



# SCHOOL & COLLEGE LEGAL SERVICES OF CALIFORNIA

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## LEGAL UPDATE

March 5, 2021

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

**From: Jennifer Henry, Associate General Counsel**

**Subject: AB 86: California’s Final Reopening Plan  
Memo No. 09-2021**

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Governor Newsom and the California Legislature reached a deal on a final school reopening plan, laid out in Assembly Bill (“AB”) 86.<sup>1</sup> The Governor signed it into law on March 5, 2021, and it is now in effect.

### **I. \$4.5 Billion Learning Recovery Funding**

The Legislature’s proposal provides for \$4.5 billion apportioned to Local Educational Agencies (“LEAs”) through the Local Control Funding Formula (“LCFF”), with an additional \$1,000 per homeless student. (Education Code section 43521. Please note that all further references to code sections pertain to the Education Code.)

As a condition of receiving these funds, LEAs must implement a learning recovery program to provide supplemental instruction and support for high-need pupils, including meals and snacks. (Section 43522.) High-need pupils include those with exceptional needs, those eligible for free/reduced price meals, English learners, foster youth, homeless pupils, at-risk students, disengaged pupils, pupils who are below grade level, credit-deficient pupils, and high school pupils at risk of not graduating.

At least 85% of the funds shall be expended to provide extended instructional learning time, and provide additional support such as tutoring, accelerated learning programs, technology hubs, and health and wellness services. Of that 85%, at least 10% must be used to hire paraprofessionals to provide individualized instruction to exceptional needs students and English learners. Up to 15% may be used for distance learning or to prepare for in-person instruction. (Section 43522.)

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<sup>1</sup> [https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill\\_id=202120220SB86](https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=202120220SB86)

## II. \$2 Billion Reopening Incentive Grants

The Legislature’s proposal, which is based on the LCFF formula, provides for \$2 billion in incentive grants for LEAs to return to in-person instruction on or **before April 1**. This apportionment is reduced by 1% for every instructional day after April 1 that an LEA does not return to in-person instruction.<sup>2</sup> An LEA that does not return to in-person instruction by May 15 forfeits all funds. Once an LEA reopens for in-person instruction, it must stay open unless ordered to close by state or local health officer. (Section 43521.)

Purple Tier: For LEAs in the purple tier not eligible to open, the LEA must offer Cohort in-person instruction to all pupils with exceptional needs and to all Prioritized Pupils,<sup>3</sup> up to the maximum practical capacity. For elementary schools in the purple tier, the school must offer in-person instruction to all pupils in K-2, and to exceptional needs pupils and Prioritized Pupils. Once a purple tier elementary school moves to red tier, it must reopen to its highest elementary school grade. LEAs in the purple tier must conduct asymptomatic testing for staff and students per the state guidance for schools.<sup>4</sup> LEAs in the purple tier would not have to adopt the testing cadences if they reopen by March 31, or their board adopts a plan to reopen and they post their COVID-19 Safety Plan on their website. (See Safety Plan definition below.) Once an LEA moves out of the purple tier, it does not have to maintain the testing cadence.

Elementary (K-6): Elementary schools not in the purple tier must offer in-person instruction to all pupils in all grade levels, and to exceptional needs pupils and Prioritized Pupils.

Middle/High (6-12): Middle and high schools must offer in-person instruction in at least one full grade level, and to exceptional needs pupils and Prioritized Pupils.

These funds may be used for in-person instruction services and supplies, including COVID-19 testing, cleaning, personal protective equipment, ventilation, salaries for certificated or classified employees providing in-person instruction or services, and social and mental health support services. All LEAs must certify compliance with the reopening criteria by June 1, on a form the State Department of Education will post by May 1. All LEAs shall continue to comply with the distance learning and instructional time requirements of SB 98.

### I. Other Key Points of the Legislature’s Proposal

- “In-Person Instruction” Definition: “Instruction under the immediately physical supervision and control of a certificated employee.” It may also include “hybrid” models that are open fewer than five days per week if the LEA is offering in-person instruction to the greatest extent possible. (Section 43520.5(f).) Reopening is not contingent on school staff receiving the COVID-19 vaccination.

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<sup>2</sup> Note, based on the individual LEAs instructional calendar, an LEA may return to in-person instruction after April 1, if there were no instructional days between April 1 the first day of in-person instruction.

<sup>3</sup> Prioritized Pupils is defined to include: pupils at risk for abuse, neglect, or exploitation; homeless pupils; foster youth; English learners; pupils without online access; and disengaged pupils.

<sup>4</sup> [https://www.cdph.ca.gov/Programs/CID/DCDC/CDPH%20Document%20Library/COVID-19/Consolidated\\_Schools\\_Guidance.pdf](https://www.cdph.ca.gov/Programs/CID/DCDC/CDPH%20Document%20Library/COVID-19/Consolidated_Schools_Guidance.pdf)



- **COVID-19 Safety Plan:** Requires LEAs offering in-person instruction to post a completed COVID-19 safety plan<sup>5</sup> on its website at least five days before reopening. (Section 32091.) LEAs in the purple tier must also submit their Safety Plan to the local health department and the California Department of Public Health (“CDPH”) for review, and fix any deficiencies identified by the county or state health department.
- Requires LEAs to report a student or employee’s positive COVID-19 test to the local health officer within 24 hours, if the student or employee was on campus while infectious. (Section 32090.)
- Requires LEAs to notify the State, beginning March 15, 2021, twice per month how many students are enrolled and attending school in-person, virtually, and by hybrid method, or the reasons why in-person instruction is not being offered. (Section 32090.)
- Requires the State Government Operations Agency to prioritize a portion of COVID-19 vaccines for Tier 1B (education sector). (Section 32090.)
- \$25 million appropriated from the General Fund to the State for a Safe Schools for All Team to coordinate pandemic health and safety in schools. (Section 32090.) \$5 million appropriated from the General Fund to the State Superintendent of Public Instruction to provide support to LEAs to maximize pupil outcomes. (Section 32090.)

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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<sup>5</sup> The Safety Plan has two parts: 1. The LEA’s COVID-19 Prevention Program (“CPP”) required by Cal/OSHA Emergency Temporary Standards (See our Cal/OSHA Legal Update – Addendum to Legal Update Memo No. 72-2020 <https://sclscal.org/addendum-legal-update-memo-no-72-2020-cal-osh-issues-emergency-covid-19-regulations-for-all-employers-k-12/>), and including description of any planned testing cadences for staff and pupils; and 2. The COVID-19 School Guidance Checklist, a CDPH form to complete regarding the LEA’s plans to comply with the new public health requirements. (CDPH CSP Checklist: [https://www.cdph.ca.gov/Programs/CID/DCDC/CDPH%20Document%20Library/COVID-19/COVID19\\_School\\_Guidance\\_Checklist.pdf](https://www.cdph.ca.gov/Programs/CID/DCDC/CDPH%20Document%20Library/COVID-19/COVID19_School_Guidance_Checklist.pdf).) (Section 32090.)