

FINDING OF EMERGENCY

The State Allocation Board (SAB) finds that an emergency exists, and that the proposed regulations are necessary for immediate action to avoid serious harm to the public peace, health, safety, or general welfare.

Specific Facts Showing the Need for Immediate Action

These SAB emergency regulatory amendments provide for:

- the continued use of the priority funding process to apportion the proceeds from on-hand and future successful school bond sales to those school district and charter school projects that are “construction-ready.” The Office of Administrative Law (OAL) has previously approved the first and second priority funding periods as emergency regulatory actions, as detailed below. The next priority funding process application period will begin July 13, 2011 or as soon thereafter as the emergency regulations go into effect, and thereafter be held annually commencing the second Wednesday every January and July.
- the resumption of Financial Hardship (FH) re-reviews for approved School Facility Program (SFP) projects that have been on the Unfunded List for over 180 days. The SAB had previously approved a waiver of the FH re-review requirement for FH determinations, but now the SAB allows that waiver to become inoperative on July 1, 2011. The FH re-review process will be based only on school district financial records on or after July 1, 2011.

Priority Funding Process.

The first “Priority Funding Round” was established by the SAB through emergency regulations at its May 26, 2010 meeting, and allowed the SAB to fund \$408.14 million for 78 “construction-ready” school construction projects at its August 4, 2010 meeting. There was no opposition to the Priority Funding Round by school districts or stakeholders at the SAB meeting or during the public comment period. School districts with projects on the Unfunded List received apportionments from remaining State bond funds (actual cash from remaining bond funds and/or from successful bond sales). These emergency regulations were approved by the OAL (File No. 2010-0617-06E) and filed with the Secretary of State on June 24, 2010. Clarification to the text was approved by the OAL on July 1, 2010 (File No. 2010-0701-01E), with Certification of Compliance (File No. 2010-1101-06C) approved by the OAL on December 16, 2010.

The second Priorities in Funding Round was established by the SAB through emergency regulations at its August 25, 2010 meeting, and allowed the SAB to fund \$1.630 billion for 487 school construction projects from December 2010 through February 2011. There was no opposition by school districts or stakeholders at the SAB meeting or during the public comment period. These emergency regulations were approved by the OAL (File Number 2010-1019-01E) and filed with the Secretary of State on October 29, 2010. Certification of Compliance (OAL File No. 2011-0310-01C) was approved by the OAL on April 21, 2011.

It is vital to the State’s continuing economic recovery that these proposed emergency regulations be in effect as soon as possible. The priority funding process will be established on a regular routine basis, with the next application period to begin July 13, 2011 or as soon thereafter as the emergency regulations go into effect. Thereafter, a new filing period will commence annually on the second Wednesday of every January and July.

All school districts/charter schools with projects on the Unfunded List will have the opportunity to participate with each filing period.

Background on the State's Fiscal Crisis.

The State's fiscal crisis caused a stoppage of school bond apportionments to SFP school construction projects following December 17, 2008. SAB-approved but unfunded construction projects accumulated until school bond funding again became available, and the SAB then implemented Priority Funding Rounds to assure that the school bond funding could be directed only to the "construction-ready" projects in order to create jobs in construction-related businesses and trades, and stimulate the State's economy.

Prior to December 17, 2008, the process for making State apportionments and providing fund releases for SFP projects was relatively simple. Fund release requests were regularly accommodated due to the ability to borrow cash from the State's Pooled Money Investment Account (PMIA) in advance of bond sales. After December 17, 2008, the State's Pooled Money Investment Board (PMIB) took action to temporarily halt disbursing cash from the State's PMIA for capital projects, including school construction projects, because of the State's financial situation. This placed the Office of Public School Construction (OPSC) on notice that fund release requests would not be able to proceed and impeded the SAB's ability to make State apportionments despite there being remaining bond authority.

Due to the unprecedented circumstance of the State's inability to provide cash for projects that were supported by bond authority, the SAB took multiple actions, commencing in January 2009, that ensured regulations and processes were adjusted in an attempt to minimize the impact to school district projects. These actions included:

- Emergency regulations declaring prior SAB-approved apportionments inactive until cash became available;
- The creation of an Unfunded List for approved projects; and
- Prompt action to make State apportionments and/or reactivate projects with SAB-approved apportionments, including unfunded approvals, once cash became available.

In 2009, bond sales provided \$2.627 billion to the SFP, which made it possible for the SAB to reactivate previously inactive apportionments and make State apportionments to projects that had received unfunded approvals on the Unfunded List. Once the SAB makes State apportionments, the school districts have 18 months to submit a Fund Release Authorization, Form SAB 50-05 for the project. In the slowing economy, many school districts could not afford to request their SFP funding and move their projects forward. Fund release requests decreased dramatically * and commitments of State bond funding went unused for up to the permissible 18 months. This impeded the Legislative intent and voter approvals to help construct and modernize facilities for California pupils, and contributed to the slowdown in the State's economy.

Furthermore, on April 27, 2010, the Department of Finance (DOF) issued Budget Letter #10-09, which specifically relates to general obligation bond funded programs/projects, and stipulated that cash need estimates would be requested by the DOF and the State Treasurer's

* From an average of about \$265 million per month from April through July 2009 to about \$38.7 million per month from August 2009 through April 1, 2010.

Office (STO) twice a year prior to each spring and fall sale period. Budget Letter #10-09 further stipulated that State funds previously received should be expended prior to the sale of additional bonds. This new method of funding general obligation bond-funded projects provides that State apportionments will not be made in anticipation of bond sales; only when bond sales have been successful and the cash estimate has been submitted to the DOF and the STO showing a need or demand for the cash. In addition, it should be noted that the STO is not statutorily required to sell general obligation bonds, but it has been a standard operating procedure.

The emergency regulations for priority funding periods are therefore critically important to prioritize school bond apportionments by directing the available bond funds only to construction-ready projects. Districts with projects approved in these periods were required to submit a fund release request within 90 days from receipt of a State apportionment. The \$2 billion apportioned to districts in the first and second priority funding periods for construction-ready projects has created jobs associated with the construction industry and trades, thereby stimulating the State's economy, which was and continues to be in direct alignment with the Governor's directive.

Resumption of Financial Hardship Re-Reviews.

As explained below, it is necessary to approve on an emergency basis these proposed criteria for the resumption of FH re-reviews because the waiver of the FH re-review requirement becomes inoperative on July 1, 2011. Without the criteria in the proposed emergency regulations, FH re-reviews must resume on or after July 1, 2011 without critical guidelines for fair and uniform application.

There are (as of May 31, 2011) 93 SAB-approved FH projects on the Unfunded List awaiting apportionments totaling \$264.3 million of State bond funds, with additional FH projects scheduled for future SAB meetings. Unless these projects are funded sooner, they will be reaching 180 days on the Unfunded List on or after July 1, 2011 and must have their FH status re-reviewed. School district financial contributions to construction project costs could decrease or increase based on the FH re-reviews. Districts with financial difficulties, and still without their State apportionments, risk losing these school projects if the FH re-review is triggered and greatly increases the amount the district must provide towards the project.

The Financial Hardship (FH) Program implements Education Code Section 17075.15 to assist those districts that cannot afford to fund their portion of an SFP project. A school district meeting the FH criteria (Regulation Section 1859.81) is eligible for the State to pay up to 100 percent of the district's share of new construction or modernization project costs. Without FH status, districts must contribute 50 percent of new construction project costs or 40 percent of modernization project costs. Districts are required under Education Code Section 17075.10(b) to make all reasonable efforts to fund their share of their project's cost.

To be approved with FH status, a thorough review of the district's financial records must be conducted by the OPSC including the records with the County Office of Education and the California Department of Education. Districts are required under Education Code Section 17075.10(b) to make all reasonable efforts to fund their share of their project's cost.

The SFP Regulations require that the SAB-approved FH status of an SFP project on the Unfunded List for over 180 days must have a re-review of the district's financial records to determine if additional district funds are available to fund the district's matching share of the school construction project costs.

Waiver of the Re-review Requirement Until July 1, 2011. At its May 26, 2010 meeting, the SAB adopted a waiver of the FH re-review requirement for approved, unfunded SFP projects that have remained on the Unfunded List for over 180 days due to the State's inability to provide AB 55 loans from the PMIA. The SAB waiver was based upon the State's fiscal crisis having halted project apportionments to school districts, and the difficulty of FH projects to proceed without the State's share of the project cost. The waiver benefited school districts with previously approved FH determinations because without a FH re-review, their financial contributions to project costs were not at risk of being changed. This waiver was approved by the OAL as emergency regulations (File Number 2010-0922-03E) and filed with the Secretary of State on October 4, 2010. The waiver was extended to July 1, 2011 by emergency regulations approved by the OAL (File No. 2011-0329-03E) and filed with the Secretary of State on April 5, 2011.

The SAB emergency amendments will now allow FH re-reviews to resume for approved, unfunded SFP projects that have been on the Unfunded List for over 180 days. Therefore, after July 1, 2011, FH re-reviews of the district's financial records may be made to determine if additional district funds are available to fund the district's matching share of the costs for the school construction project. The FH re-review process will be based only on school district financial records on or after July 1, 2011.

Authority and Reference Citations

Authority: Sections 17070.35, 17075.15, 17078.72 and 17592.73 of the Education Code.

Reference: Sections 17071.75, 17072.12, 17072.30, 17074.16, 17075.10, 17075.15, 17076.10, 17077.40, 17077.42, 17077.45 and 17079.20 of the Education Code.

Informative Digest/Policy Overview Statement

Senate Bill 50, Chapter 407, Statutes of 1998, established the School Facility Program which streamlined funding processes, eliminated State oversight, and made school districts more accountable for their projects. The SAB adopted regulations to implement the Leroy F. Greene School Facilities Act of 1998, which were adopted by the Office of Administrative Law and filed with the Secretary of State on October 8, 1999.

The proposed emergency amendments to SFP regulation sections are summarized as follows:

Existing Regulation Section 1859.81 permits school districts to qualify for FH status in order to receive additional State funding for school facility projects, upon meeting specific financial criteria. FH reviews remain valid for 180 days. If a district submits its funding application and has been on the Unfunded List for over 180 calendar days, then its financial records must be re-reviewed and its FH status re-determined. There is an exception up until July 1, 2011 that waives the requirement for FH re-reviews if the project has been on the "Unfunded List (Lack of AB 55 Loans)" for more than 180 calendar days. This waiver becomes inoperative on July 1, 2011.

The proposed emergency amendments resume FH re-reviews on or after July 1, 2011 for approved, unfunded SFP projects that have been on the Unfunded List for over 180 days. The FH re-reviews will be based only on school district financial records on or after July 1, 2011. Four existing unnumbered paragraphs are numbered as "(e)," "(1)," "(2)," and "(3)" sequentially.

Existing Regulation Section 1859.90.2 is described as follows:

1. It authorizes the SAB to establish 30-calendar day application filing periods for school districts and charter schools to apply for apportionments of available State school bond funds. Projects under the Charter School Facilities Program (CSFP) may apply for advance release of design funds from a Preliminary Charter School Apportionment. Projects under the Critically Overcrowded School (COS) Facilities Program may apply for advance release of environmental hardship site acquisition funds.
2. School districts and charter schools must submit the Form SAB 50-05, "Fund Release Authorization," with an original signature, within 90 calendar days of the Board's approval of the apportionment; failure to make this submittal and have it physically received by the OPSC within 90 calendar days will result in rescission of the project without further Board action. School districts/charter schools wishing to participate must provide a written statement signed by the authorized district representative within the 30-calendar day filing period that contains all of the following:
 - Request to convert the unfunded approval to an apportionment;
 - Concurrence with the 90-calendar day time limit on fund release;
 - Acknowledgement that failure to submit a valid Form SAB 50-05, with an original signature, to be physically received by the OPSC within the 90-calendar day time limit will result in the rescission of the apportionment without further Board action; and
 - Acknowledgement that by participating in the priority funding round, the district/charter school is waiving its right to a standard 18-month timeline for fund release submittal.
3. Projects under the CSFP may apply for advance release of site acquisition funds from a Preliminary Charter School Apportionment, subject to a timeline of 180 calendar days for school districts/charter schools to file their request for fund release, Form SAB 50-05, with the specific requirements to provide a written statement signed by an authorized representative within the 30-calendar day filing period that contains all of the following:
 - Requests to convert the advance release of funds to an approved advance release of funds,
 - Concurs with the 180 calendar day timeline to submit the fund release request,
 - Acknowledges the participant's requirement to submit a valid, signed Form SAB 50-05 to be physically received by the OPSC within the 180 calendar day time limit, and failure to do so will result in the rescission of the approved advance release of funds request without further Board action, and
 - Acknowledges that the participant must provide evidence of entering into the Charter School Agreements within 90 calendar days of the approval of the advance release of funds request, and failure to do so will result in the rescission of the approval without further Board action.
4. School districts and charter schools must be given advance public notice of a SAB meeting by which a priority funding round would be established.

5. All requests to participate in the priority funding process must be physically received by the OPSC by the 30th calendar day to be valid. All submittals of fund release requests, Form SAB 50-05, must be physically received by the OPSC within the applicable 90 or 180 calendar day time periods.
6. For the purposes of this section, the word “rescinded” or “rescission” means that the apportionment or approved advance release of funds request returns to unfunded approval status with a new unfunded approval date. The new unfunded approval date will be determined by the Board at the time each priority funding round is approved. The district/charter school will not be required to re-submit the application and no further application review will be required.

The proposed emergency regulatory amendments are as follows:

1. Change Priority Funding “Round” to Priority Funding “Process.”
2. Change the setting of individual priority funding rounds by the SAB to the regular scheduling of priority funding periods that begin on July 13, 2011 or as soon thereafter as the emergency regulations go into effect, and thereafter to be held annually beginning on the second Wednesday of every January and July.
3. Add “Certifications are valid until the next filing period begins.”
4. Remove language that priority funding rounds are established at monthly SAB meetings upon advance public notice and announcement.
5. Remove language that priority funding rounds require advance notice to all school districts and charter schools with projects on the Unfunded List.
6. Remove language that 30-calendar day application filing periods begin on the next business day following the SAB meeting that establishes a priority funding round.
7. Remove language that any funds not apportioned in a specified priority funding round remain available for other SFP apportionments by the SAB.
8. Clarify that school district/charter school participants must submit the Form SAB 50-05 fund release request only if they are approved for an apportionment.
9. Clarify that application submittals for CSFP design and COS Facilities Program environmental hardship within the 30-calendar day filing periods must specify in writing each of the project application numbers and type of apportionment being requested.
10. Provide criteria for the sequence of apportioning projects if the total amount requested for a specific period exceeds the funds available.
11. Clarify that applicants requesting to participate but for which an apportionment cannot be provided retain their date order position on the Unfunded List.
12. Clarify that request letters will not be returned to applicants or maintained by the OPSC if the projects are not approved for apportionments.

13. For purposes of “rescinded” or “rescission,” changes the new unfunded approval date from a date determined by the SAB at its meeting establishing the priority funding period, to “90 calendar days after the apportionment date.”

Mandate on Local Agencies or School Districts

The Executive Officer of the SAB has determined that the proposed emergency regulations do not impose a mandate or a mandate requiring reimbursement by the State pursuant to Part 7 (commencing with Section 17500) of Division 4 of the Government Code. It will not require local agencies, school districts or charter schools to incur additional costs in order to comply with the proposed emergency regulations.

Cost Estimate

The Executive Officer of the SAB has assessed the potential for significant adverse economic impact that might result from the proposed emergency regulatory action and it has been determined that:

- There will be no costs or savings to the State.
- There will be no non-discretionary costs or savings to local agencies.
- There will be no costs to school districts or charter schools except for the required district contribution toward each project as stipulated in statute.
- There will be no costs or savings in federal funding to the State.