

## **Governor's New Executive Order Regarding Charter School Closures: What To Do Now**

Numerous California school districts and charter schools announced today, March 13, 2020 that they would be closing in an effort to control the spread of the Coronavirus (COVID-19). Late today, the Governor issued an executive order confirming that charter schools which close to address COVID-19 will continue to receive funding to provide critical services (<https://www.gov.ca.gov/wp-content/uploads/2020/03/3.13.20-EO-N-26-20-Schools.pdf>). We realize that many of you have been preparing for this possibility. This legal alert will provide you with additional guidance and information regarding legal issues and questions you may have during this process. Such guidance does not constitute legal advice but is solely intended as a general resource to assist charter schools. For specific legal advice under the particular facts of your school's situation, legal counsel should be consulted. Based upon the current information available, in addition to the information contained in our prior Legal Alert, sent on March 10, we recommend consideration of the following additional issues:

- **Governor's Executive Order**

The Executive Order issued by Governor Newsom confirms the following:

1. Charter schools which close to address COVID-19 will continue to receive funding so that they may continue to:
  - a. Continue to deliver high-quality educational opportunities to students to the extent possible through, among other options, distance learning and/or independent study.
  - b. Provide school meals in non-congregate settings.
  - c. Arrange for supervision of students during ordinary school hours to the extent practicable.
  - d. Continue to pay employees.
2. If a charter school closes to address COVID-19, it is not prohibited from offering distance learning or independent study.<sup>1</sup>
3. Schools that close due to COVID-19 shall qualify for emergency funding under Education Code Section 41422, and all that will be required for continuing funding will be a written confirmation from the charter school leader that the closure was due to COVID-19.

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<sup>1</sup> Please note that the Governor's Executive Order did not waive requirements of independent study laws, including but not limited to: the requirement to get signatures on master student agreements in advance of commencing independent study, Board adoption of independent study policies, and collection of work samples. As a result, all charter schools that choose to offer independent study in lieu of closure must comply with all independent study laws in order to collect apportionment.

4. The Department of Education and Health and Human Services Agency have been directed to issue guidance by March 17, 2020 regarding implementing distance learning/independent study, ensuring students with disabilities receive a free and appropriate public education, and how to provide meals to students in a safe manner.
  5. The Labor and Workforce Development Agency and the Health and Human Services Department shall issue guidance by March 17, 2020 regarding how to support parents to care for their children during ordinary school hours in the event of school closure.
- **Coordinate with the County Superintendent and the County Department of Health**

Many individual school districts and some entire counties in California have made the decision to close schools in the last several days.

It is critical that individual counties address charter schools in their decisions and directives, both to ensure consistent public health actions as well as to ensure that your school's funding continues so that all school expenses may be responsibly addressed.

As a result, it is imperative that each charter school closely coordinate all COVID-19 and school closure-related actions with its District Superintendent, County Superintendent of Schools, and County Department of Health.

Please note that independent study and virtual schools should review carefully any directives from your County Health Department to determine if your school is mandated to close or has the discretion to close.

- **Updated Sources of Important Information**

Local, state, and federal health authorities and governmental agencies (California Department of Education ("CDE"), California Department of Public Health, and the Governor's Office) have issued and will continue to issue regular updates and guidance regarding COVID-19. The latest guidance from the California Department of Public Health and the CDE is linked here:

[https://www.cdph.ca.gov/Programs/CID/DCDC/CDPH%20Document%20Library/School%20Guidance\\_ADA%20Compliant\\_FINAL.pdf](https://www.cdph.ca.gov/Programs/CID/DCDC/CDPH%20Document%20Library/School%20Guidance_ADA%20Compliant_FINAL.pdf)

To receive regular updates, consider regularly checking the following websites along with your county department of health:

<https://www.cdph.ca.gov/Programs/CID/DCDC/Pages/Immunization/ncov2019.aspx>

<https://www.cde.ca.gov/ls/he/hn/coronavirus.asp>

<https://www.gov.ca.gov/newsroom/>

<https://www.cdc.gov/>

<https://www.cdc.gov/coronavirus/2019-ncov/community/schools-childcare/guidance-for-schools.html>

- **Regular Communication with Families**

Please ensure that you have a system in place to provide your families with regular communications during the closure, for example capability to send out school-wide email or phone messages.

Use this process to pass on guidance you receive from local, state, and federal authorities surrounding school closure, as well as to update parents regarding when school may reopen.

- **Apportionment Impacts of School Closure or Reductions in ADA**

As noted above, pursuant to the Governor's Executive Order of today's date, if your school closes due to COVID-19, you will continue to receive funding to meet the critical needs as outlined in the Executive Order.

To receive this funding, you will likely need to complete a J-13A form, found here [<https://www.cde.ca.gov/fg/aa/pa/j13a.asp>]. We continue to monitor this situation to determine the timeline within which the forms must be submitted and will update schools in the near future.

If your school does not close, but the average daily attendance of your charter school shows a material decrease during the fiscal year as a result of students who have COVID-19 symptoms or are quarantined,<sup>2</sup> Education Code Section 46392 provides for a process by which the State Superintendent of Public Instruction approximates the total average daily attendance that would have occurred had the epidemic not occurred. Similar to the provisions above, Education Code 46392 requires a charter school to demonstrate to the satisfaction of the State Superintendent of Public Instruction that its circumstances have met the requirements of Section 46392 through affidavits of members of the governing board and the County Superintendent, and approval from the Superintendent of your chartering authority.

- **Meals for Students**

One of the concerns expressed by the Governor and other public officials is the effect of school closure on the tens of thousands of students in the state who rely on the meals they receive at school.

Charter schools are required to provide all needy students with at least one nutritionally adequate free or reduced-price meal during each school day. This law remains in effect even during a school closure.

The U.S. Department of Agriculture ("USDA") recently approved a request from California to allow meal service during school closures to minimize potential exposure

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<sup>2</sup> Please note, average daily attendance decreases as a result of parents keeping their children home as a precaution may not be eligible for this reimbursement.

to COVID-19. As a result, meals can be served either at a school site or off-site and are not required to be served in a group setting to ensure students receive nutritious meals while schools are temporarily closed. Many school districts are identifying a limited number of locations where meals may be picked up each day within a specific time frame. We recommend that charter schools work with their food service provider to develop meal delivery options.

In order to take advantage of this waiver, you will need to submit a request to the School Nutrition Department of the CDE. More information on this process can be found here:

[cde.ca.gov/ls/nu/waivereqschoolclosures.asp](https://cde.ca.gov/ls/nu/waivereqschoolclosures.asp)

- **Special Education Students**

The United States Department of Education has confirmed<sup>3</sup> that if a charter school LEA closes and does not provide any educational services to the general student population, then it would not be required to provide services to students with disabilities during that same period of time. However, if the school continues to provide educational opportunities to students, for example through packets of work, independent study or other forms of distance learning, the school must ensure that students with disabilities also have equal access to the same opportunities, including the provision of a free and appropriate education.

Once school resumes, the LEA must make every effort to provide special education and related services to the child in accordance with the child's individualized education program (IEP) or 504 Plan. In addition, an IEP Team and/or a 504 team, would be required to make an individualized determination as to whether compensatory services are needed as a result of the closure.

Please check back on Tuesday, March 17, 2020 for guidance to be issued by the State regarding how charter schools are to meet the needs of students with disabilities during closure, including if the charter school chooses to offer distance learning or independent study during the closure.

- **Independent Study and Academic Credit**

In Case of School Closure

Apportionment cannot be collected through independent study on days that the charter school is not in session under current law. However, if a charter school wished to provide independent study instruction for students during a school closure in order to maintain instruction *without claiming ADA*, it may lawfully do so. The CDE has also confirmed that academic credit can be earned through independent study and other types of distance learning while school is closed. However, if you have not already, your school should consider adopting a policy or other protocols defining how

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<sup>3</sup> <https://www2.ed.gov/policy/speced/guid/idea/memosdcltrs/qa-covid-19-03-12-2020.pdf>

academic credit will be calculated for work performed during school closure to ensure consistency.

Please note, as referenced above, further guidance regarding implementing independent study and/or distance learning during school closures will be provided by the Department of Education and Health and Human Services Agency by March 17, 2020.

### In Case of NO School Closure

#### *Independent Study In Lieu of School Closure*

It is possible that a charter school could consider offering independent study instead of a school closure. However, as noted above, current law requires that independent study always be voluntary and the strict legal requirements noted above would apply school-wide. As a result, a charter school could not mandate school-wide independent study, and average daily attendance could suffer as a result. In considering this option, consult with legal counsel as such a decision could be a violation of the terms of your approved charter, could change the characterization of your charter from “classroom-based” to “nonclassroom-based,” which carries significant fiscal implications, and applicable employment laws must be considered as well.

#### *For Excluded Students*

Independent study is a viable option to offer to students excluded due to COVID-19. However, it is important to note that current law requires that independent study always be optional. As such, no student can be required to engage in independent study. In order to collect apportionment for a student on independent study, a charter school must follow all strict requirements related to independent study, which include, but are not limited to the adoption of a board policy, a fully executed written agreement for each student which aligns with legal requirements and the adopted board policy, the collection of work samples, and the maintenance of appropriate contemporaneous records of attendance. Further, each student that engages in independent study must be assigned a supervising credentialed employee.

Excluded students can also be included in classroom instruction telephonically or through video conference. However, it is important to note that current law would still consider this synchronous instruction to be “independent study” and thus subject to independent study laws. In considering this option, consult with legal counsel to ensure appropriate compliance with applicable employment and independent study law. **Failure to comply with independent study law can result in a complete loss of ADA funding for each student on independent study.**

- **Employee Considerations**

There are many employee considerations that need to be carefully addressed in the event of a school closure, including if there are applicable collective bargaining agreements in play. Due to the complexity of such issues and the fact-specific nature

of your employment policies, we recommend you contact your legal counsel to coordinate a lawful action plan.

Also, the California Division of Occupational Safety and Health has put out guidance for employers in responding to COVID- 19:

<https://www.dir.ca.gov/dosh/coronavirus/Health-Care-General-Industry.html>,

- **Portions of the Brown Act Waived**

Under a recently issued Executive Order by the Governor on March 12, certain provisions of the Brown Act have been waived during the state of emergency. Please note that not all provisions were waived, and it is critical that you review the order carefully and consult with legal counsel to ensure you are still in compliance with the Brown Act, especially as non-compliance could result in any actions to be taken by your board being declared invalid.

- **Public Lotteries**

Education Code Section 47605(d) requires that charter school admission lotteries be held as “public random drawings.” We have been getting a lot of calls about whether “public” means “in person.” Section 47605(d) does not define “public” and therefore, given the current health emergency, we believe a live public broadcast of a lottery that is fully accessible to members of the public would fulfill legal requirements under these unique circumstances. We encourage recording and subsequently posting the live broadcast on the school website or through a log-in site, for those who are unable to view the broadcast live. We also encourage accommodations for families who may not have access to high speed internet.

- **Exclusions of Students and Employees from School Campuses**

For those schools which decide not to close, local, state, and federal health authorities are providing guidance and directives regarding the exclusion of certain students and staff from campus for fourteen (14) days from the day of their last exposure.<sup>4</sup> These currently include students, teachers, and staff who present with fever and/or respiratory infection symptoms; those who have traveled over the course of the last fourteen (14) days to an area identified by the Center for Disease Control as Level 3 and those who have been in close contact with someone diagnosed with COVID-19.

Further, Education Code Sections 49451 and 48213 and Section 202 of Title 5 of the California Code of Regulations allow for the exclusion of any student whenever there is a good reason to believe that the child is suffering from a recognized contagious or infectious disease or the continued presence of the student would constitute a clear and present danger to the life, safety, or health of a pupil or school personnel. Similar provisions of the Health & Safety Code exist to prohibit students and teachers who

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<sup>4</sup> A student or employee’s race or ethnicity cannot justify exclusion from school. All schools have an obligation to protect their students and staff from unlawful discrimination

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reside in a quarantined area from coming on to campus (Health & Safety Code Section 120230).

Schools may also consider excluding all non-essential visitors from campuses (e.g., vendors, delivery services etc.). Almost all meetings with parents could be held telephonically or through video conference. In addition, schools should consider curtailing all school-wide gatherings such as assemblies, dances, etc.

- **Sanitation and Cleaning**

If your school campus is closed, we recommend you take this opportunity to have the facility thoroughly cleaned and sanitized in accordance with local, State and Federal guidelines:

<https://www.cdc.gov/coronavirus/2019ncov/community/organizations/cleaning-disinfection.html>

Should you have any questions about this Legal Alert, please contact Jerry Simmons ([jsimmons@mycharterlaw.com](mailto:jsimmons@mycharterlaw.com)) or Lisa Corr ([lcorr@mycharterlaw.com](mailto:lcorr@mycharterlaw.com)) at 916-646-1400. You can also [view past Legal Alerts here](#).

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