REPORT OF THE EXECUTIVE OFFICER
State Allocation Board Meeting, June 27, 2007

LABOR COMPLIANCE PROGRAM GRANTS

PURPOSE OF REPORT

To present for the Board's consideration regulations to allow Labor Compliance Program (LCP) grant funding for districts that voluntarily initiate and enforce a LCP and to adjust the LCP grant.

BACKGROUND

Labor Code Section 1771.7 requires school districts that choose to use funds derived from either the Kindergarten-University Public Education Facilities Bond Act of 2002 or 2004 (Propositions 47 and 55, respectively) to initiate and enforce a LCP. However, school districts with projects apportioned from the Kindergarten-University Public Education Facilities Bond Act of 2006 (Proposition 1D) are not required to comply with this law. As a result, at the February 2007 State Allocation Board (SAB) meeting, the Board requested Staff to research if a district voluntarily implements a LCP on a project for which such a program is no longer mandated by statute, if it is permissible for the SAB to continue to provide the grant for the purpose of reimbursing the district for the costs of voluntarily initiating and enforcing a LCP.

At the March 2007 SAB meeting, Staff reported that SAB Legal Counsel opined that while the Labor Code Section 1771.7(a) requires school districts to initiate and enforce a LCP on those projects funded under Propositions 47 and 55 and not Proposition 1D, subsection (e) of the aforementioned statute was sufficiently broad enough that it can be read to authorize the SAB to continue to provide the LCP grant for those districts that voluntarily initiate and enforce a LCP. SAB Legal Counsel cited the legislative intent of Labor Code 1771.7 was to ensure that every school district in the State pay the prevailing rate of per diem wages to workers employed on public works projects undertaken by districts. As a result, the Legislature provided the Board with the ability to increase the State's share of increased costs to accommodate labor compliance programs. Since labor compliance programs may continue to be voluntarily implemented by school districts, the Board is simply furthering the legislative intent of Labor Code 1771.7 by providing the grant augmentation to help ensure the prevailing wage rates are paid on public works projects.

In addition, Staff provided the Board an update to the March 2006 report regarding the adequacy of LCP apportionments based on 245 project audits. The report contained the following information:

- Through January 2007, the SAB has provided LCP grants for 3,342 projects.
- The 245 project audits represent 7.3 percent of all projects that have received LCP grants and 100 percent of those projects closed out to date.
- New Construction LCP apportionments have been under spent by an average of 40.9 percent.
- Modernization LCP apportionments have been under spent by 63.7 percent.

As a result of the discussion on these two issues, the Board requested Staff to return at a future meeting with regulations to provide the LCP grant augmentation for those districts that voluntarily initiate and enforce a LCP for projects apportioned from Proposition 1D and to adjust the LCP grant. However, due to recently raised legal concerns regarding the SAB's authority to provide LCP grants on a voluntary basis, Staff have provided alternatives that could bifurcate this issue and allow the SAB to move forward with both issues or just the grant adjustment portion of this item.

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AUTHORITY

Labor Code 1771.7 states in part that the SAB shall increase per-pupil grant amounts to accommodate the State's share of the costs of initiating and enforcing a LCP. The law provides that a School Facility Program (SFP) project is eligible for an increase in the per-pupil grant amount if both of the following conditions are met:

- The project was or will be funded from the proceeds of Propositions 47 or 55.
- The Notice to Proceed for the initial contract for construction of the project was issued on or after April 1, 2003.

Labor Code 1771.7 also provides an exception to the full and final apportionment provisions in the law to accommodate LCP costs on projects that have already received their full apportionment amount without the LCP funding but were eligible for the funding. Additionally, this statute gives the SAB the authority to provide grant augmentations to ensure prevailing wage rates are paid on public works projects.

STAFF COMMENTS

Providing the LCP Grant on a Voluntary Basis

At the May 4, 2007 Implementation Committee meeting, based on the Board's request, Staff proposed allowing those projects apportioned with funds from other than Propositions 47 and 55 to be eligible for LCP funds provided the district voluntarily initiates and enforces a LCP. A member of the audience involved in the Proposition 1D bond discussions questioned the recommendation and the SAB Legal Counsel's February 2007 opinion stating that the SAB Legal Counsel's basis for opining that the SAB can provide the LCP grant on a voluntary basis is hinged on the legislative intent of Assembly Bill 1506 which added Labor Code 1771.7. However, it was this audience member's belief that the legislative intent of Proposition 1D was more recent and therefore more germane to the issue as the Legislature chose not to require the initiation and enforcement of a LCP for projects apportioned with these bond funds. The same member of the audience also called attention to the fact that existing law provides a SFP project is eligible for an increase in the per-pupil grant if "both" of the conditions noted above are met. Projects funded out of Proposition 1D do not meet the first condition and, thus, are not eligible.

Staff consulted with the SAB's Legal Counsel regarding the audience member's concerns. The SAB Legal Counsel opined that Labor Code 1771.7 is not absolute and that while Labor Code 1771.7 requires that districts with projects apportioned from Propositions 47 and 55 initiate and enforce a LCP for which the Board will provide a grant augmentation, the intent of the legislation was to ensure prevailing wage rates are enforced on public work projects constructed by school districts. While it is true the Legislature did not require the initiation and enforcement of a LCP in Proposition ID, it did not prohibit it. If a district's project is funded exclusively with Proposition 1D bond funds, the Board does have the discretion to make a policy decision to allow the continual funding of a LCP on a voluntary basis; however, the SAB Legal Counsel did caution that such a decision may be vulnerable to a legal challenge. The SAB Legal Counsel further opined that those districts that have projects funded in part with Proposition 47 and/or 55 bond funds will be required to initiate and enforce a LCP.

Should the Board request Staff to provide LCP funding on a voluntary basis, Staff recommends that provisions be made for impacted districts to access this additional funding effective upon the approval of the regulations by the Office of Administrative Law. Since Labor Code 1771.7(e) provides an exemption to the full and final provisions of Education Code 17070.63, Staff intends, if this provision is approved by the SAB, to automatically include the appropriate LCP funding for projects that indicated LCP compliance for those applications previously funded with Proposition 1D funds. Staff would also notify all other districts individually of the opportunity to include a request for LCP grants where a request was not made on the funding application, but where that district voluntarily initiated and enforced an LCP.

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STAFF COMMENTS (cont.)

LCP Grant Amounts

At the same Implementation Committee meeting, Staff introduced a proposed reduction to the new construction and modernization LCP grant. For new construction projects, the proposed reduction is limited to those districts with projects with a total project cost, less site acquisition costs, of one million dollars or less as Staff believes there is sufficient data to justify the reduction. Under current regulations, a district receives a LCP apportionment of $16,000 for any project where the cost is one million dollars or less, less site acquisition costs. So a district with a project that will cost one million dollars and a district with a project that will cost $50,000 will both receive a $16,000 LCP grant. Under the proposed regulations, districts with projects in this cost range will receive a LCP apportionment of 0.65 percent of the total project cost, less site acquisition costs. Staff recommends this change based on data which indicates districts are expending only 16.10 percent of the LCP funds for projects totaling one million dollars or less. If a project exceeds one million dollars, no changes are being recommended as there is insufficient data to provide a defensible adjustment to the existing LCP grant.

For modernization projects, Staff is proposing a 25 percent reduction in the LCP grant for all projects regardless of the total project costs. While the data supports an even further reduction in the LCP apportionment for most of the projects audited, Staff believes a 25 percent reduction is conservative and reasonable at this time until more data can be gathered over the forthcoming year.

Members of the Committee and audience expressed concern with Staff's recommendations. Many cited that the data pool was too small to justify any adjustment to the LCP grant. While the data used for this analysis represented 7.3 percent of all projects apportioned with LCP funds, the 245 projects represented 100 percent of all projects audited. Some audience members also cited that it is common for districts to not report or under-report LCP expenditures explaining that with larger projects it was difficult for the district to identify LCP costs, especially if force account labor was used. Others cited that multiple projects are often bid together as a means of economies of scale, therefore making it difficult to extract accurate LCP costs as the common practice was to take the LCP costs and divide them equally amongst the contracted projects. While this method may be convenient for reporting purposes, it does not represent the actual LCP costs for each of the projects reported. Some members of the Committee and audience contended that since 73 (12 new construction and 61 modernization) of the 245 projects had no LCP costs reported by the districts, the adjustments to the LCP grants could not be justified. While Staff does not concur with that rationale, Staff eliminated those 73 projects when developing their conservative grant reduction recommendations to the Board. The results of the review of the remaining 172 projects (39 new construction and 133 modernization) are as follows:

- New Construction LCP apportionments have been under spent by an average of 30.3 percent.
- Modernization LCP apportionments have been under spent by 46.8 percent.

The average under spent amounts compared to the LCP grants provided is visually displayed on the attached Exhibits 1 and 2. These exhibits also illustrate that the proposed grant reduction will still provide grants in excess of the average LCP expenditures.

There was limited LCP cost data available during the initial implementation of the program in July 2003. Staff, with the assistance of the Implementation Committee, therefore provided a grant augmentation that was based on the best available cost data at the time. In turn, it was agreed that the amount of the per pupil grant for LCP would be revisited based on actual costs incurred by districts. The districts were subsequently asked to account for all LCP funds expended for each project apportioned. If a district combined several projects for the purposes of economies of scale or used force account labor, the district was responsible for tracking and reporting complete LCP expenditures appropriately for audit purposes. In fact, pursuant to SFP Regulation Section 1859.106, Program Accountability Expenditure Audit, districts are required to maintain a record of the complete LCP costs incurred:

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STAFF COMMENTS (cont.)

LCP Grant Amounts (cont.)

> "Districts shall be required to maintain all appropriate records that support all district certifications and expenditures for all costs associated with SFP, Charter School, and Joint-Use projects for a period of not less than four years from the date the notice of completion is filed for the project in order to allow other agencies, including, without limitation, the Bureau of State Audits and the State Controller to perform their audit responsibilities."

Furthermore, in the SFP Expenditure Audit Guidebook, districts are instructed to:

> "…provide a detailed listing of project expenditures that reflect all expenditures for the project by warrant numbers, warrant dates, warrant payees, warrant amounts, and specific descriptions of the expenditures, as required on the Form SAB 50-06. The description of expenditures must provide sufficient detail for the audit staff to verify all project expenditures are applicable to the project and that the expenditures have been recorded in the proper cost categories. In addition, the district must report the eligible expenditures for the project that encompass the State and district matching share. Also, if the district augmented the project beyond the State and district share, please include these costs on the same report, but identify them as being solely district funded."

Thus, even if the LCP grants are not adjusted today based on the assertions of the stakeholders and more data is collected over the course of the next year, it is likely Staff will continue to receive incorrect LCP cost expenditure data from the districts resulting in the same conundrum. Consequently based on the expenditure data reported in the 245 projects audited thus far, it appears the SFP is over funding the LCP grant; therefore, Staff recommends a reduction in the State's share of the LCP grant for new construction and modernization projects. In an effort to ensure the LCP grant augmentation remains sufficient to cover the costs of initiating and enforcing a LCP, Staff will conduct another analysis in one year to ensure the adequacy of the LCP grant.

Additional non-substantive SFP Regulation changes included in this item:

The *Application for Funding* (Form SAB 50-04) includes the addition of a certification that the district will comply with all laws pertaining to the construction of its facilities. This certification was inadvertently omitted in a prior regulatory revision.

The *Fund Release Authorization* (Form SAB 50-05) is being revised to require districts to provide:

- a copy of voter approved bond language when a district's joint-use partners' financial contribution is provided through local bond proceeds.
- a certification that the district's joint-use partner's financial contribution has been provided by a local bond specifically for the joint-use purpose, if applicable.
- the earliest issue date of the Notice to Proceed and well as the date the contract was signed for New Construction, Modernization and Joint-Use projects.

The *Application for Joint Use Funding* (Form SAB 50-07) corrects the Department of Labor Relations to Department of Industrial Relations.

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RECOMMENDATIONS

Direct Staff to proceed with either Alternative 1 or Alternative 2, as described below.

Alternative 1 (Voluntary LCP and LCP Grant Adjustment):

1. Adopt the proposed amendments to the regulations as shown on Attachment A and request Staff to begin the regulatory process to reduce the LCP grant for both new construction and modernization projects and to provide the LCP grant to districts that voluntarily initiate and enforce a LCP.

2. Request Staff return in one year to provide an update on the adequacy of the LCP grants.

Alternative 2 (LCP Grant Adjustment):

1. Adopt the proposed amendments to the regulations as shown on Attachment B and request Staff to begin the regulatory process to reduce the LCP grant for both new construction and modernization projects.

2. Request Staff return in one year to provide an update on the adequacy of the LCP grants.

BOARD ACTION

In view of the two opposing legal opinions concerning the Board's ability to provide grants for districts that voluntarily participate in a labor compliance program (LCP), the Board requested the SAB Legal Counsel obtain an informal legal opinion from the Attorney General's office. Alternative Two of this item, the proposed regulatory amendments to reduce the LCP grants, was held over to the July SAB meeting.

ATTACHMENT A

Article 8. New Construction and Modernization Grant Determinations

Section 1859.71.4. New Construction Pupil Grant Increase for Labor Compliance Program.

(a) After determining all other funding authorized by these Regulations, the Board shall increase the per-unhoused-pupil grant amount by 50 percent of the following calculation for any project for which the district is required under Labor Code Section 1771.7(a) and (b) to initiate and enforce a LCP and for any project for which the district voluntarily initiates and enforces a LCP:

(1) Using the chart in (b) of this Section, determine the total amount of funding to be provided for the increased costs of a new construction project due to the initiation and enforcement of a LCP.

(2) Divide the amount determined in subsection (a)(1) by the total number of pupils, or by one if no pupils are assigned, in the approved application.

(b) The funding provided for a new construction project to initiate and enforce a LCP shall be calculated on the total project cost, exclusive of site acquisition costs, as follows:

~~$16,000~~ 0.65 percent of ~~For~~ the ~~first~~ costs for projects less than $1 million ~~or any part thereof, plus~~ or $16,000 for the first $1 million for projects equal to or more than $1 million, plus	
1.6 percent	Of the next $1 million or any part thereof, plus
0.25 percent	Of the next $1 million or any part thereof, plus
0.15 percent	Of the next $1 million or any part thereof, plus
0.32 percent	Of the next $2 million or any part thereof, plus
0.31 percent	Of the next $2 million or any part thereof, plus
0.46 percent	Of the next $5 million or any part thereof, plus
0.44 percent	Of the next $5 million or any part thereof, plus
0.42 percent	Of the next $30 million or any part thereof, plus
0.4 percent	Of any remaining portion

Note: Authority cited: Section 17070.35, Education Code.

Reference: Section 17072.10, Education Code.

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Section 1859.78.1. Modernization Pupil Grant Increase for Labor Compliance Program.

(a) After determining all other funding authorized by these Regulations, the Board shall increase the per-pupil grant amount by the following calculation, less the district matching share required in Section 1859.79, for any project for which the district is required under Labor Code Section 1771.7(a) and (b) to initiate and enforce a LCP and for any project for which the district voluntarily initiates and enforces a LCP:

(1) Using the chart in (b) of this Section ~~1859.71.4(b)~~, determine the total amount of funding to be provided for the increased costs of a modernization project due to the initiation and enforcement of a LCP.

(2) Divide the amount determined in subsection (a)(1) by the total number of pupils, or by one if no pupils are assigned, in the approved application.

(b) The funding provided for a modernization project to initiate and enforce a LCP shall be calculated on the total project cost as follows:

$12,000	For the first $1 million or any part thereof, plus
1.2 percent	Of the next $1 million or any part thereof, plus
0.18 percent	Of the next $1 million or any part thereof, plus
0.11 percent	Of the next $1 million or any part thereof, plus
0.24 percent	Of the next $2 million or any part thereof, plus
0.23 percent	Of the next $2 million or any part thereof, plus
0.35 percent	Of the next $5 million or any part thereof, plus
0.33 percent	Of the next $5 million or any part thereof, plus
0.32 percent	Of the next $30 million or any part thereof, plus
0.3 percent	Of any remaining portion

Note: Authority cited: Section 17070.35, Education Code.

Reference: Section 17074.10, Education Code

ATTACHMENT B

Article 8. New Construction and Modernization Grant Determinations

Section 1859.71.4. New Construction Pupil Grant Increase for Labor Compliance Program.

(a) After determining all other funding authorized by these Regulations, the Board shall increase the per-unhoused-pupil grant amount by 50 percent of the following calculation for any project for which the district is required under Labor Code Section 1771.7(a) and (b) to initiate and enforce a LCP:

(1) Using the chart in (b) of this Section, determine the total amount of funding to be provided for the increased costs of a new construction project due to the initiation and enforcement of a LCP.

(2) Divide the amount determined in subsection (a)(1) by the total number of pupils, or by one if no pupils are assigned, in the approved application.

(b) The funding provided for a new construction project to initiate and enforce a LCP shall be calculated on the total project cost, exclusive of site acquisition costs, as follows:

~~$16,000~~ 0.65 percent of ~~For~~ the ~~first~~ costs for projects less than $1 million ~~or any part thereof, plus~~ or $16,000 for the first $1 million for projects equal to or more than $1 million, plus	
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0.15 percent	Of the next $1 million or any part thereof, plus
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0.4 percent	Of any remaining portion

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Section 1859.78.1. Modernization Pupil Grant Increase for Labor Compliance Program.

(a) After determining all other funding authorized by these Regulations, the Board shall increase the per-pupil grant amount by the following calculation, less the district matching share required in Section 1859.79, for any project for which the district is required under Labor Code Section 1771.7(a) and (b) to initiate and enforce a LCP:

(1) Using the chart in (b) of this Section ~~1859.71.4(b)~~, determine the total amount of funding to be provided for the increased costs of a modernization project due to the initiation and enforcement of a LCP.

(2) Divide the amount determined in subsection (a)(1) by the total number of pupils, or by one if no pupils are assigned, in the approved application.

(b) The funding provided for a modernization project to initiate and enforce a LCP shall be calculated on the total project cost as follows:

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0.23 percent	Of the next $2 million or any part thereof, plus
0.35 percent	Of the next $5 million or any part thereof, plus
0.33 percent	Of the next $5 million or any part thereof, plus
0.32 percent	Of the next $30 million or any part thereof, plus
0.3 percent	Of any remaining portion

Note: Authority cited: Section 17070.35, Education Code.

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