



# SCHOOL & COLLEGE LEGAL SERVICES OF CALIFORNIA

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## LEGAL UPDATE

March 17, 2020

**To:** Superintendents, Member School Districts (K-12)

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**Subject:** **ADDENDUM to Legal Update Memo No. 14-2020: Governor  
Executive Order N-26-20 and Related Issues**  
**ADDENDUM to Memo No. 14-2020**

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*This version has been updated to include information related to Senate Bills 117 and 89. Please discard the previous version, distributed March 16, 2020. New/revised information from the previous Legal Update is in italics to assist the reader.*

After 5:00 p.m. on Friday March 13, 2020, the Governor issued Executive Order N-26-20<sup>1</sup>, which addresses Local Educational Agencies (“LEAs”)<sup>2</sup> and responding to COVID-19 issues. The purpose of this Legal Update is to summarize the Governor’s Executive Order *and subsequent clarifying legislation*, 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

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

<sup>2</sup> LEAs include school districts, county offices of education, and charter schools.



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 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.<sup>3</sup> *In addition, Senate Bill 117 waived all instructional minutes requirements.*

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.”<sup>4</sup> 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.*

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

<sup>4</sup> 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.<sup>1</sup>

**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 continued 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. How will any closure affect my ADA for 2019-20?**

*Senate Bill 117 clarifies that for the 2019-20 school year ADA calculation, LEAs that comply with Executive Order N-26-20 shall have their ADA calculated by the average daily attendance reported to the State Department of Education for only those full months where school was in session from July 1, 2019, through February 29, 2020. The bill also waives instructional time requirements.*

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<sup>1</sup> Please be advised, President Trump announced on March 16, 2020 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. 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.

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

*SB 117 clarifies that Executive Order N-26-20 “imposes additional duties on local educational agencies” and is therefore a state-mandated local program for LEAs that choose to comply with it.*

**8. 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.”

**9. What type of funding is provided through these emergency actions?**

*Compliance with the Executive Order ensures that LEAs continue to maintain LCFF funding, although it is acknowledged in SB 117 that the additional costs of complying with the Executive Order are mandated.*

*SB 117 also provides for apportionment funding of at least \$250 per LEA for purchase of personal protective equipment or for labor and supplies related to cleaning. The amount your LEA will qualify for depends on the ADA generated during all days of classroom-based instruction held between March 4, 2020 and June 30, 2020.*

**Personnel Matters**

**10. Am I required to “pay” employees their full salary during any period of closure?**

*Yes. SB 117 states that in order to qualify for continuing funding, an LEA must compensate their employees “as reasonably anticipated if the school has not been closed*

*due to COVID-19.” We interpret this to mean that any employee that would be entitled to pay if the school was open, is entitled to pay during a COVID-19 closure.*

**11. 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. Examples of 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.

**12. 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.

**13. 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 or other 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 or unpaid leave in order to address childcare needs.

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

*We believe so, although this is not clear in the Executive Order or subsequent legislation. As above, LEAs are required to pay employees as if the school was open, therefore it is likely that long-term substitutes are entitled to payment. We also refer LEAs to any*

*applicable Board Policies and/or collective bargaining agreements which may provide further guidance.*

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

*Yes. As with employees, SB 117 requires that LEAs provide any contractors payment as if the school was open in order to maintain funding pursuant to the Executive Order. This would include Nonpublic Schools and Nonpublic Agencies.*

**16. 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 not displaying symptoms but who are otherwise at enhanced risk, 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**

**17. 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.

**18. 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. SB 117 provides that LEAs operating after-school or childcare programs pursuant to the After School Education and Safety Program or other sections of the Education Code should continue to operate those programs as long as it is safe to do so. SB 117 waives attendance reporting requirements for these programs, ensuring continuity of payments.*

**19. 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.

**20. 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.

**21. 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.

**22. 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.

**23. 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.

**24. 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.

**25. Do we have to meet required special education legal timelines?**

*SB 117 extends timelines with regard to 1) provision of assessment plans, 2) provision of copies of records, and 3) transfer of special education records to a new LEA. In those situations, timelines are extended through the length of any closure pursuant to COVID-19. However, these requests should be handled as soon as possible; SB 117 requires schools to respond expeditiously to parent requests during COVID-19 school closures. It has been reported that SB 117 waived all special education timelines and service provisions; that is not the case.*

*Regarding assessment timelines, on March 17, 2020, the U.S. Department of Education, Office for Civil Rights issued a Fact Sheet: Addressing the Risk of COVID-19 in Schools While Protecting the Civil Rights of Students. In that guidance, the OCR stated that: “If an evaluation of a student with a disability requires a face-to-face assessment or observation, the evaluation would need to be delayed until school reopens. Evaluations and re-evaluations that do not require face-to-face assessments or observations may take place while schools are closed, so long as a student’s parent or legal guardian consents.” If a school district delays an assessment because face-to-face assessment or observation are needed, they should send a prior written notice to the parents regarding this decision.*

**26. Do we have to comply with testing timelines?**

*SB 117 provides that English language proficiency testing (ELPAC) timelines are extended by 45 days, and that the SPI can extend the timelines further. All other general education testing mandated under the Education Code, including CAASPP testing, are extended by the time that a school is closed, or until the end of the testing window, whichever comes first.*

**27. How do we handle Uniform Complaints?**

*SB 117 provides that the timelines established in the Uniform Complaint Procedure are extended for the duration of any COVID-19 school closure.*

**Collective Bargaining**

**28. 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.

**29. 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.

**30. 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.

**31. 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.

**32. 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.