

REPORT OF THE EXECUTIVE OFFICER  
State Allocation Board Meeting, May 27, 2009

STATE ALLOCATION BOARD  
MERCY CLAUSE

PURPOSE OF REPORT

To discuss a concept and whether there is a need for a "mercy clause" under the Leroy F. Greene School Facilities Act (Greene Act) of 1998.

DESCRIPTION

On April 22, 2009, the Board requested that Staff review the State Allocation Board's (SAB) authority to exercise "mercy" for districts that cannot meet the statutory and/or regulatory requirements on certain projects.

AUTHORITY

Please see the Attachment.

STAFF COMMENTS

Since the inception of the School Facility Program (SFP) in 1998, the voters have authorized \$35.4 billion in bond funds and the Board has apportioned more than \$29 billion to more than 9,000 projects. In calendar year 2008, the Board made the following apportionments:

| <u>Program</u>                 | <u>Apportionment</u> | <u>Total Number of Projects</u> |
|--------------------------------|----------------------|---------------------------------|
| New Construction               | \$ 2,036,511,789     | 340                             |
| Modernization                  | 707,382,332          | 376                             |
| Career Technical Education     | 417,601,473          | 425                             |
| High Performance Schools       | 11,387,995           | 44                              |
| Overcrowding Relief Grant      | 98,981,077           | 16                              |
| Critically Overcrowded Schools | 1,174,722,246        | 37                              |
| Charter Schools                | 560,777,349          | 37                              |
| Joint-Use                      | 23,155,629           | 18                              |
| Grand Total:                   | \$ 5,030,519,890     | 1,293                           |

- The Board granted unfunded approvals for an additional 99 projects in March and April 2009 for a total of 1,392 project approvals since January of 2008.
- Of these 1,392 projects, the board heard appeals on 11 projects (0.8 percent) that represent a total of \$55.7 million (1.1 percent).

The relative success of the program can be attributed to substantial customer outreach and education efforts and internal procedures for resolving issues and maximizing funding. The SAB serves as the court of last resort when projects fall outside of statute and regulation. As the numbers bear out, these approaches are highly successful in efficiently and effectively funding projects and underscore the SFP's position as the crown jewel of California's public infrastructure programs.

*Customer Outreach and Education Efforts*

One key to program success is the substantial effort dedicated to customer outreach and education. These efforts are consistent and ongoing. In 2008, staff made the following commitment to customer success:

- Staff provided nearly 200 outreach efforts to county office of education meetings and individual school districts addressing specific needs and providing one-on-one assistance before and during the application submittal process. Outreaches were conducted in 42 of the 58 California counties.
- Staff conducted 15 workshops on changes and updates to the program – including AB 1014, Career Tech, and High Performance programs.

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*Customer Service Provided to School Districts (cont.)*

- Staff delivered trainings and presentations at six events sponsored by the Coalition for Adequate School Housing, the Collaborative for High Performance Schools, The California Green Schools Summit, and the Division of the State Architect.

*Internal Processes for Resolving Issues and Maximizing Funding*

In addition to the above, Staff provides assistance to districts submitting funding applications for processing to help them to succeed:

- Within the last year, approximately 39 percent of the funding applications submitted to the Office of Public School Construction (OPSC) were incomplete “at the door” (This statistic is tracked to identify trends and opportunities for customer outreach).
  - Staff provides courtesy notices and other assistance to aid districts in submitting complete applications. This assistance is successful in converting a 39 percent failure rate to a 97 percent success rate at application submittal.
- Staff then conducts an in-depth analysis of each project to make sure it adheres to the program criteria.
  - If a project qualifies for additional grants or Staff needs further clarification on the request, a letter is sent to provide districts an opportunity to clarify any issues within a specified time limit.
  - Staff is available and regularly meets with school districts during this process to assure the district is successful in obtaining funding.
  - If the project is eligible for supplemental funding not requested, Staff ensures that the district is made aware of the additional funding opportunity.
  - In the event that unresolved issues still exist, Staff sends a second letter outlining the final determination and seeking concurrence from the district within a specified time period.

These processes ensure that districts are well informed of any issues and are given reasonable time to mitigate any discrepancies or unmet program requirements. Funding applications are processed to ensure that all school districts have equitable access to State funds. Districts are also provided assistance to help ensure successful close-out audits.

*Granting “Mercy”*

The concept of a mercy clause suggests that the Board may allocate State bond funds on the basis of circumstance rather than law. While statute authorizes the Board to adopt rules and regulations to administer the Greene Act, the law does not currently empower the Board to waive any portion of statute or regulation. Other entities such as the State Board of Education (SBE) are granted specific statutory authority to waive certain regulations and sections of the Education Code. In the case of the SBE, statute cites a list of programs and statutes that cannot be waived – one of which is the Greene Act.

As noted above, less than one percent of projects become appeals before the Board. This provides compelling evidence that the program works well within the framework of laws and regulations that have been established. If the Board wishes to pursue a “Mercy Clause,” the SBE waiver process noted above provides a statutory model. Enacting this model would require legislation.

## Attachment

### GOVERNMENT CODE

#### **Local Agency Allocation Law**

15503. Whenever the board is required to make allocations or apportionments under this part, it shall prescribe rules and regulations for the administration of, and not inconsistent with, the act making the appropriation of funds to be allocated or apportioned. The board shall require the procedure, forms, and the submission of any information it may deem necessary or appropriate.

Unless otherwise provided in the appropriation act, the board may require that applications for allocations or apportionments be submitted to it for approval.

### EDUCATION CODE

#### **State Allocation Board Duties**

17070.35. (a) In addition to all other powers and duties as are granted to the board by this chapter, other statutes, or the California Constitution, the board shall do all of the following:

(1) Adopt rules and regulations, pursuant to the rulemaking provisions of the Administrative Procedure Act, Chapter 3.5 (commencing with Section 11340) of Part 1 of Division 3 of Title 2 of the Government Code, for the administration of this chapter. However, the board shall have no authority to set the level of the fees of any architect, structural engineer, or other design professional on any project. The initial regulations adopted pursuant to this chapter shall be adopted as emergency regulations, and the circumstances related to the initial adoption are hereby deemed to constitute an emergency for this purpose. The initial regulations adopted pursuant to this chapter shall be adopted by November 4, 1998. If the initial regulations are not adopted by that date, the board shall report to the Legislature by that date, explaining the reasons for the delay.

(2) Establish and publish any procedures and policies in connection with the administration of this chapter as it deems necessary.

(3) Determine the eligibility of school districts to receive apportionments under this chapter.

(4) Apportion funds to eligible school districts under this chapter.

(b) The board shall review and amend its regulations as necessary to adjust its administration of this chapter to conform with the act that amended this section to add this subdivision. Regulations adopted pursuant to this subdivision shall be adopted by November 5, 2002, and shall be adopted as emergency regulations in accordance with the rulemaking provisions of the Administrative Procedure Act (Chapter 3.5 (commencing with Section 11340) of Part 1 of Division 3 of Title 2 of the Government Code). The adoption of any emergency regulation pursuant to this subdivision filed with the Office of Administrative Law shall be deemed to be an emergency and necessary for the immediate preservation of the public peace, health and safety, or general welfare. Notwithstanding subdivision (e) of Section 11346.1 of the Government Code, any emergency regulation adopted pursuant to this section shall remain in effect for no more than 365 days unless the board has complied with Sections 11346.2 to 11348, inclusive, of the Government Code.

**State Board of Education waiver provision in Education Code:**

33050. (a) The governing board of a school district or a county board of education, on a districtwide or countywide basis or on behalf of one or more of its schools or programs, after a public hearing on the matter, may request the State Board of Education to waive all or part of any section of this code or any regulation adopted by the State Board of Education that implements a provision of this code that may be waived, except:

- (1) Article 1 (commencing with Section 15700) and Article 2 (commencing with Section 15780) of Chapter 4 of Part 10.
  - (2) Chapter 6 (commencing with Section 16000) of Part 10.
  - (3) Chapter 12 (commencing with Section 17000), Chapter 12.5 (commencing with Section 17070.10), and Chapter 14 (commencing with Section 17085) of Part 10.
  - (4) Part 13 (commencing with Section 22000).
  - (5) Section 35735.1.
  - (6) Paragraph (8) of subdivision (a) of Section 37220.
  - (7) The following provisions of Part 10.5 (commencing with Section 17211):
    - (A) Chapter 1 (commencing with Section 17211).
    - (B) Article 1 (commencing with Section 17251) to Article 6 (commencing with Section 17365), inclusive, of Chapter 3.
    - (C) Sections 17416 to 17429, inclusive; Sections 17459 and 17462 and subdivision (a) of Section 17464; and Sections 17582 to 17592, inclusive.
  - (8) The following provisions of Part 24 (commencing with Section 41000):
    - (A) Sections 41000 to 41360, inclusive.
    - (B) Sections 41420 to 41423, inclusive.
    - (C) Sections 41600 to 41866, inclusive.
    - (D) Sections 41920 to 42911, inclusive.
  - (9) Sections 44504 and 44505.
  - (10) Article 3 (commencing with Section 44930) of Chapter 4 of Part 25 and regulations in Title 5 of the California Code of Regulations adopted pursuant to Article 3 (commencing with Section 44930) of Chapter 4 of Part 25.
  - (11) Part 26 (commencing with Section 46000).
  - (12) Chapter 6 (commencing with Section 48900) and Chapter 6.5 (commencing with Section 49060) of Part 27.
  - (13) Section 51513.
  - (14) Chapter 6.10 (commencing with Section 52120) of Part 28, relating to class size reduction.
  - (15) Section 52163.
  - (16) The identification and assessment criteria relating to any categorical aid program, including Sections 52164.1 and 52164.6.
  - (17) Sections 52165, 52166, and 52178.
  - (18) Article 3 (commencing with Section 52850) of Chapter 12 of Part 28.
  - (19) Section 56364.1, except that this restriction shall not prohibit the State Board of Education from approving any waiver of Section 56364 or Section 56364.2, as applicable, relating to full inclusion.
  - (20) Article 4 (commencing with Section 60640) of Chapter 5 of Part 33, relating to the STAR Program, and any other provisions of Chapter 5 (commencing with Section 60600) of Part 33 that establish requirements for the STAR Program.
- (b) Any waiver of provisions related to the programs identified in Section 52851 shall be granted only pursuant to Article 3 (commencing with Section 52850) of Chapter 12 of Part 28.
- (c) The waiver of an advisory committee required by law shall be granted only pursuant to Article 4 (commencing with Section 52870) of Chapter 12 of Part 28.
- (d) Any request for a waiver submitted by the governing board of a

school district or a county board of education pursuant to subdivision (a) shall include a written statement as to both of the following:

(1) Whether the exclusive representative of employees, if any, as provided in Chapter 10.7 (commencing with Section 3540) of Division 4 of Title 1 of the Government Code, participated in the development of the waiver.

(2) The exclusive representative's position regarding the waiver.

(e) Any request for a waiver submitted pursuant to subdivision (a) relating to a regional occupational center or program established pursuant to Article 1 (commencing with Section 52300) of Chapter 9 of Part 28, that is operated by a joint powers entity established pursuant to Chapter 5 (commencing with Section 6500) of Division 7 of Title 1 of the Government Code, shall be submitted as a joint waiver request for each participating school district and shall meet both of the following conditions:

(1) Each joint waiver request shall comply with all of the requirements of this article.

(2) The submission of a joint waiver request shall be approved by a unanimous vote of the governing board of the joint powers agency.

(f) The governing board of any school district requesting a waiver under this section of any provision of Article 5 (commencing with Section 39390) of Chapter 3 of Part 23 shall provide written notice of any public hearing it conducted pursuant to subdivision (a), at least 30 days prior to the hearing, to each public agency identified under Section 39394.