

CLIENT NEWS BRIEF

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“SWINE FLU” AND OTHER EMERGENCY SCHOOL CLOSURES: FINANCIAL AND LEGAL IMPACTS

The California Department of Public Health recently urged school districts to close a school when even one person has been confirmed to have the new H1N1 virus (also known as the “swine flu”). Although only a few schools in California have experienced emergency closures due to an outbreak of the swine flu, now is a good time to assess your district’s emergency closure procedures for compliance with the law and review the financial and legal ramifications that arise from the loss of instructional minutes as a result of an emergency school closure.

Financial Impact of Emergency School Closure

The Education Code allows the Superintendent of Public Instruction (“SPI”) to grant normal apportionment credit to school districts that experience a material drop in attendance or a closure due to certain emergencies. In Education Code section 41422, the Legislature provides that if a school district cannot operate school for the minimum required 175 days “because of fire, flood, earthquake or epidemic,” then the district shall receive the same apportionment that it would have received had it operated for the full 175 day minimum. Section 41422 also applies if the conditions of section 46392 are met. That section, in turn, provides that when the average daily attendance (“ADA”) of a school district “has been materially decreased during any fiscal year” because of fire, flood, impassable roads, an epidemic, an earthquake, a safety hazard determined by the local law enforcement agency or a strike involving transportation services, the school district may still receive its apportionment upon approval of the SPI, based on the approximate total ADA for which the school district otherwise would have received apportionment. A “material decrease” is defined by the California Department of Education (“CDE”) to be less than 90 percent of “normal” attendance. (CDE Management Advisory 90-01.) However, where the Governor has declared a state of emergency (as Governor Schwarzenegger did in relation to the swine flu on April 28, 2009), the loss of attendance is deemed automatically to be material. (Ed. Code § 46392(b).)

A school district or county office of education may apply for an Emergency Conditions Waiver from CDE for attendance credit and approval of a school closure. A form entitled “Request for Allowance of Attendance Because of Emergency Conditions” (CDE J-13A form) must be completed, approved by the county superintendent, and then approved by the SPI. A district should keep all writings that document any major safety hazard or order from a local public

agency that required the closure for purposes of the waiver request.

State Assemblyman Tom Torlakson has stated that he plans on amending Assembly Bill 95, currently pending in the Legislature, to ensure that schools closed due to the swine flu will continue to receive state funding. If the bill passes, districts would probably not have to file form J-13 in case of school closures, although this will not be certain until the bill is passed in its final form.

Concerning state testing requirements, SPI Jack O'Connell has said that the current period for make-up STAR testing should give enough time to complete testing unless a school is closed for more than one week.

Labor Issues Related to Emergency School Closure

Current law no longer requires that districts “make up” instructional time lost due to emergencies. However, the CDE recommends that districts make every effort to replace instructional time losses and restore the instructional program as soon as safety allows. (CDE Management Advisory 90-01.) A district’s applicable collective bargaining agreements should be consulted to see how they address payment of employee salaries and any required make-up time in the event of emergency closures. If the agreement is silent on the issue, making up such lost time by adding an additional workday is generally a negotiable issue, because the beginning and ending dates of the work year and work hours are within the scope of negotiations.

Emergency Procedures

Education Code section 32282 requires that emergency procedures be incorporated into the comprehensive school safety plan, including epidemic emergency procedures. Every district should have a board policy and administrative regulations in place addressing these issues. Emergency procedures may address use of a Standardized Emergency Management System (“SEMS”) (which is a system required by Government Code section 8607 for managing emergencies involving multiple public agencies), emergency communications with parents and employees, release of students in the event of a mid-day closure, emergency roles of personnel, and the use of alternative facilities in the event of extended school closures.

If you have any questions about the foregoing, please do not hesitate to contact one of our seven offices statewide.

As the information contained herein is necessarily general, its application to a particular set of facts and circumstances may vary. For this reason, this News Brief does not constitute legal advice. We recommend that you consult with your counsel prior to acting on the information contained herein.

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Written by Jennifer Henry, Sarah Kaatz, Ed Sklar and Harold Freiman. Sarah is a shareholder (skaatz@lozanosmith.com) in our Monterey office, Harold and Ed are shareholders (hfreiman@lozanosmith.com; esklar@lozanosmith.com) in our San Ramon office and Jennifer is an associate (jhenry@lozanosmith.com) in our San Ramon office.