



SCHOOL & COLLEGE LEGAL SERVICES OF CALIFORNIA

*A Joint Powers Authority
serving school and college
districts throughout the
state.*

5350 Skylane Boulevard
Santa Rosa, CA 95403

Tel: (707) 524-2690
Fax: (707) 578-0517
santarosa@sclscal.org
www.sclscal.org

General Counsel
Carl D. Corbin

Attorneys
Monica D. Batanero
Jennifer Henry
Sarah Hirschfeld-Sussman
Nancy L. Klein
Damara L. Moore
Jennifer E. Nix
Steven P. Reiner
Kaitlyn A. Schwendeman
Loren W. Soukup
Erin E. Stagg

Of Counsel
Robert J. Henry
Margaret M. Merchat
Patrick C. Wilson
Frank Zotter, Jr.

LEGAL UPDATE

March 16, 2020

To: Superintendents, Member School Districts (K-12)
From: Carl D. Corbin, General Counsel *CDC*
Kaitlyn A. Schwendeman, Schools Legal Counsel *KAS*
Subject: Governor Executive Order N-26-20 and Related Issues
Memo No. 14-2020

After 5:00 p.m. on Friday March 13, 2020, the Governor issued Executive Order N-26-20¹, which addresses Local Educational Agencies (“LEAs”)² and responding to COVID-19 issues. The purpose of this Legal Update is to summarize the Governor’s Executive Order and to address various other COVID-19 issues in a Frequently Asked Question (“FAQ”) format. Our office will continue to provide legal guidance through Legal Updates during the ongoing situation.

In summary, the Governor provided that *if* schools close temporarily because of COVID-19, to maintain funding, school districts must:

1. Continue delivering high-quality educational opportunities to students through other options, distance learning and independent study;
2. Safely provide school meals through the Summer Food Service Program and Seamless Summer Option, consistent with the requirements of the California Department of Education and U.S. Department of Agriculture;
3. To the extent practicable, arrange for supervision for students during ordinary school hours; and
4. Continue to pay employees.

The Governor acknowledged through this Executive Order that the decision to close an LEA is a local decision, and does not mandate that schools close.

The Executive Order also clarified that effective immediately, “the LEA is not prohibited from offering distance learning or independent study to impacted

¹ <https://www.gov.ca.gov/wp-content/uploads/2020/03/3.13.20-EO-N-26-20-Schools.pdf>.

² LEAs include school districts, county offices of education, and charter schools.



students. To the extent any state or local law might have been interpreted to the contrary, that law is waived.”

Districts are encouraged to consider whether the provision of distance learning and/or independent study meets the needs of their students during this time. In considering this, we remind Districts to view the decision through a lens of equity of access and whether they can provide a free and appropriate education for special education students.

The Executive Order also waives the 175-school day mandate set forth in Education Code Section 41422, so long as LEAs comply with the requirements to maintain funding, set forth above.³

Pursuant to the Executive Order, we expect further guidance from the California Department of Education (“CDE”), regarding the requirements for funding, including the impact of this Executive Order on the provision of special education students. We also expect that the California Labor and Workforce Development Agency and California Health and Human Services will issue a joint guidance on childcare, which may impact school operations. The Executive Order requires that both of these guidances be issued by March 17, 2020.

Finally, as a reminder, Superintendents and other Chief School Officials have the inherent authority pursuant to the Education Code to close a school in the event of an emergency, as discussed in Legal Update 10-2020, “Quarantine and Issues Related to COVID-19.”⁴ There is no requirement that a Governing Board first provide authority. Nevertheless, LEAs may choose to have their Governing Boards adopt a resolution acknowledging this inherent authority or ratifying the decision of the Superintendent of Schools. We have included as an attachment with this Legal Update a model resolution that your LEA may adopt providing such.

Many County Health Officials are recommending a closure of at least 2 weeks, beginning immediately. We recommend that LEAs review their plans and consider the ongoing impact of such closures on their students and staff prior to making any decisions. Our office is fully staffed and available for you during this time.

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.

© 2020 School and College Legal Services of California
All rights reserved. However, SCLS grants permission to any current SCLS client to use, reproduce, and distribute this Legal Update in its entirety for the client’s own non-commercial purposes.

³ Please see the attached “FAQ” for further clarification on the availability of the J-13A waiver.

⁴ In addition to the Education Code, LEAs may have adopted CSBA model policy 3516.5 which additionally states the authority of the Superintendent to close schools.

General Questions

1. Who is covered by the Governor's Executive Order?

Executive Order N-26-20 applies to all public school districts, county offices of education, and charter schools within the State of California.

2. Must my LEA close, pursuant to this Executive Order?

No, Executive Order N-26-20 sets forth conditions for LEAs to maintain funding if they choose to close. The decision to close remains a local decision that each LEA should make on its own, in conjunction with County Health Officials.¹

3. Must my Governing Board approve a closure due to COVID-19?

No. Education Code is clear that the Superintendent/County Superintendent/Executive Director has the inherent authority to close a school due to concerns for the health of its staff and students. Additionally, many LEAs have adopted CSBA Model Board Policy 3516.5, which explicitly states that such authority rests with the Superintendent.

4. Will my LEA continue to receive funding if I close the school and do not provide alternative methods of instruction?

Executive Order N-26-20 conditions funding on the LEA providing the following services during any closure due to COVID-19:

- A. Provide alternative educational methods, if feasible;
- B. Provide school meals;
- C. To the extent practicable, arrange for supervision of students; and
- D. Pay employees during school closures.

To continue to receive funding, LEAs are *required* to provide alternative methods of instruction, if it is feasible. Methods of alternative instruction can be, but are not limited to, independent study, distance learning, or remote learning.

5. Will my LEA qualify for a J-13A Waiver if we are unable to meet minimum instructional days due to a closure related to COVID-19?

This is not addressed in the Executive Order. Based on the trends that we are seeing with J-13A waivers for closures related to fires, it is possible that an LEA that closes and chooses not to comply with Executive Order N-26-20 may be denied a J-13A waiver. We recommend that any LEA that closes due to COVID-19 comply with the parameters set forth in the Executive Order.

¹ Please be advised, President Trump announced today, March 16, 2020 at noon, new federal guidelines advising Americans to home-school children when possible, and avoid gathering in groups of 10 or more. In addition, Health officers for the counties of Santa Clara, San Mateo, San Francisco, Alameda, Contra Costa, and Marin, and the city of Berkeley (which has its own independent public health authority), announced new "shelter in place" restrictions today, with a quarantine going into effect midnight on March 17, 2020.

6. Are the costs imposed on the LEA by this Executive Order mandated, and therefore reimbursable?

The Governor has clarified, unofficially, that these costs are not mandated. However, this remains an open question. We will have to wait for further interpretation from CDE and/or the Governor on this topic.

7. How does this impact Board Meetings?

On Thursday, March 12, 2020, the Governor issued Executive Order N-25-20, which waived certain parts of the Brown Act. For now, governing boards of K-12 public schools, charter schools, and community college districts may, in order to prevent the spread of COVID-19, hold board meetings by teleconference with no quorum of board members in the district's geographic boundaries, without having board members physically present, without having to post an agenda or allow public access at each board member's teleconference location, and without having to post each teleconference location on the agenda. However, boards are only privy to these exceptions if they notice at least one publicly accessible location from which the public can attend and observe the meeting, and otherwise comply with the pre-existing Brown Act notice requirements of 72 hours for a regular board meeting, 24 hours for a special board meeting, or less than 24 hours for an emergency board meeting.

For additional information on this topic, please see Legal Update 13-2020, "Governor's March 12, 2020 Executive Order N-25-20 Regarding Teleconferencing of Board Meetings; and Emergency Meeting Requirements under the Brown Act."

Personnel Matters

8. Am I required to "pay" employees their full salary during any period of closure?

The Executive Order does not make this clear; however, we anticipate that there will be forthcoming information from the Governor clarifying that "pay" means their full salary.

9. Can I require certificated employees to perform non-instructional tasks such as cleaning, or classified staff to provide duties outside their normal job duties?

The Governor of California has declared a state of emergency due to COVID-19. School employees are considered disaster service workers under Government Code Section 3100 and are subject to disaster service assignment in an emergency. Disaster service assignments may include cleaning, supervision of students, assistance with food service, or other needs of the LEA during this time. This applies whether or not the LEA chooses to close their schools.

10. Can I require that employees use their accrued paid leave time during any period of closure? What about if they are self-quarantined, or if the LEA imposes a quarantine?

If the employee self-quarantines and the LEA remains open, the LEA may require that the employee use any accrued leave. LEAs are encouraged to apply leave policies liberally in this instance.

If the employee is quarantined by the LEA or a physician and the LEA remains open, the employee should be required to utilize sick leave and/or extended illness leave.

If the LEA closes pursuant to Executive Order N-26-20, employees should not be required to use any accrued leave time, and should be paid their normal salary.

As always, we recommend that LEAs check their applicable collective bargaining agreements for any requirements beyond those set forth in the law.

11. Am I required to pay staff who are unable to work due to their own childcare needs?

If the LEA closes and requires that employees provide services, then the LEA may require that the employees use accrued leave time for any time they are unable to provide services due to childcare needs.

LEAs are encouraged to be flexible during any period of closure to recognize employees' childcare needs. LEAs may ask employees to work remotely or to provide services during a time that would not conflict with their childcare obligations.

If the LEA does not close, employees must use accrued paid leave in order to address childcare needs, or take unpaid leave.

12. Am I required to pay long-term substitutes during any period of closure?

It is unclear whether long-term substitutes would qualify as an "employee." In an abundance of caution, we recommend paying these persons. We also refer LEAs to any applicable Board Policies and/or collective bargaining agreements which may provide further guidance.

13. Am I required to pay contractors during any period of closure?

No, the Executive Order specifies that, to maintain funding, LEAs must pay their "employees." As contractors are not employees, they would not fall under this requirement. However, if LEAs continue to use the services of contractors, they should be paid.

14. May I exclude staff over 65 or those with preexisting health conditions which make them more susceptible to COVID-19?

It depends. If such employees are exhibiting any symptoms of COVID-19, you may exclude them. Additionally, the EEOC recommends that for these employees, the LEA engage in the interactive process to determine whether the employee should be excluded. LEAs should not unilaterally exclude these employees who are not exhibiting symptoms without first engaging in the interactive process.

Student Matters

15. What are "high-quality educational opportunities?"

This term is not defined in the Executive Order. We anticipate that this was meant to mean work which can progress knowledge and/or curriculum. It is unclear whether

optional school work that is provided to families would meet this requirement. We recommend LEAs contact either their County Office of Education or CDE for specific questions. We are hopeful that this will be further clarified by CDE in its next update, due March 17, 2020.

We recommend that whichever option your LEA chooses (optional or mandatory), LEAs make the expectations extremely clear to parents.

16. What is meant by “supervision for students?”

We believe this is meant to be a noncongregate setting where students can be brought for supervision during school hours. This setting is not required to provide high-quality educational opportunities, and appears to be meant to provide childcare relief for parents, somewhat in contradiction of the purpose of closing the school site. In implementing this recommendation, if the LEA determines it is practicable, we remind LEAs to maintain all COVID-19 prevention protocols, including social distancing and sanitation.

17. If we close schools entirely, do we have to provide students with disabilities their special education and related services?

No, if you are not providing any instruction, you do not have to provide instruction to students with disabilities. However, depending on the length of time of the school closure and its impact on each individual student, you might need to provide compensatory education based on missed special education and/or related services.

18. If we provide “optional” work for students, such as take home packets, do we have to provide students with disabilities their special education and related services?

No, if school is closed and you are providing optional work packets to students, you do not have to provide students with disabilities their special education and related services.

19. If we provide distance learning and/or independent study, what are our obligations to students with disabilities?

Your obligation is two-fold. First, you must provide each student with a disability a free and appropriate public education (FAPE) under the IDEA or Section 504, as appropriate for his/her disability. For each student who has an IEP, you must ensure that your offer of FAPE provides accommodations, aids, services, and supports that enable the student to make appropriate progress on his or her IEP goals. Second, you must ensure that your offer of FAPE provides each student with a disability with access to the general curriculum. For each student with a disability, accommodations, aides, services, and supports must be provided to ensure access to the distance learning and/or independent study model.

20. Do we have to hold an IEP meeting to amend each student’s IEP?

Yes. A required change to distance learning and/or independent study is a change in placement. You should hold IEP meetings for all students to effectuate that change in placement within ten (10) school days of your district’s change to a non-classroom-based program. Your IEP meeting should be legally compliant, to include participation of a regular education teacher if the student is participating in the regular curriculum.

Pursuant to guidance from the U.S. Department of Education, this IEP meeting does not need to be held prior to the change of placement, but must be held by the tenth school day of the change in placement.

21. Should we offer compensatory education at the IEP meeting to change placement?

At the IEP meeting, you should discuss and provide for FAPE and access to the general curriculum. In the event that the team is able to determine that some component of FAPE cannot be provided, the team should discuss compensatory education at that IEP meeting. For example, PT and APE cannot be provided remotely, so a plan to provide compensatory education in those areas, if needed, should be developed at this meeting.

22. Do we have to hold a Section 504 meeting to amend each student's 504 plan?

A student's 504 plan may need to be revised to address needs in the distance learning and/or independent study program. Teachers, administrators, and parents should work together to determine if amendment is needed and to amend the 504 plans as needed. A formal meeting is not needed if team members are able to fully discuss the student's needs in an alternate manner, such as through email.

23. Do we have to meet required legal timelines?

Until guidance is received otherwise, it is recommended that you continue to try to meet all required timelines, both with regard to special education and Section 504, and with regard to student discipline/expulsion.

Collective Bargaining

24. My LEA received a demand to bargain from one of our unions. Do I have to respond?

Yes, an LEA must respond to a demand to bargain. Please contact our office if you have specific questions regarding this process.

25. Am I required to provide the information requested by the union in their demand to bargain letter?

To the extent that any information requested is available and the information is "necessary and relevant" to the request, your LEA should make the information available to the union in a reasonable amount of time. PERB has held that information "immediately pertaining to mandatory subjects of bargaining [are] presumptively relevant." Changes to location and manner of providing work are both mandatory subjects of bargaining.

Examples of requests that are necessary and relevant and would have to be provided:

- Policies and/or procedures relating to LEA decision to close a school.
- Policies and/or procedures relating to LEA protocol to prevent spread of infectious disease.
- Policies and/or protocols relating to LEA imposition of quarantine.

26. Exclusive representatives have provided a draft Memorandum of Understanding. Should I sign it?

Our office has received copies of many Memorandums from various unions. Please contact us to address this for your specific LEA, prior to signing the MOU.

27. Am I required to provide information to unions regarding any employee who is confirmed or may have COVID-19?

Employee medical information is confidential and should not be disclosed to union representatives or anyone else, except as explicitly permitted by law. It is permissible to notify the union that an employee has tested positive for COVID-19, provided personally identifiable information about the employee is not disclosed.

28. What should we do about scheduled collective bargaining meetings?

We recommend that the meeting be scheduled to occur via video/tele-conferencing, or other alternative means. In the alternative, we recommend that meetings be postponed, with an explanation for the postponement, referring to COVID-19 and health/safety concerns, sent to the union in writing.

If your LEA wants to hold in-person collective bargaining, we recommend a location which allows for social distancing of at least 3-6 feet between participants, and adherence to all CDPH guidelines for meetings. Please keep in mind that this same recommendation applies to caucus meeting rooms.