

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, pursuant to Government Code Section 11342.545.

Specific Facts Showing the Need for Immediate Action

For new construction and modernization project funding, the four general obligation school bonds for the School Facility Program (SFP) are near exhaustion. Immediate action is needed to approve emergency regulatory amendments to the SFP Regulations to protect the general welfare of the State. Failure to adopt the regulations on an emergency basis will result in an increased financial liability to the State. Urgent action must be taken to change the current process in the SFP Regulations for approving SFP eligibility and funding applications submitted after bond authority has been exhausted or is insufficient to fund submitted projects.

The current process includes fully processing such applications, presenting them to the SAB for "approval," and then placing these projects on an "Unfunded List" until funding from a future State school bond is made available. The new process in the proposed emergency regulations dispels any expectations or reliance by school districts upon future State bond funding for SFP project applications submitted after bond authority has been exhausted. Potential risks of litigation against the State will be eliminated because such project applications must be accompanied by a written school board resolution clarifying that the State bears no responsibility or liability for project eligibility and funding applications submitted after there is insufficient bond authority. This will avoid misinterpretations of the existing process in the SFP Regulations to argue that the State bears an ongoing responsibility or liability for these projects.

The basis for the Finding of Emergency is supported by five supporting reasons:

1. Avoiding Claims of State Financial Liability for Unfunded School Construction Costs.

As of October 16, 2012, the Office of Public School Construction (OPSC) received applications exceeding the available new construction bond authority by approximately \$102.6 million and applications exceeding the available modernization bond authority by approximately \$161.7 million. SFP funding applications (new construction and modernization combined) are now continuing to be submitted and increasing the State's risk of liability by a daily average of **\$2.1 million per day**, or a projected \$252 million in funding applications beyond available bond authority for the anticipated four months (120 days) to implement the proposed amendments without emergency status. At this rate, the project costs submitted by school districts for funding will grow to \$1.533 billion in the two years before another school bond is even possibly considered for the November 2014 General Election. Without the expeditious approval of the proposed emergency regulations, SFP applications being received after bond authority has been exhausted must be administered under the existing process in the SFP Regulations which the SAB believes incurs undue risks of financial liability and potential lawsuits against the State of California.

2. The State's Financial Condition.

School districts in the past have relied upon four successive school bonds (1998 – 2006) to fund the SFP, which have now reached the point of being exhausted:

- Class Size Reduction Kindergarten-University Public Education Facilities Bond Act of 1998 (Proposition 1A)
- Kindergarten-University Public Education Facilities Bond Act of 2002 (Proposition 47)
- Kindergarten-University Public Education Facilities Bond Act of 2004 (Proposition 55)
- Kindergarten-University Public Education Facilities Bond Act of 2006 (Proposition 1D)

Since 1998, school districts facing the exhaustion of a preceding bond's authority have waited on an unfunded list for the passage of the next school bond, and have either been "grandfathered" into program funding (Proposition 1A provided \$1.35 billion for growth projects and \$800 million for reconstruction or modernization projects), or been apportioned because a succeeding school bond was passed and approved by the voters which funded the projects on the unfunded list. However, the State's current financial circumstances cannot justify any reliance upon such a future school bond. It has been six years since the last school bond, and it is uncertain whether the State's financial circumstances can support a future school bond.

The State Treasurer's Office reports a steady increase in California's annual debt service-to-revenue ratio (State of California Debt Affordability Report, October 2012, Bill Lockyer, State Treasurer):

FY 1999/2000 *	3.48 percent
2004/2005 *	4.28 "
2009/2010 *	6.91 "
2011/2012	7.9 "
2012/2013	8.9 " (projected)

*Specified in earlier annual Treasurer's Reports.

The above increases and projection are without another school bond. The above-cited State Treasurer's Report states that State issuance of General Obligation bonds set a two-year record for calendar years 2009 and 2010. The Report states that \$40.26 billion of General Fund supported bond debt is authorized but still unissued as of June 30, 2012.

The 2012 Treasurer's Report adds that "the State continues to face financial challenges caused by the 2007-09 national recession and California's slow recovery. The economic downturn has left the State with significant revenue declines and large budget gaps." "To close a \$15.7 billion shortfall, the adopted 2012-13 budget cut spending by \$8.1 billion. It also included \$6 billion of revenue solutions and \$2.5 billion of other solutions." Notably, the Governor's tax initiative is Proposition 30 to be voted upon on November 6, 2012. If Proposition 30 does not get enough support by the voters, automatically triggered General Fund spending "cuts of approximately \$5.95 billion would go into effect on January 1, 2013."

In this economic climate, the Office of Administrative Law (OAL) should approve emergency status for the proposed regulations because the State cannot afford to accumulate another projected \$252 million in funding applications beyond available bond authority for the anticipated four months (120 days) to implement the proposed amendments without emergency status, and without the specific protections in the emergency regulations to

protect the State from potential liability regarding SFP funding applications submitted after the State bond funds have been exhausted or are insufficient.

There are 983 school districts, 58 county offices of education, and other entities across the State which can continue to submit SFP eligibility and funding applications beyond the amounts in the authorizing school bond measures. The State cannot risk financial responsibility and potential lawsuits for a growing “Unfunded List” of expectant school construction projects beyond the authority of the existing school bonds.

3. Potential Lawsuits Against the State.

Under the SFP, the State provides to eligible projects 50 percent of the new construction projects costs and 60 percent of the modernization projects costs. District representatives have stated in public hearings that they want the existing SFP application process to continue in which, despite insufficient remaining bond authority, projects are: 1) processed, 2) presented to the SAB for “approval,” and 3) placed upon an Unfunded List awaiting available funding - - principally the next school bond. Many districts pass local school bonds and obtain “bridge” financing in reliance upon the SAB’s unfunded “approval,” and with expectations of future State bond funding. This involves numerous financial parties in the funding process that could potentially file claims or lawsuits if “expected” State bond funding is not forthcoming. These parties will have legal counsel who could easily include and name the SAB as the “deep pocket” of the State of California in resulting lawsuits.

Without this emergency approval, it would take at least four months for these regulations to proceed through the Administrative Procedure Act to become permanent regulations, while another projected \$252 million in SFP funding applications accumulate beyond available school bond authority, and without the financial protections for the State in the proposed emergency regulations. The OPSC, on behalf of the SAB, requests that the protections for the State set forth in the proposed emergency regulations be approved with emergency status.

4. Financial Hardship Reviews Not Performed if Insufficient Bond Authority.

Under the proposed emergency regulations, once there is Insufficient Bond Authority, the OPSC would not process requests for Financial Hardship status. The existing SFP Regulations provide for the State to bear up to 100 percent of the local school district’s share of project costs if the district undergoes the process of proving that it cannot pay its local share obligation. There are costs associated to both the State and the school district in applying for Financial Hardship. The Financial Hardship review process must continue under the existing Regulations. This process will expend considerable school district time and OPSC review time that is not necessary when there is Insufficient Bond Authority. School districts’ financial status may change considerably in the years ahead before another potential school bond. Under the proposed emergency regulations, school districts would not have to pre-apply for financial hardship status before submitting the Form SAB 50-04, *Application for Funding*. The financial hardship determinations would only be made if sufficient bond authority became available to process the Form SAB 50-04.

5. Five Past Approvals of Emergency Regulations by the OAL Based on the State’s Financial Condition.

When the State has been in financial crisis situations, the SAB has adopted emergency regulations to address such conditions, and the OAL has supported the SAB by approving

emergency status as summarized in the following five regulatory actions. All proposed regulations are unique and must meet the statutory definition of “emergency” on their own merits. However, the OPSC, on behalf of the SAB, contends that these proposed regulatory amendments also merit emergency treatment because of the risks of financial liability to the State and the State’s financial situation as the SFP’s bond authority is becoming exhausted. The proposed regulations meet the test of avoiding serious harm to the public peace, health, safety, or general welfare - - specifically, the financial general welfare of the State of California.

- a. Due to the State’s financial crisis situation in December 2008, the OAL approved emergency regulations to authorize the SAB to designate apportionments as “inactive” to relieve school districts from meeting the 18-month time limit to submit Form SAB 50-05 requesting the release of their funding. The emergency regulations were effective on April 9, 2009 upon filing with the Secretary of State (OAL File No. 2009-0330-02E).
- b. Similarly, the OAL approved emergency regulations in the continuing State financial crisis when it authorized the SAB to find preliminary apportionments as “inactive” to temporarily suspend the time period for Charter School Facilities Program and Critically Overcrowded Schools Program projects to “convert” to final apportionments. The emergency regulations were effective on April 22, 2009 upon filing with the Secretary of State (OAL File No. 2009-0414-03E).
- c. Again as the State’s financial crisis continued, the OAL approved emergency regulations authorizing the SAB to suspend for up to 12 months the deadline for school districts to submit Division of the State Architect (DSA) and California Department of Education (CDE) approvals to the OPSC in the Career Technical Education Facilities Program and SFP Joint-Use Program. The emergency regulations were effective on April 30, 2009 upon filing with the Secretary of State (OAL File No. 2009-0422-01E).
- d. In a further example as the State’s financial crisis continued, the OAL approved emergency regulations authorizing the SAB to extend the sunset date from January 1, 2011 to July 1, 2011 for SAB authority to find apportionments and preliminary apportionments “inactive” for New Construction, Modernization, Critically Overcrowded Schools, and Charter School Facilities Program. The emergency regulations were effective on December 22, 2009 upon filing with the Secretary of State (OAL Files No. 2009-1216-10E and 2011-0329-03E).
- e. The next year, when immediate action was needed to create jobs and stimulate the State’s economy, the OAL again approved emergency regulations authorizing the SAB to establish a Priority Funding Round to help speed SFP bond funding to projects which were “construction-ready.” The emergency regulations were effective on June 24, 2010 upon filing with the Secretary of State (OAL File No. 2010-0617-06E). Four “rounds” so far in the Priority Funding process have expedited \$3.6 billion of school bond funding for construction into the State’s economy.

Background. The proposed emergency regulations result from the SAB directing staff to draft regulations to establish a new method to accept and track SFP project eligibility and funding applications when there is insufficient bond authority for the SAB to apportion. An SAB sub-committee considered how to address the diminishing New Construction bond authority until the next potential school facilities bond could be placed on the ballot. The New Construction Sub-committee met on November 7, 2011, January 11, 2012 and February 14, 2012. The Sub-committee’s recommendations form the basis for the proposed emergency regulatory amendments.

The proposed adoption of Regulation Section 1859.95.1 would establish a different process for the OPSC to accept SFP eligibility and funding applications when bond authority is exhausted, without fully processing them, without presenting them to the SAB for approval, and without placing them on the “Unfunded List” currently described in the Regulations. The existing process set forth in Regulation Section 1859.95 would be superseded upon the effective date of these emergency regulations.

The OPSC would review application packages to ensure that all required documents are submitted, which would be identified as “Approved Applications.” Approved Applications would be presented to the SAB for formal acknowledgment but not approval, and placed on the “Applications Received Beyond Bond Authority List” in the order of date received, and with the preliminary grant amounts requested by the district.

Authority and Reference Citations

Authority: Section 17070.35 of the Education Code and Section 15503 of the Government Code.

Reference: Sections 17070.35, 17070.40, 17071.75 and 17072.20 of the Education Code.

Informative Digest/Policy Overview Statement

The Leroy F. Greene School Facilities Act of 1998 established the SFP through Senate Bill 50, Chapter 407, Statutes of 1998. The SFP provides a per-pupil grant amount to qualifying school districts for purposes of constructing school facilities and modernizing existing school facilities. The SAB adopted regulations to implement the Leroy F. Greene School Facilities Act of 1998, which were approved by the OAL and filed with the Secretary of State on October 8, 1999.

The school bond authority for the SFP is at the point of being exhausted.

The SAB, at its September 19, 2012 meeting, adopted emergency regulatory amendments to the SFP Regulations to establish an “Applications Received Beyond Bond Authority List” for the purpose of accepting and tracking SFP project eligibility and funding applications once school bond authority has been exhausted. The proposed emergency amendments would add definitions of “Applications Received Beyond Bond Authority List,” “Bond Authority,” and “Insufficient Bond Authority” in order to implement a different process for accepting SFP applications after bond authority becomes insufficient.

A summary of the proposed emergency regulatory amendments, adoption of a new section, and amendments to an associated form, are as follows:

Existing Regulation Section 1859.2 represents a set of defined words and terms used exclusively for these regulations. The proposed emergency amendments add the following three definitions:

- “Applications Received Beyond Bond Authority List” means an informational list of applications submitted to the Office of Public School Construction (OPSC) and presented to the Board. Funding applications placed on this list contain the preliminary grant amounts requested by a district. The OPSC has not determined that the Approved Application(s) are Ready for Apportionment.

- “Bond Authority” means the authority of the Board to Apportion bond funds pursuant to Education Code Section 17070.40.
- “Insufficient Bond Authority” means the total funding requested on the Approved Application received by the OPSC exceeds the Bond Authority.

In addition, the definition of “Approved Application(s)” is amended by deleting redundancies in a listing of SAB forms, and by deleting an obsolete reference to OPSC reviews pursuant to Education Code Section 17072.25(a). The reference is obsolete because this Education Code Section applies to ranking funding applications to be funded with proceeds of State bonds approved by the voters prior to January 1, 2002. Such funds are not being apportioned. Finally, in the definition of Form SAB 50-04, *Application for Funding*, the proposed amendments change the revision date of the Form to “09/12.”

Existing Regulation Section 1859.95 sets forth a process for accepting SFP funding applications when the SAB has no funds to apportion, which includes processing both eligibility and funding applications, presenting them to the SAB for approval, and placing them on the “Unfunded List” to await additional bond authority becoming available. The proposed emergency amendments add the following as the first sentence in the Section:

“This Section shall not apply to Approved Applications submitted to the OPSC on or after the effective date of Section 1859.95.1.”

Proposed adoption of Regulation Section 1895.95.1 would establish a new process for handling SFP applications received when bond authority has been exhausted, which would supersede the process set forth in Regulation Section 1859.95 above, upon the effective date of this new Section 1859.95.1. Under this new process, the OPSC will not:

- process the applications,
- present the applications to the SAB for approval, nor
- place approved projects on the existing “Unfunded List.”

Under proposed Regulation Section 1859.95.1, when bond authority has been exhausted, the OPSC would accept eligibility and funding application packages to be reviewed to ensure that all required documents are submitted. Application packages that include all required documentation would be identified as “Approved Applications.” An Approved Application would be required to include a school board resolution acknowledging that:

- the remaining SFP bond authority has been exhausted for funds requested on the district’s application,
- the State is not expected nor obligated to fund the project, and there is no guarantee of State funding,
- any potential future State bond may not provide funds for the district’s application,
- the criteria, including but not limited to funding, qualifications, and eligibility in a future State bond may be substantially different from the SFP,
- the district’s Approved Application may be returned to the district,
- the school board elects to commence pre-construction or construction activities at its own discretion and the State is not responsible for those activities, and
- if the school district intends to apply for financial hardship status, it must submit the application if bond authority becomes available for the SAB to fund the district’s submitted application.

“Approved Applications” would be placed on the “Applications Received Beyond Bond Authority List” in the order of date received, and with the preliminary grant amounts requested by the district. This list would be presented to the SAB for formal acknowledgement, but not approval.

In addition, proposed Regulation Section 1859.95.1 states that it will not constitute notification from the SAB pursuant to Government Code (GC) Section 65995.5(b)(1). In other words, the proposed new process for handling SFP applications after bond authority has been exhausted does not constitute notification from the SAB regarding a district’s eligibility and/or funding application under that GC Section nor regarding a district’s decision to impose developer fees thereunder.

Finally, the proposed Regulation Section 1859.95.1 will not apply to Approved Applications for:

- Joint-Use funding,
- Career Technical Education Facilities Program project funding,
- Form SAB 50-04 submitted for Critically Overcrowded School Facilities funding,
- Charter School Facilities Program funding, and
- Overcrowding Relief Grant Program.

Existing Form SAB 50-04, *Application for Funding*, is submitted by school districts to apply for State funding for new construction or modernization projects. The proposed emergency amendments provide for the following:

- Applicants, including applicants for financial hardship status, are advised that if there is Insufficient Bond Authority, the school district must submit a school board resolution setting forth the requirements set forth in Regulation Section 1859.95.1.
- Financial hardship applicants must check a box for either submitting with a “pre-approval” letter, or for submitting with a school board resolution pursuant to Regulation Section 1859.95.1 (Insufficient Bond Authority).
- A “Certification” is added to which the district representative must sign, that if the application is submitted when there is Insufficient Bond Authority, the district has adopted a school board resolution pursuant to Regulation Section 1859.95.1.
- A “Certification” is added to which the district representative must sign, that the district will comply with all laws pertaining to the construction or modernization of its school building.
- Two concluding data fields are added for the district representative’s name to be printed, and for the district representative’s phone number.
- Non-substantive grammatical and punctuation corrections are made.

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 or school districts 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 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.