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COVID-19 Advisory



DWK Advisory on COVID-19 (Coronavirus)

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On March 4, 2020, Governor Gavin Newsom proclaimed a State of Emergency regarding COVID-19. The pandemic has created many issues involving students and other areas of LEA operations. The following Advisory provides general guidance and answers some of the most frequently asked questions in these areas.

In balancing the risk of spreading of the virus with the impact of closing schools on students and staff, we suggest the following themes as reference points to assist all stakeholders in maintaining a deliberate and common-sense focus:

- Existing policies and administrative regulations likely provide for “emergency powers” being delegated to district officials (usually the superintendent) in emergencies. (See e.g., CSBA BP 2210).
- Check before attempting to create and adopt “emergency resolutions,” to “declare a “state of emergency,” or take other actions. Districts will likely fare the crisis better by identifying, clarifying and affirming these existing delegations of authority and establishing logistical protocols for implementation.
- Collective bargaining agreements (CBAs) likely address most, if not all, leave-of-absence situations for employees in pandemic situations, including provisions addressing “quarantine.” Look to your CBAs for leaves of absence, emergency provisions (perhaps in a “District Rights” article), and other areas which might be impacted such as safety, work day, work year, and transfer/reassignment (even temporarily).
- Existing CBA provisions could obviate the need to create and negotiate new agreements or memoranda of understanding (MOUs). Instead, employers and employee association representatives might be better served by identifying, clarifying and affirming these existing rules regarding working conditions, and then ascertaining whether any new or modified rules need to be articulated and reduced to writing.
- Establish or affirm emergency lines of communications with stakeholders – parents, staff, and labor representatives. Let stakeholders know that, while updates will be given as soon as possible, it may be necessary to inform, consult or negotiate after emergency measures have been taken.

DWK will continue to update this advisory with current links and recommendations specific to public schools as they become available.

STUDENTS AND SPECIAL EDUCATION

We advise LEAs to develop plans to attempt and ensure the continuity of educational services if schools must close for extended periods of time. Although LEAs’ plans should account for local community and student demographics, the following factors should be considered:

Schoolwide Health Plans. Health plans must be school-specific and should be developed in conjunction and collaboration with the local health department. Key LEA staff may include school health services, facilities personnel, administrators, and others who may be able to provide input for scheduling regular cleaning/disinfecting of school facilities and encouraging safe health practices.

Non-Traditional Instruction. COVID-19 may require LEAs to consider non-traditional modes of instruction, such as the following: electronic learning, television or pre-recorded video lessons, live-streamed lessons and opportunities

to conference with teachers and peers, and instructional packets to be completed at home. The method and level of instructional content may include consideration of:

- Types of instructional support available to staff and to students.
- Assessment and evaluation methods and monitoring.
- Skills development.
- Supplemental instruction.
- Measurable grade-level and subject matter content.

Prior guidance from the United States Department of Education for continuity of learning can be found here: www2.ed.gov/admins/lead/safety/emergencyplan/pandemic/guidance/continuity-recs.pdf

Students With Disabilities. LEAs need to also ensure their plan considers students with disabilities so they may continue to have meaningful access to any educational program made available during the crisis, and account for IEP and 504 teams' need to potentially address individual needs upon school reopening when meetings can be convened. Some suggested considerations include:

- Districts and other LEAs will need to consider the timeline requirements for holding IEPs, Section 504 meetings and SST meetings. Since there may be breaks in the delivery of special education services due to school closures, on an individualized basis, districts and other LEAs will need to consider what services have been missed, whether compensatory education is required and whether follow-up meetings need to be offered. Where there are long-term closures, districts and other LEAs may consider, as an option, holding a few classrooms open for the delivery of special education services that are required and reserving the ability to convene IEP and Section 504 meetings. If general education students are offered distance learning opportunities, to the extent possible, districts and other LEAs should offer special education and support services to students. We recommend sending a letter to all parents and parents of students with disabilities (meeting prior written notice requirements) explaining what the district's plan is and whether staff is available to provide services at school sites or otherwise.
- Districts and other LEAs will want to monitor the program, placement and services of those special education students that are placed in nonpublic schools. It will be important to have knowledge of the service delivery model for students attending NPAs during the school closure period.

School Environment. Administration should consider a number of factors that may impact students, such as whether changes to schedules will be necessary (e.g., holidays, breaks, and instructional minutes), how to track the health of students and staff, and how to plan for students to return to school in a safe environment.

FREQUENTLY ASKED QUESTIONS CONCERNING THE IMPACTS OF COVID-19 ON STUDENTS:

Q: I am receiving emails from concerned parents requesting an update. How should I respond?

A: Update your community with steps that have already been taken. For example, provide updates on where they can find the latest information, how often the district/LEA will be disinfecting facilities, the availability of cleaning agents (hand sanitizer, cleaning supplies, etc.), steps taken to reduce person-to-person contact, continuity of education plans, and how the district/LEA will keep apprised of the health status of the local community. If appropriate, also include any ongoing efforts and how stakeholders can remain involved. Depending on the circumstances, it may be necessary for districts/LEAs to indicate when another update can be expected.

Q: What if a special education assessment is pending during school closure?

A: We do not know if CDE will excuse them through a waiver of applicable timelines. Assuming there is no guidance from CDE regarding waivers for special education assessments, we would look at this as a school break longer than five school days. This would in essence toll the time that the student is out of school for the number of days missed. A similar analysis could be applied to a request for an IEP meeting. Our general advice is that districts should adhere to the IDEA timelines and procedures to the extent possible, given each particular circumstance, with the goal of upholding students' rights.

Q: What about students who rely on free/reduced meals at school?

A: Free/reduced meals are provided at the school district level. Districts/LEAs should include consideration of free/reduced meals as part of its COVID-19 plans.

Q: What is the district's obligation to students with disabilities if it closes, but makes resources available to all of its students through non-required distance learning?

A: The district would need to ensure that materials are available to all students, accounting for and accommodating all students with disabilities. The accommodation in this instance would be associated with students with disabilities having the same access as their non-disabled peers. For example, if a district has reading materials available online, a visually impaired student would need to have speech to text materials available.

Q: If a district closes, what are its obligation to special education students when they return to school?

A: If the district closes entirely, and no students are receiving instruction, most likely the district would not have an obligation to provide compensatory education for student with IEPs. However, the district must consider each child individually, and if upon return it is evident that regression has occurred due to the amount of time away from instruction, the district should determine whether it is appropriate to develop a plan to get the student back on track with their individualized goals.

LABOR AND EMPLOYMENT

Review Existing Sources

- As stated above, review CBAs for provisions relating to emergencies, management rights, leaves and leave verification, work year, work day etc.
- Review job descriptions.
- Review policies regarding disaster management/recovery, infectious diseases, universal precautions, use of technology, remote learning etc.
- Review and clarify established past practices regarding how CBA provisions and policies have been implemented.
- Engage with bargaining unit representatives to seek consensus on existing work rules and their application in current circumstances; identify the need, if any, for additional temporary/emergency agreements regarding negotiable areas not already covered by the CBA; and discuss protocols and procedures in the event management must make emergency decisions.
- Determine Potential Negotiable Subjects. The Educational Employment Relations Act (EERA) requires public school employers to negotiate with exclusive representatives regarding matters within the scope of bargaining. (Gov. Code, § 3543.2.) The following negotiable topics may be impacted by LEA actions in response to the COVID-19 outbreak:
 - Wages and benefits (compensation in all forms, including the timing of payment)
 - Employee work year
 - Employee work day, length, start/stop times
 - Sick leave, personal necessity leave, vacation
 - Provision of physician notes
 - Duties not reasonably comprehended within the job descriptions
 - Transfer of bargaining unit work
 - Transfer and reassignment

Changes or modifications in these negotiable areas require the employer to give the exclusive representative notice and the opportunity to bargain the effects or impacts of an otherwise non-negotiable management decision. Normally, this notice must be provided sufficiently in advance of implementation of the decision in order to allow for meaningful negotiations to occur and be completed before carrying out the decision. However, statutory deadlines (e.g., layoffs), "business necessity," and other "immutable deadlines" outside of the employer's control may justify a relaxation in the amount of advance notice as well enable the employer to unilaterally implement the decision before effects negotiations are completed.

“Business Necessity” and Unilateral Actions. Unlike other public sector labor relations statutes, the EERA does not contain an exception to the duty to bargain for emergencies. PERB has recognized that under exceptionally limited circumstances, however, an employer may be excused from negotiating on the basis of a true emergency that provides a basis for claiming that a “business necessity” excused a unilateral change. (*Cloverdale Unified School District* (1991) PERB Decision No. 911). To establish “operational necessity” or “business necessity” as a defense to a unilateral change, the employer must establish the following:

- An actual financial or other emergency that leaves no alternative to the action taken and allows no time for meaningful negotiations before taking action. (*Calexico Unified School District* (1983) PERB Decision No. 357, ALJ Proposed Dec., p. 20.)
- The alleged necessity must be the unavoidable result of a sudden change in circumstance beyond the employer’s control. (*Lucia Mar Unified School District* (2001) PERB Decision No. 1440, ALJ Proposed Dec., p. 46.)

PERB has rarely, if ever, upheld employer unilateral action based on a “business necessity” defense; however, the present circumstances may provide an unprecedented context in which this argument could prevail if the employer acted in good faith in its efforts to involve the exclusive representative as soon as possible.

FREQUENTLY ASKED QUESTIONS REGARDING IMPACTS ON EMPLOYEES IN CONNECTION WITH COVID-19:

Q: If an employee is exhibiting symptoms traditionally associated with a cold or flu, can we send them home?

A: Applying existing rules and acting consistent with past practice is paramount regarding the conditions under which employees may or must take leaves of absence. If an employee visibly appears to be sick, you can send them home and ask them not to return until they are well just as you would have before now.

Q: If we send someone home because we suspect they may be ill, how should they be compensated?

A: Leave provisions should be enforced consistent with past practice according to circumstances in which employees take leave of their own volition (“self-quarantine” in this case) or because they appear to be visibly ill. Also consider the following:

- Employees might request or provide factual information that invokes family leave under the FMLA or CFRA, in which case employers should supply information and request verification as usual.
- Employees may cite Labor Code section 230.8 to request leave to “address a child care provider or school emergency.” In most instances, however, the leave benefits under this statute are subsumed within negotiated personal necessity leave provisions.
- Depending on the duration of a district closure of schools, the amount of leave employees have accrued, and the nature of leave due to COVID-19, some employees may exhaust sick leave or enter into differential pay sick leave. Governing boards have the discretion to grant additional paid leaves due to the quarantine of certificated (Ed. Code 44964) and classified (Ed. Code, § 45199) employees who have come into contact with persons with contagious diseases. Districts should collaborate with labor representatives before enacting such additional leave policies.

Q: Can we require an employee who has been out sick to provide a doctor’s note clearing them to return to work?

A: Most school districts have CBA provisions or a board policy specifying when a doctor’s note may be required after a specified period of time, e.g, for an absence of more than three consecutive days. Districts should continue to comply with these terms of uniformly and consistently; however, these rules should be applied in light of recommendations and directives from governmental agencies. For example, if an employee is quarantined, some advisories caution against requiring them to exit the quarantine to visit a doctor for a verification note.

Q: Can we ask employees whether they have been tested for COVID-19?

A: No, we should not ask employees whether they have been tested for COVID-19. Federal and state laws preclude employers from asking employees for their diagnosis, prognosis, list of medications and genetic background. Employer inquiries are limited to what is justified by business necessity and the inquiries must be job-related. Inquiries are also limited to an employee’s ability to perform the essential functions of their position with or without reasonable accommodation and without presenting a direct threat of harm to themselves or others.

Q: What are my responsibilities if an employee voluntarily discloses that they were exposed to the coronavirus?

A: An employee who voluntarily discloses they may have been exposed to the virus may be sent home pending a return to work clearance or a wait time of 14 days. You must also keep the disclosure confidential as you would any other medical information.

DISTRICT AND BOARD RELATIONS

FREQUENTLY ASKED QUESTIONS REGARDING GOVERNANCE AND FUNDING:

Q: My district was just notified that a student may have the virus. Can the Board call an emergency meeting?

A: The Brown Act permits the boards of public agencies to meet during an emergency situation. Suspected instances of COVID-19 would qualify as an emergency situation that “severely impairs public health.” Boards can meet so long as they comply with Government Code section 54956.5, with subsection (b)(2) providing the requirements that must be complied with prior to meeting. Text of section 54956.5 and the other requirements related to special meetings can be found here: leginfo.legislature.ca.gov/faces/codes_displaySection.xhtml?sectionNum=54956.5.&lawCode=GOV

Q: If my district closes schools, will those days have to be made up at the end of the year?

A: Districts are excused from the full school year requirement in the event of an epidemic or order from a federal, state, city or county official responding to an emergency. (Ed. Code, § 41422)

Q: Will my district lose funding if school is cancelled due to COVID-19?

A: No, this should not happen. Due to the Governor’s recent Proclamation of a State of Emergency, school districts and other LEAs are held harmless for ADA loss if they fill out and submit the proper forms (the J-13 waiver). For ADA calculations and the application for waivers, we recommend reviewing the guidance from School Services. www.sscal.com/publications/fiscal-reports/coronavirus-and-considerations-instructional-minutes-and-ada

RESOURCE LINKS

CDE’s guidance on COVID-19 impacts on students and staff, which includes multiple helpful resources: www.cde.ca.gov/lr/he/hn/coronavirus.asp

California Department of Public Health, issued on March 7, 2020
[www.cdph.ca.gov/Programs/CID/DCDC/CDPH Document Library/School Guidance_ADA Compliant_FINAL.pdf](http://www.cdph.ca.gov/Programs/CID/DCDC/CDPH%20Document%20Library/School%20Guidance__ADA%20Compliant_FINAL.pdf)

CDC’s informational factsheets: What you need to know about coronavirus disease 2019 (COVID-19) www.cdc.gov/coronavirus/2019-ncov/downloads/2019-ncov-factsheet.pdf; and What to do if you are sick with coronavirus disease 2019 (COVID-19) www.cdc.gov/coronavirus/2019-ncov/downloads/sick-with-2019-nCoV-fact-sheet.pdf

In terms of a substantive analysis of the impacts of the coronavirus on schools, we recommend a review of the following EdSource link Question and Answer regarding “What parents and students should know about COVID-19,” which can be found here: edsources.org/2020/coronavirus-qa-what-california-parents-and-students-should-know-about-covid-19/624413

The Governor’s March 4, 2020 Proclamation www.gov.ca.gov/wp-content/uploads/2020/03/3.4.20-Coronavirus-SOE-Proclamation.pdf

The United States Department of Education previously compiled resources in September 2009 in response to H1N1 rem.ed.gov/docs/PlanningforPotentialSchoolClosures.pdf



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