LIEBERT CASSIDY WHITMORE

# PRIVATE EDUCATION MATTERS

News and developments in education law, employment law, and labor relations for California Independent and Private Schools and Colleges.

April 2021

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## LCW NEWS



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# STUDENTS

## *DISABILITY ACCOMMODATIONS*

### *Student's Failure To Accommodate Claim Against University Fails.*

In August 2013, Daniel Goldberg began taking classes at the Herbert Wertheim College of Medicine at Florida International University (College). In general, the College grades on a scale of 0 to 100, with a score of 80 indicating competency and a score of 75 to 79 indicating marginal competency. Students who receive a score below 75 in a course receive one opportunity to remediate their score and pass the course.

During his first year, Goldberg had to remediate his score in one course and completed the year with an overall score of 82.34. At the beginning of his second year, Goldberg experienced a head injury that required medical treatment. Goldberg told College employees about the injuries, but did not request any accommodations.

Goldberg failed one course during his second year and finished the year with a score of 79.46. Shortly after the end of his second year, Goldberg asked for an accommodation for Attention Deficit Hyperactivity Disorder (ADHD). The College granted him 50% extra time on examinations and a quiet room in which to take those examinations, which would take effect when Goldberg returned to the College for his third year.

Before his third year began, Goldberg submitted a doctor's note requesting 100% extra time on examinations. The College declined this request because there had not been a chance to determine whether the 50% accommodation was effective and because they did not believe the National Board of Medical Examiners would provide Goldberg 100% extra time on his licensure examinations.

During his third year, after mid-term examinations, Goldberg requested an additional accommodation of a white noise machine for all future exams due to tinnitus, which the College granted. Goldberg subsequently failed two courses, and had to appear before the Medical Student Evaluation and Promotion Committee (MSEPC). The MSEPC issued a memorandum finding that Goldberg's "continued lack of insight about the importance of medical knowledge pose[d] a threat to patients," that he was "not able to successfully complete medical school," and that "he be given the opportunity to voluntarily withdraw or, otherwise, that he be involuntarily withdrawn."

Due to Goldberg's disability, he was permitted to continue at the College, and was ultimately given a new accommodation of 100% extra time on examinations. With all accommodations in place, Goldberg failed his OB/GYN clerkship and failed two attempts to take the family medicine examination. The MPSEC recommended for a third time that Goldberg receive the choice between voluntary and involuntary withdrawal.

The Dean of the Medical College involuntarily withdrew Goldberg, finding that "[b]ased upon Mr. Goldberg's historical poor academic performance (specifically excluding his failure in the OB/GYN clerkship) and his failing grade in the Family Medicine clerkship, his academic performance is unacceptable." Goldberg appealed the Dean's decision to the University's Provost, who upheld the involuntarily withdrawal.

Thereafter, Goldberg filed a lawsuit, alleging that the University violated the Rehabilitation Act and Title II of the Americans with Disabilities Act (ADA) by failing to provide reasonable accommodations for his disability. The Rehabilitation Act prohibits any program or activity that receives federal financial assistance from discriminating against an otherwise qualified individual with a disability solely because of her or his disability. Title II of the ADA prohibits public entities from denying the benefits of their services, programs, or activities to a qualified individual with a disability because of his or her disability. To state a claim under the Rehabilitation Act or the ADA, Goldberg had to demonstrate that he (1) is disabled, (2) is a qualified individual, and (3) was subjected to unlawful discrimination because of his disability. The University filed a motion for summary judgment, essentially arguing that Goldberg was unable to make this showing and they were entitled to a judgment in their favor without the need for a trial.

The District Court found in favor of the University and Goldberg appealed. The Appeals Court held that Goldberg was not a qualified individual because his academic performance was not acceptable even after he received his requested accommodations (e.g., 50% extra time with a quiet room, 50% extra time with a quiet room and a sound machine, and then 100% extra time with a quiet room and a sound machine). Further, the Appeals Court noted that Goldberg "did not meet his burden to identify a reasonable accommodation that would have allowed him to meet the standards of the medical school program despite his disability." Goldberg was unable to meet the College's academic standards and continued to fail courses despite having the accommodations he requested in place.

*Goldberg v. Florida International University* (11th Cir., Dec. 29, 2020, No. 20-11462) 2020 WL 7703136.

***NOTE:***

*While this case arose under Title II of the ADA, which applies to public entities, Title III of the ADA applies to places of public accommodation, including nursery, elementary, secondary, undergraduate, or postgraduate private schools, and prohibits discrimination against certain individuals, such as current students and student applicants. based on disability with regard to the full and equal enjoyment of the goods, services, facilities, or accommodations. With regard to reasonable accommodations, the ADA and its regulations envision an interactive process with participation by the school, the student, and, if the student is a minor, the student's parents. The interactive process involves the school working with a disabled student and his or her parents or medical providers to identify reasonable accommodations that provide equitable opportunity to participate in the school's educational programs. The interactive process is ongoing, and if an implemented accommodation is not effective, the parties should revisit the process and explore whether other possible accommodations exist.*

## CONTRACTS WITH MINORS

### *Individual Who Filed Lawsuit Within Eight Months Of Turning 18 Years Old Disaffirmed Arbitration Agreement Entered Into As A Minor Within A Reasonable Time.*

When Sarah Coughenour was 16 years old, she began working for Del Taco, LLC. At that time, she signed initial hiring documents, including an arbitration agreement, which covered employment-related claims. Coughenour contended she was required to sign all initial hiring documents electronically in a kiosk, did not receive a copy of the documents she signed, did not receive the opportunity to read or understand the documents or negotiate their terms, and did not receive any explanation from Del Taco about the documents. Coughenour worked for Del Taco until about four months after she turned 18 years old at which time she quit her job. About four months later, Coughenour filed a lawsuit against Del Taco for wage and hour claims under the Labor Code, sexual harassment, and other claims under the Fair Employment and Housing Act (FEHA).

Del Taco filed a motion to compel arbitration of Coughenour's claims based on the arbitration agreement she signed when she was 16 years old. The trial court denied Del Taco's motion, and Del Taco appealed. On appeal, Del Taco argued that Coughenour ratified the arbitration agreement by working for Del Taco for four months after turning 18 years old, and, alternatively, that Coughenour did not disaffirm the arbitration agreement within a reasonable time after turning 18 years old as required by Family Code section 6710. The appeals court granted review.

Family Code section 6700 generally provides that "a minor may make a contract in the same manner as an adult subject to the power of disaffirmance" in Family Code section 6710. Family Code section 6710 allows individuals to disaffirm contracts they entered into when they were minors either before they turn 18 years old or

within a reasonable time afterwards, unless the contract is one that the law prohibits a minor from disaffirming. Minors may disaffirm a contract "by any act or declaration disclosing an unequivocal intent to repudiate its binding force and effect"; filing a lawsuit is sufficient to disaffirm a contract.

The appeals court upheld the trial court's denial of Del Taco's motion, concluding that Coughenour had disaffirmed the arbitration agreement within a reasonable time after turning 18 years of age, as permitted by Family Code section 6710, by filing the lawsuit against Del Taco. The appeals court explained that filing the lawsuit within eight months of turning 18 years of age was a reasonable time, and the lawsuit itself served as adequate notice that Coughenour disaffirmed the arbitration agreement.

The appeals court found Del Taco's contention that Coughenour ratified the arbitration agreement by working for Del Taco for four months after turning 18 years of age was unpersuasive and not supported by the evidence. The appeals court noted that Del Taco did not provide Coughenour a copy of the hiring documents she signed when she was 16 years old nor did they explain the documents to her, which supported Coughenour's assertion that she was unaware of the significance of the documents she signed. Further, there was no evidence that Del Taco asked Coughenour to reaffirm the arbitration agreement or other hiring documents when she turned 18 years of age. Under these facts, the appeals court noted that finding that Coughenour ratified the arbitration agreement by continuing to work for Del Taco for four months after turning 18 years old was against the important public policy reasons for allowing individuals to disaffirm contracts they entered into while minors, including "to protect a minor against himself and his indiscretions and immaturity."

*Coughenour v. Del Taco, LLC* (2020) 57 Cal.App.5th 740, *review filed* (Dec. 30, 2020).

***NOTE:***

*Schools, universities, and colleges should provide employees, regardless of their age, the opportunity to read, review, and ask questions about contracts employees are required to sign, including employment and arbitration agreements, and should also provide employees with copies of any contracts they sign. For employees who may have signed contracts when they were minors, schools, universities, and colleges should consider having these employees reaffirm these contracts once they turn 18 years of age.*

## *STUDENT DISCIPLINE*

### *New York Court Upholds Student Discipline For Student Code Of Conduct Violations.*

Several students of Syracuse University, a private university located in New York, were pledging for the University's chapter of the Theta Tau fraternity (Chapter). The students participated in video-recorded skits in which they expressed hatred for certain racial groups, ethnicities, and religions and imitated sexual violence against women and disabled persons. The video-recorded skits were posted on the Chapter's private Facebook page.

After a female student received access to the Chapter's private Facebook page, she recorded the videos and shared them with University administrators and its student-run newspaper. The student-run newspaper and local media outlets shared the videos, which roused campus-wide demonstrations and protests.

In response, the University's Chancellor made a statement to the University community that the conduct in the videos was unacceptable and contrary to the University's moral standards. He further stated that the University was conducting a formal investigation to identify the individuals involved and to take legal and disciplinary action against them.

The University conducted an investigation into the pledging and current members of the Chapter and charged the students who participated in the skits with violations of the Code of Student Conduct (Code). After a disciplinary hearing before the University Conduct Board, the students received sanctions of between one and two years, which were affirmed by the University Appeals Board.

Thereafter, the students sought judicial intervention seeking to invalidate the University's disciplinary sanctions, contending that the University failed to adhere substantially to its own rules and guidelines for disciplinary proceedings. The trial court disagreed and upheld the disciplinary sanctions. The students appealed the trial court's decision.

On appeal, the court determined that the University had substantially adhered to its own rules and guidelines for disciplinary proceedings from the time the University provided the students with timely and adequate notice of the charges against them through the disciplinary hearing and the subsequent discipline imposed. The court noted that while the University's Chancellor statement to the University community "risked creating the appearance of predetermination in a pending investigation and disciplinary process," the evidence

indicated that the University otherwise substantially followed its own policies and procedures and the students were not deprived of a fundamentally fair process.

*Doe 1 v. Syracuse University* (N.Y. App. Div. 2020) 188 A.D.3d 1570.

***NOTE:***

*Private schools, universities, and colleges must provide their students a fundamentally fair disciplinary process, and must follow their own policies, procedures, and guidelines for investigations into student misconduct and for student discipline. It is also best practice to refrain from making statements about pending investigations that give the appearance of bias or prejudgment, and student privacy rights and interests must always be considered and protected.*

## TITLE IX

### *Student Alleges Plausible Violation Of Title IX Against University For Failing To Address Alleged Sexual Harassment By Professor.*

Jane Doe was a student at Weber State University from 2009-2014 and 2016-2019. Dr. Todd Baird was a professor in the University's psychology department. In spring 2013, Dr. Baird offered Doe private psychological counseling services, and she accepted his offer. Doe contends that during these counseling sessions, Dr. Baird touched her inappropriately during "therapeutic" and "mindfulness" exercises, disclosed personal information about other patients, invited Doe to swim naked with him, and made other inappropriate comments. Doe further alleged that after Dr. Baird asked Doe whether she orgasmed during a "mindfulness" exercise, Doe confronted him about his inappropriate touching and comments, and Dr. Baird responded by calling her a "slut." Doe ended her counseling sessions with Dr. Baird in spring 2015.

Doe informed a colleague of Dr. Baird's, Dr. Jacklyn Knapp, about his inappropriate behavior. Dr. Knapp told Doe that Dr. Baird had been inappropriate with other students and that she and another University employee, Dr. Dianna Abel, were worried about Dr. Baird's pattern of behavior. Thereafter, Dr. Knapp shared the information she received from Doe with Dr. Abel, who was a member of the University's Strategic Threat Assessment and Response (STAR) team. The STAR team is responsible for identifying and assessing potential safety threats to members of the University community and making recommendations to reduce or eliminate those threats.

After Doe was diagnosed with breast cancer in fall 2015, she resumed counseling sessions with Dr. Baird. Doe ended her counseling sessions in spring 2016 after a series of inappropriate comments and touching by Dr. Baird. In winter 2017, Doe told the University counseling center about Dr. Baird's inappropriate conduct and they told Doe that she had to file a formal complaint with the Title IX office, which they could not do for her. Doe did not want to work with the Title IX office, so she instead reported Dr. Baird's conduct to ecclesiastical authorities in the Church of Jesus Christ of Latter-Day Saints, to the Utah Department of Occupational Licensing (DOPL), and to the Ogden police department.

Doe filed a formal Title IX complaint with the University in winter 2018. The Title IX investigation into Doe's complaint found that Dr. Baird's conduct toward "Doe was more than likely unwelcome and severe," Dr. Baird "was responsible for the ensuing hostile environment Doe experienced," and Dr. Baird's conduct violated University's policies on discrimination and harassment. The Title IX report and the police report collectively referenced several allegations against Dr. Baird by other students and patients.

The University's Provost recommended that Dr. Baird be placed on leave without pay for one year. However, Doe opposed this punishment and filed a formal charge against Dr. Baird with the Faculty Board of Review, which recommended instead that Dr. Baird's employment be terminated.

Doe brought a lawsuit against the University for a violation of Title IX of the Education Amendments of 1972 (Title IX), alleging that Dr. Baird sexually harassed her during private counseling sessions. Title IX prohibits discrimination based on sex, including sexual harassment, by an educational institution receiving federal financial assistance. To properly state a claim under Title IX, Doe must allege that the University (1) had actual knowledge of, and (2) was deliberately indifferent to (3) harassment that was so severe, pervasive and objectively offensive that it (4) deprived Doe of access to the educational benefits or opportunities provided by the University.

To properly allege the first element of the Title IX claim, an appropriate person, who at minimum is an official of the university with authority to take corrective action on behalf of the university to end the discrimination, must have actual knowledge about the harassment. The first element is satisfied if other students made earlier complaints about an employee, which put the university on notice that the employee posed "a substantial risk of abuse." Here, the court inferred that the University had actual knowledge that Dr. Baird harassed Doe and other students in the past. Doe told Dr. Knapp about Dr. Baird's behavior, and Dr. Knapp shared with Doe the

concerns she and Dr. Abel had about Dr. Baird's pattern of inappropriate behavior with other students. Also, Dr. Abel, who was a member of the STAR team and tasked with addressing potential threats on campus, knew about Dr. Baird's inappropriate conduct.

To properly allege the second element of the Title IX claim, the university's response or lack of a response to the harassment must be "clearly unreasonable in light of the known circumstances." A university's response is unreasonable when it, "at a minimum, cause[s] students to undergo harassment or make them liable or vulnerable to it," but a university need not take a particular disciplinary action or provide a particular remedy.

Here, the court determined that it was plausible to infer that the University was deliberately indifferent when it took no action to address Dr. Baird's conduct when Doe reported the conduct to Dr. Knapp in spring 2015 and Dr. Knapp shared the information with Dr. Abel. No action was taken until 2018. Between 2015 and 2018, Doe experienced further harassment from Dr. Baird and so did a second student who also reported the conduct in 2018.

The University did not argue that Doe failed to plead the third or fourth elements properly. The court held that Doe alleged the third or fourth elements properly without further explanation. Therefore, the court held that Doe properly alleged all four elements of her Title IX claim.

*Doe v. Weber State University* (D. Utah, Jan. 5, 2021, No. 1:20-CV-00054-TC) 2021 WL 37646.

***NOTE:***

*Title IX applies to schools, universities, and colleges that accept federal financial assistance. Regardless of whether Title IX applies, schools, universities, and colleges that become aware of alleged misconduct or violations of policies by employees, should take appropriate steps consistent with internal policies and legal obligations to address the allegations promptly and take suitable remedial measures whether or not Title IX applies.*

# EMPLOYEES

## *DISCRIMINATION*

### *Terminated Employee Could Not Establish Claims Under The CFRA Or FEHA.*

In March 2012, Barracuda Networks, Inc. (Barracuda) hired George Choochagi as a Technical Support Manager. In May 2013, Choochagi reported to HR that his former supervisor had made inappropriate sexual comments to him and suggested that he was not "man enough" for his position. Choochagi's former supervisor also told him he was not part of the "boys club."

In January 2014, Choochagi sought medical treatment for severe migraine headaches and eye irritation. Choochagi notified the Director of Sales Engineering and one of his supervisors that he needed to take time off from work. Barracuda gave Choochagi the time off he initially requested. But when Choochagi approached his supervisors about taking additional time off, they seemed "irritated" and attempted to force Choochagi to quit. One month later, a supervisor told Choochagi he "must decide whether he wants to be fired or gracefully quit." Choochagi refused to resign and maintained that he had performed well. Barracuda terminated his employment.

Choochagi initiated a lawsuit against Barracuda alleging, among other things: 1) disability and gender discrimination, retaliation, and failure to prevent discrimination and retaliation under the Fair Employment and Housing Act (FEHA); and 2) interference and retaliation under the California Family Rights Act (CFRA).

Barracuda moved to dismiss the case on the grounds that Choochagi was a poorly performing employee. Barracuda argued that while Choochagi would follow explicit instructions, he could not proactively solve problems or come up with creative solutions. Barracuda also presented evidence that Choochagi's supervisors and team had immediately felt misgivings about his leadership. For example, Choochagi's performance evaluation indicated he "demonstrated poor leadership skills" and had not improved in key areas of concern.

As to medical leave, Barracuda argued that Choochagi never specifically requested it. Barracuda said that Choochagi did inform his supervisors he was experiencing headaches and needed to follow up with his doctors. According to Barracuda, Choochagi only mentioned taking time off in one email and ultimately took the leave as requested.

Finally, Barracuda argued that it properly investigated Choochagi's complaint about his supervisor. Even though the supervisor denied saying anything inappropriate, Barracuda reminded the supervisor of its policies and instructed him not to have any type of sexually explicit communication in the workplace.

The trial court entered judgment for Barracuda on all but two of Choochagi's claims. The case proceeded to trial on the remaining claims, including Choochagi's disability

discrimination claim. The jury found Barracuda had no liability. After the trial court denied Choochagi's request for a new trial, Choochagi appealed.

As relevant here, the California Court of Appeal considered the merits of Choochagi's claims regarding CFRA interference, CFRA retaliation, FEHA retaliation, and FEHA failure to prevent discrimination and retaliation. With respect to Choochagi's CFRA claims, the Court of Appeal determined that the trial court properly found for Barracuda. To establish CFRA interference, an employee must prove: 1) he is entitled to CFRA leave rights; and 2) the employer interfered with those rights. Similarly, to establish a cause of action for CFRA retaliation, the employee must prove: 1) the employer was a covered employer; 2) he was eligible for CFRA leave; 3) he exercised his right to take qualifying leave; and 4) he suffered an adverse employment action because he exercised the right to take CFRA leave.

The court noted that Choochagi could not establish either of these claims because he failed to present evidence that he asked for and was denied leave. While Choochagi mentioned his headaches and sent a single email requesting time off, these facts would not have alerted Barracuda to the CFRA criteria that an employee was requesting leave to take care of his own serious health condition that made him unable to perform his job functions. Further, because the court found Choochagi did not request leave, there could be no adverse employment action taken because of a request for leave. Accordingly, the court found the trial court properly entered judgment for Barracuda on these claims.

The Court of Appeal also concluded the trial court properly decided Choochagi's FEHA retaliation and failure to prevent claims. First, Choochagi could not establish FEHA retaliation because the individuals responsible for terminating his employment were not aware of the HR complaint Choochagi had made against his former supervisor. Thus, Choochagi could not establish the requisite causal link between his protected activity and termination. Second, Choochagi could not establish a claim for failure to prevent discrimination and retaliation since Barracuda submitted evidence it had anti-discrimination policies and procedures in place and that its HR department directed an immediate investigation into Choochagi's complaint.

The Court of Appeal concluded Choochagi's evidentiary objections were without merit.

*Choochagi v. Barracuda Networks, Inc.* (2020) 60 Cal. App.5th 444.

***NOTE:***

*This case demonstrates the importance of: 1) having an up-to-date anti-discrimination policy; 2) conducting immediate investigations into complaints of discrimination, harassment, or retaliation and 3) maintaining good documentation. An employer's swift response to an employee's complaint may help to reduce liability.*

## *Teacher With Electromagnetic Hypersensitivity Can Pursue Only Her Reasonable Accommodation Claim.*

Laurie Brown has been a teacher employed by the Los Angeles Unified School District (LAUSD) since 1989. In 2015, LAUSD installed an updated Wi-Fi system at the school where Brown taught that would accommodate the iPads, Chromebooks, and tablets LAUSD intended to provide its students. During public comment before LAUSD installed the new system, an environmental scientist and expert on electromagnetic frequency stated she could not support the installer's conclusions about the safety of the new Wi-Fi system. LAUSD's medical personnel also indicated they were uncertain about any long-term effects the Wi-Fi system may have on students and staff, but LAUSD promised to continue actively monitoring any developments.

Soon after LAUSD installed the new system, Brown had chronic pain, headaches, nausea, itching, ear issues, and heart palpitations. Brown thought the new Wi-Fi caused her symptoms. Brown reported her symptoms, and her school granted her leave from work "due to these symptoms, on an intermittent basis, for several days thereafter." After Brown returned to work the following week, she immediately fell ill again. Brown's doctor subsequently diagnosed her with electromagnetic hypersensitivity, which is also referred to as "microwave sickness."

Brown then requested accommodations. LAUSD held its first interactive process meeting with Brown on July 15, 2015. Following the meeting, LAUSD agreed to disconnect the Wi-Fi access points in Brown's assigned classroom and in an adjacent classroom. LAUSD also agreed to use a hardwired computer lab with Wi-Fi turned off. However, Brown alleged that LAUSD's accommodations were not reasonable and did not work. For example, while LAUSD disconnected the routers in Brown's classroom and one adjoining classroom, other classrooms nearby continued to have their routers active. Another one of Brown's physicians subsequently placed her on a medical leave of absence for three months.

While on leave, Brown filed a second request for accommodation. Brown requested that LAUSD further reduce her exposure using paints and other forms of

shielding materials to block Wi-Fi and radio frequencies in her classroom. After another interactive process meeting, LAUSD denied Brown's second request for accommodation, relying on testing the installer performed that indicated the system was safe. Brown appealed the denial, and LAUSD agreed to provide a "neutral expert EMF inspection for further microwave measurements." However, the parties could not reach an agreement about the expert to use. During this time, a third physician extended Brown's medical leave through June 2016.

Brown expressed frustration that LAUSD was retracting an accommodation it had promised and claimed she could not return to work without being overcome with crippling pain. She also alleged she was forced to go out on a disability leave, which exhausted her approximately 800 hours of accrued paid leaves. Brown then sued LAUSD, alleging it discriminated against her based on her electromagnetic hypersensitivity, failed to accommodate her condition, and retaliated against her in violation of the Fair Employment and Housing Act (FEHA). The trial court dismissed Brown's lawsuit finding she failed to plead sufficient facts to support each of her claims, and Brown appealed.

On appeal, the Court of Appeal concluded that Brown could not establish her claims for disability discrimination or retaliation. For both discrimination and retaliation claims under the FEHA, an employee must show that the employee took an adverse employment action because of the employee's membership in a protected classification or protected activity. However, the court concluded Brown could not make this showing. For Brown's disability discrimination claim, the court noted she could not establish an "adverse employment action" because she merely alleged that LAUSD would not reasonably accommodate her disability. The court reasoned Brown was improperly conflating an "adverse employment action" with a failure to accommodate claim. Further, the court found that Brown did not show any facts from which to infer any discriminatory intent. This is because Brown did not have any facts to suggest that LAUSD: 1) clung to any belief that the campus was safe; or 2) refused to accommodate her because it was biased against her as a person with a disability.

However, the Court of Appeal concluded that Brown adequately alleged facts sufficient to support a claim for failure to provide reasonable accommodation. Brown alleged that LAUSD did agree on a reasonable accommodation (to hire an independent consultant to determine where on-campus exposure to the electromagnetic frequencies was most minimal) and then changed its mind, deciding the campus was "safe." Since these allegations were sufficient to support a claim for failure to accommodate, the court reversed the trial court's decision regarding this claim only.

*Brown v. Los Angeles Unified School District* (2021) 60 Cal. App.5th 1092.

***NOTE:***

*A critical part of the FEHA reasonable accommodation and interactive process is that the employer must keep the process moving and do what they say they will do. Further, the interactive process should be documented, including the potential accommodations identified and the analysis supporting which accommodations are deemed reasonable and which accommodations are not.*

# BUSINESS & FACILITIES

## *COVID-19 SCHOOL REQUIREMENTS*

### *CDPH Modifies Physical Distance Requirements For Schools.*

On March 20, 2021, the California Department of Public Health (CDPH) updated the COVID-19 and Reopening In-Person Instruction Framework & Public Health Guidance for K-12 Schools in California, 2020-2021 School Year, to modify some of the physical distance requirements between students in the classroom.

Prior to the updates, the CDPH required, at least 6 feet of distance between student chairs "except where 6 feet of distance is not possible after a good-faith effort has been made", and "[u]nder no circumstances should distance between student chairs be less than 4 feet." The CDPH now states the following:

- Maximize space between seating and desks… Maintaining a minimum of 3 feet between student chairs is strongly recommended. A range of physical distancing recommendations have been made nationally and internationally, from 3 feet to 6 feet. Considerations for schools implementing a shorter physical distancing policy between students: focus on high mask adherence—if there are doubts about mask adherence, consider more robust physical distancing practices; consider enhancing other mitigation layers, such as stable groups or ventilation; maintain 6 feet of distancing as much as possible during times when students or staff are not masked (e.g., due to eating or drinking).

The new CDPH updates include the requirement that 6 feet of distance is maintained as much as possible between students when eating meals indoors. The CDPH still strongly recommends a distance of more than 6 feet during singing and band practice, which is only permitted to be held outdoors at this time, and requires 6 feet of distance between staff and faculty desks and students and between staff on campus.

The CDPH updates were likely triggered by updates made by the Centers for Disease Control and Prevention ("CDC") on March 19, 2021, to its Operational Strategy for K-12 Schools through Phased Prevention and Operating Schools during COVID-19: CDC's Considerations, recommending at least 3 feet of distance between students in the classroom and clarifying when a distance greater than 3 feet is recommended. The CDC now recommends that elementary school students be at least 3 feet apart in the classroom. For middle school and high schools, the CDC now recommends that students be at least 3 feet apart in the classroom in areas of low, moderate, or substantial community transmission, and 6 feet apart in areas of high community transmission if cohorting is not possible.

The CDC further recommends for schools that maintain less than 6 feet of distance between students in the classroom, to use cohorting and maintain at least 6 feet between cohorts. A distance of 6 feet remains recommended between adults and between adults and students, when face coverings cannot be used (e.g., while eating), when in common areas, and during activities when increased exhalation occurs, such as singing, shouting, band, or sports and exercise (it is recommended that these activities are held outdoors or in large, well-ventilated spaces).

California schools remain obligated to comply with any applicable guidance from state or local authorities, including the CDPH, Cal/OSHA, California Department of Social Services, or local public health department. Schools are not legally permitted to follow less restrictive or contradictory guidance from the CDC in lieu of following state or local requirements, laws, regulations, or orders.

### *CDC Releases New Guidance For Schools And Child Care Providers.*

On March 8, 2021, the Centers for Disease Control and Prevention (CDC) issued a new Toolkit to provide educational leaders at schools and in child care programs with ideas and materials to communicate COVID-19 vaccine information to staff. The Toolkit contains resources, such as:

- Tips and strategies
- PowerPoint presentations
- Information about the benefits, safety, side effects, and effectiveness of the COVID-19 vaccine and printable fact sheets
- Printable COVID-19 vaccine stickers
- Template letters and emails
- Vaccine promotion posters and infographics
- Sample social media messages

Further, on March 12, 2021, the CDC updated its Guidance for Operating Child Care Programs during COVID-19. Some of the updates include guidance for mask use, ventilation and water systems, children with special needs and disabilities, cohorting and staggering strategies, communal spaces, food service, playgrounds and play space, recognizing signs and symptoms of COVID-19 and screening, and protecting people at higher risk.

When reviewing CDC guidance, California schools and child care providers should keep in mind that any applicable state or local requirements, laws, regulations, or orders, such as that from the CDPH, Cal/OSHA, California Department of Social Services, or local public health department, are controlling and take precedence over guidance from the CDC. Accordingly, schools and child care providers are not legally permitted to follow less restrictive or contradictory guidance from the CDC in lieu of following state or local requirements, laws, regulations, or orders.

## EANS PROGRAM

### *U.S. Dept. of Education Issues Revised EANS FAQs.*

On March 19, 2021, the U.S. Department of Education issued revised Frequently Asked Questions Emergency Assistance to Non-Public Schools (EANS) Program for the EANS funds authorized by the Coronavirus Response and Relief Supplemental Appropriations Act, 2021 (CRRSA Act). The Frequently Asked Questions provides information on a number of topics, including eligibility to receive EANS funds and allowable uses for EANS funds. Importantly, the Frequently Asked Questions makes clear that a non-public school whose students and teachers receive services or assistance under the EANS program is not a "recipient of Federal financial assistance" by virtue of the receipt of EANS services or assistance. Therefore, Federal laws applicable to recipients of Federal financial assistance would not apply to a non-public school whose students and teachers receive services or assistance under the EANS program, unless the non-public school accepts other funds that do make the school a "recipient of Federal financial assistance."

Governor Newsom submitted a signed certification and agreement for EANS funding for California on February 22, 2021. For information about applying for EANS funding, see the April 1, 2021 LCW Special Bulletin, CA Dept. of Education Releases EANS Program Reference Application; Portal To Submit Application Opens April 12, 2021. Schools may find additional information about EANS funding on the CDE website at https://www.cde.ca.gov/fg/cr/eans.asp.

## *SUMMER CAMPS*

### *Checklists For Schools With Summer Camp Programs.*

With the school year winding down, many schools are in the process of getting ready to open or run summer camp programs at their facilities. Below are checklists of issues to consider when running these summer camp programs.

*The following checklists are general advice only. Please consult legal counsel should you have specific questions about these issues.*

1. *For Summer Camps Operated by a Camp Operator*

□ Clear communication to parents of school students that the school does not operate the summer camp

□ School's contract with the Camp Operator includes the following essential provisions:

- □ Clear description of premises
- □ Description of lease by school of any equipment or furniture
- □ Indemnification provision
- □ Termination for convenience
- □ Criminal background checks and tuberculosis risk assessments by Camp Operator of camp staff
- □ Camp Operator compliance with all applicable local, state, and federal laws, regulations, and orders, including those related to COVID-19
- □ Camp Operator compliance with all applicable school COVID-19 policies, protocols, and procedures
- □ Payment terms
- □ Use restrictions and rules
- □ Insurance by Camp Operator naming school as additional insured:
  - o Third Party policies to be primary
  - o School's insurance to be non-contributory
  - o Third Party policies to provide endorsement waiving rights of subrogation against the school
- □ Provisions addressing camp's use of school's name/logo
- □ Marketing/Advertising of camp
- □ Provision that Camp employees are not jointly employed by the school. Joint employment is determined when:
  - o The school directly or indirectly exercises control over wages, hours, or working conditions of the camp's staff. This includes setting rates and negotiating summer camp staff's rates of pay, authority to hire and fire, and supervising camp staff.
  - o Provision ensuring that Camp Operator does not hire independent contractors.

2. *For Summer Camps Operated by the School*

□ Use individualized waivers and releases for COVID-19 and activities posing a heightened risk of injury, including hiking, horseback riding, swimming, and off campus field trips (e.g., trips to the beach)

□ Obtain essential forms such as emergency contacts, authorization for medical treatment in emergencies, and authorization to administer medications

□ Independent Contractors – confirm classification as independent contractor is appropriate. Factors that must be met are:

- □ The worker is free from the control and direction of the hirer in connection with the performance of the work, both under the contract for the performance of such work and in fact;
- □ The worker performs work that is outside the usual course of the hiring entity's business; and
- □ The worker is customarily engaged in an independently established trade, occupation, or business of the same nature as the work performed for the hiring entity

□ Determine whether California and Federal laws relating to organized camps may apply

□ Camp employees must:

- □ Pass criminal background checks; and
- □ Complete tuberculosis risk assessments before they begin work

□ Work permits for employees who are minors

□ Volunteers and interns – confirm worker is categorized appropriately. A few key rules:

- □ Employees may not volunteer for services similar to those they are paid to perform during the school year
- □ Volunteers may only receive nominal compensation
- □ Volunteers should sign volunteer agreements clearly stating they have no expectation to be compensated for services

□ Evaluate wage and hour compliance for camp staff (i.e., if the camp is overnight, determine whether camp staff need to be paid for on call time when they are sleeping

□ Mandated Reporter training for camp staff

## BENEFITS CORNER

### *IRS Provides Cafeteria Plan Relief Related To COVID-19.*

On February 18, 2021, the Internal Revenue Service (IRS) issued Notice 2021-15 (Notice), providing additional flexibility to employers who offer health flexible spending arrangements (Health FSAs) or dependent care assistance programs (DCAPs aka Dependent Care FSAs).

A Health FSA and DCAP offered under a Section 125 cafeteria plan (Section 125) allow employees to set aside pre-tax wages to reimburse qualified medical or dependent care expenses, respectively. As a result of the COVID-19 public health emergency, many employees have unused amounts in these arrangements left over at the end of the plan year. Typically, funds remaining at the end of the plan year are forfeited under the "use it or lose it" rules applicable to Health FSAs and DCAPs.

However, the Notice allows employers to amend existing Section 125 plans to provide additional flexibility during the 2020 and 2021 plan years for employees to make use of these funds.

Specifically, the Notice addresses the following issues: (1) the temporary special rules relating to Health FSAs and DCAPs; (2) mid-year election changes related to employer-sponsored health coverage; and (3) plan amendments necessary to provide for the specific forms of relief described herein.

The Notice also references the expansion of reimbursements for over-the-counter drugs (OTCs) without prescriptions and menstrual care products.

A. *Temporary Special Rules Related to Health FSAs and DCAPs*

Employers have discretionary authority to amend their Section 125 plan document in order to provide certain relief to employees, which may include the following:

1. Either extend the applicable grace period (grace period relief) or expand the carryover amount (carryover relief) in order to allow employees to carryover some or all unused FSA and DCAP amounts from a plan year ending in 2020 or 2021 to the immediate next plan year ;

2. Allow employees who cease participation in a plan during plan year to spend down unused FSAs and DCAPs benefits after ceasing their participation ;

3. Expand DCAP coverage to dependents who are 13 years of age, rather than 12 years of age (DCAP age relief), and to establish a special carryover rule for unexpended funds related to such dependent care to the following plan year ; and

4. Allow employees to make certain mid-year election changes for FSAs and DCAPs for plan years ending in 2021, including revoking elections, increasing or decreasing salary reduction contributions, and making new elections, regardless of whether the basis for such election change satisfies the generally applicable IRS election change requirements (FSA election relief) and allow employees to use amounts contributed to a FSA or DCAP after a revised election for qualified expenses incurred prior to the election change.

B. *Mid-Year Elections to Change to Employer-Sponsored Health, Dental and/or Vision Coverage*

An employer also has discretionary authority to allow employees to make mid-year election changes to their coverage under employer-sponsored health, dental and vision plans (Health coverage election relief).

If the employer amends its Section 125 plan to allow for such mid-year elections, employees may change their coverage, according to the plan, as follows: (1) to elect coverage under an employer-sponsored plan if the employee was not previously covered; (2) to revoke an existing election and elect a different employer-sponsored plan; or (3) to revoke existing employer-sponsored coverage entirely, so long as the employee revoking such coverage attests in writing that they are enrolled in or will immediately enroll in another health plan not sponsored by the employer. Relatedly, the Notice provides sample attestation language that employers may use and rely upon when an employee is revoking their employer-sponsored coverage entirely.

Employers who offer this flexibility may want to consider limiting the number of election changes an employee may make or limiting the circumstances under which an employee may make an election change, such as to only allow a change if it would improve the employee's coverage.

C. *Section 125 Plan Amendments*

In order to take advantage of the flexibility offered by the IRS Notice, an employer must adopt an amendment to its Section 125 Plan. In order for such plan amendments to provide relief retroactively, the employer must adopt the amendment no later than the last day of the first calendar year beginning after the end of the plan year in which the amendment is effective and the employer must operate such plan in accordance with the amendment at all times beginning on the effective date of such amendments.

This generally means that any Section 125 Plan amendment should be adopted by December 31, 2021 in order for the flexibility to apply retroactively to 2020 and 2021. Employers with a non-calendar plan year may have additional time.

D. *Expansion of Reimbursable Expenses*

Lastly, FSAs and Health Reimbursement Accounts (HRAs) can now reimburse participants for menstrual care products and over-the-counter drugs (OTCs) as qualified medical care expenses if incurred after December 31, 2019.

Employers should ensure that the definition of qualified medical care expenses in their 125 Plan includes this expanded definition.

## LCW BEST PRACTICES TIMELINE

Each month, LCW presents a monthly timeline of best practices for private and independent schools. The timeline runs from the fall semester through the end of summer break. LCW encourages schools to use the timeline as a guideline throughout the school year.

**FEBRUARY- EARLY MARCH**

□ Issue enrollment/tuition agreements for the following school year.

□ Review field trip forms and agreements for any spring/summer field trips.

□ Tax documents must be filed if School conducts raffles:

- Schools must require winners of prizes to complete a Form W-9 for all prizes $600 and above. The School must also complete Form W-2G and provide it to the recipient at the event. The School should provide the recipient of the prize copies B, C, and 2 of Form W-2G; the School retains the rest of the copies. The School must then submit Copy A of Form W2-G and Form 1096 to the IRS by February 28th of the year after the raffle prize is awarded.

□ Planning for Spring Fundraising Event:

□ Summer Program:

- Consider whether summer program will be offered by the school and if so, identify the nature of the program and anticipated staffing and other requirements.
- Review, revise, and update summer program enrollment agreements based on changes to the law and best practice recommendations.

**MARCH- END OF APRIL**

□ The budget for next school year should be approved by the Board.

□ Issue contracts to existing staff for the next school year.

□ Issue letters to current staff who the School is not inviting to come back the following year.

□ Assess vacancies in relation to enrollment.

□ Post job announcements and conduct recruiting.

- Resumes should be carefully screened to ensure that applicant has necessary core skills and criminal, background and credit checks should be done, along with multiple reference checks.

□ Summer Program:

- Advise staff of summer program and opportunity to apply to work in the summer, and that hiring decisions will be made after final enrollment numbers are determined in the end of May.
- Distribute information on summer program to parents and set deadline for registration by end of April.
- Enter into Facilities Use Agreement for Summer Program, if not operating summer program

□ Transportation Agreements:

- Assess transportation needs for summer/next year
- Update/renew relevant contracts

**MAY**

□ Complete hiring of new employees for next school year.

□ Complete hiring for any summer programs.

□ If service agreements expire at the end of the school year, review service agreements to determine whether to change service providers (e.g., janitorial services if applicable).

- Employees of a contracted entity are required to be fingerprinted pursuant to Education Code sections 33192, if they provide the following services:
  - School and classroom janitorial.
  - School site administrative.
  - School site grounds and landscape maintenance.
  - Pupil transportation.
  - School site food-related.
- A private school contracting with an entity for construction, reconstruction, rehabilitation, or repair of a school facilities where the employees of the entity will have contact, other than limited contact, with pupils, must ensure one of the following:
  - That there is a physical barrier at the worksite to limit contact with pupils.
  - That there is continual supervision and monitoring of all employees of that entity, which may include either:
    - Surveillance of employees of the entity by School personnel; or
    - Supervision by an employee of the entity who the Department of Justice has ascertained has not been convicted of a violent or serious felony (which may be done by fingerprinting pursuant to Education Code section 33192). (See Education Code section 33193).

□ If conducting end of school year fundraising through raffles:

- Qualified tax-exempt organizations, including nonprofit educational organizations, may conduct raffles under Penal Code section 320.5.
- In order to comply with Penal Code section 320.5, raffles must meet all of the following requirements
  - Each ticket must be sold with a detachable coupon or stub, and both the ticket and its associated coupon must be marked with a unique and matching identifier.
  - Winners of the prizes must be determined by draw from among the coupons or stubs. The draw must be conducted in California under the supervision of a natural person who is 18 years of age or older
  - At least 90 percent of the gross receipts generated from the sale of raffle tickets for any given draw must be used by to benefit the school or provide support for beneficial or charitable purposes.

□ Auctions:

- The school must charge sales or use tax on merchandise or goods donated by a donor who paid sales or use tax at time of purchase.

  ▪ Donations of gift cards, gift certificates, services, or cash donations are not subject to sales tax since there is not an exchange of merchandise or goods.

  ▪ Items withdrawn from a seller's inventory and donated directly to nonprofit schools located in California are not subject to use tax.

  - Ex: If a business donates to the school for the auction items from its inventory that it sells directly, the school does not have to charge sales or use taxes. However, if a parent goes out and purchases items to donate to an auction (unless those items are gift certificates, gift cards, or services), the school will need to charge sales or use taxes on those items.

## CONSORTIUM CALL OF THE MONTH

*Members of Liebert Cassidy Whitmore's consortiums are able to speak directly to an LCW attorney free of charge to answer direct questions not requiring in-depth research, document review, written opinions or ongoing legal matters. Consortium calls run the full gamut of topics, from leaves of absence to employment applications, student concerns to disability accommodations, construction and facilities issues and more. Each month, we will feature a Consortium Call of the Month in our newsletter, describing an interesting call and how the issue was resolved. All identifiable details will be changed or omitted.*

**ISSUE:** The Business Officer for an independent school called an LCW attorney and explained that due to the uncertainty of clubs, sports, and other activities because of COVID-19, the School is considering creating separate stipend contracts for employees who receive stipends for performing these types of additional duties. The Business Officer explained that all employees would execute an employment agreement and employees who receive a stipend would execute a separate stipend agreement. The Business Officer asked whether this was possible.

**RESPONSE:** The LCW attorney explained that creating separate employment and stipend agreements is reasonable and appropriate. A separate stipend agreement would govern the duties associated with receipt of the stipend and make clear that if those duties are no longer needed due to shut down of the school or just the club, sport, and other activity, the employee is no longer entitled to receive the stipend. In that event, the stipend would be prorated and paid out to the employee. The LCW attorney also reminded the Business Officer that all non-exempt employees who perform these types of additional duties, must be paid at least minimum wage for all hours worked as well as any applicable overtime.

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## Firm Publications

To view these articles and the most recent attorney-authored articles, please visit: **www.lcwlegal.com/news.**

Partner Peter Brown was quoted in the February 8, 2021 *Daily Journal* article "Third attempt to let legislative staff unionize has more support," which highlighted the stakes of AB 314 and its potential effects on unionized workforces.

Partner Elizabeth Tom Arce and Associate Kaylee Feick penned "COVID-19, Social Justice and Their Impact on Litigation for Years to Come" for the January-February 2021 issue of *California Special Districts*, Volume 16, Issue I. The article spotlights the impact the COVID-19 pandemic and social justice movement will have on litigation in 2021 and beyond; the piece further cautions special districts to brace for increased legal claims.

Senior Counsel David Urban's op-ed column "The next landmark case on student free speech" was published in the March 9 issue of the *Daily Journal*. The piece illuminates a U.S. Supreme Court case that questions whether the First Amendment prohibits public school officials from regulating off-campus speech.

Senior Counsel Arti Bhimani was mentioned in the *Daily Journal's* March 1 "Joining The Firm" section.

Law.com recently mentioned the promotion of litigator Jenny-Anne Flores to the role of LCW litigation manager in the Los Angeles office.

Liebert Cassidy Whitmore was recently ranked #57 in the *Los Angeles Business Journal's* Annual List of Law Firms.

## LCW Webinar

## Five Things California Private Schools Need to Know About: Layoffs and Furloughs

**TUESDAY, APRIL 6, 2021 | 8:30 AM**

**REGISTER TODAY!**

The COVID-19 pandemic has forced private schools to confront countless challenges, including financial uncertainty and a shift in campus needs. With this unfortunate reality in mind, your school may be considering laying off or furloughing certain positions. But what is even the difference between a layoff and a furlough? What documentation will dictate which positions you can or should consider for layoffs or furloughs, and what legal issues should you consider when making these decisions? Can the school ask employees to sign anything before or after a layoff that will minimize potential legal risks? This webinar will address five key topics to help prepare privWate schools for the issues surrounding layoffs and furloughs. We know that this is a difficult topic that involves tough decisions. We are here to help.

**PRESENTED BY: Grace Chan**

MANAGEMENT TRAINING WORKSHOPS

## Firm Activities

**Consortium Trainings**

**Apr. 7** **"Emerging Legal Issues"**
Builders of Jewish Education Consortium | Webinar | Michael Blacher

**Apr. 13** **"Crisis Management: How to Approach Chaos in an Organized and Thoughtful Manner"**
ACSI Consortium | Webinar | Grace Chan

**Apr. 20** **"Planning and Preparing for School Travel Amid COVID-19"**
Golden State Independent School Consortium | Webinar | Julie L. Strom

**Apr. 27** **"Emerging Legal Issues"**
CAIS Consortium | Webinar | Michael Blacher

**Customized Training**

**Our customized training programs can help improve workplace performance and reduce exposure to liability and costly litigation. For more information, please visit www.lcwlegal.com/events-and-training.**

**May 21** **"Performance Evaluations"**
San Diego French-American School | Webinar | Judith S. Islas

**Seminars/Webinars**

**For more information and to register, please visit www.lcwlegal.com/events-and-training.**

**Apr. 6** **"Five Things California Private Schools Need to Know About: Layoffs and Furloughs"**
Liebert Cassidy Whitmore | Webinar | Grace Chan

**Apr. 30** **"Train the Trainer Refresher: Harassment Prevention"**
Liebert Cassidy Whitmore | Webinar | Christopher S. Frederick

**Speaking Engagements**

**Apr. 27** **"Legal Issues for California Business Officers"**
California Independent Schools Business Officers Association (Cal-ISBOA) Annual Conference | Webinar | Michael Blacher

**May 3** **"Leaves in the Age of COVID and Beyond"**
Cal-ISBOA Pre-Conference Human Resources Virtual Workshop | Webinar | Grace Chan



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