

RESPONDENTS' APPENDIX

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¹ Respondents have omitted SER pages 166 through 205 of the Complaint from the Appendix for economy, as those pages contain only a lengthy list of defendants.

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EXECUTIVE DEPARTMENT
STATE OF CALIFORNIA

EXECUTIVE ORDER N-26-20

WHEREAS on March 4, 2020, I proclaimed a State of Emergency to exist in California as a result of the threat of COVID-19; and

WHEREAS responses to the threat of COVID-19, including decisions about schools, should be informed by and commensurate with scientific evidence and real-time data related to protecting public health; and

WHEREAS schools are critical to the daily lives of many Californians; and

WHEREAS local public health and education officials, in collaboration, are best positioned to measure and balance competing considerations, including the community's current public health, access to food and care, availability of resources, and other factors informing responses to the threat of COVID-19; and

WHEREAS under the provisions of Government Code section 8571, I find that strict compliance with various statutes and regulations specified in this order would prevent, hinder, or delay appropriate actions to prevent and mitigate the effects of the COVID-19 pandemic.

NOW, THEREFORE, I, GAVIN NEWSOM, Governor of the State of California, in accordance with the authority vested in me by the State Constitution and statutes of the State of California, and in particular,

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Government Code sections 8567 and 8571, do hereby issue the following Order to become effective immediately:

IT IS HEREBY ORDERED THAT:

1. For purposes of this Order, Local Educational Agency (LEA) means school districts, county offices of education, and charter schools.
2. If an LEA closes its schools to address COVID-19, as provided in Paragraph 4 of this Order, the LEA will continue to receive state funding to support the following during the period of closure:
 - (i) Continue delivering high-quality educational opportunities to students to the extent feasible through, among other options, distance learning and/or independent study; and
 - (ii) Provide school meals in noncongregate settings through the Summer Food Service Program and Seamless Summer Option, consistent with the requirements of the California Department of Education and U.S. Department of Agriculture;
 - (iii) Arrange for, to the extent practicable, supervision for students during ordinary school hours; and
 - (iv) Continue to pay its employees.
3. If an LEA closes its schools to address COVID-19, the LEA is not prohibited from offering distance learning or independent study

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to impacted students. To the extent any state or local law might have been interpreted to the contrary, that law is waived.

4. For LEAs that initiate a school closure to address COVID-19, the closure shall qualify as a condition that prevents the maintenance of the LEA's schools during a fiscal year for at least 175 days pursuant to Education Code section 41422. Additionally, for such LEAs, the requirement in Education Code section 41422 to submit affidavits of the members of the governing board of the school district, the governing board of the county office of education, or the governing board or body of the charter school and of the county superintendent of schools are hereby suspended on the condition that the superintendent of the school district, the county superintendent of schools, or the charter school leader certifies in writing to the Superintendent of Public Instruction that the closure occurred to address COVID-19.
5. The California Department of Education and the Health and Human Services Agency shall jointly develop and issue guidance by March 17, 2020. The guidance shall include, but not necessarily be limited to, the following topics:
 - (i) Implementing distance learning strategies and addressing equity and access issues that may arise due to differential access to Internet connectivity and technology;
 - (ii) Ensuring students with disabilities receive a free and appropriate public

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education consistent with their individualized education program and meeting other procedural requirements under the Individuals with Disabilities Education Act and California law; and

(iii) Providing meals to be served in noncongregate settings at school and non-school sites in a manner that protects the safety of both students and school personnel, including classified employees.

6. The Labor and Workforce Development Agency and the Health and Human Services shall jointly develop and issue guidance by March 17, 2020 covering how to support parents to care for their children during ordinary school hours in the event of a school closure.
7. The Governor's Office of Business and Economic Development shall work with the California business community to encourage employers to exercise flexibility in the event of a school closure to enable parents to care for their children during ordinary school hours.

IT IS FURTHER ORDERED that as soon as hereafter possible, this Order be filed in the Office of the Secretary of State and that widespread publicity and notice be given of this Order.

This Order is not intended to, and does not, create any rights or benefits, substantive or procedural, enforceable at law or in equity, against the State of

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California, its agencies, departments, entities, officers, employees, or any other person.

IN WITNESS WHEREOF I have hereunto set my hand and caused the Great Seal of the State of California to be affixed this 13th day of March 2020.

/s/ Gavin Newsom
GAVIN NEWSOM
Governor of California

ATTEST:

ALEX PADILLA
Secretary of State

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**California Department of Education
Official Letter**

March 13, 2020

Dear County and District Superintendents, Special Education Local Plan Area Directors, Special Education Administrators at County Offices, Charter School Administrators, Principals, and Nonpublic School Directors:

**Information Related to Coronavirus (COVID-19)
and Services to Students with Disabilities**

As we work together to address ongoing concerns related to Novel Coronavirus (COVID-19) and the impact on schools, communities, families, and students, we want to ensure that school communities across the state are connected with up-to-date guidance and information to support local decisions about protecting the health and safety of students.

The California Department of Education (CDE) acknowledges that closing a school is a complex and difficult decision. Local Educational Agencies (LEAs) should continue to work with county public health agencies to evaluate appropriate options given their regional context. In the event school closure is deemed necessary, assessing the impact on students with disabilities and their families warrants unique consideration.

The United States Department of Education (USDOE) recently issued a document titled *“Questions and Answers on Providing Services to Children with*

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Disabilities During the Coronavirus Disease 2019 Outbreak,” which can be accessed on the USDOE website at <https://www2.ed.gov/policy/speced/quid/idea/memos/dcltrs/qa-covid-19-03-12-2020.pdf> (PDF; 2MB). The California Department Education (CDE) encourages LEAs to review the document in its entirety for guidance on services to students with disabilities, placement considerations, and appropriate use of funding. Further information and resources for schools and school personnel related to COVID-19 is available on the USDOE’s website at <https://www.ed.gov/coronavirus>

Additionally, the United States Center for Disease Control and Prevention (CDC) has issued a document titled “*Considerations for School Closure*” outlining factors for LEAs to consider when discussing potential school closure, including a sample decision tree. The document is available on the CDC website at <https://www.cdc.gov/coronavirus/2019-ncov/downloads/considerations-for-school-closure.pdf> (PDF).

The CDE has established a web page for information related to COVID-19 on the CDE website at <https://www.cde.ca.gov/ls/he/hn/coronavirus.asp>. Please refer to this webpage for guidance from the CDE and other public agencies on the response to COVID-19.

Many questions about structuring special education and related services for students with disabilities have yet to be answered as we navigate this unprecedented response to COVID-19. LEAs are encouraged to work collaboratively and creatively to provide instruction and services in an equitable manner for all students.

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The CDE stands ready to support LEAs in their efforts to protect the safety of students during this time. If you have any questions regarding this subject, please email SEDINFO@cde.ca.gov.

Sincerely,

Kristin Wright, Director
Special Education Division

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[SEAL] **California** DEPARTMENT OF EDUCATION Special Education Guidance for COVID-19

Coronavirus (COVID-19) Main Web Page

COVID-19 School Closures and Services to Students with Disabilities

New Guidance (Posted 09-Apr-2020)

The United States is currently experiencing a pandemic emergency due to the threat of novel coronavirus (COVID-19). On March 13, 2020, Governor Newsom signed Executive Order N-26-20 requiring the California Department of Education (CDE) to issue guidance on several topics, including ensuring students with disabilities (SWD) receive a free appropriate public education (FAPE) consistent with their individualized education program (IEP) and meeting other procedural requirements under the Individuals with Disabilities Education Act (IDEA) and California law. Initial guidance on services to students with disabilities was provided on March 20, 2020.

The following guidance provides additional information based on questions received by the CDE in recent weeks. We will continue to update the guidance on this web page as necessary in response to any guidance from the U.S. Department of Education or waivers of any laws or regulations pertaining to special education services.

1. Must all Individualized Education Programs (IEPs) be amended to reflect the change to distance learning?

No, not all IEPs will need to be amended. In response to the Governor's Executive Order, schools are physically closed, and local educational agencies (LEAs) are to provide educational services through alternative options such as distance learning. Under this unique circumstance, in the CDE's view it is not necessary for an LEA to convene an IEP team meeting, or propose an IEP amendment without a team meeting, for every student, solely for the purpose of discussing the need to provide services away from school, because that change must necessarily occur due to the COVID-19 pandemic. Similarly, in the CDE's view, it is not necessary for an LEA to obtain the parent's written consent to provide previously agreed-upon services, away from school. The IEP that was in effect at the time of physical school closure remains in effect, and LEAs should, to the greatest extent possible, continue to provide the services called for in those IEPs in alternative ways.

According to the United States Department of Education (USDOE) Office of Special Education Program's (OSEP) March 21, 2020 guidance, "[T]hese exceptional circumstances may affect how all educational and related services and supports are provided . . . the provision of [free and appropriate public education (FAPE)] may include, as appropriate, special education and related services provided

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through distance instruction provided virtually, online, or telephonically . . . schools may not be able to provide all services in the same manner that they are typically provided . . . federal disability law allows for flexibility in determining how to meet the individual needs of students with disabilities. The determination of how FAPE is to be provided may need to be different in this time of unprecedented national emergency.” To review OSEP’s March 21, 2020 guidance titled “*Supplemental Fact Sheet Addressing the Risk of COVID-19 in Preschool, Elementary and Secondary Schools While Serving Children with Disabilities*”, visit the USDOE website at <https://bit.ly/2VdoJn6>.

However, there may be instances when amending the IEP to reflect the change to distance learning might be necessary and/or appropriate. LEAs may convene an IEP team meeting, or propose an IEP amendment without a team meeting, particularly where it is deemed necessary to address unique circumstances related to alternative service delivery. (See 20 USC 1414 (d)(4)(A); 20 USC 1414 (d)(3)(D); 34 C.F.R. § 300.324.) Parents too may request an IEP meeting or propose an IEP amendment, pursuant to Education Code § 56343, subdivision (c). Some LEAs and parents have agreed to amend the IEP by incorporating a distance learning plan outlining the special education and related services being provided to the student during the temporary, emergency situation created by the COVID-19 pandemic.

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At this time, LEAs should necessarily be focused on serving each and every student. OSEP's March 21, 2020 guidance clarifies that "ensuring compliance with the Individuals with Disabilities Education Act . . . should not prevent any school from offering educational programs through distance instruction." The CDE recognizes that due to the emergency situation created by the COVID-19 pandemic, it will take time for LEAs to determine their continuum of services during school site closures and provide information to parents and students about the services being offered. As such, communication and collaboration are vital. It is recommended that LEAs maintain regular communication with parents of students with disabilities about their efforts to transition to distance learning, plans to ensure access for all students, and to identify and address any immediate support needs when feasible.

2. Is an LEA precluded from providing services to students with disabilities in-person or in the home for the purpose of supporting the student in accessing the alternative options for learning being offered?

No. In some exceptional situations, LEAs may need to provide certain supports and services to individual students in-person in order to maintain students' mental/physical health and safety for the purpose of supporting the student in accessing the alternative options for learning being offered (e.g. distance

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learning). With that said, alternative service delivery options should seek to comply with federal, state, and local health official's guidance related to physical distancing, with the goal of keeping students, teachers and service providers safe and healthy as the primary consideration.

In such cases, service providers may be considered "Essential Critical Infrastructure Workers" under Executive Order N-33-20. To review the list of "Essential Critical Infrastructure Workers", see the California Coronavirus (COVID-19) Response website at <https://covid19.ca.gov/img/EssentialCriticalInfrastructureWorkers.pdf>.

For example, the list of essential workers in the healthcare/public health sector includes:

- Health care providers and caregivers (e.g. physicians, psychologists, mid-level practitioners, nurses and assistants, physical and occupational therapists and assistants, social workers, speech pathologists, and diagnostic and therapeutic technicians and technologists).
- Behavioral health workers (including mental and substance use disorder) responsible for coordination, outreach, engagement, and treatment to individuals in need of mental health and/or substance use disorder services.
- Workers who provide support to vulnerable populations to ensure their health

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and well-being including family care providers. In addition, other community-based government operations and essential functions includes:

- ❖ Workers supporting public and private childcare establishments, pre-K establishments, K-12 schools, colleges, and universities for purposes of distance learning, provision of school meals, or care and supervision of minors to support essential workforce across all sectors.

Therefore, if an individualized determination is made that a student needs services or supports in-person to maintain their mental/physical health and safety for the purpose of supporting the student in accessing the alternative options for learning being offered (e.g. distance learning), an LEA is not necessarily precluded from providing that service by Governor Newsom's stay at home order.

3. I'm a parent of a student with a disability and I have questions about my child's IEP. Where can I go for information and support?

Questions about your student's IEP and educational program in light of school site closures and the COVID-19 pandemic should be discussed with your school or district. Schools across the state are responding to the COVID-19 pandemic in different ways, specific to the school's regional context. The CDE

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encourages parents to reach out to their school or district office to have a conversation about the impact of the pandemic on their student's education and collaborative ways to support the student during this time.

Parents of students with disabilities may also reach out to California's parent organizations offering support and resources to families of students with disabilities. Information on parent organizations can be accessed on the CDE website at <https://www.cde.ca.gov/sp/se/qa/caprntorg.asp>.

In addition, the Understood.org website is an example of numerous state and national organizations offering practical advice and strategies for parents and caregivers during this crisis. A link to COVID-19 resources for parents and families developed by Understood can be accessed on the Understood.org website at <https://www.understood.org/en/school-learning/coronavirus-latest-updates>.

4. What should an LEA do if it has closed school sites due to COVID-19 and is unable to meet the obligation to have an IEP or an Individual Family Service Plan (IFSP) in effect for a child transitioning from Part C to Part B no later than the child's third birthday?

34 C.F.R. §§ 300.101(b) and 300.124(b) require that an IEP or IFSP is developed and is being implemented by the third birthday of a child participating in Part C programs and who will participate in Part B preschool programs. The

U.S. Department of Education has not waived or exempted this requirement. Either an IEP or IFSP must be developed and implemented by the child's third birthday. To meet this obligation, teams may conduct meetings virtually via telephone, videoconference, or other means.

5. If IEP teams meet virtually while school sites are closed due to COVID-19, how should parent consent be obtained? Is verbal consent sufficient?

34 C.F.R. § 300.9(b) states that "consent" means in part "... the parent understands and agrees in writing ...". Thus, verbal consent alone is not sufficient. However, the IDEA does not specify how written consent must be obtained. Therefore, LEAs that wish to utilize electronic or digital signatures for consent may do so if they choose. Options for electronic signatures or digital signatures could include but are not limited to use of applications such as HelloSign, DocuSign, Adobe Sign, as well as scanned copies or photographs of signed signature pages. For record keeping purposes, it is recommended that LEAs maintain documentation as proof of consent, including printed or mailed copies of signed documents.

For more information on general electronic signature requirements for public agencies in California, please refer to Government Code § 16.5, and Title 2 of the California Code of Regulations, §§ 22000 et seq.

Earlier Guidance

March 20, 2020

The United States is currently experiencing a pandemic emergency due to the threat of novel coronavirus (COVID-19). On March 13, 2020, Governor Newsom signed Executive Order N-26-20 ensuring State funding for Local Educational Agencies (LEA) in the event of physical closure due to the threat of COVID-19. The Executive Order requires the California Department of Education (CDE) to issue guidance on several topics, including ensuring students with disabilities (SWD) receive a free appropriate public education (FAPE) consistent with their individualized education program (IEP) and meeting other procedural requirements under the Individuals with Disabilities Education Act (IDEA) and California law.

At this time, the federal government has not waived the federal requirements under the Individuals with Disabilities Education Act (IDEA). To review guidance from the USDOE titled “*Questions and Answers on Providing Services to Children with Disabilities During the Coronavirus Disease 2019 Outbreak*,” visit the USDOE website at <https://www2.ed.gov/policy/speced/guid/idea/memosdcltrs/qa-covid-19-03-12-2020.pdf>. The CDE and the California State Board of Education (SBE) are working with the United States Department of Education (USDOE) to determine what flexibilities or waivers may be issued in light of the extraordinary circumstances. Until and unless USDOE ultimately provides flexibilities under federal law, LEAs should do

their best in adhering to IDEA requirements, including federally mandated timelines, to the maximum extent possible. LEAs are encouraged to consider ways to use distance technology to meet these obligations. However, the CDE acknowledges the complex, unprecedented challenges LEAs are experiencing from the threat of COVID-19. As such, the CDE is committed to a reasonable approach to compliance monitoring that accounts for the exceptional circumstances facing the state.

The CDE appreciates the difficult decisions that LEAs and families are faced with as we grapple with this unprecedented crisis. The CDE has formed a workgroup of special education practitioners and other experts to help brainstorm best practices that we plan to share in the coming weeks. In addition, resources for addressing the needs of students with disabilities are provided in this guidance and in the CDE's guidance on distance learning at <https://www.cde.ca.gov/ls/he/hn/guidance.asp>. We will update this guidance as necessary in response to any guidance from the U.S. Department of Education or waivers of any laws or regulations pertaining to special education services.

The following answers to frequently asked questions received by the CDE provides guidance on topics relevant to serving students with disabilities.

- 1. If an LEA offers distance learning for instructional delivery in lieu of regular classroom instruction during a school site closure for students, what is the**

obligation to implement the IEP for students with disabilities?

As a result of Governor Newsom's Executive Order N-26-20, schools will receive funding to continue delivering educational opportunities to students to the extent feasible through, among other options, distance learning and/or independent study. When an LEA continues to provide educational opportunities to the general student population during physical school site closures, the LEA must ensure that students with disabilities have equitable access to comparable opportunities, appropriately tailored to the individualized need of a student to ensure meaningful access, as determined through the IEP process to the extent feasible.

If the LEA can continue providing special education and related services as outlined in the IEP, or an agreed upon amendment to the existing IEP, through a distance learning model, they should do so. The LEA can also consider alternative service delivery options such as in-home service delivery, meeting with individual students at school sites, or other appropriate locations to deliver services. Further, LEAs are encouraged to work collaboratively with Nonpublic Schools and Agencies (NPS/As) to ensure continuity of services, including moving to virtual platforms for service delivery to the extent feasible and appropriate.

These alternative delivery options should seek to comply with federal, state, and local health official's guidance related to social distancing, with the goal of keeping students, teachers and service providers safe and healthy. Teachers and specialists should work collaboratively to ensure instruction is accessible for the student based on the student's individualized needs. Given the unprecedented situation created by the threat of COVID-19, exceptional circumstances may affect how a particular service is provided under a student's IEP. In such a situation, the IEP team will need to make individualized decisions regarding whether compensatory services are required when the regular provision of services resumes.

Further guidance on distance learning, including considerations for students with disabilities, can be accessed on the CDE website at <https://www.cde.ca.gov/ls/he/hn/guidance.asp>.

2. What is considered equitable access for students with disabilities?

When an LEA provides services to students during a school site closure, the LEA must provide equitable access to those services for students with disabilities, with services appropriately tailored to the individualized needs of students, to the greatest extent possible. When LEAs are providing instruction through a distance learning model to replace what would have been provided in the classroom, LEAs must create access to the

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instruction for students with disabilities, including planning for appropriate modifications or accommodations based on the individualized needs of each student and the differences created by the change in modality (e.g. virtual vs. classroom-based). Educational and support services provided should be commensurate with those identified in the IEP for each student to ensure educational benefit.

For example, LEAs may consider the use of accessible distance technology, instructional phone calls, and other curriculum-based activities that have been scaffolded based on student need. More information on accessibility and distance learning can be accessed on the CDE website at <https://www.cde.ca.gov/ls/he/hn/appendix2.asp>.

In some cases, it may be appropriate for LEAs to consider providing classroom-based instruction to small groups of students with disabilities that have extensive support needs, despite the fact that the school site has closed, consistent with federal, state, and local health directives related to COVID-19. Alternative service delivery options should seek to comply with federal, state, and local health official's guidance related to social distancing, with the goal of keeping students, teachers and service providers safe and healthy. There is no single service delivery method that will meet the needs of every student. Therefore, LEAs should consider employing a variety of service delivery options. The CDE has convened a work group of special educators to develop

more specific guidance for operationalizing such strategies, including examples from California LEAs.

3. If distance learning is provided in some capacity but does not mirror the offer of FAPE in the IEP, will compensatory services be required once an LEA resumes the regular school session?

Once the regular school session resumes, LEAs should plan to make individualized determinations, in collaboration with the IEP team, regarding whether or not compensatory education and services may be needed for a student. Educational need can be measured by assessing whether or not the student continued making progress in the general education curriculum, or alternative course of study specified in their IEP, or toward meeting their individualized IEP goals and/or if any regression occurred during the period of school site closure.

4. Is the CDE encouraging continued utilization of and payment to Nonpublic Schools and Agencies (NPS/As)?

Yes. California NPS/As provide critical programs and related services to students with disabilities. LEAs should work collaboratively with NPS/As to ensure continuity of services, including moving to virtual platforms for service delivery to the extent feasible and appropriate. In an effort to ensure that the full continuum of placements and service delivery options remains available to students and

LEAs subsequent to these unprecedented school site closures, CDE encourages LEAs to continue to use the services of NPS/As during school site closures, including distance learning options made available by NPS/As, so that NPS/As may continue to receive payment in accordance with pupils IEPs and the Master Contracts/Individual Service Agreements between LEAs and NPS/As.

5. When school sites are closed and no services or instruction are being provided for a period of time, can LEAs consider providing some special education services to some students? How should LEAs determine what services can or should be provided?

Yes. To be clear, CDE is not recommending this as an option. Consistent with Executive Order N-26-20, LEAs are continuing to receive ADA funding during school site closures so they will continue to provide services to all students, including students with disabilities. Should services be discontinued for a period of time, LEAs and IEP teams would be required to make an individualized determination as to whether compensatory services are needed once services resume.

At this uncertain time, it is imperative to keep the safety of students as the primary consideration for every decision made. As LEAs strive for equitable supports and services for students, in some exceptional situations, LEAs may need to provide certain supports

and services to individual students with extensive support needs in order to maintain their mental/physical health and safety. The LEA may provide such services, even if the services are not available to all students with disabilities during a school site closure. As such, LEAs should make individualized determinations about the need to provide services to ensure the mental/physical health and safety of a student with a disability, even during a school site closure, if those services are able to be provided consistent with federal, state, and local health directives.

6. How will state and federal grants be impacted by school site closures (e.g. Alternative Dispute Resolution, Workability, Supporting Inclusive Practices, etc.)?

Federal and state grants already funded should continue with their program deliverables. In cases where grant deliverables cannot be provided, grantees should work with their CDE program and fiscal contact to determine next steps. If grants have scheduled in-person conferences, institutes, training, or workshops they should be rescheduled or delivered virtually. Any grant amendments or change in due date for expenditure reports will need to be done on a case by case basis due to the specific requirements of funding sources.

7. What is the impact of school site closures on special education monitoring timelines and processes?

At this time, the federal government has not waived the federal requirements under the IDEA. The CDE and SBE are working with the USDOE to determine what flexibilities or waivers may be issued in light of the extraordinary circumstances. Until and unless USDOE ultimately provides flexibilities under federal law, LEAs should do their best in adhering to IDEA requirements, including federally mandated timelines, to the maximum extent possible. LEAs are encouraged to consider ways to use distance technology to meet these obligations. However, the CDE acknowledges the complex, unprecedented challenges LEAs are experiencing from the threat of COVID-19. As such, the CDE is committed to a reasonable approach to compliance monitoring that accounts for the exceptional circumstances facing the state.

In general, for purposes of determining LEA compliance with special education timelines, the CDE will consider the days of school site closure as days between the pupil's regular school session, similar to school breaks in excess of five days planned in the instructional calendar (e.g. Thanksgiving break). For annual or triennial IEP reviews that fall on a day when the LEA is closed due to COVID-19, the CDE will take the exceptional circumstances causing the delay into consideration for purposes of LEA compliance monitoring.

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In addition, due dates issued by the CDE for Special Education Division monitoring activities, including Targeted Monitoring, Intensive Monitoring, and significant Disproportionality have been extended for a minimum of two months from the date of this notice. The CDE will continue to evaluate the need for further extensions and will work with LEAs to be reasonable and accommodating given these exceptional circumstances. At this time, the USDOE has not extended the allowable Comprehensive Coordinated Early Intervening Services budget period of 27 months. If an LEA is having difficulty meeting timelines or has questions related to timelines, please contact your regional Intensive Monitoring Consultant. A list of regional consultants is available at <https://www.cde.ca.gov/sp/se/qa/fmtacnct.asp>.

8. What is the impact of school site closures on state complaints and due process hearings under the IDEA?

Regarding the state complaint process, in light of widespread school site closures and the inability of LEAs to meaningfully respond to complaint investigations, the CDE will be extending current complaint investigation timelines for good cause by the length of any school site closure during the stated emergency. It is anticipated that once LEAs reopen and are available to participate in the investigation process, the 60-day timeline will recommence and both the complainant and LEA will be notified. The CDE will continue to

receive complaints that allege violations of the IDEA and complainants will be notified of any delay that may impact the investigation.

Currently, California's system for due process hearings and mediation through the Office of Administrative Hearings (OAH) remains operational, although some processes and/or timelines may be impacted by widespread school site closures and in order to maintain compliance with federal, state, and local health directives related to COVID-19. Updated information on the impact of COVID-19 on special education due process hearings can be accessed on the OAH's website at <https://www.dgs.ca.gov/OAH/Case-Types/Special-Education/Resources/SE-Coronavirus-Update/#@ViewBag.JumpTo>.

9. What is the impact on services to students with disabilities served by Part C of the IDEA?

For information related to the impact of the COVID-19 response on services to students with disabilities, ages 0 to 3, served under Part C of the IDEA, please visit the California Department of Developmental Services website at <https://www.dds.ca.gov/corona-virus-information-and-resources/>

In addition, IDEA Part C and COVID-19 are addressed in guidance from the USDOE's Office of Special Education Programs, which can be accessed on the USDOE website at <https://www2.ed.gov/policy/speced/guid/idea/memosdcltrs/qa-covid-19-03-12-2020.pdf>.

10. Where can I find more guidance and resources related to serving students with disabilities, distance learning, and online accessibility?

- To review previous guidance related to COVID-19 and services to students with disabilities, issued by the CDE on March 13, 2020, visit the CDE website at <https://www.cde.ca.gov/sp/se/lr/om031320.asp>.
- For updated information and resources from the CDE related to the COVID-19 response, visit the CDE website at <https://www.cde.ca.gov/ls/he/hn/coronavirus.asp>.
- To review federal guidance from the USDOE titled “*Questions and Answers on Providing Services to Children with Disabilities During the Coronavirus Disease 2019 Outbreak*,” visit the USDOE website at <https://www2.ed.gov/policy/speced/guid/idea/memosdcltrs/qa-covid-19-03-12-2020.pdf>.
- To review federal guidance from the USDOE Office of Civil Rights on how to protect students’ civil rights, visit the USDOE website at https://www2.ed.gov/about/offices/list/ocr/docs/ocr-coronavirus-fact-sheet.pdf?utm_content=&utm_medium=email&utm_name=&utm_source=govdelivery&utm_term.
- Guidance issued by the CDE on distance learning, including considerations for

students with disabilities, can be accessed on the CDE website at <https://www.cde.ca.gov/ls/he/hn/guidance.asp>.

- For research on how online learning can be made more accessible, engaging, and effective for K-12 learners with disabilities, visit the Center on Online Learning and Students with Disabilities webpage at <http://www.centerononlinelearning.res.ku.edu/>.
- Common Sense Media has curated a list of the Best Special Education Applications and Websites based on recommendations by educators who work with students with disabilities, which can be accessed on the Common Sense Media website at <https://www.commonsense.org/education/top-picks/best-special-education-apps-and-websites>.
- The Council for Exceptional Children (CEC) has developed COVID-19 Information for Special Educators, including a forum for members on how to adapt IEP services during school closures, which can be accessed on the CEC website at <https://www.cec.sped.org/~media/Files/News/A%20Message%20on%20COVID19%20Supporting%20Students%20with%20Exceptionalities.pdf>.
- The Council of Administrators of Special Education (CASE) has developed a resource page for Special Education Administrators, which can be accessed at

<https://docs.google.com/document/d/1zEH-ggcHSI7sRQy5IpPEC0FaP4Vw5Wm0uUooruNFmrI/preview>.

- The State Educational Technology Directors Association (SETDA) offers strategies and resources for ensuring that online learning supports students with disabilities, which can be accessed on the SETDA website at <https://www.setda.org/main-coalitions/elearning/accessibility/>.
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[SEAL] **CALIFORNIA DEPARTMENT
OF EDUCATION** **TONY THURMOND**
STATE SUPERINTENDENT
OF PUBLIC INSTRUCTION
1430 N STREET, SACRAMENTO, CA 95814-5901 •
WWW.CDE.CA.GOV

July 15, 2020

Dear County and District Superintendents, Special Education Local Plan Area Directors, Special Education Administrators at County Offices, Special Education Program Directors, Charter School Administrators, Principals, and Nonpublic School Directors:

2020 Budget Act and Special Education

On June 29, 2020, Governor Newsom signed the 2020 Budget Act and accompanying budget-implementing legislation, including Senate Bill (SB) 98 (Chapter 24, Statutes of 2020), the education omnibus trailer bill. The purpose of this notice is to outline some notable changes related to special education and distance learning enacted with the 2020 Budget Act.

Individualized Education Program Requirements

SB 98, Section 66, amends Section 56345 of the California *Education Code (EC)* to require that individualized education programs (IEPs) include a description of the means by which the IEP will be provided under emergency conditions, as described in *EC* 46392, in which instruction or services, or both, cannot be provided to the pupil either at the school or in person for

more than 10 school days. Specifically, SB 98 adds *EC* 56345(a)(9)(A-C), which states:

(9)(A) A description of the means by which the individualized education program (IEP) will be provided under emergency conditions, as described in Section 46392, in which instruction or services, or both, cannot be provided to the pupil either at the school or in person for more than 10 school days. The description shall include all of the following:

- (i) Special education and related services.
- (ii) Supplementary aids and services.
- (iii) Transition services, as defined in Section 56345.1.
- (iv) Extended school year services pursuant to Section 300.106 of Title 34 of the Code of Federal Regulations.

(B) Subparagraph (A) shall apply, on or after the operative date of this paragraph, to the development of an initial individualized education program or the next regularly scheduled revision of an individualized education program that has not already met the requirements of subparagraph (A).

(C) Public health orders shall be taken into account in implementing subparagraph (A).

The description required by *EC* 56345(a)(9)(A) must be included in the development of each student's initial IEP or addressed during the next regularly scheduled revision of students' IEPs (i.e. annual IEP).

Distance Learning

SB 98, Section 34, includes new requirements for distance learning services in the 2020-21 school year, including defining “distance learning” in *EC* 43500(a) as:

. . . instruction in which the pupil and instructor are in different locations and pupils are under the general supervision of a certificated employee of the local educational agency. Distance learning may include, but is not limited to, all of the following:

- (1) Interaction, instruction, and check-ins between teachers and pupils through the use of a computer or communications technology.
- (2) Video or audio instruction in which the primary mode of communication between the pupil and certificated employee is online interaction, instructional television, video, telecourses, or other instruction that relies on computer or communications technology.
- (3) The use of print materials incorporating assignments that are the subject of written or oral feedback.

In contrast, *EC* 43500(b) defines “in-person instruction” as “instruction under the immediate physical supervision and control of a certificated employee of the Focal educational agency (LEA) while engaged in educational activities required of the pupil.”

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EC 43503(b) requires that distance learning shall include several components, including:

- (4) Special education, related services, and any other services required by a pupil's individualized education program pursuant to Section 56341, including the requirements of subparagraph (A) of paragraph (9) of subdivision (a) of Section 56345, with accommodations necessary to ensure that individualized education program can be executed in a distance learning environment.

Learning Continuity and Attendance Plan

SB 98, Section 34, in *EC* 43509(a)(1)(A), requires the governing board of a school district, a county board of education, and the governing body of a charter school to adopt, by September 30, 2020, a learning continuity and attendance plan for the 2020-21 school year. *EC* 43509(f) requires the California Department of Education (CDE) to develop a template for the learning continuity and attendance plan on or before August 1, 2020.

The learning continuity and attendance plan must include what additional supports will be provided for pupils with exceptional needs served across the full continuum of placements during the period in which distance learning is provided (*EC* 43509(f)(1)(B)(vi)). Additionally, *EC* 43509(f)(1) specifies that the learning continuity and attendance plan shall include:

- (C) How the school district, county office of education, or charter school will address pupil

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learning loss that results from COVID-19 during the 2019-20 and 2020-21 school years, including all of the following:

- (i) How the school district, county office of education, or charter school will assess pupils to measure pupil learning status, particularly in the areas of English language arts, English language development, and mathematics.
- (ii) What actions and strategies the school district, county office of education, or charter school will use to address learning loss and accelerate learning progress for pupils, as needed, and how these strategies differ for pupils who are classified as English learners, are eligible for a free or reduced-price meal, or are foster youth, as those terms are defined in Section 42238.01, individuals with exceptional needs, pupils in foster care, and pupils who are experiencing homelessness.
- (iii) How the effectiveness of the services or supports provided to address learning loss will be measured, actions and strategies the school district, county office of education, or charter school will use to address learning loss and accelerate learning progress for pupils, as needed, and how these strategies differ for individuals with exceptional needs.

Funding to Mitigate Learning Loss

SB 98 appropriates funding to support pupil achievement and mitigate learning loss. *EC* 43509(f)(2) specifies that the learning continuity and attendance plan

shall describe how federal and state funding will be used to support the efforts described in the learning continuity and attendance plan, including federal and state funds provided for learning loss mitigation pursuant to Section 110 of SB 98. Subsection 110(d) specifies that certain funds shall be used for activities that directly support pupil academic achievement and mitigate learning loss related to COVID-19 school closures, and shall be expended for any of the following purposes:

- (1) Addressing learning loss or accelerating progress to close learning gaps through the implementation, expansion, or enhancement of learning supports that begin before the start of the school year and the continuation of intensive instruction and supports into the school year.
- (2) Extending the instructional school year by making adjustments to the academic calendar, increasing the number of instructional minutes provided during each week or school day, or taking any other action that increases the amount of instructional time or services provided to pupils based on their learning needs.
- (3) Providing additional academic services for pupils, such as diagnostic assessments of pupil learning needs, intensive instruction for addressing gaps in core academic skills, additional instructional materials or supports, or devices or connectivity for the provision of in-classroom and distance learning.

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- (4) Providing integrated pupil supports to address other barriers to learning, such as the provision of health, counseling, or mental health services, professional development opportunities to help teachers and parents support pupils in distance-learning contexts, access to school breakfast and lunch programs, or programs to address pupil trauma and social-emotional learning.

LEAs are encouraged to carefully review the 2020 Budget Act and implementing legislation, including the required components of the IEP, distance learning, and learning and continuity plans outlined in SB 98, in order to plan for services to students with disabilities in the upcoming school year.

Should there be any questions related to the above information, please contact the Special Education Division via email at SEDinfo@cde.ca.gov or the appropriate Focused Monitoring and Technical Assistance (FMTA) Consultant using the contact information provided on the CDE FMTA Consultant Assignments by Region web page at <https://www.cde.ca.gov/sp/se/qa/fmtacncnt.asp>.

Sincerely,

Original signed by Sarah Neville-Morgan. A hard copy of the signed document is available by contacting the Special Education Division's Director's Office by phone at 916-445-4602.

Sarah Neville-Morgan, Deputy Superintendent
Opportunities for All Branch

State of California—Health and Human
Services Agency
[LOGO] **California Department of** [SEAL]
Public Health

Sandra Shewry
Acting Director

GAVIN NEWSOM
Governor

September 4, 2020

TO: All Californians

SUBJECT: Guidance Related to Cohorts –
UPDATED March 22, 2021

This guidance applies to groups of children and youth in controlled, supervised, and indoor environments operated by local educational agencies, non profits, or other authorized providers, including, but not limited to, public and private schools; licensed and license-exempt child care settings; organized and supervised care environments, i.e., “distance learning hubs”; recreation programs; before and after school programs; youth groups; and day camps. **Guidance and directives related to schools, child care, day camps, youth sports, and institutions of higher education are not superseded by this document and still apply to those specified settings.**

Purpose: To provide guidance for necessary in-person child supervision and limited instruction, targeted support services, and facilitation of distance learning in small group environments for a specified subset of children and youth, and for those programs to understand the required health and safety practices

needed to prevent the spread of COVID-19 in their settings.

Definitions:

Cohort: a cohort is a stable group of no more than 14 children or youth and no more than two supervising adults (or a configuration of no more than 16 individuals total in the cohort) in a supervised environment in which supervising adults and children stay together for all activities (e.g., meals, recreation, etc.), and avoid contact with people outside of their group in the setting.

Supervising adult: an adult assigned to one cohort of children or youth, who does not physically interact with any other cohorts. This includes child care staff, certificated or classified school staff, volunteers, participating parent or caregiver, or other designated supervising adult(s).

Supervised care environment: an environment where multiple children or youth, from multiple families or households, are being supervised simultaneously by an adult. This includes, but is not limited to, licensed child care facilities, licensed exempt child care programs, supervised programs on a school site while a school is not in session or is providing curriculum in a distance-learning format, or where some educational services are being offered to a subgroup of students as identified by a local educational agency on a school campus.

Considerations for Cohorts

Utilizing cohorts minimizes the number of people exposed if a COVID-19 case is identified in a child or youth attendee, provider, other instructional support provider, or staff member of a particular cohort.

Children or youth, attendees and adults in supervised care environments during the COVID-19 pandemic must be in groups as small as possible. This practice decreases opportunities for exposure to or transmission of the virus; facilitates more efficient contact tracing in the event of a positive case; and allows for targeted testing, quarantine, and isolation of a single cohort instead of an entire population of children or youth and supervising adults in the event of a positive case or cluster of cases.

While present at the supervised care environment, children or youth and supervising adults in one cohort must not physically interact with children or youth and supervising adults in other cohorts, other child facility staff, or parents of children or youth in other cohorts.

Cohort Size

- Cohorts must be limited to no more than 14 children and youth and no more than two supervising adults, or a configuration of no more than 16 individuals total (children and youth or adults) in the cohort.

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- Requirements for adult to child ratios continue to apply for licensed child care programs.
- Cohorts can be divided, as needed, into subgroups of children and youth from the same cohort, as long as the 14-to-2 ratio is not exceeded.
- The maximum cohort size applies to all children and youth in the cohort, even when all children are not participating at the same time. For example:
 - A cohort may not include 6 children or youth who attend full-time, 6 children on Mon/Wed/Fri, and 6 children on Tue/Thu (total of 18).
 - A cohort may not include 8 children or youth who attend for the entire day, 4 who attend mornings only, and 4 who attend afternoons only (total of 16).

Cohort Mixing

- Prevent interactions between cohorts, including interactions between staff assigned to different cohorts.
 - Assign children and youth who live together or carpool together to the same cohort, if possible.
 - Avoid moving children and youth from one cohort to another, unless needed for a child's overall safety and wellness.

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- Cohorts must be kept separate from one another for special activities such as art, music, and exercise. Stagger playground time and other activities so that no two cohorts are in the same place at the same time.
- The requirement to prevent interaction between cohorts can be met either by having each cohort in a separate room or space created by partitions.
- One-to-one specialized services can be provided to a child or youth by a support service provider that is not part of the child or youth's cohort.
- Specialized service includes but not limited to occupational therapy services, speech and language services, and other medical, behavioral services, or educational support services as part of a targeted intervention strategy.
- Services must be provided consistent with the industry guidance for Limited Services (PDF).

Considerations for Staff

Supervising adults should be assigned to one cohort and must work solely with that cohort, unless serving children five years of age and younger in which case an adult may be assigned to no more than 2 cohorts. Avoid changing staff assignments to the extent practicable. Substitute providers who are covering for short-term staff absences are allowed but must only work with one cohort of children per day.

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Meetings among the staff from different cohorts must be conducted remotely, outdoors, or in a large room in which all providers wear cloth face coverings and maintain at least 6 feet distance from other providers. Outdoor meetings and meetings in large rooms with the windows open are preferred over meetings in small rooms with windows closed.

Precautions and Considerations

Physical distancing, in combination with the use of face coverings, decreases the risk of COVID-19 from respiratory droplets. Physical distancing between adults must be maintained as much as possible, and adults and students must use face coverings at all times, pursuant to the CDPH Schools Guidance regarding face coverings. Physical distancing between young children in the same cohort should be balanced with developmental and socio-emotional needs of this age group. Supervised care settings should follow applicable industry guidance on appropriate use of face coverings by children and youth.

See the CDPH Industry-specific Guidance for these settings for additional considerations regarding face coverings, meals, cleaning, drop off and pick up, and health screening.

California Department of Public Health
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Sacramento, CA 95899-7377
Department website (cdph.cagov)

California DEPARTMENT OF
EDUCATION

Special Education Guidance for COVID-19

Coronavirus (COVID-19) Main Web Page

Providing In-Person Specialized Supports and Services to Students with Disabilities

New Guidance (Posted 30-Sept-2020)

Is a Local Educational Agency (LEA) permitted to offer in-person supports and services to small groups of students with disabilities?

Yes. The California Department of Public Health (CDPH) released guidance on August 25, 2020, permitting the provision of in-person targeted, specialized support and services in stable cohorts when the school is able to satisfy all of the conditions detailed in CDPH's guidance related to cohorts. The guidance provides uniform messaging regarding the required health and safety practices needed to prevent the spread of COVID-19 across settings, such as small group learning for students with disabilities and district or school "hubs" for distance learning and childcare. The CDPH guidance related to cohorts is available on the CDPH website at <https://www.cdph.ca.gov/Programs/CID/DCDC/Pages/COVID-19/small-groups-child-youth.aspx>.

In addition, the CDPH released a set of frequently asked questions (FAQs) on how this guidance applies to the provision of school-based targeted, specialized support for schools that are not permitted to reopen

based on current state public health directives. The FAQ is available on the CDPH website at <https://files.covid19.ca.gov/pdf/guidance-schools-cohort-FAQ.pdf>.

Does the CDPH guidance related to cohorts apply to students age 18-22 participating in post-secondary programs that are provided through the K-12 school setting?

Yes. LEAs may serve small cohorts of students with disabilities ages 18-22 consistent with the CDPH guidance.

Does an LEA need to have received an elementary school waiver through the local public health office before offering in-person supports and services to small groups, consistent with the CDPH guidance related to cohorts?

No. The August 25, 2020 CDPH FAQ states “[t]he Cohorting Guidance applies to schools that cannot reopen for in-person instruction pursuant to the July 17 Framework, including elementary schools in those jurisdictions that have not received an elementary school waiver through the local public health office. Under these circumstances, school officials should develop and implement plans in collaboration with local health officials and school-based staff (including, if applicable, organized labor), but are not required to receive express approval from the local health department. **They are, however, required to adhere to any applicable, more restrictive local public health directive.**”

Distance Learning

Are there new requirements related to Individualized Education Programs (IEP) and distance learning?

Yes. On June 29, 2020, Governor Newsom signed the 2020 Budget Act and accompanying budget-implementing legislation, including Senate Bill (SB) 98 (Chapter 24, Statutes of 2020). SB 98 included notable changes related to special education and distance learning. The CDE posted related guidance on the CDE website at <https://www.cde.ca.gov/sp/se/lr/om071520.asp>.

SB 98, Section 66, amended Section 56345 of the Education Code (EC) to require that Individualized Education Programs (IEP) include a description of the means by which the IEP will be provided under emergency conditions, in which instruction or services, or both, cannot be provided to the pupil either at the school or in person for more than 10 school days. This description must be included in the development of each initial IEP or addressed during the regularly scheduled revision of an IEP (e.g., annual IEP), and must take public health orders into account.

Where can I find more information about the requirements for distance learning and instructional time?

The CDE has established a webpage dedicated to providing guidance and resources for teachers and families in K–12 schools regarding high quality distance learning. The CDE’s distance learning webpage

can be accessed on the CDE's website at <https://www.cde.ca.gov/ci/cr/dl/index.asp>

In addition, the CDE has developed a frequently asked questions (FAQ) webpage addressing principal apportionment, instructional time, attendance accounting, attendance reporting and the Form J-13A for fiscal year (FY) 2020–21. The FAQ can be accessed on the CDE website at <https://www.cde.ca.gov/fg/aa/pa/pafaqs.asp>.

Do the requirements for distance learning and instructional minutes in the FY 2020-21 school year impact Specialized Academic Instruction on a student's IEP?

Specialized Academic Instruction (SAI) in a student's IEP (including minutes), like all aspects of the IEP, is determined by the IEP team. SAI is an instructional service and individualized based on student need. LEAs are required to implement IEPs.

Description of How the IEP Will be Provided Under Emergency Conditions

What are considered “emergency conditions”?

EC 46392 outlines what constitutes “emergency conditions” and includes: fire, flood, impassable roads, epidemic, earthquake, the imminence of a major safety hazard as determined by the local law enforcement agency, a strike involving transportation services to pupils provided by a non-school entity, and an order provided for in *EC 41422*.

Is the emergency conditions description part of the IEP or a separate document?

The description of the means by which the IEP will be provided under emergency conditions must be part of the IEP. SB 98 amended section 56345 of California Education Code, and added the requirement that an IEP include a description of the means by which the IEP will be provided under emergency conditions, effective July 1, 2020. It applies to the development of an initial IEP or the next regularly scheduled revision of the IEP (i.e. annual IEP) (*EC* Section 56345(a)(9)(B)). Because all students must have an annual IEP, pursuant 34 C.F.R. 300.324(b)(1), all IEPs in the state should include this description by June 30, 2021.

Must the parent or student consent to the description required by *EC* 56345(a)(9)?

Yes. As a required component of the IEP, the description of the means by which the IEP will be provided under emergency conditions must be adopted by the IEP team at an IEP team meeting or through an amendment to the IEP. Parents/students are required members of the IEP team and thus will be involved in the development of this description through the IEP process. The LEA must obtain consent to the IEP consistent with applicable state and federal law.

The United States Department of Education Office of Special Education Programs (OSEP) issued a Question and Answer (Q & A) document on June 30, 2020 in response to inquiries concerning implementation of the Individuals with Disabilities Education Act (IDEA)

Part B procedural safeguards in the current COVID-19 environment, including obtaining parental consent. In that document, OSEP encourages LEAs to ensure “that parents are fully informed of how their child’s special education and related services needs are addressed during remote learning” (<https://www2.ed.gov/policy/speced/guid/idea/memosdcltrs/qa-procedural-safeguards-idea-part-b-06-30-2020.pdf>).

How does the IEP requirement for a description of the means by which the IEP will be provided under emergency conditions impact the offer of a Free Appropriate Public Education (FAPE)?

The description of the means by which an IEP will be provided under emergency conditions is an element of the overall offer of FAPE, and should help an LEA to plan for how to address the needs of an individual student in an emergency.

What if the description of the means by which an IEP will be provided under emergency conditions inadequately addresses or anticipates the needs of the student in the event of an emergency?

IEP teams are required to meet when a student demonstrates a lack of expected progress (34 C.F.R. 300.324(b)(1)(ii)). Additionally, the parent or the teacher may request an IEP meeting at any time (*EC* 56343) to discuss and address any concerns with student access including a lack of resources, or ineffectiveness of the means by which the IEP is being provided under emergency conditions.

Teachers and parents are encouraged to work together to ensure that a student is able to access instruction and that the delivery of instruction is effective. The student's IEP can be changed or amended at any time with agreement from both the parents and the LEA.

Does an LEA need to wait 10 days before implementing the description of how the IEP will be implemented under emergency conditions IEP?

No. If the LEA has good reason to believe that, due to emergency conditions as described in *EC* 46392, instruction or services, or both, cannot be provided to the pupil either at the school or in person for more than 10 school days, the LEA may implement the provisions outlined in the description before 10 school days have elapsed.

Should the description of the means by which the IEP will be provided under emergency conditions required by *EC* 56345(a)(9) include provisions for how the LEA will deliver feedback and information to parents regarding a student's learning progress during the emergency closure?

While *EC* 56345(a)(9) does not specifically require including plans for delivering feedback and information regarding a student's progress, communication and collaboration between the local educational agency (LEA) and parent are vital to ensure educational progress. In addition, *EC* Section 43504(g) requires that, during the 20-21 school year, each school shall regularly

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communicate with parents and guardians regarding a pupil's academic progress.

Special Education Assessments

Must LEAs continue to conduct special education assessments while providing distance learning?

Yes. The U.S. Department of Education (USDOE) has not waived the requirement for LEAs to conduct a full and individual initial evaluation for a student suspected of having a disability, nor has the USDOE waived requirements relating to triennial assessments. Additionally, 34 C.F.R. §§ 300.101(b) and 300.124(b) are still in effect and require that an IEP or individual family service plan (IFSP) is developed by the third birthday of a child participating in Part C programs and who will participate in Part B preschool-age programs. The USDOE has encouraged LEAs to work with parents to reach mutually agreeable extensions of time, as appropriate, if the LEA or parent feels additional time is needed.

Can special education assessments be conducted in-person at this time?

Yes. Current guidance from the California Department of Public Health and the CDE does not expressly prohibit in-person assessments. Further, the CDPH's "Cohort" Guidance of August 25, 2020 permits in-person instruction and services, including assessments, if done in compliance with the Guidance, or if an elementary

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school has received a waiver of the school closure mandate from its local public health officer in accordance with the July 17, 2020 Framework for re-opening schools.

As stated in the CDE's April 9 2020 updated special education guidance (<https://www.cde.ca.gov/ls/he/hn/specialedcovid19guidance.asp>), any in-person services or supports should "seek to comply with federal, state, and local health official's guidance related to physical distancing, with the goal of keeping students, teachers and service providers safe and healthy as the primary consideration". Each LEA will need to monitor current health conditions and determine appropriate measures regarding in-person assessments. Some assessments, or components of assessments, may be conducted virtually, and, in some cases, existing data may be used. As with all assessments, the LEA can work together with parents to determine which assessments are necessary and appropriate in order to evaluate eligibility for special education services.

The California Association of School Psychologists (CASP) has developed several resources related to assessments and COVID-19, including considerations and recommendations for conducting in-person assessments. Those resources can be accessed by visiting the CASP website at <https://casponline.org/about-casp/publications/covid-19-resources/>.

Are the special education timeline waiver provisions included in Section 8 of Senate Bill 117 (Chapter 3, Statutes of 2020) still in place?

No. On September 18, 2020, the Governor approved Senate Bill (SB) 820 (Chapter 110, Statutes of 2020). Section 56 of SB 820 rendered SB 117, Section 8 inoperative on July 1, 2020. LEAs must adhere to all state and federal special education timelines, including those related to assessments and access to educational records.

Supporting Social-Emotional Wellness

If students are unable to meaningfully engage in distance learning due to social-emotional and/or mental health needs, what support should the LEA provide? What are the state and federal mandates?

Students with disabilities are required to have educational programs that are designed to meet their specific individual needs. IEP teams are required to monitor students for educational progress and revise the IEP for any lack of expected progress toward the student's annual goals and in the general education curriculum (34 C.F.R. 300.324(b)(1)(ii)). Additionally, the IEP team for a student with disabilities whose behavior impedes learning is required to consider the use of positive behavioral interventions and supports (34 C.F.R. 300.324(a)(2)(i)).

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In addition, *EC* 43503(b) requires that distance learning include several components, including:

(3) Academic and other supports designed to address the needs of pupils who are not performing at grade level, or need support in other areas, such as . . . pupils with exceptional needs . . .

(4) Special education, related services, and any other services required by a pupil's individualized education program pursuant to Section 56341, including the requirements of subparagraph (A) of paragraph (9) of subdivision (a) of Section 56345, with accommodations necessary to ensure that individualized education program can be executed in a distance learning environment.

Further, an LEA's learning continuity and attendance plan required for the 20-21 school year must outline what additional supports will be provided for pupils with exceptional needs served across the full continuum of placements during the period in which distance learning is provided (*EC* 43509(a)(1)(A), (e), (f)(1)(B)(vi)).

In the Spring of 2020, the CDE convened the Distance Learning Innovative Solutions Workgroup to assist educators and families across the state with distance learning by developing solutions and resources that can be used to help support students with disabilities. The Innovative Solutions Workgroup created several resource documents located on the Distance Learning Innovations for Special Education webpage located at <https://www.sipinclusion.org/distance-learning-resources/>. Available resources on the webpage can be filtered by

“Behavior and Mental Health”, which will provide educators and parents with information on how to address student social-emotional and mental health needs in the home during distance learning. Additionally, the webpage has a resource library that can be searched using keywords, including topics like “student engagement” to provide educators and parents with resources for maintaining student engagement and access to distance learning.

What is the LEA’s responsibility to provide educationally related mental health services (ERMHS) services in the IEP while the LEA is providing distance learning?

Supporting social-emotional and mental health needs of students is critical during this time. *EC* 43503(b)(4) requires that distance learning include “special education, related services, and any other services required by a pupil’s individualized education program pursuant to Section 56341, including the requirements of subparagraph (A) of paragraph (9) of subdivision (a) of Section 56345, with accommodations necessary to ensure that individualized education program can be executed in a distance learning environment.” Therefore, the LEA should ensure that the IEP, including ERMHS when required by the IEP, can be executed in a distance learning environment. With that said, LEA’s may not be able to provide all services in the same manner that they are typically provided during this COVID-19 pandemic.

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According to the United States Department of Education (USDOE) Office of Special Education Program's (OSEP) March 21, 2020 guidance, "[T]hese exceptional circumstances may affect how all educational and related services and supports are provided . . . the provision of [free and appropriate public education (FAPE)] may include, as appropriate, special education and related services provided through distance instruction provided virtually, online, or telephonically . . . schools may not be able to provide all services in the same manner that they are typically provided . . . federal disability law allows for flexibility in determining how to meet the individual needs of students with disabilities. The determination of how FAPE is to be provided may need to be different in this time of unprecedented national emergency." To review OSEP's March 21, 2020 guidance titled "Supplemental Fact Sheet Addressing the Risk of COVID-19 in Preschool, Elementary and Secondary Schools While Serving Children with Disabilities", visit the USDOE website at <https://bit.ly/2VdoJn6>.

Updated Resources

Has the USDOE issued additional guidance since April 2020?

Yes. On September 28, 2020, the USDOE's OSEP released a Question and Answer (Q&A) document in response to inquiries concerning implementation of the IDEA Part B provision of services in the current COVID-19 environment. The document can be accessed on the USDOE website at <https://sites.ed.gov/idea/>

[idea-files/part-b-implementation-idea-provision-services-current-covid-19-environment-qa-document-sept-28-2020/](#).

Additionally, on September 28, 2020, the USDOE's Office of Civil Rights issued a COVID-19-related technical assistance document to assist K-12 schools in meeting their obligations under Federal Civil Rights Laws. The document can be accessed on the USDOE website at <https://www2.ed.gov/about/offices/list/ocr/docs/qa-covid-20200928.pdf>.

On June 25, 2020, the USDOE's OSEP issued a Question and Answer (Q & A) document in response to inquiries concerning implementation of the IDEA Part B use of funds in the current COVID-19 environment. The document can be accessed on the USDOE website at <https://sites.ed.gov/idea/files/qa-part-b-use-of-funds-06-25-2020.pdf>.

On June 26, 2020, the USDOE's OSEP issued a Q & A document in response to inquiries concerning flexibility on IDEA Part B fiscal requirements in the current COVID-19 environment. The document can be accessed on the USDOE website at <https://sites.ed.gov/idea/files/qa-fiscal-flexibilities-idea-part-b-06-26-2020.pdf>.

On June 30, 2020, the USDOE's OSEP issued a Q & A document in response to inquiries concerning implementation of the IDEA Part B procedural safeguards in the current COVID-19 environment. The document can be accessed on the USDOE website at <https://>

sites.ed.gov/idea/files/qa-procedural-safeguards-idea-part-b-06-30-2020.pdf.

To review all of these documents, as well as other Q & A documents that OSEP has provided related to COVID-19, please visit the USDOE's website at <https://sites.ed.gov/idea/topic-areas/#COVID-19>.

Are there updated resources to support parents, students, families, and LEAs during this time?

Yes. In Spring of 2020, the CDE hosted five webinars on supporting students with disabilities in distance learning, which are archived on the CDE website at <https://www.cde.ca.gov/ls/he/hn/covid19webinars.asp>.

Webinar topics included:

- Highlighting and sharing best practices from LEAs and educators across the state
- Discussing critical parent partnerships and outlining resources for parents of students with disabilities
- Addressing critical transitions in special education via distance learning: preschool to K-12 and post-secondary transition
- Addressing the behavioral and mental health needs of students
- Highlighting strategies to serve students with disabilities that have unique, extensive support needs

Additionally, the CDE worked to build a resource library through the convening of the Distance Learning

Innovative Solutions Workgroup comprised of over 130 educators, administrators, services providers, parents, advocates, etc., to address a variety of topics related to special education and distance learning. The resource library can be accessed on the Distance Learning Innovations for Special Education webpage at <https://www.sipinclusion.org/distance-learning-resources/>.

The CDE has also been working with Special Education Local Plan Area leads within the state System of Support to develop targeted resources for distance learning. Those resources can be accessed on the following websites:

- Improving Outcomes for English Learners with Disabilities-distance learning models: <https://www.icoe.org/selpa/distance-learning-training-modules>
- Resource and Guidance Padlets during school closures for students with Autism Spectrum Disorder, CAPTAIN/Marin County SELPA: <http://www.captain.ca.gov>
- Making Distance Learning Accessible to Students with Disabilities: <https://sites.google.com/placercoe.k12.ca.us/accessible-distance-learning/home>
- Distance Learning Resources for Parents and Educators: <https://systemimprovement.org/distance-learning>

The USDOE OSEP has established a webpage for continuity of learning during COVID-19 that offers information, tools, and resources to help educators, parents

and families, and related service providers meet the educational, behavioral, and emotional needs of children and youth with disabilities through remote and virtual learning. The OSEP continuity of learning during COVID-19 webpage can be accessed at <https://osep.ideasthatwork.org/continuity-learning-during-covid-19>.

Created specifically for parents, the IRIS Center offers a new, user-friendly module “Parents: Supporting Learning During the COVID-19 Pandemic” with practical tools and easy-to-implement strategies to help children learn at home during COVID-19. This multimedia learning module covers practical tips to get children ready to learn, strategies for reading and mathematics instruction, support for children’s social and emotional well-being, and considerations for the parents of struggling learners and students with disabilities, among other topics. The IRIS Center is supported by the USDOE OSEP and located at Vanderbilt University’s Peabody College. The module can be accessed on the IRIS Center website at <https://iris.peabody.vanderbilt.edu/module/c19/>.

Earlier Guidance

09-Apr-2020

The United States is currently experiencing a pandemic emergency due to the threat of novel coronavirus (COVID-19). On March 13, 2020, Governor Newsom signed Executive Order N-26-20 requiring the California Department of Education (CDE) to issue guidance on several topics, including ensuring students with

disabilities (SWD) receive a free appropriate public education (FAPE) consistent with their individualized education program (IEP) and meeting other procedural requirements under the Individuals with Disabilities Education Act (IDEA) and California law. Initial guidance on services to students with disabilities was provided on March 20, 2020.

The following guidance provides additional information based on questions received by the CDE in recent weeks. We will continue to update the guidance on this web page as necessary in response to any guidance from the U.S. Department of Education or waivers of any laws or regulations pertaining to special education services.

1. Must all Individualized Education Programs (IEPs) be amended to reflect the change to distance learning?

No, not all IEPs will need to be amended. In response to the Governor's Executive Order, schools are physically closed, and local educational agencies (LEAs) are to provide educational services through alternative options such as distance learning. Under this unique circumstance, in the CDE's view it is not necessary for an LEA to convene an IEP team meeting, or propose an IEP amendment without a team meeting, for every student, solely for the purpose of discussing the need to provide services away from school, because that change must necessarily occur due to the COVID-19 pandemic. Similarly, in the CDE's view, it is not necessary for an LEA to obtain

the parent’s written consent to provide previously agreed-upon services, away from school. The IEP that was in effect at the time of physical school closure remains in effect, and LEAs should, to the greatest extent possible, continue to provide the services called for in those IEPs in alternative ways.

According to the United States Department of Education (USDOE) Office of Special Education Program’s (OSEP) March 21, 2020 guidance, “[T]hese exceptional circumstances may affect how all educational and related services and supports are provided . . . the provision of [free and appropriate public education (FAPE)] may include, as appropriate, special education and related services provided through distance instruction provided virtually, online, or telephonically . . . schools may not be able to provide all services in the same manner that they are typically provided . . . federal disability law allows for flexibility in determining how to meet the individual needs of students with disabilities. The determination of how FAPE is to be provided may need to be different in this time of unprecedented national emergency.” To review OSEP’s March 21, 2020 guidance titled “Supplemental Fact Sheet Addressing the Risk of COVID-19 in Preschool, Elementary and Secondary Schools While Serving Children with Disabilities”, visit the USDOE website at <https://bit.ly/2VdoJn6>.

However, there may be instances when amending the IEP to reflect the change to distance learning might be necessary and/or

appropriate. LEAs may convene an IEP team meeting, or propose an IEP amendment without a team meeting, particularly where it is deemed necessary to address unique circumstances related to alternative service delivery. (See 20 USC 1414(d)(4)(A); 20 USC 1414(d)(3)(D); 34 C.F.R. § 300.324.) Parents too may request an IEP meeting or propose an IEP amendment, pursuant to Education Code § 56343, subdivision (c). Some LEAs and parents have agreed to amend the IEP by incorporating a distance learning plan outlining the special education and related services being provided to the student during the temporary, emergency situation created by the COVID-19 pandemic.

At this time, LEAs should necessarily be focused on serving each and every student. OSEP's March 21, 2020 guidance clarifies that "ensuring compliance with the Individuals with Disabilities Education Act . . . should not prevent any school from offering educational programs through distance instruction." The CDE recognizes that due to the emergency situation created by the COVID-19 pandemic, it will take time for LEAs to determine their continuum of services during school site closures and provide information to parents and students about the services being offered. As such, communication and collaboration are vital. It is recommended that LEAs maintain regular communication with parents of students with disabilities about their efforts to transition to distance learning, plans to ensure access for all students, and to

identify and address any immediate support needs when feasible.

2. Is an LEA precluded from providing services to students with disabilities in-person or in the home for the purpose of supporting the student in accessing the alternative options for learning being offered?

No. In some exceptional situations, LEAs may need to provide certain supports and services to individual students in-person in order to maintain students' mental/physical health and safety for the purpose of supporting the student in accessing the alternative options for learning being offered (e.g. distance learning). With that said, alternative service delivery options should seek to comply with federal, state, and local health official's guidance related to physical distancing, with the goal of keeping students, teachers and service providers safe and healthy as the primary consideration.

In such cases, service providers may be considered "Essential Critical Infrastructure Workers" under Executive Order N-33-20. To review the list of "Essential Critical Infrastructure Workers", see the California Coronavirus (COVID-19) Response website at <https://covid19.ca.gov/img/EssentialCriticalInfrastructureWorkers.pdf>.

For example, the list of essential workers in the healthcare/public health sector includes:

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- Health care providers and caregivers (e.g. physicians, psychologists, mid-level practitioners, nurses and assistants, physical and occupational therapists and assistants, social workers, speech pathologists, and diagnostic and therapeutic technicians and technologists).
- Behavioral health workers (including mental and substance use disorder) responsible for coordination, outreach, engagement, and treatment to individuals in need of mental health and/or substance use disorder services.
- Workers who provide support to vulnerable populations to ensure their health and well-being including family care providers.

In addition, other community-based government operations and essential functions includes:

- ❖ Workers supporting public and private childcare establishments, pre-K establishments, K-12 schools, colleges, and universities for purposes of distance learning, provision of school meals, or care and supervision of minors to support essential workforce across all sectors.

Therefore, if an individualized determination is made that a student needs services or supports in-person to maintain their mental/physical health and safety for the purpose of supporting the student in accessing the alternative options for learning being offered (e.g. distance learning), an LEA is not necessarily precluded from providing that service by Governor Newsom's stay at home order.

3. I'm a parent of a student with a disability and I have questions about my child's IEP. Where can I go for information and support?

Questions about your student's IEP and educational program in light of school site closures and the COVID-19 pandemic should be discussed with your school or district. Schools across the state are responding to the COVID-19 pandemic in different ways, specific to the school's regional context. The CDE encourages parents to reach out to their school or district office to have a conversation about the impact of the pandemic on their student's education and collaborative ways to support the student during this time.

Parents of students with disabilities may also reach out to California's parent organizations offering support and resources to families of students with disabilities. Information on parent organizations can be accessed on the

CDE website at <https://www.cde.ca.gov/sp/se/qa/caprntorg.asp>.

In addition, the Understood.org website is an example of numerous state and national organizations offering practical advice and strategies for parents and caregivers during this crisis. A link to COVID-19 resources for parents and families developed by Understood can be accessed on the Understood.org website at <https://www.understood.org/en/school-learning/coronavirus-latest-updates>.

4. **What should an LEA do if it has closed school sites due to COVID-19 and is unable to meet the obligation to have an IEP or an Individual Family Service Plan (IFSP) in effect for a child transitioning from Part C to Part B no later than the child's third birthday?**

34 C.F.R. §§ 300.101(b) and 300.124(b) require that an IEP or IFSP is developed and is being implemented by the third birthday of a child participating in Part C programs and who will participate in Part B preschool programs. The U.S. Department of Education has not waived or exempted this requirement. Either an IEP or IFSP must be developed and implemented by the child's third birthday. To meet this obligation, teams may conduct meetings virtually via telephone, videoconference, or other means.

5. If IEP teams meet virtually while school sites are closed due to COVID-19, how should parent consent be obtained? Is verbal consent sufficient?

34 C.F.R. § 300.9(b) states that “consent” means in part “ . . . the parent understands and agrees in writing . . . ”. Thus, verbal consent alone is not sufficient. However, the IDEA does not specify how written consent must be obtained. Therefore, LEAs that wish to utilize electronic or digital signatures for consent may do so if they choose. Options for electronic signatures or digital signatures could include but are not limited to use of applications such as HelloSign, DocuSign, Adobe Sign, as well as scanned copies or photographs of signed signature pages. For record keeping purposes, it is recommended that LEAs maintain documentation as proof of consent, including printed or mailed copies of signed documents.

For more information on general electronic signature requirements for public agencies in California, please refer to Government Code § 16.5, and Title 2 of the California Code of Regulations, §§ 22000 et seq.

March 20, 2020

The United States is currently experiencing a pandemic emergency due to the threat of novel coronavirus (COVID-19). On March 13, 2020, Governor Newsom signed Executive Order N-26-20 ensuring

State funding for Local Educational Agencies (LEA) in the event of physical closure due to the threat of COVID-19. The Executive Order requires the California Department of Education (CDE) to issue guidance on several topics, including ensuring students with disabilities (SWD) receive a free appropriate public education (FAPE) consistent with their individualized education program (IEP) and meeting other procedural requirements under the Individuals with Disabilities Education Act (IDEA) and California law.

At this time, the federal government has not waived the federal requirements under the Individuals with Disabilities Education Act (IDEA). To review guidance from the USDOE titled “Questions and Answers on Providing Services to Children with Disabilities During the Coronavirus Disease 2019 Outbreak,” visit the USDOE website at <https://www2.ed.gov/policy/speced/guid/idea/memosdcltrs/qa-covid-19-03-12-2020.pdf>. The CDE and the California State Board of Education (SBE) are working with the United States Department of Education (USDOE) to determine what flexibilities or waivers may be issued in light of the extraordinary circumstances. Until and unless USDOE ultimately provides flexibilities under federal law, LEAs should do their best in adhering to IDEA requirements, including federally mandated timelines, to the maximum extent possible. LEAs are encouraged to consider ways to use distance technology to meet these obligations. However, the CDE acknowledges the complex, unprecedented challenges LEAs are experiencing from the threat of COVID-19. As such, the CDE is committed to

a reasonable approach to compliance monitoring that accounts for the exceptional circumstances facing the state.

The CDE appreciates the difficult decisions that LEAs and families are faced with as we grapple with this unprecedented crisis. The CDE has formed a workgroup of special education practitioners and other experts to help brainstorm best practices that we plan to share in the coming weeks. In addition, resources for addressing the needs of students with disabilities are provided in this guidance and in the CDE's guidance on distance learning at <https://www.cde.ca.gov/ls/he/hn/guidance.asp>. We will update this guidance as necessary in response to any guidance from the U.S. Department of Education or waivers of any laws or regulations pertaining to special education services.

The following answers to frequently asked questions received by the CDE provides guidance on topics relevant to serving students with disabilities.

1. If an LEA offers distance learning for instructional delivery in lieu of regular classroom instruction during a school site closure for students, what is the obligation to implement the IEP for students with disabilities?

As a result of Governor Newsom's Executive Order N-26-20, schools will receive funding to continue delivering educational opportunities to students to the extent feasible through, among other options, distance learning and/or independent study. When an LEA continues

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to provide educational opportunities to the general student population during physical school site closures, the LEA must ensure that students with disabilities have equitable access to comparable opportunities, appropriately tailored to the individualized need of a student to ensure meaningful access, as determined through the IEP process to the extent feasible.

If the LEA can continue providing special education and related services as outlined in the IEP, or an agreed upon amendment to the existing IEP, through a distance learning model, they should do so. The LEA can also consider alternative service delivery options such as in-home service delivery, meeting with individual students at school sites, or other appropriate locations to deliver services. Further, LEAs are encouraged to work collaboratively with Nonpublic Schools and Agencies (NPS/As) to ensure continuity of services, including moving to virtual platforms for service delivery to the extent feasible and appropriate.

These alternative delivery options should seek to comply with federal, state, and local health official's guidance related to social distancing, with the goal of keeping students, teachers and service providers safe and healthy. Teachers and specialists should work collaboratively to ensure instruction is accessible for the student based on the student's individualized needs. Given the unprecedented situation created by the threat of COVID-19,

exceptional circumstances may affect how a particular service is provided under a student's IEP. In such a situation, the IEP team will need to make individualized decisions regarding whether compensatory services are required when the regular provision of services resumes.

Further guidance on distance learning, including considerations for students with disabilities, can be accessed on the CDE website at <https://www.cde.ca.gov/ls/he/hn/guidance.asp>.

2. What is considered equitable access for students with disabilities?

When an LEA provides services to students during a school site closure, the LEA must provide equitable access to those services for students with disabilities, with services appropriately tailored to the individualized needs of students, to the greatest extent possible. When LEAs are providing instruction through a distance learning model to replace what would have been provided in the classroom, LEAs must create access to the instruction for students with disabilities, including planning for appropriate modifications or accommodations based on the individualized needs of each student and the differences created by the change in modality (e.g. virtual vs. classroom-based). Educational and support services provided should be commensurate with those identified in the IEP for each student to ensure educational benefit.

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For example, LEAs may consider the use of accessible distance technology, instructional phone calls, and other curriculum-based activities that have been scaffolded based on student need. More information on accessibility and distance learning can be accessed on the CDE website at <https://www.cde.ca.gov/ls/he/hn/appendix2.asp>.

In some cases, it may be appropriate for LEAs to consider providing classroom-based instruction to small groups of students with disabilities that have extensive support needs, despite the fact that the school site has closed, consistent with federal, state, and local health directives related to COVID-19. Alternative service delivery options should seek to comply with federal, state, and local health official's guidance related to social distancing, with the goal of keeping students, teachers and service providers safe and healthy. There is no single service delivery method that will meet the needs of every student. Therefore, LEAs should consider employing a variety of service delivery options. The CDE has convened a work group of special educators to develop more specific guidance for operationalizing such strategies, including examples from California LEAs.

3. If distance learning is provided in some capacity but does not mirror the offer of FAPE in the IEP, will compensatory services be required once an LEA resumes the regular school session?

Once the regular school session resumes, LEAs should plan to make individualized determinations, in collaboration with the IEP team, regarding whether or not compensatory education and services may be needed for a student. Educational need can be measured by assessing whether or not the student continued making progress in the general education curriculum, or alternative course of study specified in their IEP, or toward meeting their individualized IEP goals and/or if any regression occurred during the period of school site closure.

4. Is the CDE encouraging continued utilization of and payment to Nonpublic Schools and Agencies (NPS/As)?

Yes. California NPS/As provide critical programs and related services to students with disabilities. LEAs should work collaboratively with NPS/As to ensure continuity of services, including moving to virtual platforms for service delivery to the extent feasible and appropriate. In an effort to ensure that the full continuum of placements and service delivery options remains available to students and LEAs subsequent to these unprecedented school site closures, CDE encourages LEAs to continue to use the services of NPS/As during

school site closures, including distance learning options made available by NPS/As, so that NPS/As may continue to receive payment in accordance with pupils IEPs and the Master Contracts/Individual Service Agreements between LEAs and NPS/As.

5. When school sites are closed and no services or instruction are being provided for a period of time, can LEAs consider providing some special education services to some students? How should LEAs determine what services can or should be provided?

Yes. To be clear, CDE is not recommending this as an option. Consistent with Executive Order N-26-20, LEAs are continuing to receive ADA funding during school site closures so they will continue to provide services to all students, including students with disabilities. Should services be discontinued for a period of time, LEAs and IEP teams would be required to make an individualized determination as to whether compensatory services are needed once services resume.

At this uncertain time, it is imperative to keep the safety of students as the primary consideration for every decision made. As LEAs strive for equitable supports and services for students, in some exceptional situations, LEAs may need to provide certain supports and services to individual students with extensive support needs in order to maintain their mental/physical health and safety. The

LEA may provide such services, even if the services are not available to all students with disabilities during a school site closure. As such, LEAs should make individualized determinations about the need to provide services to ensure the mental/physical health and safety of a student with a disability, even during a school site closure, if those services are able to be provided consistent with federal, state, and local health directives.

6. How will state and federal grants be impacted by school site closures (e.g. Alternative Dispute Resolution, Workability, Supporting Inclusive Practices, etc.)?

Federal and state grants already funded should continue with their program deliverables. In cases where grant deliverables cannot be provided, grantees should work with their CDE program and fiscal contact to determine next steps. If grants have scheduled in-person conferences, institutes, training, or workshops they should be rescheduled or delivered virtually. Any grant amendments or change in due date for expenditure reports will need to be done on a case by case basis due to the specific requirements of funding sources.

7. What is the impact of school site closures on special education monitoring timelines and processes?

At this time, the federal government has not waived the federal requirements under the IDEA. However, given the complex, unprecedented challenges LEAs are experiencing

from the threat of COVID-19, the CDE is committed to a reasonable approach to compliance monitoring that accounts for the exceptional circumstances facing the state.

If an LEA is having difficulty meeting timelines or has questions related to timelines, please contact your regional Intensive Monitoring Consultant. A list of regional consultants is available at <https://www.cde.ca.gov/sp/se/qa/fmtacnct.asp>.

8. What is the impact of school site closures on state complaints and due process hearings under the IDEA?

Regarding the state complaint process, in light of widespread school site closures and the inability of LEAs to meaningfully respond to complaint investigations, the CDE will be extending current complaint investigation timelines for good cause by the length of any school site closure during the stated emergency. It is anticipated that once LEAs reopen and are available to participate in the investigation process, the 60-day timeline will recommence and both the complainant and LEA will be notified. The CDE will continue to receive complaints that allege violations of the IDEA and complainants will be notified of any delay that may impact the investigation.

Currently, California's system for due process hearings and mediation through the Office of Administrative Hearings (OAH) remains operational, although some processes and/or

timelines may be impacted by widespread school site closures and in order to maintain compliance with federal, state, and local health directives related to COVID-19. Updated information on the impact of COVID-19 on special education due process hearings can be accessed on the OAH's website at <https://www.dgs.ca.gov/OAH/Case-Types/Special-Education/Resources/SE-Coronavirus-Update/#@ViewBag.JumpTo>.

9. What is the impact on services to students with disabilities served by Part C of the IDEA?

For information related to the impact of the COVID-19 response on services to students with disabilities, ages 0 to 3, served under Part C of the IDEA, please visit the California Department of Developmental Services website at <https://www.dds.ca.gov/corona-virus-information-and-resources/>

In addition, IDEA Part C and COVID-19 are addressed in guidance from the USDOE's Office of Special Education Programs, which can be accessed on the USDOE website at <https://www2.ed.gov/policy/speced/guid/idea/memosdcltrs/qa-covid-19-03-12-2020.pdf>.

10. Where can I find more guidance and resources related to serving students with disabilities, distance learning, and on-line accessibility?

- To review previous guidance related to COVID-19 and services to students with

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disabilities, issued by the CDE on March 13, 2020, visit the CDE website at <https://www.cde.ca.gov/sp/se/lr/om031320.asp>.

- For updated information and resources from the CDE related to the COVID-19 response, visit the CDE website at <https://www.cde.ca.gov/lr/he/hn/coronavirus.asp>.
- To review federal guidance from the USDOE titled “Questions and Answers on Providing Services to Children with Disabilities During the Coronavirus Disease 2019 Outbreak,” visit the USDOE website at <https://www2.ed.gov/policy/speced/guid/idea/memosdcltrs/qa-covid-19-03-12-2020.pdf>.
- To review federal guidance from the USDOE Office of Civil Rights on how to protect students’ civil rights, visit the USDOE website at https://www2.ed.gov/about/offices/list/ocr/docs/ocr-coronavirus-fact-sheet.pdf?utm_content=&utm_medium=email&utm_name=&utm_source=govdelivery&utm_term.
- Guidance issued by the CDE on distance learning, including considerations for students with disabilities, can be accessed on the CDE website at <https://www.cde.ca.gov/lr/he/hn/guidance.asp>.
- For research on how online learning can be made more accessible, engaging, and effective for K-12 learners with

disabilities, visit the Center on Online Learning and Students with Disabilities webpage at <http://www.centerononlinelearning.res.ku.edu/>.

- Common Sense Media has curated a list of the Best Special Education Applications and Websites based on recommendations by educators who work with students with disabilities, which can be accessed on the Common Sense Media website at <https://www.commonsense.org/education/top-picks/best-special-education-apps-and-websites>.
- The Council for Exceptional Children (CEC) has developed COVID-19 Information for Special Educators, including a forum for members on how to adapt IEP services during school closures, which can be accessed on the CEC website at <https://www.cec.sped.org/~media/Files/News/A%20Message%20on%20COVID19%20Supporting%20Students%20with%20Exceptionalities.pdf>.
- The Council of Administrators of Special Education (CASE) has developed a resource page for Special Education Administrators, which can be accessed at <https://docs.google.com/document/d/1zEH-ggcHSI7sRQy5IpPEC0FaP4Vw5Wm0uUooruNFmrI/preview>.
- The State Educational Technology Directors Association (SETDA) offers strategies and resources for ensuring that

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online learning supports students with disabilities, which can be accessed on the SETDA website at <https://www.setda.org/main-coalitions/elearning/accessibility/>.

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**UNITED STATES DISTRICT COURT FOR
THE CENTRAL DISTRICT OF CALIFORNIA**

DANIELLE HOWARD) CASE NO.
MARTINEZ , an individual) JUDGE:
and guardian ad litem, on) CLASS ACTION
behalf of D.P. , a minor, K.P. ,) COMPLAINT
a minor, and T.W. , a minor;)
AMBER WOOD , an individual;)
LASHONDA HUBBARD ,)
an individual and guardian ad)
litem, on behalf of P.C. , a minor,)
all individually and on behalf)
of all UNIFIED SCHOOL)
DISTRICT; CAMPTONVILLE)
ELEMENTARY SCHOOL)
DISTRICT; MARYSVILLE)
JOINT UNIFIED SCHOOL)
DISTRICT; PLUMAS LAKE)
ELEMENTARY SCHOOL)
DISTRICT; WHEATLAND)
SCHOOL DISTRICT;)
WHEATLAND UNION)
HIGH SCHOOL DISTRICT,)
as public entities organized and)
existing pursuant to the laws)
of the State of California and)
doing business as public school)
districts,)
Defendants.)

**COMPLAINT FOR DAMAGES AND
INJUNCTIVE RELIEF**

(Filed Aug. 31, 2020)

COME NOW Plaintiffs Danielle Howard Martinez, D.P., K.P., T.W., LaShonda Hubbard and P.C., individually and on behalf of all others similarly situated, and for their Complaint For Declaratory Relief, Injunctive Relief, and Damages against the Defendants named herein, and allege as follows:

JURISDICTION AND VENUE

1. This Honorable Court has jurisdiction over this matter under 28 U.S.C. §1331 as this matter arises under the Constitution and laws of the United States, including but not limited to 20 U.S.C. §1400 *et seq.* and 42 U.S.C. §1983, and under 28 U.S.C. §1343 as this matter seeks to redress the deprivation, under color of state law, a right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States. This Honorable Court has the authority to hear class action suits under 28 U.S.C. § 1332(d).

2. Venue is appropriate in this Court under 28 U.S.C. §1391 because this is the District in which most of the Defendants maintain offices, exercise their authority in their official capacities, and will enforce their Orders, and because a substantial part of the events and omissions giving rise to the claims herein occurred in this judicial district.

3. This Court has the authority to award the requested declaratory relief under 28 U.S.C. §2201(a).

4. This Court has the authority to award the requested injunctive relief and damages under 28 U.S.C. §1343(a).

5. This Court has the authority to award such further relief as the court deems appropriate under 28 U.S.C. §2202 and under 20 U.S.C. § 1415(i)(2)(C)(iii) (“the court . . . shall grant such relief as the court determines appropriate”).

6. This Court has the authority to award attorneys’ fees and costs under 42 U.S.C. §1983, pursuant to 42 U.S.C. §1988, and under 20 U.S.C. § 1415(i)(3)(B).

INTRODUCTION

7. This case involves a group of California special needs students and their parents, who are representative of all special needs students and their parents in California and who have found their most fundamental rights under the Individuals with Disabilities Education Act, 20 U.S.C. §1400 *et seq.* (the “IDEA”) and related statutes taken away by the State of California when the state reassigned them to distance learning / online learning without determining what changes needed to be made to their individualized education programs (“IEP”) to account for the differences in distance learning compared to in-person instruction. The IEP is the lynchpin of the IDEA which ensures that students with special needs are placed on an equal

footing with their non-special needs peers. By transferring these students to distance learning without even learning what accommodations needed to be made for these students, they have been set up for failure and, thereby, denied a free appropriate public education, the cornerstone of the right to a basic minimum education.

8. Now, these students face the loss of their basic minimum education for the 2020-2021 School Year because (1) Governor Newsom has not properly addressed the IDEA in his Executive Orders, (2) Defendants State Department of Education, State Board of Education, California Health and Human Services Agency, California Department of Public Health, California Governor Gavin Newsom, State Superintendent of Public Instruction and Director of Education Tony Thurmond, State Public Health Officer & Director of the California Department of Public Health Sonia Y. Angell mishandled and inadequately implemented the IDEA through their Covid-19 related guidances and regulations, and (3) the District Defendants chose not to comply with the IDEA, thrusting their responsibilities onto untrained parents.

9. Plaintiffs seek declaratory and injunctive relief to require the Defendants to comply with the IDEA and receive the accommodations necessary to ensure that they do not lose another year of education in 2020-2021 as a result of the Defendants' failures, as well as catch-up assistance to compensate them for their loss of a basic minimum education for the end of the 2019-2020 School Year. Ultimately, they seek to be

placed on the same footing as their non-special needs peers.

CLASS ACTION ALLEGATIONS

10. “Proposed Class” are an unknown number of students who are entitled to receive special education services from the District Defendants but have been denied the services to which they are entitled under their IEPs because they have been assigned to distance-learning without any accommodations being made for the difficulties they face as a result of their disabilities. The exact number and identity of these individuals is not known, but are believed to number approximately 800,000. These students are spread throughout the District Defendants. Each member of the Proposed Class has suffered deprivations of their rights that entail the identical questions of law being addressed herein by Plaintiffs, could legally make the same claims raised herein by Plaintiffs subject only to minor factual differences depending on the nature of their disabilities, and would face the same defenses expected to be raised herein. Allowing these matters to be addressed as a class would adequately address the concerns and interests of all members of the Proposed Class, whereas requiring those matters to proceed separately could lead to inconsistent adjudications. Plaintiffs are representative of the members of the Proposed Class and of the problems the members of the Proposed Class are having as a result of distance learning, and Plaintiffs’ counsel has extensive experience in matters related to representing students with

disabilities. Thus, Plaintiffs can fairly and adequately protect the interests of the class and, if certified, Plaintiffs will move by separate motion under Rule 23 of the Federal Rules of Civil Procedure to certify this action as a class action to allow Plaintiffs to represent all members of the Proposed Class.

THE PARTIES

11. Plaintiff Danielle Howard Martinez (“Plaintiff Martinez”) is *suis juris* and a resident of San Bernardino County. She is the guardian of three children who all qualify for special needs education. Plaintiff D.P. is her foster son. Plaintiff K.P. is her foster daughter. Plaintiff T.W. is her foster son.

12. Plaintiff D.P., a minor, is a fifth-grade student at Falcon Ridge Elementary School within Etiwanda School District in San Bernardino County. D.P. is a special needs student.

13. Plaintiff K.P., a minor, is a third-grade student at John L. Golden Elementary within Etiwanda School District in San Bernardino County. K.P. is a special needs student.

14. Plaintiff T.W., a minor, attends Los Osos High School within Chaffey Joint Union High School District in Rancho Cucamonga. T.W. is a special needs student.

15. Plaintiff Amber Wood is T.W.’s biological mother and holds educational rights for T.W.

16. Plaintiff LaShonda Hubbard (“Plaintiff Hubbard”) is *suis juris* and a resident of San Bernardino County. She is the mother of Plaintiff P.C.

17. Plaintiff P.C., a minor, is a tenth grader at Rancho Cucamonga High School within Chaffey Joint Union High School District. P.C. is a special needs student.

18. Defendant State of California is subject to the United States Constitution, Federal law, and its own Constitution and laws.

19. Defendant Gavin Newsom (“Governor Newsom”) is the Governor of the State of California and is vested by the California Constitution with the “supreme executive power of the state” and is charged with seeing “that the law is faithfully executed.” Cal. Const. Art. V, §1. As such, he has the authority to issue Executive Orders to ensure that the law is faithfully executed. Governor Newsom is sued in his official capacity for the issuance of various Executive Orders which have deprived the Plaintiffs of their rights under United States and California law.

20. Defendant State Department of Education (“Department of Education”) is the agency within the State of California which oversees public education. It issued guidance which deprived the Plaintiffs of their rights under United States and California law.

21. Defendant State Board of Education (“Board of Education”) is the governing and policy-making body of the California Department of Education. It

issued guidance which deprived the Plaintiffs of their rights under United States and California law.

22. Defendant Tony Thurmond (“Superintendent Thurmond”) is the State Superintendent of Public Instruction and Director of Education, and is responsible for establishing the rules for special education in the State of California to ensure that all “eligible children with exceptional needs are given equal access to all child care and development programs.” *See* Education Code Title 1, Division 1, Part 6, Chapter 2, Article 9, Sec. 8250. Superintendent Thurmond is sued in his official capacity for guidance he issued which has deprived Plaintiffs of their rights under United States and California law.

23. Defendant California Health and Human Services Agency (“Health and Human Services Agency”) is the agency within the State of California tasked with administration and oversight of state and federal programs for health care, social services, public assistance and rehabilitation. It issued guidance which deprived the Plaintiffs of their rights under United States and California law.

24. Defendant California Department of Public Health (“Department of Public Health”) is a subdivision of the California Health and Human Services Agency and is the state department responsible for public health in California. It issued guidance which deprived the Plaintiffs of their rights under United States and California law.

25. Defendant Sonia Y. Angell, MD, MPH (“Director Angell”) is the State Public Health Officer & Director of the California Department of Public Health. She is sued in her official capacity for guidance she issued which has deprived Plaintiffs of their rights under United States and California law.

26. California School Districts named in the caption, (“District Defendants” or “Districts”) are sued for failing to comply with United States and California law and thereby depriving Plaintiffs of their rights.

27. Each and every Defendant acted under color of state law with respect to all acts or omissions herein alleged.

FACTS

28. On March 4, 2020, Governor Newsom proclaimed a State of Emergency as a result of the Covid-19 virus. *See Exhibit A.*

29. On March 13, 2020, Governor Newsom issued Executive Order N-26-20 (“March 13, 2020 Executive Order”) which allowed school districts to close and assign students to distance learning / online learning, and which required the Department of Education and the Health and Human Services Agency to “jointly develop and issue guidance by March 17, 2020” which would cover, among other things, the following topics:

- (i) Implementing distance learning strategies and addressing equity and access issues

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that may arise due to differential access to internet connectivity and technology;

(ii) Ensuring students with disabilities receive a free and appropriate public education consistent with their individualized education program and meeting other procedural requirements under the Individuals with Disabilities Act and California law.

See Exhibit B.

30. On March 17, 2020, the California Department of Education, the State Board of Education, and the California Health and Human Services Agency issued the guidance required by the March 13, 2020 Executive Order (“March 17, 2020 CDE Guidance”). <https://www.cde.ca.gov/ls/he/hn/strongertogether.asp>. This Guidance included a section on ensuring a Free Appropriate Public Education (“FAPE”) under the Individuals with Disabilities Education Act, 20 U.S.C. §1400 *et seq.* (the “IDEA”). In this section, the March 17, 2020 CDE Guidance encouraged, but did not require, the state’s school districts, including each of the District Defendants, to:

- Work with each family and student to determine what FAPE looks like for each student and family during COVID-19. It may be different than the individualized education program (IEP) developed pre-C OVID-19.
- Use the LEA model(s) for all students as the basis for establishing FAPE.

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- Ensure children with disabilities are included in all offerings of school education models by using the IEP process to customize educational opportunities and provide supports when necessary.
- Use annual IEP to plan for traditional school year and while not required, it is suggested LEAs include distance learning plans or addendums to address distance learning needs during immediate or future school site closures.

See <https://www.cde.ca.gov/ls/he/hn/strongertogether.asp>. This guidance applied to each of the District Defendants.

31. Supplemental guidance was provided as well, on March 21, 2020, which also does not require that each students' needs be determined. *See* Exhibit C.

32. The District Defendants did not reassess special needs students.

33. On March 19, 2020, Governor Newsom issued Executive Order N-33-20 ("March 19, 2020 Executive Order") which ordered all Californians to stay at home, effectively shutting down all schools in the state and effectively transferring all special needs students to distance learning / online learning for the remainder of the 2019-2020 School Year. *See* Exhibit D.

34. On May 4, 2020, Governor Newsom issued Executive Order N-6020 ("May 4, 2020 Executive Order") reaffirming that all residents of California

continue to obey the state public health directives and directed the Public Health Office to establish criteria for re-opening the state. *See* Exhibit E.

35. The 2019-2020 School Year ended in May 2020 plus an ESY (Summer School) session in June 2020.

36. On July 17, 2020, Defendant California Health and Human Services Agency, through Defendant Department of Public Health, issued a framework for the reopening of in-person learning for K-12 schools in California (“July 17, 2020 DPH Guidance”). *See* Exhibit F. Issued by State Public Health Officer & Director Sonia Y. Angell, MD, MPH, and titled: “COVID-19 and Reopening In-Person Learning Framework for K-12 Schools in California, 2020-2021 School Year, July 17, 2020,” the July 17, 2020 DPH Guidance provides, among other things:

- (1) California schools have been closed for in-person instruction since mid-March 2020 due to the COVID-19 pandemic.
- (2) Schools and school districts may re-open for in-person instruction only if they are located in a local health jurisdiction which has not been on the county monitoring list within the prior 14 days.
- (3) Waivers can be obtained for the 14 day requirement, but only by elementary schools.
- (4) Schools are not required to close again if the local health jurisdiction is returned to the county monitoring list, but are required to

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close if 25% or more of the other schools in the district have closed.

No mention was made in this Guidance of Special Education students or their needs.

37. Under the July 17, 2020 DPH Guidance, local health officers (district superintendents, private school principals, or executive directors of charter schools) could request waivers for elementary schools (K-6 only) for these requirements. <https://www.cdph.ca.gov/Programs/CID/DCDC/Pages/COVID-19/In-Person-Elementary-Waiver-Process.aspx> This has not resulted in the consistent opening of schools, nor has this tool been used to remedy the effect of closure on special needs students. None of the Plaintiffs' schools has reopened.

38. Compliance by California schools with the July 17, 2020 DPH guidance was made mandatory by the May 4, 2020 Executive Order.

39. Under the plan created by the May 4, 2020 Executive Order and the July 17, 2020 DPH Guidance, most schools remain closed with special needs students continuing distance learning / online learning for the 2020-2021 School Year even though their IEPs have never been adjusted to account for the difficulties these students face in distance learning / online instruction as compared to in-person instruction as a result of their individual disabilities.

40. Under this plan, as of July 30, 2020, Governor Newsom through the Department of Public Health

has allowed school athletics to resume in-person.
<https://www.cdph.ca.gov/Programs/CID/DCDC/Pages/COVID-19/Youth-Sports-FAQ.aspx>

41. On August 14, 2020, Governor Newsom issued Executive Order N-73-20 (“August 14, 2020 Executive Order”) related to broadband issues. *See* Exhibit G. This Order stated, among other things:

WHEREAS the COVID-19 pandemic has caused schools to shift to distance learning;

* * *

NOW, THEREFORE, I, GAVIN NEWSOM, Governor of the State of California in accordance with the power and authority vested in me by the Constitution and statutes of the State of California, do hereby issue this Order to become effective immediately.

IT IS HEREBY ORDERED THAT:

* * *

14. The California Department of Education is requested to continue leading statewide efforts to ensure that students have the computing devices and connectivity necessary for distance learning and online instruction.

42. The same day, August 14, 2020, Governor Newsom released a press release (“August 14, 2020 Press Release”) stating that schools would receive \$5.3 billion to support learning during the pandemic and that he had issued the August 14, 2020 Executive

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Order to direct state agencies to “bridge the digital divide.” Said Governor Newsom:

Schools may be physically closed, but in California at least, class is still in session. While more work remains, districts across the state are in a far better position this semester to provide meaningful distance instruction to every child.

In these challenging circumstances, our state has profound respect and gratitude for the parents and teachers who are doing all they can to make sure our students’ educational and social-emotional needs are met.

See Exhibit H.

43. The August 14, 2020 Press Release further states:

New statewide requirements have been enacted to ensure quality instruction through distance learning, including:

- Access to devices and connectivity for all kids
- Daily live interaction with teachers and other students
- Challenging assignments equivalent to in-person classes
- Adapted lessons for English-language learners and special education students

The “statewide requirements” to which the August 14, 2020 Press Release linked, however, were the July 17, 2020 DPH Guidance which makes no mention of special needs students.

44. On August 25, 2020, the Department of Public Health issues Guidance for “Small Cohort.” This provides guidance for in-person child supervision and limited instruction, targeted support services, and facilitation of distance learning in small group environments for a specified subset of children, numbering 14 or fewer with no more than two supervising adults, stay together for all activities (e.g., meals, recreation, etc.), and avoid contact with people outside of their group in the setting. This Guidance explicitly notes that it does not supersede “Guidance and directives related to schools, child care, day camps, youth sports, and institutions of higher education,” and it has no operative provision allowing teaching in cohorts – it only describes the requirements for such teaching where it is allowed. *See* Exhibit I. This Guidance has not resulted in any of the Plaintiffs being allowed to return to in-person instruction.

45. On August 28, 2020, Governor Newsom revised his school opening plan by eliminating the County Data Monitoring system, which was created by the July 12, 2020 DPH Guidance, and replacing it with a “Blueprint for a Safer Economy,” which makes opening even harder as it designates almost every county in the state as having widespread Covid and it requires counties to step down through a tier system toward re-opening. <https://covid19.ca.gov/safer-economy/> Only 19

counties currently are within the tiers where they can attempt reopening. The others must first reach the “substantial” tier and stay there for two weeks.

46. Plaintiff D.P. attends Falcon Ridge Elementary School within Etiwanda School District in San Bernardino County as a fifth grader. Plaintiff D.P. is eligible for special education services because he has significant multiple developmental and communication challenges that include basic areas of self-care, communication of his needs, and response to his environment. He has an existing Individualized Education Program (“IEP”) and has been attending a combination of special day class and mainstreaming in general education. His IEP goals include Letter Identification, Number Identification, Reading Comprehension, Focus and Attention, Motor Skills involving hand-over-hand tracing, Receptive and Expressive language, Intelligibility and Sound Production, and Communication Pragmatics.

47. D.P. needs personal interaction with instructors and other students. Prior to the issue of Covid-19, psychologists determined that D.P. enjoys interacting with neuro-typical general education peers and the staff in the classroom and learns best through visual models and hands-on activities in addition to playing with musical instruments, listening to music, and dancing. He suffers severe delays in pragmatics communication, though he has been showing improvement from interacting with his general education peers in his partially mainstreamed academic setting as he benefits from imitating his age-typical peers. It also

has been noted that D.P. requires the daily assistance of a staff member to guide him through an Wad app or computer program. He uses Classroom Assistive Technology and needs accommodations including a 1:1 aide for mainstreaming, and behavior support in the areas of attention, motivation, and transitions, as well as for frequent breaks. D.P. also receives occupational therapy services requiring hand-over-hand assistance, and he receives 1:1 assistance from an aide.

48. D.P. has not been in a school environment since March 13, 2020 when Falcon Ridge Elementary School closed in response to the March 13, 2020 Executive Order.

49. D.P. is now displaying regressive behaviors such as being distracted by nearby visuals, frequently spilling contents when opening containers, stomping his feet when walking, and communicating by pointing or bringing an object to an adult rather than using his words. He has tried numerous times to focus but cannot learn via an online format.

50. At no point during the 2019-2020 School Year was D.P.'s IEP changed to reflect the differences between distance learning / online instruction and in-person instruction, and has not been changed since.

51. Plaintiff D.P.'s parent, Plaintiff Martinez, was not contacted to provide input into any revision to D.P.'s IEP.

52. No accommodations were offered to Plaintiff D.P. or Plaintiff Martinez to account for the difficulties

Plaintiff faces in distance learning / online instruction as compared to in-person instruction as a result of D.P.'s disabilities.

53. Plaintiff K.P. attends John L. Golden Elementary within Etiwanda School District in San Bernardino County. Plaintiff K.P. is eligible for special education services with an eligibility of Intellectual Disability and Speech and Language impairment. She has an existing IEP and receives academics, speech and language, or other services mandated by her IEP. Her IEP includes goals in the areas of Phonics/Decoding Skills, Reading High-Frequency Words, Rote Counting to 100, Addition Skills, Visual Motor Skills, Learning to raise her hand at appropriate times, Speech and Language skills, and communication goals.

54. K.P. has not been in a school environment since March 13, 2020 when John L. Golden Elementary closed in response to the March 13, 2020 Executive Order.

55. K.P. needs personal interaction with instructors and other students. There has been no progress made toward any of her IEP goals for the last six months. Without constant prompts and redirection, K.P. cannot remain on task; according to her educational records, she has a marked tendency toward regression in her learning progress, and environmental reinforcements are unavailable during distance learning. Her guardian has attempted to oversee K.P. along with her other two fosters in a distance learning setting, yet these attempts have repeatedly failed.

56. Plaintiff K.P.'s IEP was not changed to reflect the differences between distance learning / online instruction and in-person instruction, and has not been changed since.

57. Plaintiff K.P.'s parent, Plaintiff Martinez, was not contacted to provide input into any revision to K.P.'s IEP.

58. No accommodations were offered to Plaintiff K.P. or Plaintiff Martinez to account for the difficulties Plaintiffs faces in distance learning / online instruction as compared to in-person instruction as a result of K.P.'s disabilities.

59. Plaintiff T.W. attends Los Osos High School within Chaffey Joint Union High School District in Rancho Cucamonga. Plaintiff T.W. is eligible for special education services with an eligibility of Multiple Disability and, secondarily, under Orthopedic Impairment, and currently is attending a Special Day Class program that operates within Los Osos High School. T.W. has attended that program for the past three academic years, with inclusion in a few general education classes with 1:1 aide assistance. T.W. has severe impairments with neurocognitive and motility differences due to neurological medical conditions, originating with his surgery at the age of two months to remove an intracranial tumor, wherein he received a shunt. Three years ago, he suffered a stroke, as a result of a prolonged seizure, resulting in paralysis. His seizures have been so significant they occasionally result in paralysis. T.W. has episodes where he loses his balance

and falls. He has right hemiplegia, intellectual disability, short-term memory loss, and is prescribed psychotropic medications to address his mood disorders. His challenges in development, communication, and behavior are pervasive and impede his education, including but not limited to the ability to adapt to new situations and develop rewarding or sustained interpersonal relationships with peers.

60. Plaintiff T.W. was sent home when Los Osos High School closed in response to the March 13, 2020 Executive Order and/or March 19 2020 Executive Order, and reassigned to distance learning / online learning.

61. T.W. needs the assistance of a 1:1 behavioral aide throughout the entire school day to assist with social skills and interactions with peers and teachers in the school environment. T.W. is overly sensitive and makes inappropriate conversation necessitating constant prompting and consistent monitoring and assistance during all parts of the school day, in the classroom, and in lunch and assemblies. T.W. needs a behavioral aide not only to model appropriate behavior, but to prompt him to remain focused and assist with academic, behavioral, and functional tasks and interactions. T.W. requires lines drawn on his papers and an aide to assist him with any item that requires a two handed grasp, as well as verbal reminders or prompts to stay on task. When T.W. is confused, he shuts down and refuses to comply. He needs physical therapy in addition to the occupational therapy he receives.

62. Plaintiff T.W.'s EP was not changed to reflect the differences between distance learning / online instruction and in-person instruction, and has not been changed since.

63. Neither Plaintiff T.W.'s biological mother and educational rights holder, Plaintiff Wood, nor T.W.'s guardian, Plaintiff Martinez, was contacted to provide input into any revision to T.W.'s IEP.

64. No accommodations were offered to Plaintiff T.W. or Plaintiff Martinez or Plaintiff Wood to account for the difficulties Plaintiff faced in distance learning / online instruction as compared to in-person instruction as a result of T.W.'s disabilities.

65. It can be reasonably anticipated T.W. will experience a loss of a whole year's worth of academic and functional skills learning from home.

66. Plaintiff Martinez has tried valiantly and genuinely to oversee the online learning of K.P., D.P. and T.W. yet she is untrained in special education, a true specialty. She also is untrained in behavioral sciences, occupational therapy, physical therapy, and speech and language therapy. She is overextended and has struggled with limited support, caring for more than one special needs child who need daily hands-on personal assistance to maintain focus and learn. She made repeated attempts to secure a line of communication with K.P.'s school. She shared her difficulties with the district when it addressed distance learning options on July 30 and at an Open House. Yet, the

distance learning program being offered to her has proven entirely inadequate.

67. Plaintiff P.C. is a tenth grader at Rancho Cucamonga High School within Chaffey Joint Union High School District. P.C. is eligible for special education services as a student with a Specific Learning Disability. She presents behaviors of Inattention, Distraction, and Emotionality, crying easily, and her feelings are easily hurt. P.C. is kind and polite, but that belies her sense of inadequacy: she has difficulty remembering learning previously taught lessons, overcoming her reading comprehension deficits, dealing with her learning difficulties with mathematical concepts and learning writing conventions, as well as difficulty in struggling alone with her lack of ability to focus and pay attention, thanks to her auditory processing deficits.

68. P.C. has struggled tremendously to steadily attend her virtual school, remain focused on her online lessons, and complete the work necessary to address her goals in the areas of Reading Comprehension, Math Reasoning and Calculations, Work Completion, and Transition. A settlement agreement with the school district placed P.C., during the 2019-2020 school year, into general education classes for 50% of the school day and 50% into the special day class or resource study skills classes so she would have the additional 1:1 support she needs. If school performance was challenging before the pandemic, requiring remedial assistance for at least half of the day in attaining academic goals, it has become an ever-increasing

impossibility as more time passes and her work slips further and further behind. No one at home can assist P.C. sufficiently to see that her work is completed, answer her questions, and see that she advocates for herself in getting the distance help she needs in a synchronous or asynchronous assignment. Without an active and involved person at her side during the learning process, and without her peers to set the norms of give and take classroom dialogue, P.C. is a cypher in a cyber universe, a non-squeaky wheel who will simply be left to fail quietly in the corner.

69. Plaintiff P.C. was sent home when Rancho Cucamonga High School closed in response to the March 13, 2020 Executive Order and/or March 19 2020 Executive Order, and reassigned to distance learning / online learning.

70. At no point during the 2019-2020 School Year was P.C.'s IEP changed to reflect the differences between distance learning / online instruction and in-person instruction, and has not been changed since.

71. Plaintiff P.C.'s parent, Plaintiff Hubbard, was not contacted to provide input into any revision to P.C.'s IEP.

72. No accommodations were offered to Plaintiff P.C. or Plaintiff Hubbard to account for the difficulties Plaintiff faced in distance learning / online instruction as compared to in-person instruction as a result of P.C.'s disabilities.

73. Plaintiff Hubbard has tried valiantly and genuinely to oversee the online learning of P.C. yet she is untrained in special education, a true specialty. She also is untrained in behavioral sciences, occupational therapy, physical therapy, and speech and language therapy. The distance learning program being offered to her has proven entirely inadequate.

74. Like the named Plaintiffs, each member of the Proposed Class is eligible for special needs services and either has or is entitled to an IEP.

75. Like the named Plaintiffs, each member of the Proposed Class was transferred to distance learning / online instruction during the 2019-2020 School Year.

76. None of the their IEPs were changed for the 2019-2020 School Year to reflect the differences vis-a-vis their disabilities between distance learning / online instruction and in-person instruction. No accommodations were made for the 2019-2020 School Year to account for the difficulties they faced in distance learning / online instruction as compared to in-person instruction as a result of their disabilities.

77. The 2020-2021 School Year began in August.

78. Under current policy created by the Defendants, Plaintiffs, as well as each member of the Proposed Class, are to continue distance learning and online instruction for the 2020-2021 School Year until told otherwise.

79. None of the Plaintiffs has had their IEP reassessed or any other accommodation made for the 2020-2021 School Year for the affect of their disabilities on their ability to learn in a distance learning I online learning environment as compared to in-person instruction.

80. Each member of the Proposed Class faces the same violations faced by the named Plaintiffs, including lack of noteworthy changes to their IEPs for the 2019-2020 and 2020-2021 School Years and lack of accommodation for the effect of distance learning / online instruction on their disabilities.

81. Per a prior agreement with P.C.'s District, Chaffey Joint Union High School District was to fund a Lindamood Bell program to P.C. Due to Covid-19 school closures, P.C. was unable to attend. Now that Lindamood Bell services have resumed, however, the District refuses to provide make-up sessions for reading comprehension and math comprehension with Lindamood Bell.

82. In June 2020, during an IEP meeting for Plaintiff P.C., the Special Education Advisor communicated to parent that online instruction was the same as in-person education.

83. Plaintiffs' will provide expert testimony explaining how distance learning negatively affects the IEPs of the various Plaintiffs and other special needs students generally.

84. Plaintiffs have been forced to retain private counsel to vindicate their rights in this matter.

85. To satisfy the IDEA for the 2020-2021 School Year, the Defendants must either re-open the schools to the parents of those special need students whose children cannot obtain the education to which they are entitled in a distance-learning / online setting, or they must alternatively provide these students with accommodations and substitute services equivalent to the direct education services and supports to which they agreed in their IEPs, whether those are provided by private educational agencies, NPA's or private professionals until such time as schools are reopened.

86. Further, without the ability to conduct immediate, timely, valid reassessments, there should be a presumption of need in this regard that allows these students to obtain, at the defendants' expense, all of the DIS services listed in Exhibit J until such time as each student can be reassessed and their specific needs and required accommodations ascertained.

87. With regard to the 2019-2020 School Year, there should be a presumption of regression entitling members of the Proposed Class to intensive makeup services including ESY and the DIS services listed in Exhibit J to catch these students up to where they should have been.

EXHAUSTION OF ADMINISTRATIVE REMEDIES

88. Plaintiffs are not required to further exhaust their administrative remedies prior to bringing this action.

89. Judicial review under the IDEA is normally not available until all administrative proceedings are completed, but the exhaustion doctrine is subject to certain exceptions. *Hoelt v. Tucson Unified Sch. Dist.*, 967 F.2d 1298, 1302-02 (9th Cir. 1992).

90. First, Plaintiffs have been told that the assessments required to trigger the OAH administrative process cannot be performed until schools reopen because they cannot be done online. Similarly, the March 21, 2020 supplemental guidance suggests that the normal time requirements for completion of the evaluation process do not apply in circumstances such as the Covid-19 pandemic. *See Exhibit C*. This prevents Plaintiffs from availing themselves of the administrative process until after the Governor chooses to grant the relief sought herein, and/or lets Districts delay as long as desired. In effect, there are no remedies at the moment because of the very actions being challenged. Not to mention, with potentially 800,000 appeals needing to be processed by OAH, OAH will be incapable of providing the process it is meant to provide. Also, standardized assessments are deemed illegitimate when done by zoom or other virtual means. In essence students would need to wait until schools reopened to obtain new appropriate assessment which could then be appealed to OAH.

91. Secondly, parents may bypass the administrative process where exhaustion of the process would be futile or where it would be inadequate. *Honig v. Doe*, 484 U.S. 305, 325 (1988) (“parents may bypass the administrative process where exhaustion would be futile or inadequate”); *Smith v. Robinson*, 468 U.S. 992, 1014, n.17 (1984); *Hoelt v. Tucson Unified Sch. Dist.*, 967 F.2d 1298, 1302-02 (9th Cir. 1992) (citing H.R.Rep. No. 296, 99th Cong., 1st Sess. 7 (1985)); *J.F. v San Diego County USD*, 19-CV-2495-CAL-LL, 4 (S.D. Cal. April 7, 2020). An example of this is where it is improbable that adequate relief can be obtained by pursuing administrative remedies because, for example, the hearing officer lacks the authority to grant the relief sought. *Id.*

92. Plaintiffs herein challenge various Executive Orders issued by the Governor and/or guidance and regulations issued by the agency heads as those Executive Orders and Guidances interfered with their existing IEPs and frustrated their rights to obtain the benefits of those IEPs through the change to the distance-learning setting ordered by the Governor and agency-level defendants.

93. Challenging those matters administratively would be futile because the IEP teams have no power or authority to ignore or overturn Executive Orders or regulations or guidance.

94. Moreover, California Education Code section 56505 has established a right to appeal the decision of a local school district (IEP team) to the California Office of Administrative Hearing, but the OAH has

authority over the local agency only; it has no authority over the agency heads or the Governor whose actions caused the deprivations. Thus, Plaintiffs could not challenge the matters that need to be challenged to repair the harm being done in this instance through OAH because the hearing officer lacks the authority to hear the matter. That makes the administrative remedies futile.

95. OAH could not issue an injunction against the Governor or the agencies who issues the Executive Orders and Guidances being challenged either because it lacks the power to issue an injunction. Thus, even if the OAH agreed entirely with the Plaintiffs, Plaintiffs still would need to bring this matter to this Honorable Court to obtain the remedies to which they are ultimately entitled because the hearing officer lacks the authority to grant the relief sought. That makes the administrative remedies inadequate.

96. Further, time is critical for these Plaintiffs because the nature of their injury causes their injury to grow each day they don't receive a basic minimum education, and the time it would take to assemble an IEP team (which cannot be done in any event with schools closed), assess a particular plaintiff, issue a decision, appeal that decision to OAH and receive a futile decision allowing Plaintiffs to move to this Honorable Court to seek an effective remedy would cost each Plaintiff who tried their right to a basic minimum education for most or all of the 2020-2021 School Year, which injury cannot be made whole in any true sense as the student would lose a year of education and fall

behind their peers, permanently changing their educational circumstances. In effect, requiring exhaustion of administrative remedies would have the effect of permanently injuring the Plaintiffs for the sake of a procedure that is both futile and inadequate to addressing the injuries the Defendants have caused and are causing. To exhaust the available remedies would take:

- (1) The District would have up to 60 days from the date the parents sign the reassessment plan to complete any reassessment;
- (2) An TEP meeting could in theory be done in hours, but have historically taken between 2-3 months to schedule;
- (3) Once an OAH appeal is filed, OAH is required to issue a decision within 45 day, though through continuances, which are almost always granted, these decision typically take six months. Due to Covid-19, OAH cases are taking even longer.

Even in an ideal world, this process would take 106 days, assuming instant action by Plaintiffs in preparing the appeal to OAH and no continuances granted, and would wipe out the first semester of the 2020-2021 School Year for the Plaintiffs. In the real world, particularly with 800,000 children needing reassessment, this will take well into the 2021-2022 School Year, assuming the system is not overwhelmed and backs up even worse and assuming assessments are actually begun without waiting for schools to re-open.

97. *Hoelt* also held that an exception to the exhaustion doctrine is where “an agency has adopted a policy or pursued a practice of general applicability that is contrary to the law.” *Hoelt v. Tucson Unified Sch. Dist.*, 967 F.2d 1298, 1302-02 (9th Cir. 1992) (citing H.R.Rep. No. 296, 99th Cong., 1st Sess. 7 (1985)); *J.F. v San Diego County USD*, 19-CV-2495-CAL-LL, 4 (S.D. Cal. April 7, 2020). *Hoelt* held that for a policy or practice of general applicability to justify excepting exhaustion, the quality of the violations must be sufficiently serious and pervasive to challenge the statutory goal or have the practical effect of denying the Plaintiffs a forum for their grievance or the challenged policies and practices must be enforced at the highest administrative level so their only meaningful remedy is through the courts.

98. In this instance, the challenged policies come directly from the Governor of California, its highest administrative source, or agency heads directly beneath him. Those policies have the effect of vitiating every existing IEP agreed to by the state, of eliminating the IDEA’S guarantee that each IEP account for each individuals’ circumstances during at least the 2020-2021 School Year just beginning. That policy affects the abilities of IEP teams system-wide to offer required relief, creates disparate abilities for the few schools that may reopen, and effectively blocks the start of the administrative process in any event.

99. Finally, as non-special needs students would not be required to engage in these administrative procedures to be allowed to challenge the same Executive

Orders and Guidances, requiring special needs students to exhaust their remedies under the IDEA creates a unwarranted hurdle that would apply only to special needs students.

COUNT ONE

**REQUEST FOR DECLARATION,
TEMPORARY RESTRAINING ORDER,
AND PERMANENT INJUNCTION
AGAINST GOVERNOR NEWSOM**

100. Plaintiffs reallege and incorporate by reference herein paragraphs 1 through 99 as though set forth fully here in.

101. The State of California is subject to the United States Constitution, Federal law, and its own Constitution and laws.

102. Governor Newsom, as Governor of the State of California, is vested by the California Constitution with the “supreme executive power of the state” and is charged with seeing “that the law is faithfully executed.” Cal. Const. Art. V, §1. As such, he has the authority to issue Executive Orders to ensure that the law is faithfully executed.

103. On March 4, 2020, Governor Newsom proclaimed a State of Emergency as a result of the Covid-19 virus. *See Exhibit A.*

104. On March 13, 2020, Governor Newsom issued the March 13, 2020 Executive Order, allowing

school districts to close and assign students to distance learning / online learning. *See* Exhibit B.

105. Such an Order, with nothing more, would violate the IDEA because it would interfere with the existing TEPs of special needs students by placing them into a setting where they could no longer receive services necessarily provided in-person such as hand-over-hand guidance, having lessons drawn for them on paper or pointed to by hand on computers, physically being shown proper behaviors, physical therapy and the such, and would thereby deprive them of a FAPE.

106. It would also violate the IDEA'S stay-put procedures. "The purpose of the stay-put provision is to prevent school districts from 'effecting unilateral change in a child's educational program.'" *Erickson v. Albuquerque Public Schools*, 199 F.3d 1116, 1121 (10th Cir. 1999) (quoting *Susquenita Sch. Dist. v. Raelee S.*, 96 F.3d 78, 83 (3d Cir. 1996)). The Ninth Circuit has defined "placement" as the child's last implemented 'EP. *N.E. ex rel. C.E. & P.E. v. Seattle Sch. Dist.*, 842 F.3d 1093, 1096 (9th Cir. 2016). And a change in placement occurs "when there is a significant change in the student's program." *N.D. v. Haw. Dep't of Educ.*, 600 F.3d 1104, 1116 (9th Cir. 2010); *Erickson v. Albuquerque Public Schools*, 199 F.3d 1116, 1121 (10th Cir. 1999). Taking a student who requires constant in-person supervision, to be physically shown proper behaviors, to be instructed hand-over-hand, to have lessons drawn for them on paper or an instructor leading them through computer lessons by pointing suddenly or other in-person instruction and sending them to

remote learning where none of those services is available would be a prime example of a change in educational placement.

107. In an attempt to avoid this violation, the March 13, 2020 Executive Order also ordered Defendants Department of Education and Health and Human Services Agency to “jointly develop and issue guidance by March 17, 2020” which would implement distance learning while “[e]nsuring students with disabilities receive a free and appropriate public education consistent with their individualized education program and meeting other procedural requirements under the Individuals with Disabilities Act and California law.” *See* Exhibit B.

108. That guidance was issued on March 17, 2020 by Defendants Department of Education, State Board of Education, and Health and Human Services Agency. The March 17, 2020 CDE Guidance encouraged, but did not require, the state’s school districts, including each of the District Defendants, to:

- Work with each family and student to determine what FAPE looks like for each student and family during COVID-19. It may be different than the individualized education program (IEP) developed pre-C OVID-19.
- Use the LEA model(s) for all students as the basis for establishing FAPE.
- Ensure children with disabilities are included in all offerings of school education models by using the IEP process to customize

educational opportunities and provide supports when necessary.

- Use annual IEP to plan for traditional school year and while not required, it is suggested LEAs include distance learning plans or addendums to address distance learning needs during immediate or future school site closures.

See Exhibit <https://www.cde.ca.gov/ls/he/hn/stronger-together.asp>; Exhibit C.

109. The Defendant Districts did not reassess special needs students.

110. Plaintiff D.P. had an IEP.

111. Plaintiff D.P. was sent home on or around March 13, 2020 when Falcon Ridge Elementary School closed in response to the March 13, 2020 Executive Order, and reassigned to distance learning / online learning.

112. At no point during the 2019-2020 School Year was D.P.'s IEP changed to reflect the differences between distance learning / online instruction and in-person instruction, and has not been changed since.

113. Plaintiff D.P.'s parent, Plaintiff Martinez, was not contacted to provide input into any revision to D.P.'s IEP.

114. No accommodations were offered to Plaintiff D.P. or Plaintiff Martinez to account for the

difficulties Plaintiffs faces in distance learning / online instruction as compared to in-person instruction as a result of D.P.'s disabilities.

115. Plaintiff K.P. had an IEP.

116. Plaintiff K.P. was sent home on or around March 13, 2020 when John L. Golden Elementary closed in response to the March 13, 2020 Executive Order, and reassigned to distance learning / online learning.

117. At no point during the 2019-2020 School Year was K.P.'s IEP changed to reflect the differences between distance learning / online instruction and in-person instruction, and has not been changed since.

118. Plaintiff K.P.'s parent, Plaintiff Martinez, was not contacted to provide input into any revision to K.P.'s IEP.

119. No accommodations were offered to Plaintiff K.P. or Plaintiff Martinez to account for the difficulties Plaintiffs faces in distance learning / online instruction as compared to in-person instruction as a result of K.P.'s disabilities.

120. Plaintiff T.W. had an IEP.

121. Plaintiff T.W. was sent home when Los Osos High School closed in response to the March 13, 2020 Executive Order and/or March 19 2020 Executive Order, and reassigned to distance learning / online learning.

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122. At no point during the 2019-2020 School Year was T.W.'s IEP changed to reflect the differences between distance learning I online instruction and in-person instruction, and has not been changed since.

123. Neither Plaintiff T.W.'s biological mother and educational rights holder, Plaintiff Wood, nor T.W.'s guardian, Plaintiff Martinez, was contacted to provide input into any revision to T.W.'s IEP.

124. No accommodations were offered to Plaintiff T.W. or Plaintiff Martinez to account for the difficulties Plaintiff faces in distance learning / online instruction as compared to in-person instruction as a result of T.W.'s disabilities.

125. Plaintiff P.C. had an IEP.

126. Plaintiff P.C. was sent home when Rancho Cucamonga High School closed in response to the March 13, 2020 Executive Order and/or March 19 2020 Executive Order, and reassigned to distance learning / online learning.

127. At no point during the 2019-2020 School Year was P.C.'s IEP changed to reflect the differences between distance learning / online instruction and in-person instruction, and has not been changed since.

128. Plaintiff P.C.'s parent, Plaintiff Hubbard, was not contacted to provide input into any revision to P.C.'s IEP.

129. No accommodations were offered to Plaintiff P.C. or Plaintiff Hubbard to account for the

difficulties Plaintiff faces in distance learning / online instruction as compared to in-person instruction as a result of P.C.'s disabilities.

130. The same is true for each member of the Proposed Class, including having an IEP, being sent home in response to the March 13, 2020 Executive Order or the March 19, 2020 Executive Order, being reassigned to distance learning / online instruction, being reassigned to distance learning / online instruction without any changes being made to their IEP or any accommodations being made for the disabilities they would face in distance learning / online instruction as compared to in-person instruction.

131. On March 19, 2020, Governor Newsom issued the March 19, 2020 Executive Order ordering all Californians to stay at home (*see* Exhibit D), effectively shutting down all schools in the state and effectively transferring all special needs students to distance learning / online learning for the remainder of the 2019-2020 School Year.

132. On May 4, 2020, Governor Newsom issued the May 4, 2020 Executive Order reaffirming that all residents of California continue to obey the state public health directives and directing Defendant State Public Health Office to establish criteria for re-opening the state. *See* Exhibit E.

133. The 2019-2020 School Year ended in May 2020 plus an ESY (Summer School) session in June 2020.

134. On July 17, 2020, Defendant California Health and Human Services Agency, through Defendant Department of Public Health, issued the July 17, 2020 DPH Guidance. Issued by Director Angell, this provided a framework for the reopening of in-person learning for K-12 schools in California. *See* Exhibit F. This guidance required schools to remain closed until certain countywide medical conditions had been achieved. It made no mention of any exception or change for special education students.

135. Compliance by California schools with the July 17, 2020 DPH Guidance was made mandatory by the May 4, 2020 Executive Order.

136. Under this plan, created by the May 4, 2020 Executive Order and the July 17, 2020 DPH Guidance, most schools remain closed with special needs students continuing distance learning / online learning for the 2020-2021 School Year even though their IEPs have never been adjusted to account for the difficulties these students face in distance learning / online instruction as compared to in-person instruction as a result of their individual disabilities.

137. Under this plan, Governor Newsom has allowed school athletics to resume in-person.

138. Changes were made to the July 17, 2020 DPH Guidance, but none has alleviated the issues complained of herein.

139. The 2020-2021 School Year began in August.

140. Neither Plaintiff D.P. nor Plaintiff K.P. nor Plaintiff T.W. nor Plaintiff P.C. nor any other member of the Proposed Class has had their IEP reassessed or any other accommodation made for the effect of their disabilities on their ability to learn in a distance learning / online learning environment.

141. The May 4, 2020 Executive Order violates the Individuals with Disabilities Education Act, 20 U.S.C. §§1400-1487 (the “IDEA”).

142. Under the IDEA, students with disabilities are entitled to a free appropriate public education (a “FAPE”). *See* 20 U.S.C. § 1400(d)(1)(A)); 20 U.S.C. § 1400 *et. seq.*; 34 C.F.R. § 300.1 (2006) *et seq.* According to the United States Supreme Court, to ensure that a disabled student receives a FAPE, the school district must “tailor [] to the unique needs of the handicapped child by means of an ‘individual educational program’ (IEP).” *Hendrick Hudson Cent. Sch. Dist. Bd. of Educ. v. Rowley*, 458 U.S. 176, 181 (1982) (quoting 20 U.S.C. § 1401(18)); *M.C. v. Antelope Valley Union High Sch. Dist.*, No. 14-56344, slip op. at 5 (9th Cir. 2017); 20 U.S.C. §§ 1401(14), 1414(d)(1)(A). An IEP is individually designed to provide educational benefit through an IEP reasonably calculated to enable a child to make progress appropriate in light of the child’s circumstances. *Rowley*, 458 U.S. at 201-204.

143. Parents and school personnel develop an IEP for an eligible student based upon state law and the IDEA. 20 U.S.C. §§ 1401(14), 1414(d)(1). The

United States Supreme Court has recognized that parental participation in the development of an IEP is the cornerstone of the IDEA. *Winkelman v. Parma City School Dist.*, 550 U.S. 516, 524, 127 S.Ct. 1994, 167 L.Ed.2d 904 (2007). The informed involvement of parents is central to the IEP process: “Among the most important procedural safeguards are those that protect the parents’ right to be involved in the development of their child’s educational plan.” *Amanda J. v. Clark Cty. Sch. Dist.*, 267 F.3d 877, 892 (9th Cir. 2001) (“[p]rocedural violations that interfere with parental participation in the IEP formulation process undermine the very essence of the IDEA”); *W. G. v. Board of Trustees of Target Range School Dist. No. 23*, 960 F.2d 1479, 1483-1484 (9th Cir. 1992).

144. A local educational agency’s predetermination of an IEP seriously infringes on parental rights. The IEP team must consider the concerns of the parent for enhancing the student’s education and information on the student’s needs provided to or by the parent. 20 U.S.C. § 1414(d)(3)(A) (ii) and (d)(4)(A)(iii).

145. None of that has happened here.

146. Plaintiffs’ IEPs were violated when the March 13, 2020 Executive Order or the March 19, 2020 Executive Order resulted in reassigning them to distance learning because they no longer received the specific services they were to receive which could only be provided in-person and no accommodations were made for their new circumstances.

147. The May 4, 2020 Executive Order requires Plaintiffs to continue distance learning / online learning for the 2020-2021 School Year without requiring that their IEPs be reassessed.

148. Reassigning the Plaintiffs to distance learning / online learning without reassessing their IEPs violates the IDEA because it alters the conditions of their individual IEPs, many of which contain provisions that cannot be obtained by a reassignment to distance learning without special accommodation.

149. These items will be identified by expert testimony.

150. Even if the Districts have done some undisclosed reassessments, such reassessments violated the procedural safeguards of the IDEA by excluding parental participation and with local educational agencies predetermining the outcomes.

151. The Plaintiffs each have struggled in the distance-learning environment and are expected to continue struggling by being made to continue distance-learning without accommodation to the point that they are being denied a FAPE for the 2020-2021 School Year, costing them their right to a basic minimum education as defined by Congress through the IDEA.

152. This violates the IDEA.

153. The IDEA may be enforced through 42 U.S.C. §1983, which creates a private right of action against officials acting under color of state law who

deprive a person of their federal rights. *Smith v. Guilford Bd. Of Educ.*, 226 Fed. Appx. 58 (2d Cir. 2007) (“[i]t is well-settled that, while the IDEA itself does not provide for monetary damages, plaintiffs may sue pursuant to [Section 1983] to enforce its provisions – including the right to a FAPE – and to obtain damages for violations of such provisions.”).

154. Further, because the May 4, 2020 Executive Order discriminates against children with disabilities, as compared to children without disabilities, as it deprives them of a basic minimum education which it does not do to children without disabilities, the May 4 Executive Order likewise violations of Section 504 of the Rehabilitation Act of 1973 (29 U.S.C. §794 as amended), which prohibits discrimination against any person who has a disability on any federally-funded “program or activity.” 42 U.S.C. §12131-12132. Section 504 of the Rehabilitation Act of 1973 protects public school children who have disabilities. And it is a violation of Title II of the Americans with Disabilities Act of 1990 (“ADA”); 29 U.S.C. § 794, *et seq.*

155. It is also a violation of the Due Process Clause of the Fourteenth Amendment, which provides that no state shall “deprive any person of life, liberty, or property, without due process of law.” U.S. Const. amend XIV. This protects “fundamental rights and liberties,” such as the right to a basic minimum education, which right has been defined by Congress through the IDEA, which the May 4, 2020 Executive Order eliminates without reason or rational basis.

156. The four-part balancing test enunciate by the Supreme Court in *Winter v. Natural Resources Defense Council*, 555 U.S. 7 (2008) weighs in favor of Plaintiffs' request for an injunction:

- (i) Plaintiffs have a high likelihood of success on the merits in this matter for the reasons outlined above, specifically the continuing violation of the IDEA which will deprive the Plaintiffs of a FAPE for the 2020-2021 School Year.
- (ii) Irreparable harm will occur if the Plaintiffs' request for an injunction is not granted as Plaintiffs will not receive a basic minimum education for the 2020-2021 School Year, which is a real and immediate threat of future injury to the Plaintiffs because they are losing and will continue to lose a valuable formative year and will fall further behind their peers, which injury cannot be made whole through compensation. *See City of Los Angeles v. Lyons*, 461 U.S. 95, 107 n.8 (1983).
- (iii) The interests at stake here weigh in favor of Plaintiffs as Congress has already declared a basic minimum education to be a fundamental right through the IDEA and as this matter could needlessly injure 800,000 children and their parents if an injunction is denied, whereas granting the injunction only requires Governor Newsom either to open the schools to these children, as he has already done for student athletes, or to order the Defendant Districts to do what they are already required to do under Federal and State law, as

Governor Newsome himself suggested they do in the March 17, 2020 CDE Guidance.

(iv) Ensuring that California's 800,000 special needs students receive the basic minimum education to which they are entitled is in the public interest, especially where safe alternatives are available to achieve the Governor's goals.

WHEREFORE, Plaintiffs respectfully request:

(1) That this Honorable Court, in accordance with its authority under 28 U.S.C. §2201(a), issue an Order Declaring that the May 4, 2020 Executive Order denies Plaintiffs and the other members of the Proposed Class a basic minimum education because it violates the IDEA by altering the conditions of their individual IEPs by reassigning the Plaintiffs to distance learning / online learning without requiring that accommodations be made to account for the effect of their disabilities on their ability to learn in a distance learning / online learning environment to ensure they will substantively receive the same services to which they were entitled under the IEP; and

(2) That this Honorable Court, in accordance with its authority under 28 U.S.C. §1343(a), further Order that a Temporary Restraining Order be issued, followed by a Permanent Injunction, enjoining Governor Newsom from assigning special needs students to distance learning / online learning until his May 4, 2020 Executive Order is modified to eliminate

the violations of the IDEA outlined herein;
and

(3) That this Honorable Court, in accordance with its authority under 28 U.S.C. §2202 and under 20 U.S.C. § 1415(i)(2)(C)(iii), further Order that Plaintiffs and the members of the Proposed Class are entitled to the services identified in Exhibit J until such time as appropriate accommodations are made for each or they are returned to in-person instruction;
and

(4) That this Honorable Court, in accordance with the provisions of 42 U.S.C. §1988 and/or 20 U.S.C. § 1415(i)(3)(B), Order that Plaintiffs be awarded reimbursement for the attorneys fees and costs they incurred in seeking the vindication of their rights herein.

COUNT TWO

REQUEST FOR DECLARATION, TEMPORARY RESTRAINING ORDER, AND PERMANENT INJUNCTION AGAINST DEFENDANTS DEPARTMENT OF EDUCATION, BOARD OF EDUCATION, SUPERINTENDENT THURMOND, HEALTH AND HUMAN SERVICES AGENCY, DEPARTMENT OF PUBLIC HEALTH, AND DIRECTOR ANGELL

157. Plaintiffs reallege and incorporate by reference herein paragraphs 1 through 99 as though set forth fully here in.

158. The State of California is subject to the United States Constitution, Federal law, and its own Constitution and laws.

159. Governor Newsom, as Governor of the State of California, is vested by the California Constitution with the “supreme executive power of the state” and is charged with seeing “that the law is faithfully executed.” Cal. Const. Art. V, §1. As such, he has the authority to issue Executive Orders to ensure that the law is faithfully executed.

160. Defendant Department of Education is the agency within the State of California which oversees public education and is responsible for ensuring that California schools and districts follow the law, including but not limited to the IDEA, Section 504 of the Rehabilitation Act of 1973 (29 U.S.C. §794 as amended), and Title II of the Americans with Disabilities Act of 1990 (“ADA”); 29 U.S.C. § 794, *et seq.*

161. Defendant Board of Education is the governing and policy-making body of the Department of Education.

162. Superintendent Thurmond is the State Superintendent of Public Instruction and Director of Education, and is responsible for establishing the rules for special education in the State of California to ensure that all “eligible children with exceptional needs are given equal access to all child care and development programs.” California Education Code Title 1, Division 1, Part 6, Chapter 2, Article 9, Sec. 8250.

163. The Department of Education has a Special Education Division which oversees the District Defendants in their handling of special education issues and has the authority to investigate complaints against Districts.

164. Defendant Health and Human Services Agency is the agency within the State of California tasked with administration and oversight of state and federal programs for health care, social services, public assistance and rehabilitation.

165. Defendant Department of Public Health is the subdivision of the Health and Human Services Agency responsible for public health in California.

166. Director Angell is the State Public Health Officer & Director of the Department of Public Health.

167. On March 4, 2020, Governor Newsom proclaimed a State of Emergency as a result of the Covid-19 virus. *See* Exhibit A.

168. On March 13, 2020, Governor Newsom issued the March 13, 2020 Executive Order, allowing school districts to close and assign students to distance learning / online learning. The Governor specifically ordered Defendants Department of Education and Health and Human Services Agency to “jointly develop and issue guidance by March 17, 2020” which would implement distance learning while “[e]nsuring students with disabilities receive a free and appropriate public education consistent with their individualized education program and meeting other procedural

requirements under the Individuals with Disabilities Act and California law.” *See* Exhibit B.

169. Defendants Department of Education, State Board of Education, and Health and Human Services Agency issued that guidance on March 17, 2020. The March 17, 2020 CDE Guidance encouraged, but did not require, the state’s school districts, including each of the District Defendants, to:

- Work with each family and student to determine what FAPE looks like for each student and family during COVID-19. It may be different than the individualized education program (IEP) developed pre-COVID-19.
- Use the LEA model(s) for all students as the basis for establishing FAPE.
- Ensure children with disabilities are included in all offerings of school education models by using the IEP process to customize educational opportunities and provide supports when necessary.
- Use annual IEP to plan for traditional school year and while not required, it is suggested LEAs include distance learning plans or addendums to address distance learning needs during immediate or future school site closures.

See <https://www.cde.ca.gov/ls/he/hn/strongertogether.asp>; Exhibit C.

170. This left the decision of whether or not to reassess students to the Defendant Districts.

171. The Defendant Districts did not reassess special needs students.

172. The Defendants were aware or should have been aware of this.

173. Plaintiff D.P. had an IEP.

174. Plaintiff D.P. was sent home on or around March 13, 2020 when Falcon Ridge Elementary School closed in response to the March 13, 2020 Executive Order, and reassigned to distance learning / online learning.

175. At no point during the 2019-2020 School Year was D.P.'s IEP changed to reflect the differences between distance learning / online instruction and in-person instruction, and has not been changed since.

176. Plaintiff D.P.'s parent, Plaintiff Martinez, was not contacted to provide input into any revision to D.P.'s IEP.

177. No accommodations were offered to Plaintiff D.P. or Plaintiff Martinez to account for the difficulties Plaintiffs faces in distance learning / online instruction as compared to in-person instruction as a result of D.P.'s disabilities.

178. Plaintiff K.P. had an IEP.

179. Plaintiff K.P. was sent home on or around March 13, 2020 when John L. Golden Elementary closed in response to the March 13, 2020 Executive Order, and reassigned to distance learning / online learning.

180. Plaintiff K.P. was sent home on or around March 13, 2020 when John L. Golden Elementary closed in response to the March 13, 2020 Executive Order, and reassigned to distance learning / online learning.

181. At no point during the 2019-2020 School Year was K.P.'s IEP changed to reflect the differences between distance learning / online instruction and in-person instruction, and has not been changed since.

182. Plaintiff K.P.'s parent, Plaintiff Martinez, was not contacted to provide input into any revision to K.P.'s IEP.

183. No accommodations were offered to Plaintiff K.P. or Plaintiff Martinez to account for the difficulties Plaintiffs faces in distance learning / online instruction as compared to in-person instruction as a result of K.P.'s disabilities.

184. Plaintiff T.W. had an IEP.

185. Plaintiff T.W. was sent home when Los Osos High School closed in response to the March 13, 2020 Executive Order and/or March 19 2020 Executive Order, and reassigned to distance learning / online learning.

186. At no point during the 2019-2020 School Year was T.W.'s IEP changed to reflect the differences between distance learning / online instruction and in-person instruction, and has not been changed since.

187. Neither Plaintiff T.W.'s biological mother and educational rights holder, Plaintiff Wood, nor T.W.'s guardian, Plaintiff Martinez, was contacted to provide input into any revision to T.W.'s IEP.

188. No accommodations were offered to Plaintiff T.W. or Plaintiffs Martinez or Wood to account for the difficulties Plaintiff faces in distance learning / online instruction as compared to in-person instruction as a result of T.W.'s disabilities.

189. Plaintiff P.C. had an IEP.

190. Plaintiff P.C. was sent home when Rancho Cucamonga High School closed in response to the March 13, 2020 Executive Order and/or March 19 2020 Executive Order, and reassigned to distance learning / online learning.

191. At no point during the 2019-2020 School Year was P.C.'s IEP changed to reflect the differences between distance learning / online instruction and in-person instruction, and has not been changed since.

192. Plaintiff P.C.'s parent, Plaintiff Hubbard, was not contacted to provide input into any revision to P.C.'s IEP.

193. No accommodations were offered to Plaintiff P.C. or Plaintiff Hubbard to account for the difficulties Plaintiff faces in distance learning / online instruction as compared to in-person instruction as a result of P.C.'s disabilities.

194. The same is true for each member of the Proposed Class, including having an IEP, being sent home in response to the March 13, 2020 Executive Order or the March 19, 2020 Executive Order, being reassigned to distance learning / online instruction, being reassigned to distance learning / online instruction without any changes being made to their IEP or any accommodations being made for the disabilities they would face in distance learning / online instruction as compared to in-person instruction.

195. On May 4, 2020, Governor Newsom issued the May 4, 2020 Executive Order reaffirming that all residents of California continue to obey the state public health directives and directing Defendant State Public Health Office to establish criteria for re-opening the state. *See* Exhibit E.

196. On July 17, 2020, Defendant California Health and Human Services Agency, through Defendant Department of Public Health, issued the July 12, 2020 DPH Guidance. This Guidance was issued by Director Angell and provided a framework for the reopening of in-person learning for K-12 schools in California. *See* Exhibit F. This Guidance required schools to remain closed until certain county-wide medical conditions had been achieved. However, it made no mention of any exception for special needs students nor did it require any reassessment of special needs students even though the Defendant Districts had not conducted reassessments as previously recommended.

197. The 2020-2021 School Year began in August.

198. Under this plan, created by the May 4, 2020 Executive Order and the July 17, 2020 DPH Guidance, most schools remain closed with special needs students continuing distance learning / online learning for the 2020-2021 School Year even though their IEPs have never been adjusted to account for the difficulties these students face in distance learning / online instruction as compared to in-person instruction as a result of their individual disabilities.

199. Changes were made to the July 17, 2020 DPH Guidance, but none has alleviate the issues complained of herein.

200. Neither Plaintiff D.P. nor Plaintiff K.P. nor Plaintiff T.W. nor Plaintiff P.C. nor any other member of the Proposed Class has had their IEP reassessed or any other accommodation made for the effect of their disabilities on their ability to learn in a distance learning / online learning environment.

201. The March 13, 2020 Executive Order or the March 19, 2020 Executive Order resulted in reassigning Plaintiffs to distance learning, and the May 4, 2020 Executive Order continued it. The March 19, 2020 Executive Order instructed the Defendants to issue guidance implementing distance learning in such a way that it protects the IDEA rights of students with disabilities. The March 17, 2020 CDE Guidance, however, failed to require the District Defendants to follow the IDEA, making this only a recommendation, and

the July 17, 2020 DPH Guidance failed to correct failure this even after the actions of the Defendant Districts cost the Plaintiffs (and other members of the Proposed Class) their FAPE for the end of the 2019-2020 School Year.

202. Assigning the Plaintiffs to distance learning without requiring an accommodation to correct for the effects of distance-learning on the Plaintiffs' IEPs violates the IDEA because it means the Plaintiffs will no longer receive the services to which they are entitled under their IEPs which necessarily require in-person instruction, such as hand-over-hand guidance, having lessons drawn for them on paper or pointed to by hand on computers, physically being shown proper behaviors, physical therapy and the such.

203. This is a violation of the IDEA which requires that students with disabilities are entitled to a FAPE which requires school districts to tailor an IEP "to the unique needs of the handicapped child." *Hendrick Hudson Cent. Sch. Dist. Bd. of Educ. v. Rowley*, 458 U.S. 176, 181 (1982) (quoting 20 U.S.C. § 1401(18)); *M.C. v. Antelope Valley Union High Sch. Dist.*, No. 14-56344, slip op. at 5 (9th Cir. 2017). This IEP must be created with the meaningful input of parents. *Winkelman v. Parma City School Dist.*, 550 U.S. 516, 524, 127 S.Ct. 1994, 167 L.Ed.2d 904 (2007); *Amanda J. v. Clark Cty. Sch. Dist.*, 267 F.3d 877, 892 (9th Cir. 2001) ("[p]rocedural violations that interfere with parental participation in the IEP formulation process undermine the very essence of the [IDEA]"); *W.G. v. Board of Trustees of Target Range School Dist.* No. 23,960 F.2d

1479, 1483-1484 (9th Cir. 1992). And must be amended when a student's then current educational placement becomes unavailable, such as through distance learning.

204. By failing to require the Defendant Districts to reassess special needs students as part of the July 17, 2020 DPH Guidance or the March 17, 2020 CDE Guidance, and any subsequent adjustments like the August 28, 2020 changes, and provide necessary accommodations, Defendants Department of Education, Board of Education, Superintendent Thurmond, Health and Human Services Agency, Department of Public Health, and Director Angell have failed to protect the rights of the Plaintiffs under the IDEA and have caused or allowed California schools to violate the IDEA in a manner which denied and is denying Plaintiffs and the members of the Proposed Class a FAPE for the 2020-2021 School Year.

205. As a result of this violation, each of the Plaintiffs has struggled in the distance-learning environment and are expected to continue struggling by being made to continue distance-learning without accommodation to the point that they are being denied a FAPE for the 2020-2021 School Year, costing them their right to a basic minimum education as defined by Congress through the IDEA.

206. The IDEA may be enforced through 42 U.S.C. §1983, which creates a private right of action against officials acting under color of state law who deprive a person of their federal rights. *Smith v. Guilford*

Bd. Of Educ., 226 Fed. Appx. 58 (2d Cir. 2007) (“[i]t is well-settled that, while the IDEA itself does not provide for monetary damages, plaintiffs may sue pursuant to [Section 1983] to enforce its provisions – including the right to a FAPE – and to obtain damages for violations of such provisions.”).

207. By failing to require the Defendant Districts to reassess special needs students prior to the start of the 2020-2021 School Year, Defendants Department of Education, Board of Education, and Superintendent Thurmond have failed in their responsibility to establish the rules for special education in the State of California to ensure that all “eligible children with exceptional needs are given equal access to all child care and development programs,” and have denied and are denying Plaintiffs and the members of the Proposed Class their right to a FAPE for the 2020-2021 School Year.

208. By failing to require the Defendant Districts to reassess special needs students as part of the July 17, 2020 DPH Guidance or the March 17, 2020 CDE Guidance, or any subsequent adjustments, Defendants Department of Education, Board of Education, Superintendent Thurmond, Health and Human Services Agency, Department of Public Health, and Director Angell have denied and continue to deny the Plaintiffs and the members of the Proposed Class their right to a basic minimum education in violation of the Due Process Clause of the Fourteenth Amendment, which provides that no state shall “deprive any person

of life, liberty, or property, without due process of law.”
U.S. Const. amend XIV.

209. By issuing the July 17, 2020 DPH Guidance, and its subsequent adjustments, in a manner which appears neutral on its face, but which discriminates against students with special needs by failing to address the fact they have been denied a FAPE in the current distance-learning environment, Defendants Health and Human Services Agency, Department of Public Health, and Director Angell have violated the Plaintiffs’ and the members of the Proposed Class’s right to equal protection under the United States Constitution.

210. The four-part balancing test enunciate by the Supreme Court in *Winter v. Natural Resources Defense Council*, 555 U.S. 7 (2008) weighs in favor of Plaintiffs’ request for an injunction:

- (i) Plaintiffs have a high likelihood of success on the merits in this matter for the reasons outlined above, specifically the continuing violation of the IDEA which will deprive the Plaintiffs of a FAPE for the 2020-2021 School Year.
- (ii) Irreparable harm will occur if the Plaintiffs’ request for an injunction is not granted as Plaintiffs will not receive a basic minimum education for the 2020-2021 School Year, which is a real and immediate threat of future injury to the Plaintiffs because they are losing and will continue to lose a valuable formative year and will fall further behind their

peers, which injury cannot be made whole through compensation. *See City of Los Angeles v. Lyons*, 461 U.S. 95, 107 n.8 (1983).

(iii) The interests at stake here weigh in favor of Plaintiffs as Congress has already declared a basic minimum education to be a fundamental right through the IDEA and as this matter could needlessly injure 800,000 children and their parents if an injunction is denied, whereas granting the injunction only requires the Defendants to do what they are already charged with doing by the Governor and the State Code and by Federal and State law.

(iv) Ensuring that California's 800,000 special needs students receive the basic minimum education to which they are entitled is in the public interest, especially where safe alternatives are available to achieve California's health goals.

WHEREFORE, Plaintiffs respectfully request:

(1) That this Honorable Court, in accordance with its authority under 28 U.S.C. §2201(a), issue an Order Declaring that the Defendants have violated the IDEA by (1) failing to require, in either the March 17, 2020 CDE Guidance, the July 17, 2020 DPH Guidance or some other guidance, directive or order, that all special needs students assigned to distance learning / online learning during the 2020-2021 School Year be reassessed before the start of the 2020-2021 School Year to determine what changes to their individual

IEPs and/or other accommodations are needed to account for the disabilities Plaintiffs face in distance learning / online instruction as compared to in-person instruction; (2) by Defendants setting conditions on the reopening of schools in the July 17, 2020 DPH Guidance, and its subsequent revisions, which failed to protect the rights of special needs students under the IDEA; and (3) by Superintendent Thurmond failing to order the District Defendants to perform reassessments and continuing to fail to require reassessments or by failing to order the District Defendants to make appropriate accommodations; and

(2) That this Honorable Court, in accordance with its authority under 28 U.S.C. §1343(a), further Order that a Temporary Restraining Order be issued, followed by a Permanent Injunction, requiring Defendants to amend their guidance or issue new guidance either to allow special needs students to return to in-person learning immediately, or to require the immediate reassessment of special needs students assigned to engage in distance learning for the 2020-2021 School Year; and

(3) That this Honorable Court, in accordance with its authority under 28 U.S.C. §2202 and under 20 U.S.C. § 1415(i)(2)(C)(iii), further Order that Plaintiffs and the members of the Proposed Class are entitled to obtain the DIS services identified in Exhibit J, at the defendants' expense, until such time as appropriate

accommodations are made for each or they are returned to in-person instruction; and

(4) That this Honorable Court, in accordance with the provisions of 42 U.S.C. §1988 and/or 20 U.S.C. § 1415(i)(3)(B), Order that Plaintiffs be awarded reimbursement for the attorneys fees and costs they incurred in seeking the vindication of their rights herein.

COUNT THREE

REQUEST FOR DECLARATION, TEMPORARY RESTRAINING ORDER, AND PERMANENT INJUNCTION AGAINST DISTRICT DEFENDANTS

211. Plaintiffs reallege and incorporate by reference herein paragraphs 1 through 99 as though set forth fully here in.

212. District Defendants are public entities organized and existing pursuant to the laws of the state of California and doing business as a public-school district. As such, District Defendants are subject to state and federal law, including but not limited to the IDEA, Section 504 of the Rehabilitation Act of 1973 (29 U.S.C. §794 as amended), and Title II of the Americans with Disabilities Act of 1990 (“ADA”); 29 U.S.C. § 794, *et seq.*

213. The Department of Education has a Special Education Division which oversees the District Defendants in their handling of special education issues

and has the authority to investigate complaints against Districts.

214. On March 4, 2020, Governor Newsom proclaimed a State of Emergency as a result of the Covid-19 virus. *See* Exhibit A.

215. On March 13, 2020, Governor Newsom issued the March 13, 2020 Executive Order, allowing District Defendants to close the schools under their control and assign students to distance learning / online learning. *See* Exhibit B.

216. On March 17, 2020, Defendants Department of Education, State Board of Education, and Health and Human Services Agency issued the March 17, 2020 Guidance encouraging the District Defendant to:

- Work with each family and student to determine what FAPE looks like for each student and family during COVID-19. It may be different than the individualized education program (IEP) developed pre-COVID-19.
- Use the LEA model(s) for all students as the basis for establishing FAPE.
- Ensure children with disabilities are included in all offerings of school education models by using the IEP process to customize educational opportunities and provide supports when necessary.
- Use annual IEP to plan for traditional school year and while not required, it is

suggested LEAs include distance learning plans or addendums to address distance learning needs during immediate or future school site closures.

See <https://www.cde.ca.gov/ls/he/hn/strongertogether.asp>; Exhibit C.

217. On March 19, 2020, Governor Newsom issued the March 19, 2020 Executive Order ordering all Californians to stay at home (*see* Exhibit D), effectively shutting down all schools in the state and effectively transferring all special needs students to distance learning / online learning for the remainder of the 2019-2020 School Year.

218. The 2019-2020 School Year ended in May 2020 plus an ESY (Summer School) session in June 2020.

219. The Defendant Districts did not reassess special needs students.

220. Plaintiff D.P. had an IEP.

221. Plaintiff D.P. was sent home on or around March 13, 2020 when Falcon Ridge Elementary School closed in response to the March 13, 2020 Executive Order, and reassigned to distance learning / online learning.

222. At no point during the 2019-2020 School Year was D.P.'s IEP changed to reflect the differences between distance learning / online instruction and in-person instruction, and has not been changed since.

223. Plaintiff D.P.'s parent, Plaintiff Martinez, was not contacted to provide input into any revision to D.P.'s IEP.

224. No accommodations were offered to Plaintiff D.P. or Plaintiff Martinez to account for the difficulties Plaintiff faces in distance learning / online instruction as compared to in-person instruction as a result of D.P.'s disabilities.

225. Plaintiff K.P. had an IEP.

226. Plaintiff K.P. was sent home on or around March 13, 2020 when John L. Golden Elementary closed in response to the March 13, 2020 Executive Order, and reassigned to distance learning / online learning.

227. At no point during the 2019-2020 School Year was K.P.'s IEP changed to reflect the differences between distance learning / online instruction and in-person instruction, and has not been changed since.

228. Plaintiff K.P.'s parent, Plaintiff Martinez, was not contacted to provide input into any revision to K.P.'s IEP.

229. No accommodations were offered to Plaintiff K.P. or Plaintiff Martinez to account for the difficulties Plaintiff faces in distance learning / online instruction as compared to in-person instruction as a result of K.P.'s disabilities.

230. Plaintiff T.W. had an IEP.

231. Plaintiff T.W. was sent home when Los Osos High School closed in response to the March 13, 2020 Executive Order and/or March 19 2020 Executive Order, and reassigned to distance learning / online learning.

232. At no point during the 2019-2020 School Year was T.W.'s IEP changed to reflect the differences between distance learning / online instruction and in-person instruction, and has not been changed since.

233. Neither Plaintiff T.W.'s biological mother and educational rights holder, Plaintiff Wood, nor T.W.'s guardian, Plaintiff Martinez, was contacted to provide input into any revision to T.W.'s IEP.

234. No accommodations were offered to Plaintiff T.W. or Plaintiff Martinez or Plaintiff Wood to account for the difficulties Plaintiff faces in distance learning / online instruction as compared to in-person instruction as a result of T.W.'s disabilities.

235. Plaintiff P.C. had an IEP.

236. Plaintiff P.C. was sent home when Rancho Cucamonga High School closed in response to the March 13, 2020 Executive Order and/or March 19 2020 Executive Order, and reassigned to distance learning / online learning.

237. At no point during the 2019-2020 School Year was P.C.'s IEP changed to reflect the differences between distance learning / online instruction and in-person instruction, and has not been changed since.

238. Plaintiff P.C.'s parent, Plaintiff Hubbard, was not contacted to provide input into any revision to P.C.'s IEP.

239. No accommodations were offered to Plaintiff P.C. or Plaintiff Hubbard to account for the difficulties Plaintiff faces in distance learning / online instruction as compared to in-person instruction as a result of P.C.'s disabilities.

240. The same is true for each member of the Proposed Class, including having an IEP, being sent home in response to the March 13, 2020 Executive Order or the March 19, 2020 Executive Order, being reassigned to distance learning / online instruction, being reassigned to distance learning / online instruction without any changes being made to their IEP or any accommodations being made for the disabilities they would face in distance learning / online instruction as compared to in-person instruction.

241. On May 4, 2020, Governor Newsom issued the May 4, 2020 Executive Order reaffirming that all residents of California continue to obey the state public health directives and directing Defendant State Public Health Office to establish criteria for re-opening the state. *See Exhibit E.*

242. On July 17, 2020, Defendant California Health and Human Services Agency, through Defendant Department of Public Health, issued the July 12, 2020 DPH Guidance. This Guidance was issued by Director Angell and provided a framework for the reopening of in-person learning for K-12 schools in

California. *See* Exhibit F. This Guidance required schools to remain closed until certain county-wide medical conditions had been achieved. However, it made no mention of any exception for special needs students nor did it require any reassessment of special needs students even though the Defendant Districts had not conducted reassessments as previously recommended.

243. The 2020-2021 School Year began in August.

244. Under this plan, created by the May 4, 2020 Executive Order and the July 17, 2020 DPH Guidance, most schools remain closed with special needs students continuing distance learning / online learning for the 2020-2021 School Year even though their IEPs have never been adjusted to account for the difficulties these students face in distance learning / online instruction as compared to in-person instruction as a result of their individual disabilities.

245. Neither Plaintiff D.P. nor Plaintiff K.P. nor Plaintiff T.W. nor Plaintiff P.C. nor any other member of the Proposed Class has had their IEP reassessed or any other accommodation made for the effect of their disabilities on their ability to learn in a distance learning / online learning environment.

246. Assigning the Plaintiffs to distance learning without requiring an accommodation to correct for the effects of distance-learning on the Plaintiffs' IEPs violates the IDEA because it means the Plaintiffs will no longer receive the services to which they are entitled

under their IEPs which necessarily require in-person instruction, such as hand-over-hand guidance, having lessons drawn for them on paper or pointed to by hand on computers, physically being shown proper behaviors, physical therapy and the such.

247. This is a violation of the IDEA which requires that students with disabilities are entitled to a FAPE which requires school districts to tailor an IEP “to the unique needs of the handicapped child.” *Hendrick Hudson Cent. Sch. Dist. Bd. of Educ. v. Rowley*, 458 U.S. 176, 181 (1982) (quoting 20 U.S.C. § 1401(18)); *M.C. v. Antelope Valley Union High Sch. Dist.*, No. 14-56344, slip op. at 5 (9th Cir. 2017). This IEP must be created with the meaningful input of parents. *Winkelman v. Parma City School Dist.*, 550 U.S. 516, 524, 127 S.Ct. 1994, 167 L.Ed.2d 904 (2007); *Amanda J. v. Clark Cty. Sch. Dist.*, 267 F.3d 877, 892 (9th Cir. 2001) (“[p]rocedural violations that interfere with parental participation in the IEP formulation process undermine the very essence of the IDEA”); *W.G. v. Board of Trustees of Target Range School Dist. No. 23*, 960 F.2d 1479, 1483-1484 (9th Cir. 1992). And must be amended when a student’s then current educational placement becomes unavailable, such as through distance learning.

248. The IEP must be in place each year before the start of the year. 34 C.F.R. § 300.323(a) (2006); Cal. Educ. Code, § 56344, subd. (c).

249. By failing to reassess special needs students the Defendant Districts have violated the IDEA in a

manner which denied and is denying Plaintiffs and the members of the Proposed Class a FAPE for the 2020-2021 School Year.

250. As a result of this violation, each of the Plaintiffs has struggled in the distance-learning environment and are expected to continue struggling by being made to continue distance-learning without accommodation to the point that they are being denied a FAPE for the 2020-2021 School Year, costing them their right to a basic minimum education as defined by Congress through the IDEA.

251. The IDEA may be enforced through 42 U.S.C. §1983, which creates a private right of action against officials acting under color of state law who deprive a person of their federal rights. *Smith v. Guilford Bd. Of Educ.*, 226 Fed. Appx. 58 (2d Cir. 2007) ([i]t is well-settled that, while the IDEA itself does not provide for monetary damages, plaintiffs may sue pursuant to [Section 1983] to enforce its provisions – including the right to a FAPE – and to obtain damages for violations of such provisions.”).

252. By failing to reassess special needs students the District Defendants have denied and are denying the Plaintiffs and the members of the Proposed Class their right to a basic minimum education in violation of the Due Process Clause of the Fourteenth Amendment, which provides that no state shall “deprive any person of life, liberty, or property, without due process of law.” U.S. Const. amend XIV.

253. The four-part balancing test enunciate by the Supreme Court in *Winter v. Natural Resources Defense Council*, 555 U.S. 7 (2008) weighs in favor of Plaintiffs' request for an injunction:

- (i) Plaintiffs have a high likelihood of success on the merits in this matter for the reasons outlined above, specifically the continuing violation of the IDEA which will deprive the Plaintiffs of a FAPE for the 2020-2021 School Year.
- (ii) Irreparable harm will occur if the Plaintiffs' request for an injunction is not granted as Plaintiffs will not receive a basic minimum education for the 2020-2021 School Year, which is a real and immediate threat of future injury to the Plaintiffs because they are losing and will continue to lose a valuable formative year and will fall further behind their peers, which injury cannot be made whole through compensation. *See City of Los Angeles v. Lyons*, 461 U.S. 95, 107 n.8 (1983).
- (iii) The interests at stake here weigh in favor of Plaintiffs as Congress has already declared a basic minimum education to be a fundamental right through the IDEA and as this matter could needlessly injure 800,000 children and their parents if an injunction is denied, whereas granting the injunction only requires the Defendants to do what they are already charged with doing by the Governor and the State Code and by Federal and State law.

(iv) Ensuring that California's 800,000 special needs students receive the basic minimum education to which they are entitled is in the public interest, especially where safe alternatives are available to achieve California's health goals.

WHEREFORE, Plaintiffs respectfully request:

- (1) That this Honorable Court, in accordance with its authority under 28 U.S.C. §2201(a), issue an Order Declaring that the District Defendants have violated the IDEA by failing to reassess the Plaintiffs and the members of the Proposed Class before the start of the 2020-2021 School Year to determine what changes to their individual IEPs and/or other accommodations are needed to account for the difficulties Plaintiffs face in distance learning / online instruction as compared to in-person instruction as a result of their disabilities; and
- (2) by continuing to fail to reassess Plaintiffs and the members of the Proposed Class; and
- (2) That this Honorable Court, in accordance with its authority under 28 U.S.C. §1343(a), further Order that a Temporary Restraining Order be issued, followed by a Permanent Injunction, requiring the District Defendants to immediately reassess the Plaintiffs and all members of the Proposed Class, i.e. special needs students assigned to engage in distance learning for the 2020-2021 School Year; and
- (3) That this Honorable Court, in accordance with its authority under 28 U.S.C. §2202 and under 20 U.S.C. § 1415(i)(2)(C)(iii), further

Order that Plaintiffs and the members of the Proposed Class are entitled to obtain the DIS services identified in Exhibit J, at the defendants' expense, until such time as appropriate accommodations are made for each or they are returned to in-person instruction; and

(4) That this Honorable Court, in accordance with the provisions of 42 U.S.C. §1988 and/or 20 U.S.C. § 1415(i)(3)(B), Order that Plaintiffs be awarded reimbursement for the attorneys fees and costs they incurred in seeking the vindication of their rights herein.

COUNT FOUR

DENIAL OF A FAPE FOR THE 2019-2020 SCHOOL YEAR BY DISTRICT DEFENDANTS

254. Plaintiffs reallege and incorporate by reference herein paragraphs 1 through 99 as though set forth fully here in.

255. District Defendants are public entities organized and existing pursuant to the laws of the state of California and doing business as a public-school district. As such, District Defendants are subject to state and federal law, including but not limited to the IDEA, Section 504 of the Rehabilitation Act of 1973 (29 U.S.C. §794 as amended), and Title II of the Americans with Disabilities Act of 1990 ("ADA"); 29 U.S.C. § 794, *et seq.*

256. On March 4, 2020, Governor Newsom proclaimed a State of Emergency as a result of the Covid-19 virus. *See* Exhibit A.

257. On March 13, 2020, Governor Newsom issued the March 13, 2020 Executive Order, allowing District Defendants to close the schools under their control and assign students to distance learning / online learning. *See* Exhibit B.

258. On March 17, 2020, Defendants Department of Education, State Board of Education, and Health and Human Services Agency issued the March 17, 2020 Guidance encouraging the Defendant Districts to:

- Work with each family and student to determine what FAPE looks like for each student and family during COVID-19. It may be different than the individualized education program (IEP) developed pre-COVID-19.
- Use the LEA model(s) for all students as the basis for establishing FAPE.
- Ensure children with disabilities are included in all offerings of school education models by using the IEP process to customize educational opportunities and provide supports when necessary.
- Use annual IEP to plan for traditional school year and while not required, it is suggested LEAs include distance learning plans or addendums to address distance learning

needs during immediate or future school site closures.

See <https://www.cde.ca.gov/ls/he/hn/strongertogether.asp>; Exhibit C.

259. On March 19, 2020, Governor Newsom issued the March 19, 2020 Executive Order ordering all Californians to stay at home (see Exhibit D), effectively shutting down all schools in the state and effectively transferring all special needs students to distance learning / online learning for the remainder of the 2019-2020 School Year.

260. The 2019-2020 School Year ended in May 2020 plus an ESY (Summer School) session in June 2020.

261. The Defendant Districts did not reassess special needs students.

262. Plaintiff D.P. had an IEP.

263. Plaintiff D.P. was sent home on or around March 13, 2020 when Falcon Ridge Elementary School closed in response to the March 13, 2020 Executive Order, and reassigned to distance learning / online learning.

264. At no point during the 2019-2020 School Year was D.P.'s IEP changed to reflect the differences between distance learning / online instruction and in-person instruction, and has not been changed since.

265. Plaintiff D.P.'s parent, Plaintiff Martinez, was not contacted to provide input into any revision to D.P.'s IEP.

266. No accommodations were offered to Plaintiff D.P. or Plaintiff Martinez to account for the difficulties Plaintiff faced in distance learning / online instruction as compared to in-person instruction as a result of D.P.'s disabilities.

267. Plaintiff K.P. had an IEP.

268. Plaintiff K.P. was sent home on or around March 13, 2020 when John L. Golden Elementary closed in response to the March 13, 2020 Executive Order, and reassigned to distance learning / online learning.

269. At no point during the 2019-2020 School Year was K.P.'s IEP changed to reflect the differences between distance learning / online instruction and in-person instruction, and has not been changed since.

270. Plaintiff K.P.'s parent, Plaintiff Martinez, was not contacted to provide input into any revision to K.P.'s IEP.

271. No accommodations were offered to Plaintiff K.P. or Plaintiff Martinez to account for the difficulties Plaintiff faced in distance learning / online instruction as compared to in-person instruction as a result of K.P.'s disabilities.

272. Plaintiff T.W. had an IEP.

273. Plaintiff T.W. was sent home when Los Osos High School closed in response to the March 13, 2020 Executive Order and/or March 19 2020 Executive Order, and reassigned to distance learning / online learning.

274. At no point during the 2019-2020 School Year was T.W.'s IEP changed to reflect the differences between distance learning / online instruction and in-person instruction, and has not been changed since.

275. Neither Plaintiff T.W.'s biological mother and educational rights holder, Plaintiff Wood, nor T.W.'s guardian, Plaintiff Martinez, was contacted to provide input into any revision to T.W.'s IEP.

276. No accommodations were offered to Plaintiff T.W. or Plaintiff Martinez or Plaintiff Wood to account for the difficulties Plaintiff faced in distance learning / online instruction as compared to in-person instruction as a result of T.W.'s disabilities.

277. Plaintiff P.C. had an IEP.

278. Plaintiff P.C. was sent home when Rancho Cucamonga High School closed in response to the March 13, 2020 Executive Order and/or March 19 2020 Executive Order, and reassigned to distance learning / online learning.

279. At no point during the 2019-2020 School Year was P.C.'s IEP changed to reflect the differences between distance learning / online instruction and in-person instruction, and has not been changed since.

280. Plaintiff P.C.'s parent, Plaintiff Hubbard, was not contacted to provide input into any revision to P.C.'s IEP.

281. No accommodations were offered to Plaintiff P.C. or Plaintiff Hubbard to account for the difficulties Plaintiff faced in distance learning / online instruction as compared to in-person instruction as a result of P.C.'s disabilities.

282. The same is true for each member of the Proposed Class, including having an IEP, being sent home in response to the March 13, 2020 Executive Order or the March 19, 2020 Executive Order, being reassigned to distance learning / online instruction, being reassigned to distance learning / online instruction without any changes being made to their IEP or any accommodations being made for the disabilities they would face in distance learning / online instruction as compared to in-person instruction.

283. Neither Plaintiff D.P. nor Plaintiff K.P. nor Plaintiff T.W. nor Plaintiff P.C. nor any other member of the Proposed Class has had their IEP reassessed or any other accommodation made for the effect of their disabilities on their ability to learn in a distance learning / online learning environment.

284. Assigning the Plaintiffs to distance learning without requiring an accommodation to correct for the effects of distance-learning on the Plaintiffs' IEPs violates the IDEA because it means the Plaintiffs will no longer receive the services to which they are entitled under their IEPs which necessarily require

in-person instruction, such as hand-over-hand guidance, having lessons drawn for them on paper or pointed to by hand on computers, physically being shown proper behaviors, physical therapy and the such.

285. This is a violation of the IDEA which requires that students with disabilities are entitled to a FAPE which requires school districts to tailor an IEP “to the unique needs of the handicapped child.” *Hendrick Hudson Cent. Sch. Dist. Bd. of Educ. v. Rowley*, 458 U.S. 176, 181 (1982) (quoting 20 U.S.C. § 1401(18)); *M.C. v. Antelope Valley Union High Sch. Dist.*, No. 14-56344, slip op. at 5 (9th Cir. 2017). This IEP must be created with the meaningful input of parents. *Winkelman v. Parma City School Dist.*, 550 U.S. 516, 524, 127 S.Ct. 1994, 167 L.Ed.2d 904 (2007); *Amanda J. v. Clark Cty. Sch. Dist.*, 267 F.3d 877, 892 (9th Cir. 2001) (“[p]rocedural violations that interfere with parental participation in the IEP formulation process undermine the very essence of the IDEA”); *W.G. v. Board of Trustees of Target Range School Dist. No. 23*, 960 F.2d 1479, 1483-1484 (9th Cir. 1992). And must be amended when a student’s then current educational placement becomes unavailable, such as through distance learning.

286. The Plaintiffs each struggled in the distance-learning environment to the point that they were denied a FAPE for the 2019-2020 School Year, costing them their right to a basic minimum education as defined by Congress through the IDEA.

287. By failing to reassess special needs students the Defendant Districts violated the IDEA in a manner which denied Plaintiffs and the members of the Proposed Class a FAPE for the 2019-2020 School Year.

288. The IDEA may be enforced through 42 U.S.C. §1983, which creates a private right of action against officials acting under color of state law who deprive a person of their federal rights. *Smith v. Guilford Bd. Of Educ.*, 226 Fed. Appx. 58 (2d Cir. 2007) (“[i]t is well-settled that, while the IDEA itself does not provide for monetary damages, plaintiffs may sue pursuant to [Section 1983] to enforce its provisions – including the right to a FAPE – and to obtain damages for violations of such provisions.”).

289. Plaintiffs and the member of the Proposed Class should be granted compensatory education, including related services to correct for the denial of a FAPE in the 2019-2020 School Year. Courts have broad discretion to fashion an equitable remedy under the IDEA. This can include “compensatory education” to put the student in the same position he would have been in had he received the appropriate education from the school district in the first place. *T.B. v. San Diego Uni. Sch. Dist.*, No. 08-CV-28MMA (S.D. Cal. Mar. 30, 2011). The IDEA does not explicitly authorize the award of compensatory education, but based on the Supreme Court’s *Burlington* decision, compensatory education as a remedy has been embraced by most circuits, including the Ninth, under the IDEA’s authorization that courts may “grant such relief as the court determines appropriate.” *R.P. v. Prescott Unified Sch.*

Dist., 631 F.3d 1117, 1125 (9th Cir. 2011); *Parents of Student W.*, 31 F.3d at 1496 (9th Cir. 1994); *Reid v. District of Columbia*, 401 F.3d 516, 522 (D.C. Cir. 2005); *Phil v. Mass. Dept of Educ.*, 9 F.3d 184, 188-89 (1st Cir. 1993); *Ridgewood Bd. of Educ. v. N.E. ex rel. M.E.*, 172 F.3d 238, 249 (3d Cir. 1999); *G. ex rel. RG v. Fort Bragg Dependent Schs.*, 343 F.3d 295, 308-09 (4th Cir. 2003); *Bd. of Educ. of Oak Park & River Forest High Sch. Dist. 200 v. Ill. State Bd. of Educ.*, 79 F.3d 654, 656 (7th Cir. 1996); *Miener v. Missouri*, 800 F.2d 749, 753 (8th Cir. 1986).

WHEREFORE, Plaintiffs respectfully request that this Honorable Court grant the following relief:

- (1) That this Honorable Court, in accordance with its authority under 28 U.S.C. §2201(a), issue an Order Declaring that the District Defendants have violated the IDEA and denied the Plaintiffs a FAPE for the end of the 2019-2020 School Year by failing, when Plaintiffs were sent home to finish the school year in a distance-learning environment, to determine what changes to the Plaintiffs' individual IEPs and/or other accommodations needed to be made to account for the difficulties Plaintiffs faced in distance learning / online instruction as compared to in-person instruction as a result of their disabilities; and
- (2) That this Honorable Court, in accordance with its authority under 28 U.S.C. §2202 and under 20 U.S.C. § 1415(i)(2)(C)(iii), further Order that Plaintiffs and the members of the Proposed Class are entitled to compensatory

education, including but not limited to those DIS services identified in Exhibit J, to catch them up for the regression they suffered in the 2019-2020 School Year while in the distance-learning environment; and

(3) That this Honorable Court, in accordance with the provisions of 42 U.S.C. §1988 and/or 20 U.S.C. § 1415(i)(3)(B), Order that Plaintiffs be awarded reimbursement for the attorneys fees and costs they incurred in seeking the vindication of their rights herein.

DATED: August 31, 2020 Respectfully submitted,

BY: /s/ Fazil A. Munir

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**State of California—Health and Human Services
Agency
California Department of Public Health**

August 25, 2020

TO:

All Californians

SUBJECT:

Guidance for Small Cohorts/Groups of Children and Youth

This guidance applies to groups of children and youth in controlled, supervised, and indoor environments operated by local educational agencies, non profits, or other authorized providers, including, but not limited to, public and private schools; licensed and license-exempt child care settings; organized and supervised care environments, i.e., “distance learning hubs”; recreation programs; before and after school programs; youth groups; and day camps. **Guidance and directives related to schools, child care, day camps, youth sports, and institutions of higher education are not superseded by this document and still apply to those specified settings.**

Purpose: To provide guidance for necessary in-person child supervision and limited instruction, targeted support services, and facilitation of distance learning in small group environments for a specified subset of children and youth, and for those programs to understand the required health and safety practices needed to prevent the spread of COVID-19 in their settings.

Definitions:

Cohort: a cohort is a stable group of no more than 14 children or youth and no more than two supervising adults in a supervised environment in which supervising adults and children stay together for all activities (e.g., meals, recreation, etc.), and avoid contact with people outside of their group in the setting.

Supervising adult: an adult assigned to one cohort of children or youth, who does not physically interact with any other cohorts. This includes child care staff, certificated or classified school staff, volunteers, participating parent or caregiver, or other designated supervising adult(s).

Supervised care environment: an environment where multiple children or youth, from multiple families or households, are being supervised simultaneously by an adult. This includes, but is not limited to, licensed child care facilities, licensed exempt child care programs, supervised programs on a school site while a school is not in session or is providing curriculum in a distance-learning format, or where some educational services are being offered to a subgroup of students as identified by a local educational agency on a school campus.

Considerations for Cohorts

Utilizing cohorts minimizes the number of people exposed if a COVID-19 case is identified in a child or youth attendee, provider, other instructional support provider, or staff member of a particular cohort.

Children or youth, attendees and adults in supervised care environments during the COVID-19 pandemic must be in groups as small as possible. This practice decreases opportunities for exposure to or transmission of the virus; facilitates more efficient contact tracing in the event of a positive case; and allows for targeted testing, quarantine, and isolation of a single cohort instead of an entire population of children or youth and supervising adults in the event of a positive case or cluster of cases.

While present at the supervised care environment, children or youth and supervising adults in one cohort must not physically interact with children or youth and supervising adults in other cohorts, other child facility staff, or parents of children or youth in other cohorts.

Cohort Size

- Cohorts must be limited to no more than 14 children and youth.
- Cohorts must be limited to no more than two supervising adults.
- Requirements for adult to child ratios continue to apply for licensed child care programs.
- Cohorts can be divided, as needed, into subgroups of children and youth from the same cohort, as long as the 14-to-2 ratio is not exceeded.

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- The maximum cohort size applies to all children and youth in the cohort, even when all children are not participating at the same time. For example:
 - A cohort may not include 6 children or youth who attend full-time, 6 children on Mon/Wed/Fri, and 6 children on Tue/Thu (total of 18).
 - A cohort may not include 8 children or youth who attend for the entire day, 4 who attend mornings only, and 4 who attend afternoons only (total of 16).

Cohort Mixing

- Prevent interactions between cohorts, including interactions between staff assigned to different cohorts.
 - Assign children and youth who live together or carpool together to the same cohort, if possible.
 - Avoid moving children and youth from one cohort to another, unless needed for a child's overall safety and wellness.
 - Cohorts must be kept separate from one another for special activities such as art, music, and exercise. Stagger playground time and other activities so that no two cohorts are in the same place at the same time.
- One-to-one specialized services can be provided to a child or youth by a support service

provider that is not part of the child or youth's cohort.

- Specialized service includes but not limited to occupational therapy services, speech and language services, and other medical, behavioral services, or educational support services as part of a targeted intervention strategy.
- Services must be provided consistent with the industry guidance for Limited Services (PDF).

Considerations for Staff

Supervising adults should be assigned to one cohort and must work solely with that cohort. Avoid changing staff assignments to the extent practicable. Substitute providers who are covering for short-term staff absences are allowed but must only work with one cohort of children per day.

Meetings among the staff from different cohorts must be conducted remotely, outdoors, or in a large room in which all providers wear cloth face coverings and maintain at least 6 feet distance from other providers. Outdoor meetings and meetings in large rooms with the windows open are preferred over meetings in small rooms with windows closed.

Precautions and Considerations

Physical distancing, in combination with the use of face coverings, decreases the risk of COVID-19 from respiratory droplets. Physical distancing between

adults must be maintained as much as possible, and adults and students must use face coverings at all times, pursuant to the CDPH Schools Guidance regarding face coverings. Physical distancing between young children in the same cohort should be balanced with developmental and socio-emotional needs of this age group. Supervised care settings should follow applicable industry guidance on appropriate use of face coverings by children and youth.

See the CDPH Guidance on Schools and School Based Programs (PDF) and on Child Care (PDF) for additional considerations regarding, face masks, meals, cleaning, drop off and pick up and health screening.

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