



association of california
school administrators



Fagen Friedman & Fulfroft LLP

AB/SB 86 Frequently Asked Questions

ACSA partnered with Fagen, Friedman & Fulfroft (F3Law) to answer the most common questions we have received from ACSA members related to AB/SB 86. Unfortunately, some of the questions we have received cannot be answered until the release of the state's audit guide. ACSA will continue to update you on any new information we receive. A special thank you to F3Law for the time and effort they put into creating this FAQ document.

► Requirements for In-person instruction

Q: What is the definition of “in-person instruction?”

A: In-person instruction is “instruction under the immediate physical supervision and control of a certificated employee of the local educational agency while engaged in educational activities required of the pupil.” (Education Code section 43520.5.) It includes hybrid models offering fewer than five days per week of in-person instruction, only if the LEA offers in-person instruction “to the greatest extent possible.”

Q: What does one grade above elementary mean?

A: Elementary is generally grades TK-5 (grade 6 will be included if designated as elementary in your LEA). One grade above means be any one of grades 7-12 (and grade 6 if designated as secondary in your LEA).

Q: How does this apply to high school districts? Do cohorts count?

A: Eligibility for reopening incentive funding available under AB/SB 86 requires high school districts in the Purple tier to offer in-person instruction for all students eligible for special education as well as all prioritized student groups (students at risk for abuse, neglect, or exploitation; homeless; foster youth; English learners; and students without access to a computing device/software/high-speed internet necessary to participate in online instruction; and disengaged students), subject to capacity limitations, if any, consistent with the CDPH Guidance Related to Cohorts. High school districts in the Red, Orange, and Yellow tiers must provide optional in-person instruction to all students eligible for special education and those in the prioritized groups, as well as all students in at least one full secondary grade level.

Q: Is transitional kindergarten excluded from AB/SB 86?

A: No. Under the COVID-19 industry sector guidance for schools and school-based programs, all references to kindergarten expressly include transitional kindergarten.

▶ Board Approval

Q: Does AB/SB 86 require Board approval of our plans?

A: *The only plan expressly requiring governing board approval under AB/SB 86 is the Expanded Learning Opportunities Grant program expenditure plan. (Education Code section 43522(e).) Nothing in the CalOSHA Emergency Temporary Standards or the COVID-19 industry sector guidance for schools and school-based programs specifically mandates formal governing board action to approve/adopt any portion of an LEA's COVID-19 Safety Plan (CSP). That said, local educational agencies should refer to locally established policies and procedures, including those governing board-delegated duties and responsibilities, when considering how development and implementation of these documents should be effectuated. Furthermore, a board-adopted plan to provide in-person instruction is one of the requirements needed for LEAs to be exempt from complying with the testing cadences set forth in the COVID-19 industry sector guidance for schools and school-based programs. See page 5 for further details.*

Q: Does LPH need to approve my COVID-19 Safety Plan?

A: *If your county is in the Red, Orange, or Yellow tier, you do not need to submit your CSP to your LPH department prior to reopening. If your LEA was offering in-person instruction prior to March 5, 2021 and regardless of your county's current tier assignment, you do not need to submit or resubmit your CSP to your LPH. All other LEAs must complete and post their CSP to their website homepage and submit a copy to their LPH and the Safe Schools for All Team prior to reopening. Those agencies have seven (7) business days to notify the LEA of any deficiencies in the plan that must be addressed prior to reopening.*

▶ Opening Timelines

Q: When metrics change, do we still have to wait 14 days to open?

A: *No. Under the updated COVID-19 industry sector guidance for schools and school-based programs, schools are eligible to reopen the next day following announcement by the State that the local county has moved from the Purple into the Red tier. For reopening at the elementary grades while the local county remains in the Purple tier, schools are eligible to reopen (with conditions) the next day following State posting of an adjusted case rate for the county of 25 or fewer cases per 100,000 population per day.*

Q: Are LEAs expected to ramp up to serve the required students on the day they progress to less restrictive Blueprint tier? (going from purple to red, etc.)

A: *Yes. In order to qualify for apportionment based on providing in-person instruction, an LEA must continuously provide optional in-person instruction from the date it commences offering in-person instruction, adding additional grade levels as soon as authorized by the COVID-19 industry sector guidance for schools and school-based programs, through the end of the scheduled 2020-2021 school year.*



► Penalties

Q: What is the penalty if my LEA doesn't offer in-person instruction until after April 1st?

A: LEAs who do not provide optional in-person instruction (regardless of tier assignment) for all eligible students as authorized by the COVID-19 industry sector guidance for schools and school-based programs, shall have their total available apportionment reduced by 1% for each school day that they fail to open for in-person instruction between April 1 and May 15, 2021. Once commenced, optional in-person instruction must also continue without interruption (except as otherwise ordered by a state or local public health officer) or the LEA will be subject to forfeiture of all related funding. If an LEA does not provide the proscribed optional in-person instruction by May 15, 2021, it will not be eligible for any related funding.

Q: Do all schools in a district have to reopen to receive funding?

A: AB/SB 86 only requires that LEAs offer in-person instruction to all students in the relevant groups. It does not address whether all physical school sites must be reopened.

Q: Would scheduled spring break or non-instructional days result in apportionment reductions?

A: No. Reductions in apportionments are calculated only for student instructional days as designated on the LEA's adopted school calendar as of March 1, 2021.

► Paraprofessionals

Q: Can we use the new money to fill a vacant paraprofessional position?

A: Any paraprofessional position financed with Expanded Learning Opportunities Grant program funding must be providing "supplemental instruction and support" consistent with Education Code section 43522(c). "Supplemental instruction" is defined as instructional programs provided in addition to and complementary to the regular instructional programs, including services provided pursuant to an IEP. "Support" is defined as intervention provided as a supplement to those regularly provided.

Q: Can part of the 10% be used for training?

A: Yes. Training for paraprofessionals to enable them to provide "supplemental instruction and support" would be appropriately charged to the mandatory 10% allocation.

Q: Can we use the 10% to hire special ed paras?

A: Yes, however, use of Expanded Learning Opportunities Grant program funds to pay for special education paraprofessionals must be for the purpose of providing supplemental instruction and support, defined as "instructional programs provided in addition to and complementary to the regular instructional programs, including services provided pursuant to an IEP."



Q: If we have part-time paraprofessionals, can we use some of the 10% to pay them full-time?

A: Yes; however the added FTE being funded would have to be identified as providing “supplemental instruction and support.”

Q: Can we code the 10% for paraprofessionals to those we already hired this year?

A: Charging costs for paraprofessionals already employed by your LEA would not appear to be authorized unless those paraprofessionals were hired to provide “supplemental instruction and support” as contemplated by the bill.

► Collective Bargaining

Q: Are the grant funds an allowable use of funds to pay for “hazard pay”?

A: Yes. Apportionments received pursuant to Education Code section 43521(c) (reopening incentive funding) are available for salaries for certificated and classified employees providing in-person instruction or services (expenditures through August 31, 2022). Some Expanded Learning Opportunities Grant program funding may also be available to support in-person instruction, including hazard pay, for those LEAs that suffered forfeiture of available reopening incentive funding.

► Use of Funds

Q: What requirements does an LEA have to follow if they are not applying for the funding?

A: AB/SB 86 does not establish any additional requirements on LEAs who are not eligible nor intending to apply for/use any of the allocated funding.

Q: What if students and staff refused to be tested?

A: LEAs located in counties in the Purple tier reopening for in-person instruction on or after April 1, 2021 must conduct asymptomatic surveillance testing at the frequencies set forth in the COVID-19 industry sector guidance for schools and school-based programs. Nothing in the bill or the applicable guidelines explicitly require either students or staff to submit to asymptomatic testing. While LEAs may require employees to submit to testing, subject to any and all collective bargaining requirements, they cannot require students to undergo either surveillance or symptomatic testing as a condition of receipt of in-person instruction. Regardless, asymptomatic testing of students and staff is not required for LEAs already open for in-person instruction or those LEAs who have adopted a reopening plan and publicly posted their CSP, on or before March 31, 2021.

Q: Are high school districts eligible to receive reopening grant funds? What conditions would high school districts have to meet to be eligible?

A: Yes. High school districts are eligible for reopening incentive funding. For those in counties in the Purple tier, they must provide optional in-person instruction to all prioritized students subject to capacity limits consistent with the Cohort



Guidance. Once their county moves to the Red tier, high school districts must also offer optional in-person instruction to all students at least one full grade level, in addition to all prioritized student groups.

Q: If my LEA offers hybrid, am I eligible for funding?

A: Yes, as long as the hybrid model provides in-person instruction to the greatest degree possible and all other requirements of the bill are met.

▶ COVID Testing

Q: What are the asymptomatic testing cadence requirements under the bill? How do testing cadence requirements differ for LEAs with existing plans versus those without plans prior to March 31?

A: Only LEAs in counties in the Purple tier who were not open for in-person instruction or did not have a board adopted plan to provide in-person instruction and publicly posted its CSP on its internet website on or before March 31, 2021 are required to comply with the testing cadences set forth in the COVID-19 industry sector guidance for schools and school-based programs. Those testing cadences are as follows:

Adjusted Case Rate >14 per 100K population	Weekly asymptomatic testing of staff and students
Adjusted Case Rate > 7-13.9 per 100K population/Test Positivity Rate >8	Every other week asymptomatic testing of staff and students

▶ CDPH Guidelines

Q: Does SB/AB 86 change the physical distancing requirement of 4-6ft?

A: No.

Q: What happens if students in prioritized pupil groups exceed facility capacity due to health and safety modifications?

A: The only time an LEA may limit the number of students receiving in-person instruction while remaining eligible for incentive funding, is when the LEA is in a county in the Purple tier and is not open nor eligible to open under the COVID-19 industry sector guidance for schools and school-based programs and is only providing in-person instruction consistent with CDPH Guidance Related to Cohorts. In such cases, students within the prioritized groups must be permitted to receive in-person instruction to the LEA's maximum practical capacity.

DISCLAIMER: THIS IS A SUMMARY ONLY AND NOT LEGAL ADVICE. WE ADVISE YOU TO CONSULT WITH LEGAL COUNSEL TO DETERMINE HOW THIS INFORMATION MAY APPLY TO YOUR SPECIFIC FACTS AND CIRCUMSTANCES.

Elizabeth (Lisa) Mori is a partner with F3 Law. During more than two decades as an attorney, she has advised school districts across the state, with special emphasis on matters including labor and employment, governance and charter schools. A seasoned negotiator, she has assisted both large and small districts with all aspects of collective bargaining and related labor relations issues.

