



SCHOOL & COLLEGE LEGAL SERVICES OF CALIFORNIA

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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
Nancy L. Klein
Damara L. Moore
Jennifer E. Nix
Steven P. Reiner
Kaitlyn A. Schwendeman
Loren W. Soukup
Erin E. Stag

Of Counsel
Ellie R. Austin
Robert J. Henry
Patrick C. Wilson
Frank Zotter, Jr.

LEGAL UPDATE

August 26, 2020

To: Superintendents, Member School Districts (K-12)
From: Damara L. Moore, Senior Associate General Counsel *DM*
Subject: **Guidance for Cohort Instruction and Childcare at Schools on the State Monitoring List**
Memo No. 51-2020

On August 25, 2020, the California Department of Public Health (“CDPH”) issued [Cohorting Guidance](#), the guidance promised by CDPH on August 3, 2020, to identify conditions in which schools otherwise prohibited from reopening for full in-person instruction can offer in-person services to small groups of students, including for small group instruction and childcare.¹

The Cohorting Guidance applies specifically to those schools that are on the state’s Monitoring List and cannot open for in-person instruction, including elementary schools that are on the Monitoring List that do not have a waiver for in-person instruction.² Students who may receive these supports are those who require “specialized services for students with disabilities and English learners, access to internet and devices for distance learning, and in-person support for at-risk and high need students.”³

On August 25, 2020, CDPH also issued [FAQs](#) to further elaborate on the provision of targeted, specialized support and services at school (“FAQs”). The FAQs is not specifically applicable to Local Education Agencies (“LEAs”) that are authorized to open for in-person instruction.⁴

Distance learning requires that LEAs provide in-person instruction to the greatest extent possible,⁵ and, among other elements:

¹ This guidance supports but does not supplant the [COVID-19 and Reopening In-Person Learning Framework for K-12 Schools in California, 2020-2021 School Year](#) (July 17, 2020) and the [COVID-19 Industry Guidance: Schools and School-Based Programs](#) (Updated August 3, 2020).

² <https://files.covid19.ca.gov/pdf/guidance-schools-cohort-FAQ.pdf>, pp. 1-2.

³ The addition of students who lack access to the internet to this list is a new development in California’s agencies defining students who are in need of additional support during distance learning.

⁴ *Id.*, p. 2.

⁵ Cal. Educ. Code § 43504(b).

- Academic and other supports designed to address the needs of pupils who are not performing at grade level, or need support in other areas, such as English learners, pupils with exceptional needs, pupils in foster care or experiencing homelessness, and pupils requiring mental health supports.
- Special education, related services, and any other services required by a pupil's individualized education program, with accommodations necessary to ensure that individualized education program can be executed in a distance learning environment.⁶
- Designated and integrated instruction in English language development, including assessment of English language proficiency, support to access curriculum, the ability to reclassify as fully English proficient, and, as applicable, support for dual language learning.⁷

A small set of students in a school otherwise closed for in-person instruction may provide targeted specialized support, like those referenced above, when the school is able to comply with the cohort conditions set forth in the Cohorting Guidance. These conditions include:

- Cohorts are “a stable group of no more than 14 children or youth and no more than two supervising adults in a supervised environment in which supervising adults and children stay together for all activities (e.g., meals, recreation, etc.), and avoid contact with people outside of their group in the setting.”
- Maintaining a cohort of not more than 14 children.
- Maintaining a cohort of no more than two supervising adults, defined as those adults “assigned to one cohort of children or youth, who does not physically interact with any other cohorts. This includes child care staff, certificated or classified school staff, volunteers, participating parent or caregiver, or other designated supervising adult(s).”
- Cohorts may be smaller, but not larger than, a 14:2 child:adult ratio. For example, a moderate-to-severe special day class could open with six students and two adults, so long as the cohorts and supervising adults did not mix with other cohorts and their supervising adults.

Cohorts generally should not exceed 25% of the total enrollment of the school or building capacity.⁸

Cohorts and supervising adults are generally not to interact with different cohorts or their parents while on campus.⁹ However, one-to-one specialized services, which “include[] but not limited to occupational therapy services, speech and language services, and other medical, behavioral services, or educational support services as part of a targeted intervention strategy,” may be provided by an adult that is not part of the cohort. In addition, the FAQs note that “assessments, such as those related to English learner status, individualized educational programs and other

⁶ This includes special education in-person assessments.

⁷ Cal. Educ. Code § 43503(b)(3) – (5).

⁸ See FAQs, p. 5.

⁹ Substitute providers who are covering for short-term staff absences are allowed but must only work with one cohort of children per day. *Id.*



required assessments” are a specialized service that may be conducted in-person, in accord with the Guidelines. These services must comply with [CDPH’s guidance for “limited services.”](#)

Although the Cohorting Guidance strongly urges physical distancing and mandates mask wearing, it acknowledges that physical distancing among “young” students in the same cohort should be “balanced with developmental and socio-emotional needs of this age group.” Staff meetings across cohorts need to follow CDPH guidance for social distancing, such as mask-wearing and placement six feet apart from one another, ideally held outside or in a large room.

Special Education Implications of the Guidance

The FAQs accompanying the Cohorting Guidance state that “students with disabilities should be prioritized for receiving targeted supports and services.” Recent compensatory education orders from the Office of Administrative Hearings and the California Department of Education’s Compliance Department have found even when schools are closed, there is an obligation to provide, as appropriate, some students a Free Appropriate Public Education (“FAPE”) through in-person instruction.¹⁰

Given the mandate to provide in-person instruction to the greatest extent possible, and the authorization to do so that this guidance provides, a least restrictive environment analysis should include considering whether small group instruction in a cohort is necessary for a student to receive FAPE, even where a school is providing distance learning instruction.

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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¹⁰ See, e.g., *Parent vs. Los Angeles Unified School District*, OAH Case Number 2020050465, finding that a student’s IEP was not fully implemented during a period of distance learning prior to her aging out of special education, and awarding transition counseling services and speech and language services.