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LEGAL UPDATE

March 21, 2022

To: Superintendents, Member School Districts (K-12)
From: Jennifer E. Nix, Senior Associate General Counsel ^{JEN}
Subject: Update on *E.E. v. State of California*
Memo No. 11-2022

Our office has received a number of questions regarding a currently-pending civil case, styled *E.E. v. State of California*. This Legal Update summarizes the case and explains the current case status. Importantly, Local Education Agencies (“LEAs”) will not be required to take any action related to or because of this case prior to the end of the 2021-2022 school year.

E.E. v. State of California is a civil rights complaint filed in the U.S. District Court for the Northern District of California. The litigation was filed in September 2021 on behalf of 15 students with disabilities. The complaint states that the named students are at high risk if required to attend school in person during the COVID-19 pandemic because of their medical conditions. The complaint alleges that the state discriminated against the students in violation of Section 504 of the Rehabilitation Act and the Americans with Disabilities Act by excluding students with disabilities from virtual instruction, denying students with disabilities necessary accommodations in independent study, and not providing students with disabilities with an alternative to in-person instruction as they had with non-disabled students.

The complaint names the State of California, the State Board of Education, and the California Department of Education (“CDE”). Notably, there are no individual school districts included in this litigation. That means that any order or decision in this case cannot directly require any LEA to take any specific action.

In November 2021, the District Court issued a temporary restraining order requiring CDE to permit LEAs to provide the named students with the same distance learning that they had provided in the 2020-2021 school year.

In February 2022, the District Court issued a preliminary injunction requiring, among other things, the CDE to issue guidance to LEAs regarding obligations



under the law, including the following language:

- a. If a parent determines that their disabled child’s health would be put at risk by in-person instruction, the LEA and IEP team must consider reasonable modifications that allow the student to participate virtually unless to do so will be a fundamental alteration of their overall educational program. IEP teams shall consider the following in determining appropriate supports or modifications: (1) students may participate in Independent Study virtually, including via video with access to the services in the student’s IEP; and (2) the limitation on the use of an “alternative curriculum” in Independent Study does not exclude students participating in the California Alternative Assessment standards.
- b. If the student’s IEP team concludes that the student cannot receive a free and appropriate public education (“FAPE”) through Independent Study, the student is still entitled to a reasonable modification subject to the limits in subsection (a) above.
- c. In determining what is a reasonable modification, the LEA and IEP team must consider different modalities of virtual instruction to determine which is most likely to provide the student with educational benefit, including participating via videoconference in the class that the student would otherwise attend, with access to the services in the student’s IEP such as a one-to-one aide at home or in the classroom when the student is participating virtually.
- d. Students who attend a Non-Public School may attend school virtually as a reasonable accommodation, and nothing in AB 130 precludes virtual instruction as a reasonable accommodation. Assuming other requirements are met, the State of California will treat this arrangement as a valid and reimbursable form of instruction.

CDE also was ordered to direct LEAs to provide specified notice to all students with IEPs who have requested or are currently participating in Independent Study or Home Hospital Instruction, or who have been absent for more than 14 days since the beginning of school. The notice must inform the students’ families or caregivers of their rights to:

- a. Participate remotely in their educational program, either as a reasonable modification or through Independent Study, when the student’s health would be put at risk by in-person instruction, as determined by their parent; and
- b. Set aside any agreement to waive their right to accommodations and the services in their IEPs, and request this virtual instruction program.

Finally, CDE was required to take all necessary steps within their authority to ensure that LEAs comply with these directives.

The defendants appealed the preliminary injunction to the Ninth Circuit, and requested that the Ninth Circuit stay the injunction pending appeal. This week, the Ninth Circuit granted the request to stay the injunction pending appeal, meaning that the defendants do not have to comply with the injunction until the appeal is decided by the Court. The appeal is on calendar for a hearing in June 2022.



The preliminary injunction presents a number of concerns, both legal and practical. In the event the Ninth Circuit upholds the preliminary injunction, our office will issue guidance on LEAs' obligations under the prospective CDE guidance.

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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