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LEGAL UPDATE

August 24, 2021

To: Superintendents, Member School Districts (K-12)
From: Carl D. Corbin, General Counsel *CDC*
Subject: Consent for Students for COVID-19 Testing
Memo No. 26-2021

Our office has received various questions on who can provide consent for a student to be tested for COVID-19. As described in more detail below, consent can be provided by:

1. A student’s parent (or other adult legally responsible for the student) for a student under the age of eighteen; or
2. A student who is at least thirteen years of age.

The California Department of Public Health (“CDPH”) has issued various Guidance on testing students at school including on January 14, 2021, “Testing Considerations for LEAs and School Communities;” on April 21, 2021, “California K-12 School Antigen Testing Program Playbook;”¹ and on July 12, 2021, “K-12 school-based COVID-19 testing strategies for school year 2021-22.”² Among other issues discussed in the various CDPH Guidance is the issue of consent for testing students. The CDPH Guidance states:

Because SARS-CoV2 is recognized as a communicable disease, which is required to be reported, California state law provides that minors 13 years and older can consent to diagnosis and treatment of COVID-19. Accordingly, for students under the age of 13, the parent or guardian must provide consent, and use their email/phone to obtain results. A parent or guardian can receive the results on behalf of a child (ages under 13) when they provide consent on behalf of that child.³

¹ https://testing.covid19.ca.gov/wp-content/uploads/sites/332/2021/04/School_Antigen_Testing_Playbook.pdf.

² <https://testing.covid19.ca.gov/wp-content/uploads/sites/332/2021/07/School-Testing-Considerations.pdf>.

³ “Testing Considerations for LEAs and School Communities” (January 14, 2021, CDPH), page 5.

Included in the CDPH Guidance is the following table:

Age range	Consent	Results Reporting
< 13	Parental consent required	Parent only
13-17	Parental consent possible, but not necessary	Student by default, parent can be added
>=18	No parental consent required	Student only

While CDPH does not cite any specific legal authority in its Guidance, CDPH seems to be relying on Family Code section 6926, which provides:

(a) A minor who is 12 years of age or older and who may have come into contact with an infectious, contagious, or communicable disease may consent to medical care related to the diagnosis or treatment of the disease, if the disease or condition is one that is required by law or regulation adopted pursuant to law to be reported to the local health officer, or is a related sexually transmitted disease, as may be determined by the State Public Health Officer.

Furthermore, Title 17 of the California Code of Regulations, section 2500, subsection (j) provides that “Coronavirus disease 2019 (COVID-19)” is a disease or condition that health care providers must report to the local health officer.

Therefore, our office agrees that students thirteen years of age or above may provide consent and directly receive the results of COVID-19 testing.

After a student’s parent (or the student who is thirteen years of age or above) consents to testing, testing may proceed at school without the parent being present.⁴ As described in the CDPH chart above, when the student’s parent consents to testing, the test results should be provided to the parent. For a student who is thirteen years of age or above, the test results should be provided to the student and, in addition, we believe should also be provided to the student’s parents.^{5,6}

⁴ Please note that while parents are not legally required to be physically present to provide written consent for their child to be tested, our understanding is that some testing vendors are requiring that a student’s parent be physically present in order to provide written consent for testing for children twelve years of age and under.

⁵ While Education Code section 46010.1 allows for a student in grades 7th through 12th to obtain confidential medical services without the consent of the student’s parent, the results of COVID-19 testing will become a student record in accordance with Education Code section 49061 and, as such, we believe the test results should be shared with the student’s parent as “...necessary to protect the health or safety of a pupil or other persons” [such as the parent and other individuals within the student’s home] in accordance with Education Code section 49076(a)(2)(A).

⁶ Also, as the testing results are a student record, the results fall under the Family Educational Rights and Privacy Act (“FERPA”) not under the Health Insurance Portability and Accountability Act (“HIPAA”):
<https://www.hhs.gov/hipaa/for-professionals/faq/513/does-hipaa-apply-to-an-elementary-school/index.html>.



Attached to this Legal Update is a model student consent form for COVID-19 testing. Also, the previously-referenced CDPH “California K-12 School Antigen Testing Program Playbook” contains, starting on page 46 of the 58-page document, a model consent form for a student to participate in a rapid antigen school-based testing program for a one year period.

Please contact our office with questions regarding this Legal Update or any other legal matter.

The information in this Legal Update is provided as a summary of law and is not intended as legal advice. Application of the law may vary depending on the particular facts and circumstances at issue. We, therefore, recommend that you consult legal counsel to advise you on how the law applies to your specific situation.

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