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LEGAL UPDATE

October 16, 2019

To: Superintendents, Member School Districts (K-12)
From: Kaitlyn Schwendeman, Schools Legal Counsel *KAS*
Subject: Recovery of Instructional Days Due to Emergency Closures
Memo No. 31-2019

Our office has received multiple inquiries regarding making up instructional days due to emergency school closures following PG&E’s Public Safety Power Shutoff (“PSPS”). This Legal Update provides guidance for determining whether to make-up missed instructional days.

Entitlement to Average Daily Attendance (“ADA”)

School districts are normally required to provide at least 180 days of instruction, both for ADA and Instructional Time Credit for certificated staff. Education Code § 46200 provides that if a school district offers less than 180 days of instruction, the Superintendent “shall withhold from the district’s local control funding formula grant apportionment” a portion of the funding proportional to the reduction in ADA below 180 days.

On the other hand, Education Code § 41422 still provides that if “a district that is prevented from maintaining its schools during a fiscal year for at least 175 days” because of various described emergency situations, it may show to the satisfaction of the Superintendent of Public Instruction that the emergency prevented it from holding classes. In that case, it “shall receive the same apportionment from the State School Fund as it would have received” had the emergency not prevented it from meeting the minimum requirement. The California Department of Education (“CDE”) has taken the position that PG&E’s PSPS is an extraordinary condition that is likely to meet the conditions of § 41422.

Reading these statutes together, it appears that districts may, but are not required to, file a waiver application if the emergency reduces their number of days below 180 days, but would be required to do so if their number of days falls below 175. The better practice, however, is to seek the waiver for any reduction below 180 days to avoid any loss of funding.

A district or the county office of education may file a waiver with the Department of Education to request credit for lost ADA and instructional time. This topic is



covered in a comprehensive Frequently Asked Questions Document from CDE, which can be found at <https://www.cde.ca.gov/fg/aa/pa/formj13afaq.asp>. The FAQ provides detailed instructions on how to claim ADA by using the approved J-13A form, which can be found here in PDF format: <https://www.cde.ca.gov/fg/aa/pa/documents/j13a.pdf>. Approval of the waiver allows the school agency to get credit for the lost ADA for the day of the closure as well as for the missed instructional time. While the Form J-13A has multiple pages, not all of them need be completed for every closure in order to submit the waiver request to CDE.

Districts that wish to claim ADA and instructional time credit for a forced closure should complete the proper forms and retain supporting documents and records in accordance with the CDE's instructions outlined in form J-13A. However, as the FAQ notes, districts should make every effort to make up lost instructional time.

Making Up Instructional Time

Many districts want to make up this instructional time by converting days held for other, non-instructional purposes to instructional days. Education Code § 48980 requires that districts notify parents of the schedule of minimum days and student free staff development days as part of the annual parent notice at the beginning of each year, and provide 1 month notice when adding any new minimum days or staff development days. However, the Education Code does not require the converse; that is, the Education Code permits, and does not require any notice to parents, if a district changes a minimum day or staff development day back to an instructional day.

Districts should have two concerns regarding converting a non-instructional day to an instructional day. First, is whether it can provide sufficient notice to parents and students to ensure adequate attendance. Many districts have professional development days built in prior to Thanksgiving, as well as the option to convert days around the winter break. Districts should determine, based on historical attendance data, whether attendance would be sufficient on any day they schedule for purposes of ADA.

The second concern is whether there are non-statutory barriers to conversion; specifically, whether Board Policy and collective bargaining agreements permit conversion of days. We recommend that districts carefully review Board Policies and collective bargaining agreements to ensure prior to any conversion. If districts still wish to pursue conversion, we recommend negotiating a one-time, non-precedent setting MOU with all bargaining units setting forth the terms of the conversion.

The decision to make up an instructional day should be made soon. If your district requires assistance with negotiating or crafting a MOU or has any questions regarding this Legal Update or any other matter, please contact our office.

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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