

## School COVID Testing in “Yellow Zones”

As we become aware of an increasing number of schools located in areas designated as “Yellow Zones” pursuant to the New York State Cluster Action Initiative, if your school is not currently in a “Yellow Zone,” it may be useful for your school to consider taking the following proactive measures:

### **1. Consent Forms**

The New York State Department of Health (DOH) has determined that schools open to in-person instruction in yellow zones are required to test 20% of in-person students, teachers and staff over the two-week period immediately following the announcement of a yellow zone designation. If the results of the testing reveal that the positivity rate among the 20% of those tested is lower than the yellow zone’s current seven-day positivity rate, testing at that school will no longer be required to continue. Parental consent is needed prior to testing students. In order to decrease the time necessary to distribute and collect parental consent forms after a yellow zone designation, schools that will have on-site testing, either themselves or through a third-party, should consider distributing consent forms now. Please contact the Bond attorney with whom you are regularly in contact for assistance with drafting a consent form.

### **2. Decide How COVID Test Selection Will Be Performed**

It would be helpful for schools to establish a system regarding how students, teachers and staff will be selected for testing, prior to receiving a yellow zone designation. Please remember that schools may only test students who have submitted parent consent forms. The DOH and the New York State Education Department have not mandated how schools conduct this selection process, therefore, there is flexibility in how schools select students, teachers and staff for testing. At this point, the 20% threshold appears to apply to the overall combined population of students, teachers and staff, not 20% of each subgroup within the overall population (e.g., 20% of students, 20% of teachers and 20% of staff).

### **3. Communicate with your County’s Department of Health Regarding How They May Be Able to Assist Your School**

Across the state, there are a variety of ways that local departments of health and schools have partnered to facilitate testing. In some circumstances, the county department of health has established testing locations on a school’s campus. In other circumstances, rapid test kits are provided free of charge directly to the school or a local health provider designated to help the school. Contacting your local county department of health prior to a yellow zone designation to discuss the available options will help to expedite the process.

### **4. Decide Whether Your School Wants to Become a Limited Service Laboratory**

A school wanting to become registered as a limited service laboratory (LSL) to administer COVID testing must complete the application process and be approved.

### **5. Plan the Time of Day to Perform Testing**

While there is no legal mandate to perform testing at any particular time of the school day, some schools have found that it is best to perform testing near the end of the school day. Therefore, if a student tests positive, the student can be immediately released to a parent or guardian instead of implementing quarantine restrictions during the school day until a parent or guardian is able to arrive.

## 6. Consider Education Law § 2-d Implications

Education Law Section 2-d is intended to protect personally identifiable information (PII) pertaining to students, teachers and principals. Where an educational agency (school district, BOCES, school or the Department of Education) contracts with a third-party, and provides the third party with access to PII pursuant to the contract, certain safeguards must be put in place to protect confidentiality. While there does not appear to have been any guidance issued by the New York State Education Department regarding Education Law 2-d implications upon COVID testing, and Education Law 2-d would not preclude the release of information regarding positive test results to the local county department of health or the state DOH, schools should consider how to safeguard against the improper release of PII by third-party contractors.

Please refer to the following New York State Department of Health guidance documents for more detailed information:

[Guidance for School Testing in Yellow Zone](#)

[Addendum to Guidance for School Testing in Yellow Zone](#)

[Additional Addendum to Guidance for School Testing in Yellow Zone](#)

If you have any questions regarding this information memo, please contact [Candace Gomez](#), [Kate Reid](#), any of the [attorneys](#) in Bond's [School Law practice](#) or the attorney at the firm with whom you are regularly in contact.



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