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Attorney Client Privileged Communication

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Subject: **Assembly Bill 181 and Changes to Independent Study for 2022-23 School Year**

Background:

Independent study is an alternative to classroom instruction consistent with a local educational agency's ("LEA") course of study. The California state legislature initially granted LEAs the authority to offer independent study starting with the 1990-1991 school year, provided that the independent study program included, but was not limited to, the following:

1. Special assignments extending the content of regular courses of instruction;
2. Individualized study in a particular area of interest or in a subject not currently available in the regular school curriculum;
3. Continuing and special study during travel; and
4. Volunteer community service activities and leadership opportunities that support and strengthen pupil achievement. (Educ. Code § 51745)

In July 2021, in response to the COVID-19 pandemic, the state legislature passed Assembly Bill 130, which made independent study the exclusive way for students to attend school virtually for the 2021-22 school year if in-person instruction put their health at risk. The bill required school districts and county offices of education, and authorized charter schools, to offer independent study as an educational option for the 2021-2022 school year. Specifically, LEAs were required to offer individualized independent study for a pupil whose health would be put at risk by in-person instruction as determined by the parent or guardian, or a pupil who was unable to attend in-person instruction due to a quarantine due to exposure to, or infection with, COVID-19, pursuant to local or state public health guidance. However, existing state law also prohibited students with IEPs from participating in independent study unless the student's IEP specifically provided for such participation. (Educ. Code § 51745(c)).

As a result, several parents of medically vulnerable children filed a lawsuit against the State of California alleging that their students with IEPs were denied virtual instruction through independent study because of their disabilities. (*See. E.E. v. State of California*, Case No. 21-cv-07585-SI, N.D. Cal, 2021). As part of a legal settlement with disability advocates involved in this lawsuit, the Governor agreed to support new legislative amendments to ensure that special education students would have equal access to education through virtual learning.

In July 2022, the legislature passed Assembly Bill 181 (“AB 181”) which made significant changes to the requirements for independent study programs for the 2022-23 school year. AB 181, among other things, amended Education Code section 51745 and was intended to clarify the legal requirements for LEAs serving students with IEPs when offering independent study. The legislature expressly acknowledged the significant disruption to many aspects of the state’s public education system and to the experience of students and families, and that implementation of independent study programs to support the return to in-person learning in the 2021-22 school year highlighted several areas where additional clarity in the law was needed.

As a result of AB 181, Education Code section 51745(c) now provides that a student with an IEP *may* participate in independent study *if* that IEP specifically provides for that participation. This change has made the section more permissive than prohibitive. Section 51745 also states that:

If a parent or guardian of an individual with exceptional needs requests independent study [for a pupil whose health would be put at risk by in-person instruction, as determined by the parent or guardian of the pupil, or a pupil who is unable to attend in-person instruction due to a quarantine due to exposure or infection with, COVID-19, pursuant to local or state public health guidance] the pupil’s individualized education program team shall make an individualized determination as to whether the pupil can receive a free appropriate public education in an independent study placement. *A pupil’s inability to work independently, the pupil’s need for adult support, or the pupil’s need for special education or related services shall not preclude the individualized education program team from determining that the pupil can receive a free appropriate education in an independent study placement.*” (Educ. Code § 51745(c) emphasis added).

In addition to state laws regarding independent study such as the law described above, LEAs are also required to abide by IDEA requirements regarding the provision of special education to students with disabilities. Below are some frequently asked questions which can be used as a guide during the 2022-2023 school year as it relates to providing independent study to students with disabilities. LEAs should review and update their independent study policies, procedures and agreements to ensure consistency with the current law.

Frequently Asked Questions

- 1. Are LEAs required to provide a student with disabilities independent study if his/her parent/guardian makes such a request based on his/her determination that the student’s health may be put at-risk by in-person instruction?**

LEAs are not required to provide a student with disabilities independent study upon request from a parent or guardian who has determined that the student's health may be put at-risk by in-person instruction. A student's IEP team is still required to make an *individualized* determination as to whether the pupil can receive FAPE in an independent study placement and the student's IEP must specifically provide for the student's participation in independent study. Moreover, when considering whether independent study is appropriate for a particular student, the student's IEP team must continue to consider federal legal requirements. Specifically, IEP teams are still required to ensure that students receive an educational program that is "reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances." (*Andrew F. v. Douglas County Sch. Dist. RE-1* 69 IDELR 174 (2017)). As such, the IEP team must consider whether participation in independent study would allow the student to make meaningful educational progress.

Additionally, an IEP team must continue to consider the least restrictive environment when evaluating whether independent study would be appropriate for a student. The IDEA requires that, to the maximum extent appropriate, children with disabilities must be educated with children who are nondisabled and removal of a child with disabilities from the regular educational environment should occur only if the nature or severity of the disability is such that education in the regular classes with the use of supplementary aids and services cannot be achieved satisfactorily. (34 CFR § 300.314). Thus, before the IEP team places a student on independent study, the team should consider the continuum of placement options and consider whether a less restrictive setting would allow the child to make meaningful progress. In addition, in considering the least restrictive environment, IEP teams must consider "any potential harmful effect on the child or on the quality of services that he or she [receives]." (34 C.F.R. § 300.116(d)).

2. What factors should IEP teams consider when determining whether independent study is appropriate for a student with a disability whose parent has determined that in-person instruction puts the student at-risk?

IEP teams should consider the following factors, among others, when determining whether independent study is appropriate for a student with a disability whose parent has determined that in-person instruction puts the student at-risk:

- a. Can the student make sufficient progress on annual goals if placed on independent study?
- b. Will the student be educated with the nondisabled peers to the maximum extent appropriate with the use of supplementary aids and services?
- c. What are the academic benefits of placing the student in independent study?
- d. What are the nonacademic benefits of placing the student in independent study?
- e. What special education and related services does the student require in order to make progress under their IEP?
- f. What, if any, supplementary aids and supports might be necessary to ensure the student has equal access to independent study?
- g. How will services and supports be delivered to the student?

IEP teams *may not* consider a student's inability to work independently, a student's need for adult support, or a student's need for special education or related services when determining whether a student with a disability whose parent has determined that in-person instruction puts the student at-risk can receive FAPE in independent study.

3. Are LEAs required to provide a student with a disability whose parent has determined that in-person instruction puts the student at-risk with one-to-one aide to access independent study?

Section 51745 does not expressly require IEP teams to provide a student with a disability whose parent has determined that in-person instruction puts the student at-risk with one-to-one aide support to access independent study. Such a determination should be made on an individualized basis. In fact, the California Department of Education has previously indicated that students are not required to complete work independently to qualify for independent study, and students who require adult assistance or support may be able to make satisfactory progress and to receive substantially equivalent content with such assistance and support. (See CDE's Assembly Bill 130 Independent Study FAQs, Last Reviewed April 19, 2022). Instead, AB 181 prevents IEP teams from automatically eliminate independent study as an option for a student with disabilities whose parent/guardian has determined that in-person instruction puts the student at-risk because the student cannot work independently, requires adult support, or requires special education or related services. As such, LEAs should consider whether the provision appropriate accommodations and supports, such as the provision of virtual or in-person aide support or the provision of in-person or virtual special education and/or related services, would allow a student with a disability to access independent study.

4. How should IEP teams monitor a student's progress in independent study?

Education Code section 51745 provides that satisfactory progress in independent study for all students shall be determined based upon the following indicators:

- a. The pupil's achievement and engagement in the independent study program, as indicated by the LEA's local control and accountability plan;
- b. The completion of assignments, assessments, or other indicators that evidence that the pupil is working on assignments;
- c. Learning required concepts, as determined by the supervising teacher; and
- d. Progressing toward successful completion of the course of study or individual course, as determined by the supervising teacher.

Additionally, for students with disabilities, the IDEA requires IEPs to include a statement of measurable annual goals, including academic and functional goals, designed to meet the child's needs that result from the child's disability to enable the child to be involved in and make progress in the general education curriculum; and meet each of the child's other educational needs that result from the child's disability. (34 CFR § 300.320). The purpose of IEP goals is to allow the IEP team to measure a student's progress in a specific area of need. (*Los Angeles Unified Sch. Dist.*, 110 LRP 34448 (SEA CA 06/03/10).). Also, IDEA requires that every IEP include a description of:

- a. How the child's progress toward meeting the annual goals will be measured; and
- b. When periodic reports on the progress the child is making toward meeting the annual goals (such as through the use of quarterly or other periodic reports, concurrent with the issuance of report cards) will be provided. (34 C.F.R. § 300.320 (a)(3)).

As such, an LEA should measure a student's progress in independent study using a variety of measures, including, but not limited to, data regarding the student's progress on his or her IEP goals, grades, assessment results, teacher/service provider observations and parent input as well as the attendance and participation in independent study. If a student fails to make progress within a reasonable time, LEAs are required to convene an IEP meeting to address the student's lack of progress and revise the IEP as necessary to ensure that the student is receiving appropriate special education and related services. (34 C.F.R. § 300.324).

5. Are LEAs required to obtain signatures by a student's special education teacher on an independent study agreement?

Yes. LEAs must have in place a current written agreement for each independent study pupil which is signed by the pupil, the pupil's parent, legal guardian or caregiver, the certificated employee designated as having responsibility for the general supervision of independent study, *and the certificated employee designated as having responsibility for the special education programming of the pupil*, as applicable. (Educ. Code § 51747(g)(9)).

6. Can LEAs claim apportionment for a pupil who receives services from a state-certified nonpublic school through a virtual program?

An LEA may claim apportionment for a pupil who receives services from a state-certified nonpublic school through a virtual program if all of the following conditions are met:

1. The pupil is an individual with exceptional needs whose IEP includes a placement at a nonpublic, nonsectarian school;
2. The LEA offers independent study;
3. The pupil's parent or guardian has requested independent study based on a determination that in-person instruction puts the student at-risk;
4. The pupil's IEP team determines that FAPE can be provided by a virtual program in the nonpublic school placement; and
5. The virtual program provided by the nonpublic school includes procedures for tiered reengagement strategies for all pupils who are not generating attendance for more than three schooldays or 60 percent of the instructional days in a school week, or 10 percent of required minimum instructional time over four continuous weeks of a local educational agency's approved instructional calendar, or pupils who do not participate in scheduled live interaction or synchronous instruction for more than the greater of three schooldays

or 60 percent of the scheduled days of synchronous instruction in a school month as applicable by grade span.

An LEA may claim apportionment credit for a virtual program at a nonpublic school only to the extent of the time value of pupil work products as personally judged in each instance by a certificated teacher employed by the nonpublic school.

7. Are there new thresholds for triggering tiered reengagement strategies for a student participating in independent study, and if so, what are they?

Yes. LEAs are now required to have procedures for tiered reengagement strategies for all pupils, including students with IEPs, in the following circumstances:

- a. The student is not generating attendance for more 10 percent of required minimum instructional time over four continuous weeks of an LEA's approved instructional calendar;
- b. The student is found not participatory in synchronous instructional offerings for more than 50% of scheduled times of synchronous instruction in a school month as applicable by grade span; or
- c. The student is in violation of their written independent study agreement.

(Educ. Code § 51747(d)).