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A Joint Powers Authority serving school and
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LEGAL UPDATE

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

From: Frank Zotter Jr., Senior Associate General Counsel

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**Subject: Impact of Emergency School Closures
Memo No. 39-2014**

In response to the recent heavy winter storm, many school districts cancelled classes or closed early. Some schools that were open had very low attendance as a result of the storm. This Legal Update addresses several issues related to the closures and low attendance.

Entitlement to Average Daily Attendance (ADA)

When a school is closed because of an emergency such as a severe storm, the district or county office of education may file a waiver with the California Department of Education to request credit for lost ADA and instructional time. This topic is covered in a comprehensive Management Advisory from the California Department of Education, which can be found at <http://www.cde.ca.gov/fg/sf/aa/ma9001.asp>, first issued in 1990 and updated in 2005. As the advisory explains, "School districts and county offices are to be held harmless from revenue loss that might otherwise result from the loss of ADA or instructional time in emergencies."

School districts are normally required to provide at least 175 days of instruction, both for Average Daily Attendance and Instructional Time Credit for certificated staff. (Education Code § 41422.) When flood, fire, epidemic, or other public emergency require a school district to provide fewer days of instruction than that number, however, the State permits them to get credit for the time missed because of the emergency. The advisory provides detailed instructions on how to claim ADA by using the approved J-13A form, which can be found here in Microsoft Word format: <http://www.cde.ca.gov/fg/sf/aa/documents/formj13a.doc>.

Credit for ADA can also be obtained if a district does not close, but experiences lower than normal enrollment during the time of such emergencies, or even for a reasonable period thereafter. The advisory explains:

Districts that keep schools open during, or immediately after, an emergency may find that attendance is below normal. If the attendance of a school or program is less than 90 percent of “normal” for a reasonable time after the event, then the district may assume that a case exists for claiming emergency attendance credit for the “material decrease” of ADA. Any reduction of ADA in a necessary small school, even if less than 10 percent, may be considered material.

Districts that wish to claim ADA and instructional time credit for a forced closure or reduced enrollment should complete the proper forms and retain supporting documents and records in accordance with the California Department of Education’s instructions outlined in the Management Advisory (<http://www.cde.ca.gov/fg/sf/aa/ma9001.asp>) and form J-13A (<http://www.cde.ca.gov/fg/sf/aa/documents/formj13a.doc>). However, as the California Department of Education notes, districts should make every effort to make up lost instructional time.

Compensation for Staff during Closures:

Under the Fair Labor Standards Act, exempt employees such as administrators are not entitled to overtime pay, but they likewise are entitled to receive their full pay for a given pay period (bi-weekly, semi-monthly, or monthly) during which they perform any work. Thus, exempt employees who are told not to report to work because of an emergency closure will normally not lose any compensation if they perform some services during that pay period.

Employees who are paid for a certain number of work days technically may not have to be paid for the day the school is closed, but they also would not be paid any additional amount for a make-up day and so their pay would remain the same overall.

For hourly employees, such as a member of classified staff, there is no uniform federal or statewide rule governing whether such employees are entitled to compensation if they are told not to report to duty because of inclement weather, or if they are sent home because of such conditions. Ordinarily, this issue is addressed, if at all, in the collective bargaining agreement or, less commonly, in district policy. Public policy reasons likely would favor an ongoing hourly employee being paid for the time that he or she was scheduled to work but could not because of an emergency school closure. If a district holds a make-up day for the lost instructional time, it may be necessary to pay additional amounts to classified employees who otherwise would not have worked on that day (unlike employees who are paid for a certain number of work days).

We therefore advise districts to review their collective bargaining agreements and/or district policies to see how this issue is addressed. For example, a collective bargaining agreement might allow classified and certificated employees the unfettered right to use a personal necessity day (similar to, or deducted from, sick leave) for such a closure if the employee chooses. Alternatively, as a matter of fairness, districts that receive their full ADA credit for a day on which they closed or had reduced attendance may choose to pay their employees, including hourly staff, their normal or a typical day’s pay for that day even though the districts may not be legally obligated to do so.

When to schedule a make-up day and compensation issues related to either working a partial day before an emergency closure or scheduling a make-up day (for employees who are not compensated per day worked and so may be entitled to additional pay) should be negotiated.

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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