

Alerts & Articles

Senate Bill 98 Reworks Parameters for School Reopening

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Senate Bill 98 (“SB 98”), the education omnibus trailer bill to the 2020 Budget Act, was signed into law by Governor Newsom on June 29, 2020. Approved little more than a month before the start of school, SB 98 reworks parameters for the 2020–2021 school year, and contains numerous provisions of great significance to school districts, charter schools, and county offices of education (“LEAs”).

This Alert highlights new provisions of law contained in SB 98 which impact LEAs in the following areas:

1. Distance Learning and Hybrid Instructional Models
2. Special Education
3. Layoff (Classified and Certificated)
4. Instructional Days and Minutes
5. Learning Continuity and Attendance Plan
6. Charter Schools
7. Extension of Audit-Related Deadlines
8. Early Childhood Education
9. Miscellaneous Provisions

SECTION I: DISTANCE LEARNING AND HYBRID INSTRUCTIONAL MODELS

In recent months, LEAs have been charged with planning to reopen school, including developing instructional models, with little in the way of clear guidance. With the passage of SB 98, LEAs are now presented with substantial questions regarding the legality of those instructional models.

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SB 98 adds Education Code sections 43500 through 43504, containing detailed requirements applicable to distance education for the 2020–2021 school year. An analysis of these provisions follows. As discussed below, we read SB 98 as containing broad authority permitting hybrid instructional models, though subject to certain limits.

Is Distance Learning Still Permitted?

SB 98 contains text which, at first glance, suggests the Legislature intended to impose substantial limits on distance learning. For example:

- SB 98 (Education Code § 43502) contains a statement that LEAs **“shall offer in-person instruction and may offer distance learning, pursuant to the requirements of this part.”**
- SB 98 (Education Code § 43504) contains a statement that LEAs **“shall offer in-person instruction to the greatest extent possible.”**

These provisions express a strong legislative preference for in-person instruction, while the phrase “to the greatest extent possible” suggests substantial limits on distance learning.

It is important to note, however, that the decision as to what instructional models are “possible” in the 2020–2021 school year, let alone determining “the greatest extent” of that possibility, is entrusted to each LEA, in light of their individual circumstances, subject to some legal limitations (discussed below). This is an incredibly complex decision, which requires balancing of educational needs against health and safety concerns, all within the context of an ongoing public health and economic calamity. This balancing act appears clearly to involve an exercise of “discretion.” (*Carrancho v. California Air Resources Board* (2003) 111 Cal.App.4th 1255.)

Courts are loath to second-guess discretionary decisions of this sort, and generally do so only where the local agency decision is “arbitrary, capricious, entirely lacking in evidentiary support,” and only where “the action taken is so palpably unreasonable and arbitrary as to show an abuse of discretion as a matter of law. This is a highly deferential test.” (*Carrancho, supra.*) Also of note, Education Code section 35160 (the “permissive Education Code”) grants broad authority to school districts, county boards, and county superintendents, and section 35160.1



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recognizes that those entities “have diverse needs unique to their individual communities and programs . . . [and] should have the flexibility to create their own unique solutions.”^[1]

One key to supporting discretion on this question will be having a record of the facts and circumstances that underlie the LEA’s decision. Such decisions are subject to the substantial evidence test, pursuant to which courts require that there be some substantial factual basis underpinning the exercise of discretion. (See, *Lewin v. St. Joseph Hospital of Orange* (1978) 82 Cal.App.3d 368, 382.) As long as the LEA has a factual record (e.g. a board resolution) that reasonably connects to its decision, then the courts should apply the deference called for under *Carrancho*. LEAs are encouraged to consult with legal counsel in preparing an appropriate resolution or other factual record.

Accordingly, and subject to the legal limitations discussed herein, we read SB 98 as entrusting each LEA with the power to determine the extent of in-person instruction that is possible. In short, we do not read SB 98 as mandating a one-size-fits-all approach.

Distance Learning Is Allowed In Two Specific Circumstances

SB 98 adds Education Code section 43503, which expressly states that distance learning is allowed in either of the following circumstances:

- “On a local educational agency or schoolwide level **as a result of an order or guidance** from a state public health officer or a local public health officer.”
- For students who are: (1) “medically fragile”; or (2) “would be put at risk”; or (3) self-quarantining.

We read these provisions as providing substantial flexibility for LEAs wishing to offer distance learning. Specific justifications for LEAs wishing to offer distance learning will include the following:

First, guidance issued by the California Department of Public Health (“CDPH”) on June 5, 2020, (see <https://covid19.ca.gov/pdf/guidance-schools.pdf>) provides substantial support for LEAs seeking to adopt hybrid instructional models which incorporate distance learning. In particular:



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- The CDPH guidance states that “implementation of this guidance should be tailored for each setting, including adequate consideration of instructional programs . . . and the needs of students and families.” We read this language as conferring broad authority on LEAs to select an appropriate instructional model, including distance learning, based on the LEA’s consideration of the needs of its students and families.
- Of particular note, the CDPH guidance suggests separating students through various means, with one option being “six feet [separation] between desks.” We note that maintaining six feet separation will typically limit a classroom to 10-15 students, which, as a practical matter, cannot generally be accommodated without some form of distance learning. As a result, most or all LEAs electing to utilize 6 feet in-class separation must, of necessity, utilize a distance learning model.
- **Note:** The CDPH guidance states it “should be implemented only with county health officer approval.” Many county health officers have provided blanket approval for schools to reopen; have stated they do not intend to review specific reopening plans; or have simply stated that LEAs may open in accordance with CDPH guidance. These determinations, in our view, present no barrier to relying on CDPH guidance as a basis for operating hybrid instructional models, including distance learning. Other local health officials, however, have issued more detailed and potentially restrictive guidance, which, in some cases, implies use of an in-person instructional model. **LEAs concerned that their local health officer order or guidance may limit the LEA’s instructional options should confer with legal counsel.**

Second, the decision to offer distance education can, in some cases, be independently justified on the basis of local public health guidance. Where possible, LEAs operating a hybrid instructional model should also consider obtaining written confirmation from local public health officials that their instructional model is consistent with and taken “as a result of” local public health guidance. Although written confirmation is not specifically required by the language of the statute, and letters have been submitted by state legislators purporting to clarify the intent of the statute which suggest that authorization from local health officers is not necessary, such documentation could nonetheless be useful in the event of an audit or other challenge.



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Third, the authority to utilize hybrid instructional models (including 100% distance education models) for students who are “medically fragile” or “would be put at risk” or “self-quarantining” seems quite broad. The category of “would be put at risk” students, in particular, appears to encompass risks aside from special medical risk to the student (which is already covered by the “medically fragile” category), and may well encompass, as one example, risk to parents or other family members living with the student. In our view, this provision establishes broad authority for students to select a hybrid instructional model (including 100% distance education models). Also of note, this category is not subject to approval, or disapproval, of a public health officer.

Legislative History Indicates SB 98 Was Intended to Give LEAs Discretion to Adopt Hybrid Instructional Models

Notably, both Senator Holly Mitchell and Assembly Member Philip Ting, who serve as Chairs of their respective legislative Budget Committees, submitted identical letters to the Senate and Assembly Journals on June 26, 2020, shortly before SB 98 was passed by the Senate and signed by the Governor. Those letters shed light on the legislative intent behind the two circumstances in which distance learning is permitted (see Education Code section 43503(a)(2)).

The letters state:

- These provisions “[were] not intended to require an LEA to seek out or receive approval from a state or local public health officer prior to adopting a distance learning model. This section is also not intended to prevent an LEA from adopting a distance learning, hybrid, or mixed-delivery instructional model to ensure safety. Instead this section is intended to grant flexibility to an LEA to determine what instructional model the LEA will adopt during the COVID-19 Pandemic, taking into account the needs of their students and staff, and their available infrastructure, provided the model adheres to an applicable state or local public health order or guidance.”
- With respect to the authority to provide distance learning for individual students: “The intent of this language is to allow LEAs to offer distance learning based on the unique circumstances of each student The statute does not define ‘would be put at-risk by in person instruction’ and as such, does not require an LEA to verify or make a determination that a request for this allowance meets a specific standard. This section contemplates that LEAs may provide distance learning to students with varying circumstances – whether the student has health conditions, family members with health conditions, cohabitates or regularly interacts with high-risk individuals, or is otherwise identified as ‘at-risk’ by the parent or guardian.”
- The purpose of SB 98, and Education Code section 43503, is to provide “flexibility for LEAs to provide instruction in a way that reflects state and local public health needs, and respects the specific circumstances of individual students during the COVID-19 Pandemic.”

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While these letters do not have the force of a law, a court may look to them as evidence of legislative intent in resolving ambiguity in the statutory language. Courts have considered letters published in the Senate Daily Journals as evidence of legislative intent where the letters provide more than just the legislator's personal views and motives and instead shed light on the intent of the entire Legislature in enacting the legislation. (See *In re Marriage of Bouquet* (1976) 16 Cal.3d 583.)

As such, these letters support the view that SB 98 was intended to provide flexibility for LEAs to utilize distance learning.

Distance Learning Must Satisfy Strict Requirements Including Daily Live Interaction

SB 98 defines "distance learning" 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." (Ed. Code § 43500.)

SB 98 places a strong emphasis on teacher-student engagement in distance learning. Distance learning must include the following minimum components: (1) provision of access for all pupils to connectivity and devices adequate to participate in the educational program and complete assigned work; (2) content aligned to grade level standards that is provided at a level of quality and intellectual challenge equivalent to in-person instruction; (3) academic and other supports designed to address the needs of pupils who are performing below grade level, or need support in other areas; (4) special education, related services, and any other services required by a pupil's individualized education program; (5) designated and integrated instruction in English language development; and (6) **daily live interaction** with certificated employees and peers for purposes of instruction, progress monitoring, and maintaining school connectedness. (Ed. Code, § 43503(b).)

SB 98 also adopts Education Code section 43504, which imposes the following requirements aimed at ensuring that LEAs maintain regular contact with students participating in distance learning. In particular:

- LEAs are required to "document daily participation for each pupil on each schoolday, in whole or in part, for which distance learning is provided." Daily participation is defined to include: (1) evidence of participation in online activities (including completing assignments and assessments) or (2) contact between the LEA and the pupil or parent/guardian. Students not engaged in daily participation must be marked absent.
- "Each local educational agency shall ensure that a weekly engagement record is completed for each pupil documenting synchronous or asynchronous instruction for each whole or partial day of distance learning, verifying daily participation, and tracking assignments."
- "A pupil who does not participate daily in either in-person instruction . . . or distance learning . . . shall be deemed absent."

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- LEAs “shall develop written procedures for tiered reengagement strategies for all pupils who are absent from distance learning for more than three schooldays or 60 percent of the instructional days in a school week. These procedures shall include, but are not limited to, verification of current contact information for each enrolled pupil, daily notification to parents or guardians of absences, a plan for outreach from the school to determine pupil needs including connection with health and social services as necessary, and, when feasible, transitioning the pupil to full-time in-person instruction.”

SB 98 – General Rules for Implementing Instructional Models

Based on the above analysis, we read SB 98 as establishing the following general rules governing implementation of educational options, including hybrid instructional models (e.g. part-time in-person and part-time distance learning) and 100% distance learning:

- All LEAs must offer some amount of in-person instruction to all students. While SB 98 does not identify a minimum amount of in-person instruction, LEAs that are planning to offer only nominal (or no) in-person instruction are strongly encouraged to consult with legal counsel regarding options.
- LEAs that meet the first requirement to offer distance learning (i.e. acting “as a result of” state or local public health guidance) may offer a range of educational options, including hybrid instructional models and 100% distance learning, provided that at least one option must include some amount of in-person instruction (as discussed above). Students may then select the appropriate model.
- LEAs that meet the second requirement to offer distance learning (i.e. it is serving students who are medically fragile, at risk, or self-quarantining) may offer those students a range of educational options, including hybrid instructional models and 100% distance learning. Students may then select the appropriate model.
- If an LEA and/or its students meet either of the requirements to offer distance learning, the LEA may offer a range of options, including hybrid instructional models as well as 100% distance learning, keeping in mind that at least one option must include some amount of in-person instruction (as discussed above). The student may then select an appropriate option.
- LEAs may offer full-time in-person instruction to all students – if permitted under applicable health orders – recognizing that: (1) state or local public health authorities may impose limits on in-person instruction; and (2) normal alternatives to in-person instruction (e.g. independent study) still apply.

Documentation

LEAs utilizing any form of distance learning are advised to consult with legal counsel and to adopt written findings or to otherwise maintain clear documentation supporting compliance with the requirements of SB 98 for purposes of audit and in order to comply with the reporting requirements under the new “Learning Continuity and Attendance Plan” obligation (discussed in Section 5).

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SECTION 2: SPECIAL EDUCATION

With respect to its impact on special education, SB 98 not only addresses funding, but also adds statutory guidance for the provision of distance learning to students eligible for individualized education programs (“IEPs”).

In addition to the distance learning requirements discussed above, LEAs must meet a number of requirements, including implementation of special education, related services, and any other services required by a pupil’s IEP, including the requirements of newly amended Education Code section 56345 (described below), “with accommodations necessary to ensure that [the IEP] can be executed in a distance learning environment.”

Newly amended Education Code section 56345 now includes subdivision (a)(9)(A), which requires an IEP to include:

A description of the means by which the individualized education program will be provided under emergency conditions, as described in Section 46392 [*which enumerates emergency conditions such as fire, flood, and epidemics*], 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.

The requirement to include these contents in an IEP applies to initial IEPs or “the next regularly scheduled revision of an individualized education program that has not already met [the above described] requirements.”

Among its most significant impacts on special education funding, SB 98 also:

- Provides a back fill for special education programs for 2020–2021 in the event of certain funding shortfalls;
- Specifies the amount to be withheld from the Local Control Funding Formula entitlement for a county office of education that operates a special day class or classes and does not offer the required minimum number of instructional days or instructional minutes.
- Provides a moratorium on establishing new single district Special Education Local Plan Areas through the 2023–2024 fiscal year.

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- Creates a new special education funding formula, commencing with the 2020- 2021 fiscal year, that provides SELPAs with the greater of \$625 per average daily attendance or the per Average Daily Attendance rate the SELPA received in 2019-2020, and applies a Cost of Living Adjustment (COLA) in future years to the statewide base rate. COLA is not provided in the 2020-2021 fiscal year.
- Repeals statutes related to the special education funding program, freezes funding at the 2019-2020 levels for most add-on adjustments, and makes other technical amendments.

SECTION 3: LAYOFF (CLASSIFIED AND CERTIFICATED)

Two provisions of SB 98, one for certificated and one for classified, are intended to limit employers' ability to impose financially driven reductions in force, which are typically a school employer's primary emergency cost-cutting measure.[2]

Limitations on Certificated Summer Layoffs

For certificated employees, Education Code section 44955.5 provides special authority for school districts to initiate what is known as a "summer layoff" if specific financial downturn triggers are hit. The operative language from Section 44955.5(a) includes (amendments made by SB 98 are indicated by italics):

...[i]f the governing board of a school district determines that its total *local control funding formula apportionment* per unit of average daily attendance for the fiscal year of that Budget Act has not increased by at least 2 percent, and if *the governing board of a school district determines* it is therefore necessary to decrease the number of permanent employees in the *school* district, the governing board of *the school district* may terminate the services of any permanent or probationary certificated employees of the *school* district, including employees holding a position that requires an administrative or supervisory credential ... pursuant to Sections 44951 and 44955 ... in accordance with a schedule of notice and hearing adopted by the governing *board of the school district*.

Section 38 of SB 98 adds the following subsections to Education Code section 44955.5, which bar summer teacher layoffs:

(c)(1) Except as provided in paragraph (2), this section is inoperative from July 1, 2020, to July 1, 2021, inclusive.

(2) Notwithstanding paragraph (1), from July 1, 2020, to July 1, 2021, inclusive, a certificated employee of a school district holding a position that requires an administrative or supervisory credential may be terminated pursuant to subdivision (a).

This is not the first time the Legislature has with one hand implemented a budget with less than a 2-percent increase in revenue while with the other hand specifically deactivated the summer layoff provision. However, in this case, the Legislature opted to exclude certificated administrators from the temporary protections.

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This leaves open the possibility of either releasing and reassigning certificated administrators under Section 44951, or laying off their positions under Section 44955.5 during the summer without respect to the usual March 15 notice deadlines.

One concern, however, is that administrators subject to release and reassignment or layoff are typically entitled to an assignment in the teaching ranks, but LEAs are now barred from laying off teachers. The layoff or release of an administrator appears only to work in this situation if the administrator becomes the least senior employee in their credential area, where an appropriate vacancy exists, or where the employer can tolerate absorbing that employee into the teaching ranks. LEAs are encouraged to consult with legal counsel regarding their options.

Limitations on Classified Layoff/Release

SB 98 also imposes strict limits on layoff or release of three categories of classified employees. With respect to classified layoffs, Section 94 of SB 98 provides as follows:

(a) Given the critical role of classified employees in reopening school and college campuses and addressing the learning loss caused by COVID-19, **it is the intent of the Legislature that school districts, county offices of education, community college districts, and joint powers authorities retain all classified employees.** With the amount of funding and flexibility provided to schools and community colleges in the Budget Act of 2020, schools and community colleges should avoid layoffs of classified employees in the 2020–2021 fiscal year.

(b) From July 1, 2020, to June 30, 2021, inclusive, the governing board of a school district, county office of education, community college district, or joint powers authority shall not implement layoffs or releases of any permanent or probationary classified employees of the school district, county office of education, community college district, or joint powers authority who hold classifications in, or are assigned to positions in, nutrition, transportation, or custodial services. Nothing in this section shall be construed to prohibit a school district, county office of education, community college district, or joint powers authority from terminating a classified employee for good cause.

In general terms, SB 98, prohibits “implementation” of classified layoffs or releases, on or after July 1, for permanent or probationary employees in three job classifications (nutrition, transportation, custodial), unless “good cause” applies. This language does not prevent the layoff or release of any other classified employees outside of these three job classifications, nor does it preclude the termination for cause of any classified employee.

At least four important questions arise:

1. Does the statement of Legislative “intent” that no classified employee be laid off act to prevent all classified layoffs?

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No. The “intent” language contained in subsection (a) states that the Legislature intends that school employers “retain all classified employees” and suggests that all school employers “should avoid layoffs of classified employees in the 2020-2021 fiscal year.”

As a general proposition, an intent statement is not binding law, particularly if not codified in a statute (as here), but it may be used to interpret codified language. (*Carter v. California Dept. of Veterans Affairs* (2006) 44 Cal.Rptr.3d 223, 231-232 [“Although such statements in an uncodified section do not confer power, determine rights, or enlarge the scope of a measure, they properly may be utilized as an aid in construing a statute.”].)

Consideration of subsection (b) of Section 94, however, leaves no doubt of the specific, narrow, effect of this provision of SB 98. The specific unambiguous language prohibits “layoffs or releases” of permanent or probationary employees only in nutrition, transportation, or custodial services. There is no need to consider the intent paragraph for an interpretation, particularly where (as here) the intent language is ambiguous and inconsistent.

2. What does “implement” mean? May a school employer continue with a layoff already in progress?

Under SB 98, school employers may not “implement” such a layoff beginning July 1, 2020. Some employers began the layoff process prior to July 1, and ask whether they may continue with the process. We have analyzed the use of the term “implement” in the closest available context and the answer is not conclusive. One argument is that “implement” means “initiate,” and under this analysis any employer who, before July 1, started the layoff process either by board resolution or notice to the affected employees would be entitled to complete the process even if it was not complete until after July 1. In particular, there is a good argument that actual notice of layoff to an employee is sufficient to finalize the action, even where the effective date may (or must) come later. (See *United States v. McIntosh* (9th Cir. 2016) 833 F.3d 1163, 1176 [to implement means to give practical effect to or to ensure of actual fulfillment].)

Another argument is that “implement” means to complete or to give effect. Under this interpretation, only a layoff that became effective prior to July 1, 2020, may proceed for the three classifications, regardless of when the notice was given. There is some judicial support for this interpretation, at least in a decision of the Public Employment Relations Board (PERB), although the case was also not in a layoff context. (See *California School Employees Association & its Chapter 477 v. Rio Hondo Community College District* (2013) PERB Dec. No. 2313-E [notice precedes implementation].) Accordingly we advocate a cautious approach in consideration of the specific facts before a school employer proceeds with, and risks becoming a test case for, any layoff or release in the three classifications that takes effect on or after July 1, 2020.

A letter from Hon. Holly J. Mitchell, Chair of the Senate Committee on Budget and Fiscal Review, states the legislative intent was to preclude classified layoffs in the three protected classifications that have been initiated and noticed prior to July 1, but will take effect between July 1, 2020, and June 30, 2021. We believe this letter is likely to be admissible and given some weight by a court in the event of litigation. Notwithstanding

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the fact that it was written by a single legislator and submitted four days after the legislation was enacted, it appears to have been submitted for publication in the Senate Daily Journal and is written broadly and purports to express the intent of the Legislature as a whole. Courts have admitted and considered such letters as evidence of legislative intent in the face of ambiguity in statutory language, even where they were published after the date of enactment of the legislation and written by a single legislator. (See *In re Marriage of Bouquet* (1976) 16 Cal.3d 583; see also *Town of Atherton v. California High-Speed Rail Authority* (2014) 228 Cal.App.4th 314, 338.)

3. Can a school employer still release probationary nutrition, transportation, and custodial employees for misconduct? Are they now entitled to a hearing?

SB 98 expressly preserves a school employer's right to terminate any classified employee "for cause." It is unclear what this means in the case of a probationary release, which otherwise appears to be prohibited for the three protected classifications. However, the notion of "good cause" tends to confer some greater standard than the traditional at-will treatment of probationary releases.

The case law supports this approach. "If a statute provides that a public employee can be terminated only for good cause, the employee has a constitutional due process interest in continued employment." (*Leventhal v. U.S. Dep't of Labor* (9th Cir. 1985) 766 F.2d 1351, 1355 [citing *Hayward v. Henderson* (9th Cir.1980) 623 F.2d 596, 597].) Public employees who may "only be terminated for good cause" retain a property interest in employment, and are to be afforded a limited pre-termination hearing as well as a post-termination hearing as required by the United States Supreme Court in *Cleveland Bd. of Educ. v. Loudermill* (1985) 470 U.S. 532. (See *Trevino v. Lassen Mun. Util. Dist.* (E.D. Cal. Feb. 13, 2009) 2009 WL 385792, at 8-9.)

Therefore, for the current fiscal year, we advise that probationary releases of classified employees in nutrition, transportation, and food service include a modicum of due process to fulfil the "good cause" standard. This would include an informal pre-termination meeting (similar to a Skelly conference) and perhaps a post termination opportunity to be heard by the employer's board or governing authority.

4. What if a layoff would result in bumping a nutrition, transportation, or custodial employee?

A final question is whether a layoff in another classification, which results in bumping or displacement of an employee in nutrition, transportation, or custodial services, may be permitted. Bumping rights are a creation of contract and collective bargaining, and thus are superseded by contrary statutory provisions. School employers are left to determine whether the language of SB 98, which focuses on protecting employees rather than protecting positions, should be interpreted to allow a non-protected person to bump a person from a protected classification. One argument is that a person who holds seniority in a protected classification should not be barred from taking that position, and this is not contrary to the legislative intent. The position will remain and will be taken over by a person with at least as much experience as the displaced worker. The job is protected.

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The contrary argument is that SB 98 means what it says – no person currently holding one of the three protected positions may be terminated from employment via layoff. Accordingly, the senior employee may not bump because the incumbent *employee* must be protected. But may the senior employee be laid off as a consequence – effectively divesting them of their contractual bumping rights? Perhaps, but, we anticipate labor representatives will assert the correct result is neither of these employees may be laid off. The answer may lie in whether bumping rights are negotiated individually for each layoff. If so, this year’s layoff negotiations must not include bumping into one of the three protected areas and should instead result in terminating the senior employee. However, if bumping rights are written into the contract, the employer would have to rely on a theory that the contract must be abrogated by the legislation for this year.

Each of these scenarios creates a potential test case. The conservative approach is to avoid:

- Layoffs of any certificated employees under Education Code section 44955.5 during the summer of 2020 except for layoffs and releases and reassignments of certificated administrators that will not result in the termination of any non-administrator;
- Layoffs (including bumping) of any classified employee who holds a position in nutrition, transportation, or custodial classifications, where the effective date of layoff is from July 1, 2020, to June 30, 2021; and
- Probationary releases of any classified employee who holds a position in nutrition, transportation, or custodial classifications from July 1, 2020, to June 30, 2021, except under a heightened “good cause” standard.

School employers may continue to:

- Lay off certificated employees, including laying off or releasing and reassigning certificated administrators, at the end of the 2020–2021 year under the usual statutory rules of Education Code sections 44955 and 44951, including the March 15, 2021, notice deadlines;
- Layoff (including bumping) or release classified employees in positions other than nutrition, transportation, or custodial services according to the usual rules;
- Terminate any classified employees for cause, provided that any probationary employees in nutrition, transportation, or custodial services should be afforded minimal due process.
- Use alternative methods of staff reductions such as unpaid leave of absence or voluntary or involuntary transfers and assignments out of class to achieve cost reductions.

School employers are urged to coordinate any actions that touch on these areas with legal counsel.

SECTION 4: INSTRUCTIONAL DAYS AND MINUTES

ADA Apportionment

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For the 2020–2021 school year, LEAs will generally be funded based on ADA from the 2019–2020 fiscal year as reported for both the second and annual period apportionment that include all full school months from July 1, 2019, to February 29, 2020, inclusive, and extended year average ADA attributed to the 2019–2020 school year. (Ed. Code, § 43502(b).) Apportionment for new charter schools that begin instruction in the 2020–2021 school year will be calculated for 2020–2021 based on the school’s enrollment as of Information Day, October 7, 2020, reduced by the applicable statewide average rate of absence.

Daily Instructional Minute Requirements

Although SB 98 makes a number of changes to attendance-related requirements, the number of *daily* instructional minutes needed per grade level to meet minimum school day requirements for the 2020–2021 school year remain the same. (Ed. Code, § 43501.)

For the 2020–2021 school year, daily instructional minutes for in-person instruction shall be based on instructional time scheduled under the immediate supervision and control of a certificated employee of the LEA. (Ed. Code, § 43502(e)(1).) Daily instructional minutes for distance learning shall be based on the time value of assignments as determined, and certified to, by a certificated employee of the LEA. (Ed. Code, § 43502(e)(2).) When the instructional day involves a combination of both in-person instruction and distance learning, daily instructional minutes are based on a combination of the instructional time scheduled for in-person instruction and the time value of assignments provided through distance learning. (Ed. Code, § 43502(e)(3).)

Annual Instructional Day Requirements

SB 98 maintains the annual instructional day requirement, which may be satisfied through in-person instruction or a combination of in-person and distance learning instruction. (Ed. Code, §§ 43502(c), 43504(c).) LEAs that fail to meet the minimum annual instructional day requirements will be penalized through the withholding of apportionment. (Ed. Code, § 43504(i)(1).) For purposes of meeting the annual instructional day requirements, an instructional day is a day in which all pupils are scheduled for the length of the day established by the LEA for in-person instruction or distance learning. A pupil who does not participate in either in-person instruction or distance learning must be documented as absent for the school day, and such documentation must be used for reporting chronic absenteeism rates in the LEA’s local control and accountability plan (“LCAP”). (Ed. Code, § 43504(e).)

For distance learning, LEAs are required to closely monitor and document pupil participation in order to count the pupil’s attendance for purposes of apportionment. Specifically, LEAs must document daily participation for each pupil on each school day that the student participates in distance learning for any portion of the day. (Ed. Code, § 43504(d).) Daily documentation may include evidence of participation in online activities, completion of regular assignments, completion of assessments, and contacts between teachers and pupils or parents/guardians. In addition, LEAs must maintain a weekly engagement record for each pupil who participates in distance learning, which should verify the pupil’s daily participation and track

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assignments. LEAs that fail to meet the minimum documentation requirements will be penalized through the withholding of apportionment. (Ed. Code, § 43504(i)(2).)

SB 98 provides a grace period, in which LEAs will not be subject to penalties for instruction provided before September 1, 2020.

Annual Instructional Minutes Requirements

For the 2020-2021 school year, SB 98 suspends the *annual* instructional minute requirements. (Ed. Code § 43502(d).)

Suspension of Other Provisions

For the 2020-2021 school year, SB 98 suspends the minimum instructional minute requirements for physical education. (Ed. Code, § 43502(d).) Additionally, for the 2020-2021 school year, SB 98 suspends the process whereby an LEA may receive credit for a material decrease in ADA apportionment due to emergency conditions set forth in Education Code section 46392. (Ed. Code, § 43502(f).)

SECTION 5: LEARNING CONTINUITY AND ATTENDANCE PLAN (SEC. 43509)

While LEAs are excused from adopting an LCAP or annual update to the LCAP for 2020-2021, SB 98 adds Education Code section 43509, which imposes a new and substantial reporting obligation, to be completed by September 30, 2020. By this date, LEAs must adopt a learning continuity and attendance plan (“Plan”) that addresses each school within the LEA, using a template to be issued by the Superintendent of Public Instruction by August 1, 2020.

The template shall address, among other things, plans for: in-person instructional offerings, distance learning program, addressing pupil learning loss due to COVID-19, monitoring and supporting mental health and well-being of pupils, pupil engagement and outreach, professional development, provision of resources to pupils and staff to address trauma and other impacts of COVID-19, and school nutrition.

In developing the Plan, an LEA must consult designated stakeholders, including the LEA’s employees, local bargaining units, parents, and pupils, and solicit recommendations and comments from the public. Notably, an LEA must present its Plan to its parent advisory committee and English learner parent advisory committee for review and comment and address any comments in writing. An LEA must then present the Plan at a public hearing during a Board meeting before adopting the Plan at a Board meeting held on a subsequent day. Within five days of adopting the Plan, an LEA must file the Plan to the designated reviewing entity[3], which may review and submit written recommendations for amendments to a Plan by October 30, 2020. An LEA must then consider any recommendations at a public meeting within 15 days of receipt. Once finalized, the LEA must prominently post the Plan to the homepage of the LEA’s website.

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LEAs should develop a plan to timely complete the process and adopt the Plan no later than **September 30, 2020**.

SECTION 6: CHARTER SCHOOLS

SB 98 imposes the following requirements for charter schools:

- A charter school is not required to request a material revision to its charter to offer distance learning pursuant to the provisions of SB 98.
- A charter school that is scheduled to open or add grade levels in 2020-2021 may delay opening/adding grade levels for one year without a request for material revision, but must provide notice of that decision by July 17, 2020.
- New Education Code sections 47653 and 47654 now define “continuing charter schools” and “affected charter schools” that are impacted by AB 1505 and AB 1507’s changes to the geographic location and SBE authorization provisions, and SB 98 includes additional reporting obligations and funding impacts on such schools.
- SB 98 also includes charter-specific provisions that serve to clean up and/or clarify provisions of the Charter Schools Act. Some highlights of these changes include:
 - SBE cannot waive the terms of Education Code section 47604.1, which mandates that charters comply with the Brown Act, Political Reform Act, Government Code Section 1090, and the Public Records Act.
 - In the case of a request for material revision, the new causes for denial added by AB 1505 as Education Code section 47605(c)(7) and (8), operative July 1, 2020 – that the charter school is demonstrably unlikely to serve the interests of the entire community or that the district is not positioned to absorb the fiscal impact of the charter school – are limited only to consideration of the impact of the proposed material revision, not the entire charter school program.
 - The new renewal standards in Education Code sections 47607 and 47607.2 that depend on Dashboard indicators and state-average performance levels for the two consecutive years immediately preceding renewal have been modified for renewals that would depend on such results for 2019-2020 since there will be no such results for that year. In those cases, the renewal standards are now keyed to the results in two of the three years immediately preceding renewal.

SECTION 7: EXTENSION OF AUDIT-RELATED DEADLINES

SB 98 extends the following deadlines related to audits:

- For the 2019-2020 fiscal year, the May 1 deadline for county superintendents of schools and governing boards of LEAs to provide for an audit of all funds under their jurisdictions is extended to July 15, 2020. If an LEA fails to provide for an audit by July 15, 2020, the county office of education having jurisdiction over the LEA must provide for the audit by July 31, 2020. (Ed. Code, § 41020.9(a).)

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- For audit reports for the 2019–2020 fiscal year, the December 15 deadline for LEAs to file an audit report with the county superintendent of schools, the Superintendent of Public Instruction, and the Controller, and if applicable, their chartering authority, is extended to March 31, 2021. (Ed. Code, § 41020.9(b).)
- For audit reports for the 2018–2019 fiscal year, the May 15 deadline for county superintendents of schools to submit the required certification to the Superintendent of Public Instruction and the Controller is extended July 15, 2020. (Ed. Code, § 41020.9(c).)
- For audit reports for the 2019–2020 fiscal year, the May 15 deadline for county superintendents of schools to submit the required certification to the Superintendent of Public Instruction and the Controller is extended to July 15, 2021. (Ed. Code, § 41020.9(b).)
- For audits certified by the Controller between March 1, 2020, and July 15, 2020, the deadline for LEAs to appeal a finding contained in a final audit report is extended from 90 days to within 120 days of the date the LEA receives the final audit report, or within 30 days of receiving a determination of a summary review. (Ed. Code, § 41020.9(d).)
- For audits certified by the Controller between March 1, 2020, and July 15, 2020, the deadline for LEAs to request a summary review is extended from 30 days to within 90 days of the date the LEA receives the final audit report. (Ed. Code, § 41020.9(e).)

SECTION 8: EARLY CHILDHOOD EDUCATION

A number of provisions in SB 98 touch upon issues unique to early childhood education.

- In terms of funding, the budget bill is somewhat of a mixed bag. In addition to the elimination of any funding increases due to COLA for the 2020–2021 school year, allocations to the state’s preschool program for the 2020–2021 school year have been dramatically reduced. For LEAs participating in the state preschool program, over \$110 million in cuts have been imposed; state preschool programs not directly run by LEAs will see over \$31 million in cuts aimed directly at full-day preschool. Separately, the Early Learning and Care Workforce Development Grants Program, which aims to expand the number of qualified early learning and care professionals and increase the educational credentials of existing professionals, is no longer guaranteed to be funded on an ongoing basis; rather, the program is now subject to appropriation from the Legislature. This program had previously provided up to \$150 million in funding annually. As a result of these budget cuts, LEAs will need to plan for how services may be affected, especially staffing patterns.
- On a more positive note, the budget bill mandates that, subject to federal funding, the Department of Education provide up to \$300 million during the 2020–2021 school year to childcare and state preschool program providers, as identified. The bill also requires the Superintendent of Public Instruction to fully-reimburse state-funded childcare and preschool programs for the costs of operating during the 2020–2021 school year, subject to certain conditions, including the provision of distance education in the event facilities are closed by local or state public health orders. This will help alleviate some of the pressures faced by preschool and childcare providers that have been impacted by low enrollment

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numbers as we head into the new school year. Provisions have also been made to reimburse for certain costs accrued due to complications arising from closures due to the pandemic that occurred during the 2019–2020 school year. Additionally, certain qualification requirements for transitional kindergarten teachers have been suspended until August 1, 2021, allowing otherwise non-qualified teachers to continue to serve in such assignments without the threat of losing apportionment.

- Facilities programs have also been impacted. All unused monies previously earmarked by the Superintendent of Public Instruction to incentivize the construction and retrofitting of preschool facilities under the state’s Early Learning and Care Infrastructure Program have been returned to the state’s general fund as of June 30, 2020. Additionally, the Full-Day Kindergarten Facilities Grant Program, which had previously provided grant money for new and retrofitted facilities for full-day kindergarten (including \$300 million for the 2019–2020 fiscal year), is no longer an ongoing guarantee but is now subject to appropriation from the Legislature.
- Finally, unrelated to funding per se, the budget bill includes a dramatic shift in oversight of numerous state programs concerning early child development beginning on July 1, 2021. In accordance with the state’s Master Plan for Early Learning and Care, the Legislature has provided that the administration of nearly two dozen programs currently overseen by the Department of Education and Superintendent of Public Instruction be transitioned to the Department of Social Services. These programs include, but are not limited to, the CalWORKs stages 2 and 3 childcare programs, childcare and development facilities capital outlay, and the Child and Adult Care Food Program. The Department of Social Services will also become the lead agency for administration of numerous state grants designed to improve services to children. This change in oversight may dramatically impact how LEAs operate under state-administered programs, as they shift from an education-focused institution to a social services-focused organization.

SECTION 9: MISCELLANEOUS PROVISIONS

- **California School Dashboard:** The budget bill prohibits the Department of Education from publishing the California School Dashboard for December 2020. As a result, the Department of Education will not be permitted to identify LEAs for technical assistance or intervention during the 2020–2021 school year based on the performance criteria identified on the Dashboard. The Department of Education will still be permitted to publish data, as available, on its DataQuest database.
- **Funding for School Police:** Perhaps in recognition of the growing national movement to “defund police,” the Legislature has added a provision to Education Code section 38000 encouraging LEAs to reexamine their allocation of monies to their own police departments or through contracting with law enforcement to maintain police presence on school campuses. The Legislature has also encouraged LEAs to shift resources from police activities to pupil support services, including mental health services and professional development for school employees on cultural competency and restorative justice, as needed. While the Legislature has declined to prohibit or limit the expenditure of funds on police in the schools, this general statement of intent may be a predictor of future legislative action to do so.

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CONCLUSION:

The issues addressed in this Alert are complex and, in some cases, entirely rework long-standing requirements for schools during the 2020–2021 school year. LEAs are strongly encouraged to discuss these matters with legal counsel prior to taking action on the matters addressed in this Alert.

[1] Note, pursuant to the charter school “megawaiver,” the permissive Education Code does not apply to charter schools.

[2] These layoff provisions do not apply to charter schools.

[3] A school district must submit its Plan to the County Superintendent; a county office of education must submit its Plan to the Superintendent; and a charter School must submit its Plan to the chartering authority and County Superintendent, or only the latter if chartered by the County Board of Education.

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