

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

Immediate action is needed to approve emergency regulatory amendments to the School Facility Program (SFP) Regulations to clarify the requirements for school districts to initiate and enforce Labor Compliance Programs (LCPs) in order to receive school bond apportionments from either:

- the Kindergarten-University Public Education Facilities Bond Act of 2002 (Proposition 47) or
- the Kindergarten-University Public Education Facilities Bond Act of 2004 (Proposition 55).

These LCP requirements are in accordance with Assembly Bill 1506, Chapter 868, Statutes of 2002 (Wesson). The proposed emergency regulations are necessary for the SAB and the Office of Public School Construction (OPSC) to ensure that State bond funds authorized by these two Propositions are apportioned only to SFP projects that comply with the LCP requirements, which are set forth in Labor Code Sections 1771.5 and 1771.7. The proposed emergency regulations incorporate the verification criteria and terminology from these two Labor Code Sections and the Department of Industrial Relations (DIR) Regulation Section 16432.

The AB 1506 LCP requirements ensure various record-keeping, federal and state labor law compliance, and payroll documentation, as set forth in Labor Code Section 1771.5(b).

Labor Code Section 1771.7(a) allows two LCP compliance methods:

- initiating and enforcing a DIR-approved LCP, or
- contracting with a third party to initiate and enforce a DIR-approved LCP.

Failure to approve the regulations on an emergency basis will result in delays of the SAB releasing SFP funds to school districts and charter schools for the approximate 120 days needed to obtain an effective date for non-emergency regulations. Without the process and criteria set forth in the proposed emergency regulations, school districts that had delays initiating and enforcing LCPs at applicable school construction projects cannot verify meeting the legal criteria in order to receive Proposition 47 or 55 bond funding for their projects. Even if bond authority became available, the SAB may not legally provide the bond funds for those projects.

Background and Problem Being Resolved

Districts receiving an apportionment must request the State funds to be released within 90 days, pursuant to SFP Regulations. Five school construction projects in the amount of \$17.2 million (State share of total project costs) have had their requests for the release of State bond funds returned to the school districts due to delayed initiation of an LCP, with another \$441.6 million (State share) in pending projects for which the timeliness of the district's initiation and enforcement of LCPs is yet unknown.

At the December 12, 2012 SAB meeting, approximately \$19.3 million (State share of total project costs) is scheduled to be apportioned from Propositions 47 and 55 for 20 school construction projects in fourteen districts. Any of these districts that delayed initiation of the LCP will not be able to submit a valid fund release request for State funds within the required 90 day time period, unless the proposed regulations are approved on an emergency basis.

It is necessary that urgent action be taken to change the current process in the SFP Regulations so that, as soon as possible, school districts have the regulatory framework in effect to hire a certified independent third party LCP contractor to verify and report the district's LCP compliance, and thereby qualify for bond funding from these two Propositions. The regulations have a direct benefit to California businesses because, once State bond funding has been released, school districts are able to use the funds for construction projects; thus, expanding construction-related trades and businesses and stimulating the State's economy. These actions are in direct alignment with the Governor's directive. In addition, the dollars associated with these emergency regulatory amendments will benefit the school district communities by stimulating the local economies.

The State of California's financial condition continues with depressed General Fund revenues and a budget deficit. The State has relied upon the SFP as a means to provide an economic stimulus to construction-related trades and businesses while meeting the classroom needs of the State's K-12 student population. Over \$3.6 billion has been apportioned by the SAB for school construction projects from August 2010 through June 2012 for these vital purposes. However, the SFP Regulations that are currently in place do not allow the SAB the flexibility to apportion Proposition 47 and 55 funds for school projects that had delayed initiation of LCP programs. The proposed emergency regulations set forth a fair and uniform process to verify compliance and qualify these projects for bond funding.

The SAB may not release Proposition 47 or 55 bond funds until it receives a "written finding" [Labor Code Sections 1771.7(d)(1) and (d)(2)(B)] from the school district that it met one of the two methods for its school construction project. In other words, a district failing to meet the LCP requirement jeopardizes its entire bond funding for an SFP construction project. However, some school districts delayed in having an LCP approved by the DIR or contracting with a third party LCP provider, thereby raising questions whether the projects can maintain their project approval status and/or legally be funded from these bond funds.

Summary of the Regulatory Amendments

The proposed emergency regulatory amendments would add a new regulation section to clarify the LCP "written finding" requirement specified in Labor Code Section 1771.7(d)(2)(B), and provide an alternative method for districts to receive Proposition 47 or 55 bond funding in cases where a district initiated and enforced an LCP after the construction contract was awarded for the project.

Under the proposed amendments, districts that contracted with a third party LCP provider or obtained DIR approval of its LCP after the construction contract was awarded would be required to submit a report to the OPSC and the DIR from a third party LCP provider that includes:

- verification that the applicable duties of an LCP were performed on the project,

- verification that the performance of the applicable LCP duties began within one month after the commencement of the construction work, and
- a written record of the LCP's confirmation of monthly payroll records for the project.

The DIR would have 60 days to review the report and determine it to be incorrect, thereby preventing project funding from Proposition 47 or 55. Districts would also need to provide a notice to each worker that the district submitted the report and that the workers may contact the OPSC and the DIR concerning the accuracy of the findings. The emergency regulations would apply to projects with construction contracts awarded prior to January 1, 2012 (because different criteria became effective for projects with construction contracts awarded on or after January 1, 2012). The proposed emergency regulations would significantly improve the determination process for whether a school district has complied with the LCP requirements for fund release purposes, pursuant to Labor Code Sections 1771.7(d)(2)(B) and 1771.5.

Finally, for districts wishing to accelerate bond funding for their projects through the priority funding process, they must give the DIR 60 calendar days to review the report of an untimely LCP initiation prior to submitting the *Fund Release Authorization* (Form SAB 50-05) to receive the funds. To allow districts sufficient time to comply, this requirement would only apply on or after July 1, 2013.

The proposed emergency regulatory amendments are therefore determined to be consistent and compatible with existing State laws and regulations. Proceeding with the implementation of these regulatory amendments will have no impact upon the public health and safety.

The proposed regulations promote fairness by allowing school districts that delayed initiating their LCP programs to have a regulatory framework through which they can verify and report the district's LCP compliance, by an independent and certified LCP contractor, and thereby qualify for bond funding from Propositions 47 and 55. If the districts verify their entitlement to the school bond funding, State bond funds can be released to be used for school construction projects and construction-related trades and businesses benefit, the State's economy is stimulated, and school pupils receive needed classrooms. The dollars associated with these emergency regulatory amendments would also benefit the school district communities by stimulating the local economies.

Authority and Reference Citations

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

Reference: Sections 17072.12, 17072.30, 17074.16, 17076.10, 17077.40, 17077.42 and 17077.45 of the Education Code, and Section 1771.5 and 1771.7 of the Labor 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 SAB, at its October 24, 2012 meeting, adopted emergency regulatory amendments to the SFP Regulations to clarify the requirements for school districts to initiate and enforce LCPs in order to receive school bond apportionments from either Proposition 47 or Proposition 55. The LCP requirements are in accordance with AB 1506, Labor Code Sections 1771.5 and 1771.7, and the Department of Industrial Relations Regulation Section 16432.

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 change the revision date of the Form SAB 50-05 to "10/12."

Existing Regulation Section 1859.90.2 ("Priority Funding Process"):

- establishes 30-calendar day application filing periods for school districts and charter schools to apply for apportionments of available State school bond funds, provided that they submit the Form SAB 50-05, in a specified time period.
- projects under the Charter School Facilities Program (CSFP) may apply for advance release of design funds from a Preliminary Charter School Apportionment under specified criteria.
- projects under the Critically Overcrowded School Facilities Program may apply for advance release of environmental hardship site acquisition funds under specified criteria.
- projects under the CSFP may apply for advance release of site acquisition funds from a Preliminary Charter School Apportionment under specified criteria.

The proposed emergency regulatory amendments add a new document submittal criterion to be included in the district or charter school's written statement accompanying their application to participate in the Priority Funding Process, as follows:

- Acknowledgement that if the district submits the Form SAB 50-05 on or after July 1, 2013 and is required to submit an LCP third party report pursuant to Regulation Section 1859.97(b), the report must be submitted to the OPSC and the DIR at least 60 days prior to submitting the Form SAB 50-05.

Proposed adoption of Regulation Section 1859.97 would implement the requirements of Labor Code Section 1771.7 that a school district shall initiate and enforce, or contract with a third party to initiate and enforce, an LCP for any project funded in whole or in part from Propositions 47 or 55, and for which the construction contract was awarded prior to January 1, 2012. The district shall submit a "written finding" that it complied with this requirement for applicable projects.

However, if the construction contract was signed either prior to the district's LCP being approved by the DIR or prior to the district entering into a contract with a third party to implement the LCP, then a district must meet six criteria to establish compliance with the LCP requirement (criterion 3 has three subparts):

1. The DIR has approved either the district's or the third party LCP, and such approval had not been revoked at the time of implementing the LCP;

2. The district, or the third party with whom the district contracted to implement its LCP, submitted an application for approval of its LCP in accordance with the DIR's LCP regulations prior to January 1, 2012;
3. The district submits the report of a third party that has been approved by the DIR to operate an LCP in accordance with the DIR LCP regulations, and such approval has not been revoked as of the date of the report. In the case of a district that has entered into a contract with a third party to implement the LCP, the report must be prepared by a different third party that has been approved by the DIR to implement an LCP, and such approval had not been revoked as of the date of the report. The report must include all of the following:
 - Verification that the applicable duties of an LCP were all performed on the project, as set forth in Labor Code Section 1771.5(b) and DIR regulations; and
 - Verification that the performance of the applicable LCP duties began within one month after the commencement of the construction work on the project as set forth in Labor Code Section 1771.7(b); and
 - A written record of the LCP's confirmation of payroll records for each month in which a contractor or subcontractor reports having workers employed on the public work project, pursuant to Title 8, California Code of Regulations, Section 16432(c).
4. The district shall provide notice to each worker for which confirmation of payroll records has been performed pursuant to Title 8, California Code of Regulations, Section 16432(c), informing that the district has submitted a written report to the OPSC that the district has initiated and enforced, or contracted with a third party to initiate and enforce, a LCP on the project to monitor and ensure the payment of prevailing wages to workers. The notice shall inform these workers of the manner in which they may contact the OPSC and the DIR concerning the accuracy of the report set forth in #3 above.
5. The district shall provide the DIR a copy of the report set forth in #3 above at the same time the report is submitted to the OPSC. The DIR may notify the OPSC if the DIR determines the verifications in the awarding body's report to be incorrect.
6. The report shall not be determined to comply with Labor Code Section 1771.7(a) if the DIR submits the notice described in #5 above within 60 calendar days of receiving the report set forth in #3 above.

Existing Form SAB 50-05 is submitted by school districts and charter schools requesting the State to release their approved funding, provided the project is at least 50 percent under contract and the school district has met other specific criteria. The proposed emergency regulatory amendments expand paragraph #3 under General Information by adding document submittal requirements for projects requiring LCP compliance with Labor Code Section 1771.7. These districts must additionally submit:

- A written finding that the district has initiated and enforced, or had contracted with a third party to initiate and enforce, an LCP pursuant to Regulation Section 1859.97(a); and
- If the district is requesting funds to be released through the priority funding process on or after July 1, 2013, and if the district's LCP approval or contract date with an approved LCP third party is later than the construction contract date(s), then the district must have submitted the report specified in Regulation Section 1859.97(b) at least 60 days before submitting the Form SAB 50-05.

In addition, Labor Compliance Program is abbreviated to LCP on page 1 and page 3.

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.

*The proposed emergency regulations do not impose a reporting requirement. The submittal to the OPSC of a “written finding” of LCP compliance merely reflects the requirement of Labor Code Section 1771.1(d)(1). However, if a school district did not timely initiate an LCP before its school construction contract was signed for the project, as required for school bond project funding from both Propositions 47 and 55, the regulatory amendments provide districts the option to hire a certified LCP third party contractor to review the district’s labor compliance and submit a report to the OPSC and the DIR. If the report verifies the required compliance, and if bond funding is available, then project funding from Propositions 47 and 55 may occur.