' personnel as have been involved in the, development, provision or management of the Services and who are still employed or engaged by the Provider or its sub-contractors.
- 7.2 To facilitate the transfer of knowledge from the Provider to the Department and/or its Successor Provider, the Provider will provide, upon request, a detailed written explanation of the procedures and operations used to provide the Services, the change management process and other standards and procedures to the operations personnel of the Department and/or the Successor Provider.
- 7.3 The information which the Provider will provide, at its own cost, to the Department and/or its Successor Provider pursuant to paragraph 7.1 above will include:
- 7.3.1 copies of up-to-date procedures and manuals;
 - 7.3.2 agreements with third party suppliers of goods and services which are to be transferred to the Department/Successor Provider;
 - 7.3.3 key support contact details for third party supplier personnel under Agreements which are to be assigned or novated to the Department/Successor Provider pursuant to this schedule;
 - 7.3.4 any relevant interface information.

8 ASSETS, SUB-CONTRACTS AND SOFTWARE

- 8.1 Following notice of termination of this Agreement, the Provider will not, without the Department's prior written consent:
- 8.1.1 enter into or vary any sub-contract;
 - 8.1.2 enter into or vary any licence for software in connection with the Services.

9 PROVIDER PERSONNEL

- 9.1 The Department and Provider agree and acknowledge that in the event of the Provider ceasing to provide the Services or part of them for any reason, Clause 25 (Re-Provision of the Services) of the Agreement will apply.

10 **PAYMENT**

10.1 The provisions of Clause 37 (Consequences of Termination and Expiry) of the Agreement apply.