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CALIFORNIA STATE ALLOCATION BOARD
RULES AND PROCEDURES SUBCOMMITTEE
PUBLIC MEETING

LEGISLATIVE OFFICE BUILDING
1020 N STREET, ROOM 100
SACRAMENTO, CALIFORNIA 95814

DATE: MONDAY, FEBRUARY 14, 2011
TIME: 3:12 P.M.

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APPEARANCES

MEMBERS OF THE SUBCOMMITTEE PRESENT:

SENATOR LONI HANCOCK, CHAIRPERSON

SCOTT HARVEY, Chief Deputy Director, Department of General Services, designated representative for Ron Diedrich, Acting Director, Department of General Services.

ASSEMBLY MEMBER JULIA BROWNLEY

REPRESENTATIVES OF THE STATE ALLOCATION BOARD PRESENT:

LISA SILVERMAN, Acting Executive Officer

LISA KAPLAN, Assistant Executive Officer

P R O C E E D I N G S

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SENATOR HANCOCK: The meeting of the State Allocation Board Subcommittee on Rules and Procedures will come to order. We have three items of business today and I know everybody's got very, very full schedules, the pace we're -- the track we're on and the pace we're in. So I hope that we can move forward expeditiously.

The first item is --

MS. KAPLAN: Just like to call attendance.

SENATOR HANCOCK: Yes. I would like to call the roll. Thank you. Jumping the gun here. Madam Secretary.

MS. KAPLAN: Senator Hancock.

SENATOR HANCOCK: Here.

MS. KAPLAN: Assembly Member Julia Brownley.

ASSEMBLY MEMBER BROWNLEY: Here.

MS. KAPLAN: Scott Harvey.

MR. HARVEY: Present.

MS. KAPLAN: All accounted for and present.

SENATOR HANCOCK: Okay.

MS. KAPLAN: We can get started with reconsideration.

SENATOR HANCOCK: Yes. The first item on our agenda is reconsideration, an item that we've discussed on many occasions and we sent the item back for some additional

1 staff work and --

2 MS. KAPLAN: I can tell you just the main changes.
3 If you flip over where you can see where it says Staff
4 Analysis Option 1 and Option 2, Option 2 is the original
5 language that was put forth by the Subcommittee and in
6 working with staff, we wanted to make it a little bit more
7 congruent and similar to Senate Rules. And so we took the
8 genesis of what was in Senate Rules and reconsideration is
9 red tab and it's back page -- the backside of the red tab.

10 SENATOR HANCOCK: Good. Yeah. So it's Option
11 No. 1.

12 MS. KAPLAN: Option 1 is very similar to what is
13 in Senate Rules. We just made it fit for the State
14 Allocation Board. When it's -- the first paragraph is when
15 you're -- when a motion is -- has passed and there's concern
16 of reconsideration or they want to address that again, a
17 motion for reconsideration is in order and can be taken
18 on -- and a vote can be taken on that meeting.

19 However, in the second paragraph, what that second
20 paragraph says is when a motion fails, a call for
21 reconsideration is in order in that meeting. However, any
22 subsequent vote has to be at a subsequent meeting, so that
23 it is duly noticed, so that can be discussed again because I
24 know that has been a little confusing on the second part of
25 that.

1 So you may -- if an item fails, you may call for
2 reconsideration, but to discuss the reconsideration of that
3 failed item has to happen at a next regularly scheduled
4 Board meeting so that there may be compromise or something
5 else that is figured or worked out.

6 And that is very similar to Senate Rules.

7 SENATOR HANCOCK: Right. So that if there's a
8 majority of the Board, the action will be set for a
9 subsequent meeting to vote on the substance of the
10 reconsideration.

11 ASSEMBLY MEMBER BROWNLEY: So I guess that's just
12 about airing a little bit more time for something that was
13 voted against.

14 MS. KAPLAN: Um-hmm.

15 ASSEMBLY MEMBER BROWNLEY: So I presume we would
16 have noticed in either circumstance; right? So because it
17 was a failed motion before, this gives -- you know, we do
18 our due diligence about noticing the meeting again to say
19 that we're really considering --

20 MS. KAPLAN: Yes.

21 ASSEMBLY MEMBER BROWNLEY: -- this decision.

22 SENATOR HANCOCK: The action.

23 MS. KAPLAN: Yes.

24 ASSEMBLY MEMBER BROWNLEY: Okay.

25 SENATOR HANCOCK: Right.

1 ASSEMBLY MEMBER BROWNLEY: I don't know -- I
2 guess, you know, it sort of still -- I thought that all made
3 sense to me, but now I think about, well, the public would
4 be concerned of a different outcome in either case; is that
5 not true?

6 MS. KAPLAN: It could be true. We did take -- if
7 you see on the very next page, reconsideration of
8 supplemental background information, it says Senate Rules
9 and right there I copied and pasted Senate Rules and then
10 the Senate Rule 43 on reconsideration to show that this is
11 something that the Senate has adopted and it's substantially
12 similar --

13 ASSEMBLY MEMBER BROWNLEY: Well, if it's the
14 Senate, it must be good.

15 SENATOR HANCOCK: Actually though I'm thinking --
16 I think it's the same in the Assembly. You know how people
17 are always moving reconsideration and it says granted to the
18 next meeting.

19 Mr. Harvey.

20 MR. HARVEY: I just have an overarching question.
21 The ability to have this discussion prompted me to reread
22 what Mr. Patton had to say about reconsideration and he
23 talks in terms of the SAB being an administrative body, not
24 a legislative body, and all of the rules stated in here are
25 parliamentary and are appropriate for a legislative body and

1 I think we need to have a discussion on what we are because
2 if indeed we are an administrative entity as he suggested on
3 March 10th -- and I'll hand you his opinion because I wanted
4 to indicate I'm fine with reconsideration if we're an
5 administrative agency because he gives us on page 2 of this
6 exceptions to his general rule which is, hey, administrative
7 agencies such as the SAB have no inherent power or authority
8 to reopen, rehear, reconsider, and change prior final
9 decisions absent some statutory authority.

10 So (a) we either have to have statutory authority
11 or I would suggest we could have a reconsideration rule
12 which is consistent with the exemptions on page 2 which is
13 his third paragraph down where he says exemptions to the
14 general rule have been established. Specifically an
15 administrative agency is not precluded from reopening,
16 reconsidering a matter if a prior decision exceeded its
17 lawful authority or was rendered based on insufficient
18 evidence due to the agency's failure to provide notice and
19 opportunity for those affected to be heard, which is I
20 think, Assemblywoman Brownley, your point.

21 So the administrative entity generally can't do
22 it, but if we have to, there are exceptions and those are
23 the two exceptions. So I guess guidance may be in order,
24 although our DAG says we're an administrative entity not a
25 legislative one.

1 MS. KAPLAN: And if you'll actually go back -- and
2 I'm sorry I didn't have this letter ahead of time, otherwise
3 I would have been able to pull up my opinion I provided to
4 you as well as the other case law that this opinion is
5 lacking in.

6 In Mr. Patton's I guess analysis here, he only
7 provided two exemptions. In law, there is actually three
8 and one of the exemptions is when there's substantial facts
9 that would alter the decision or facts have changed that
10 would alter the outcome of that and so that would allow --
11 and while you -- while he believes you're an administrative,
12 you are a quasi kind of judicial as well because of the
13 nature of dealing with appeals and with the funding.

14 So I think there is probably going to be an
15 inherent difference and conflict. It may be in order to
16 also pull up the discussion from -- if it was the March
17 SAB -- to hear where the State Allocation Board -- but it is
18 my opinion you absolutely do have the authority to have
19 reconsideration of an item.

20 MR. HARVEY: Well, I think we do need to have that
21 very healthy discussion because his statement again is in
22 general administrative agencies such as the SAB have no
23 inherent power or authority to reopen, rehear, reconsider,
24 or change. That is on his first page.

25 So again I'm bound I think --

1 ASSEMBLY MEMBER BROWNLEY: I mean I think that --
2 you know, I think that that could true if we were actually
3 changing the law, but what we're reconsidering is our
4 interpretation of the regulations. So seemingly it seems as
5 though under certain conditions, you know, we should be able
6 to reconsider.

7 SENATOR HANCOCK: Well, it's what you're
8 reconsidering; right? Are we reconsidering --

9 MR. HARVEY: He says decisions. Final decisions.
10 I mean that's -- again on page 1, he uses the word final
11 decisions.

12 MS. KAPLAN: Which --

13 MR. HARVEY: I'm just trying to get some guidance
14 on this. I want to make sure we are following the
15 authorities we have and I'm saying reconsideration is
16 appropriate. I agree it is, but I think I would be more
17 comfortable with the exemptions and if there are others,
18 great, but we tie to the exemptions which are authorized for
19 administrative bodies.

20 He cites two. Ms. Kaplan is suggesting three.

21 MS. KAPLAN: And I'm just concerned about --

22 ASSEMBLY MEMBER BROWNLEY: Who gets to determine
23 what's insufficient evidence due to the agency's failure to
24 provide -- oh, that's to provide notice --

25 MR. HARVEY: Yeah.

1 ASSEMBLY MEMBER BROWNLEY: -- and opportunity for
2 those affected to be heard and the other exception is --

3 SENATOR HANCOCK: Exceeded its lawful authority.

4 MS. KAPLAN: Um-hmm. And then the third that I
5 found in case law is where facts would change the outcome of
6 the situation and I happen to agree with you, Assembly
7 Member Brownley.

8 I think in statute the Board is set up and has the
9 sole discretion to create regulation and interpret its own
10 regulation. You are the entity that can do that.

11 So if a decision has been made where you feel that
12 facts have changed, the situations are not in order, and
13 that it's -- the interpretation was not how it should have
14 been interpreted is within the Board's authority to do so,
15 I'm concerned greatly about the opinion by the AG's office
16 because, one, initially it is lacking in case law and it is
17 lacking in the totality of facts.

18 And so I'm concerned about the veracity of it for
19 the Board to rely on when it is already inherently lacking
20 total case law to give you guys the ability to decide based
21 on all the facts presented.

22 MR. HARVEY: Would you be willing to draft what
23 you think are the three exemptions that would keep us
24 consistent with case and statute law for administrative
25 hearing?

1 MS. KAPLAN: I'm willing to go back and look at
2 what I drafted for you in March and see if that is still
3 consistent and up to speed, but I don't believe based on my
4 reading of everything and based on the interpretation of
5 statute of the SAB's authority that they're exceeding their
6 authority to handle reconsideration if it's dealing with
7 interpretations of regulations. So I don't believe that
8 this opinion would actually apply.

9 MR. HARVEY: Well, I'd like another attorney, if
10 you don't mind, to rule on that because the DAG has said
11 final decisions. He's not splitting a hair about a
12 regulation or a law. It says decisions.

13 And I don't challenge the fact that --

14 MS. KAPLAN: Which -- no --

15 MR. HARVEY: -- we have the right to interpret
16 regulations. I just don't know if we get to go back and
17 have another bite of the apple according to the --

18 MS. KAPLAN: Well, then it would place in fact
19 because at the March meeting the Board did go back and
20 reconsider CCI and how they handled CCI.

21 So the Board did decide that they had the ability
22 to reconsider how they decided the construction cost index
23 and has already acted in a manner by a majority --

24 MR. HARVEY: And he said we could do that in this
25 opinion. He said that was an example of --

1 SENATOR HANCOCK: Well -- how now -- could you
2 point out where that is because none of us have had a chance
3 to read this.

4 MS. KAPLAN: And how would that fall under either
5 exemption 1 or 2?

6 MR. HARVEY: I'm looking at page 3 where he says
7 may -- the State Allocation Board reconsiders January 2010
8 decisions concerning adjustments to developer fees and he
9 says that we cannot, but the unfunded approval list arguably
10 any action, da-da-da-da -- it's actually the last paragraph
11 on page 4.

12 With regard to adjusting per pupil grant
13 allocations for projects not yet approved as noted, the
14 issue was agendized, but the transcript does not clearly
15 indicate whether the SAB actually took any final action.

16 So without final action, you're okay. Final
17 action, he seems to be suggesting, means without fitting
18 into one of those exemptions, you really can't.

19 MS. KAPLAN: Well --

20 ASSEMBLY MEMBER BROWNLEY: Yeah, but that doesn't
21 get to the issue that we're getting at. I mean we're trying
22 to get a place where -- you know, I'm not a lawyer, but, you
23 know, from a commonsense perspective, every once in a while,
24 a Board might deliberate on something and have some
25 information, but future information becomes relevant

1 relatively quickly and there is a desire to change course.

2 And -- but you're saying it only fits under this
3 because of a technicality that the transcripts didn't
4 portray that we -- it was unclear whether we made a decision
5 or not.

6 But what we're trying to I think address is, you
7 know, a -- you know, changing a decision on real information
8 that we might not have been aware of or has changed in some
9 order and we want to reverse now.

10 Now, is this something that's going to happen very
11 often? I don't think so.

12 MR. HARVEY: Probably not.

13 ASSEMBLY MEMBER BROWNLEY: But I do think that
14 it's worthy for us to have this within our regulations to
15 exercise it on that rare occasion.

16 I mean at the end of the day, we want to make the
17 right decisions; right? And the right decisions in this
18 context is the majority vote.

19 SENATOR HANCOCK: Okay.

20 MR. HARVEY: Well, again I've suggested that
21 Ms. Kaplan draft language which would be consistent with
22 what she believes is the case law, arguing your point, as
23 well as what the DAG has suggested are the exemptions.

24 ASSEMBLY MEMBER BROWNLEY: Well, in this case, you
25 do get a second bite at the apple because this is just an

1 advisory vote; correct? For the rest of the Board.

2 MS. KAPLAN: If there is a vote to either --

3 MR. HARVEY: On a final vote.

4 MS. KAPLAN: -- either approve Option 1 or approve
5 Option 1 with added language that may reflect the AG's
6 opinion, it would then go to the full Board for discussion
7 and final vote. So I await your direction.

8 SENATOR HANCOCK: Well, I would entertain that as
9 a motion. I've been letting this colloquy -- obvious
10 colloquy go on because there's only three of us and we've
11 been over this ground a lot.

12 But would someone like to make that motion, that
13 we adopt Option 1, that we receive a draft reflecting the
14 AG's opinion, when we present this to the full Board. Is
15 there such a motion?

16 ASSEMBLY MEMBER BROWNLEY: I'd be happy to make
17 that motion.

18 MR. HARVEY: I would second it.

19 SENATOR HANCOCK: Good.

20 MS. KAPLAN: So -- and I'll just restate the
21 motion for clarity, is approve Option 1 with the draft of
22 going through the AG's opinion on exemptions and the third
23 one I found in case law to then be presented to the full
24 Board for discussion and consideration.

25 SENATOR HANCOCK: Yes.

1 MS. KAPLAN: Okay.

2 SENATOR HANCOCK: That's the motion. I just want
3 to point out to Board members that one of the reasons we got
4 into this was realizing there were no procedures whatsoever
5 and that we did have a meeting in which a member had been
6 out of the room during a vote and then came back in and
7 didn't exactly know what the topic was and therefore we were
8 unable to reconsider.

9 Option 1 will take care of things like that and we
10 are an appeals board which is an interesting thing. It's
11 administrative but a little more than that and I know that
12 many times we've -- when we've come into really difficult
13 circumstances at the SAB, we've said this may require a
14 legislative fix, understanding that there are times when we
15 do have to appeal back to the legislative body to change the
16 rules. But --

17 MS. KAPLAN: So there is a motion and a second.

18 SENATOR HANCOCK: But there has been a motion and
19 a second. I just want to clarify kind of where I think we
20 are here. And, Madam Secretary, would you read the roll.

21 MS. KAPLAN: Senator Hancock.

22 SENATOR HANCOCK: Aye.

23 MS. KAPLAN: Assembly Member Brownley.

24 ASSEMBLY MEMBER BROWNLEY: Aye.

25 MS. KAPLAN: Scott Harvey.

1 MR. HARVEY: Aye.

2 MS. KAPLAN: All right. I will do that, work with
3 OPSC and draft that language so that you guys have that
4 before my departing day.

5 SENATOR HANCOCK: Okay. That will be very good.
6 Thank you very much.

7 Next we are on the appeals process.

8 MS. KAPLAN: Blue tab.

9 SENATOR HANCOCK: The blue tab. And again,
10 Ms. Kaplan, why don't you give the staff report. I'm
11 inclined to think that we've laid out a good procedure, but
12 I am going to suggest that we wait till our next meeting and
13 that we ask OPSC to comment more directly on it in terms of
14 how prescriptive they think it should be and how it will
15 actually affect the work they do. So --

16 MS. KAPLAN: So I went through and looked at has
17 happened at the State Allocation Board and I did find a
18 report from 1995 that was first brought up that said that
19 there were no current guidelines or former policies on
20 handling appeals and nothing had really changed since then.

21 So I looked at the policies for appeals with other
22 Boards/administrative agencies that may be dealing with
23 money or no money. Also looked at kind of like the judicial
24 process of just making sure that there was a transparent
25 timeline.

1 And so what you'll see on the second page on Tab
2 Blue is Option 1 kind of is a very broad I guess outline of
3 how appeals should be handled but basically puts it on
4 OPSC's lap to finalize the details and bring that to the
5 Board.

6 So the first part is the filing an appeal. You
7 turn it in to OPSC and then the timeline -- sets up a
8 timeline between 90 and 120 days for processing an appeal
9 and if it is something that is kind of like Calxico, a
10 earthquake or some other issues, that there be an expedited
11 timeline, that they would take priority.

12 But that the really prescriptive part is just that
13 within five working days of receiving Form 189 that OPSC
14 would acknowledge that they have received an appeal and then
15 would start the workload process of setting it up so that it
16 would enter onto, so that you would see it when it comes to
17 the Board, be it 90 or 120 days out, and that it would --
18 and then it sets out a process of request for postponement
19 that a school district must do that within a certain
20 timeline and within writing.

21 Option 2 just kind of takes that 90 to 100 days
22 and sets out a sample prescriptive process, but what I'm
23 recommending is that Option 1 be approved, bring it to the
24 full SAB, and if the SAB likes that, direct OPSC to bring
25 back a timeline for processing and communicating with the

1 districts that meets the 90- to 120-day process so that then
2 OPSC is in charge of what works best internally for them on
3 a timeline for processing an appeal.

4 But generally the 90 to 120 days was similar with
5 whether it be BOE or other things that are dealing with
6 money and a timeline especially I found it very objective
7 and in the middle of how to handle things because of the
8 state of financial affairs that we have in school
9 construction, the lack of money.

10 And I think what I have come to realize with
11 talking with districts of how the appeals are handled and
12 looking at other agencies, if you set up a timeline, you
13 have somebody on it, while OPSC may disagree with the school
14 district, I think ultimately it's for the Board to decide.
15 So let OPSC present its facts, let the district present its
16 facts, and then it's the State Allocation Board that
17 ultimately decides what should happen.

18 But I think sometimes districts feel that they get
19 caught up in that -- well, we need this, then we need this,
20 then we need this, and then all of a sudden, six months and
21 then a year and we're trying to work it out, but we don't
22 get there.

23 I think at some point you have to stop it and just
24 bring it to the State Allocation Board for the State
25 Allocation Board to either interpret the regulations as, you

1 know, that your job and responsibility and have a finality
2 to that, but let's set an objective timeline because none
3 has been created as far back as 1995 that I've been able to
4 find or see.

5 MR. HARVEY: Kind of like the Imp. Committee.
6 Finally get it done and bring it to the Board.

7 MS. KAPLAN: Hey, on my last thing, I got
8 consensus. I got consensus.

9 SENATOR HANCOCK: Do we have comment from OPSC?

10 MS. SILVERMAN: Oh, yeah. You know, I think we've
11 all been trying to create some kind of structure with the
12 appeal process and we all agree that structure should exist
13 and that way it's clear and transparent and having -- you
14 know, either dictated in a policy or a regulation would
15 serve everyone well and we don't disagree with that, but I
16 think what -- as far as some of the challenges receiving
17 some of the appeals that come in through the pipeline is,
18 you know, they may just submit a letter of fact or finding
19 that they don't necessarily agree with that, but you're
20 right, it may require additional documentation to be shared.

21 It may be -- obviously somebody else handling the
22 appeal and somebody else with objective eyes. So hitting
23 the timelines would be great, but I think sometimes there
24 are challenges with -- you know, maybe districts aren't
25 ready to present their information or maybe they need to get

1 clarification on the type of documentation or maybe they
2 have legal representatives.

3 So those timelines unfortunately get stretched and
4 there are going to be some exceptions to the rule, but I
5 think in the spirit of bringing these items forward to the
6 Board for decision, I think we don't disagree with that, but
7 maybe perhaps some of the language -- and I appreciate that
8 you would give us the opportunity to review this and provide
9 some feedback and we can weigh in on a full Board.

10 But I think the goal is to have them on the
11 workload list. But I'm not sure if aggressively placing
12 them in a docket would serve us any good because you may
13 have some false expectations of some districts really moving
14 forward. I mean you might have a large issue that may not
15 be that clean and it may require some internal legal review.
16 It may result in counsel being hired by the district, that
17 they may challenge some of that review.

18 So again the goal is to streamline it and bring it
19 forward, but there may be some issues where it may not be
20 that tight of a 90-day turnaround or a 120-day turnaround.

21 MS. KAPLAN: And I think that's where allowing
22 OPSC the ability to draft a standard timeline of 90 to 120
23 days, there is already, you know, request for postponement
24 by the district, so if they do more time or get legal
25 counsel, but I think it needs to be clear and in writing so

1 that districts truly understand and know what the process is
2 because right now, consistently if there is -- attorney
3 doesn't have an opinion or they can't get one, OPSC has been
4 delaying things or if there's been a disagreement, there's
5 been a delay. And I've had several districts, you know,
6 come up last month that thought they were on and they
7 weren't on and, you know, appeals that have been delayed two
8 or three months, you know, and the district goes, well,
9 they've got all the information.

10 So I think we do need some real structure that we
11 can -- so that districts can hold OPSC and the State
12 Allocation Board accountable while allowing some flexibility
13 because it's understandable. If attorneys get involved or
14 it's a bigger issues, happens in court, you can delay things
15 and there is a process for delaying things, but I just think
16 we need to lay out that process of what it is and that's the
17 only fair and objective and transparent thing to do.

18 SENATOR HANCOCK: What's the average time that it
19 takes to process an appeal now?

20 MS. SILVERMAN: Oh, gosh. Statistics I think
21 we've been -- now that we've been flushing out the workload,
22 I'd probably say -- there's a good portion of those projects
23 that actually do come to the Board in a timely fashion.

24 So there probably --

25 SENATOR HANCOCK: But like 120 days, 90 days? Do

1 we know what the average --

2 MS. SILVERMAN: We can lay out some statistics for
3 you in the future, but I mean yeah, we can definitely give
4 you that information.

5 SENATOR HANCOCK: Well, I'm interested because
6 quite honestly looking at this, I thought 120 days, that's
7 four months. Things happen in districts in four months.
8 That's a long time. Now I'm hearing that maybe it's too
9 short a time?

10 MS. SILVERMAN: If they have legal counsel
11 involved, it could extend that timeline and so those are the
12 extenuating circumstances or they may hire a new consultant
13 to have an opportunity to weigh in on the facts. So those
14 are the anomalies, but in -- I think in most circumstances,
15 we do have a timely manner in how we process items to the
16 Board and I think we've been working our -- working in that
17 direction to provide a clear -- clarity in that area.

18 But I mean I would probably -- firmly believe that
19 there's at least 80 percent of those projects, if not 90, a
20 higher level that actually do go to the Board in a timely
21 fashion.

22 SENATOR HANCOCK: Mr. Harvey.

23 MR. HARVEY: Well, what I heard you say,
24 Ms. Silverman, is that you do endorse the idea of a time
25 frame. I too believe that this structure is reasonable in

1 most cases and would respectfully ask that you try to live
2 within them.

3 I think there are a couple of suggested changes
4 which you can talk about since I'm hoping -- what I hear
5 from the Chair is that she wants you to noodle on this and
6 come back and give us a more full-blown discussion at the
7 Board, but those anomalies you reference I think can be
8 taken care of if we allow not only the school district in
9 written form to request a postponement but OPSC.

10 And you're saying in here that you have to give
11 the reasons for it and it's got to go to the Chair and the
12 Vice Chair. It seems to me that the Chair or the Vice
13 Chair, if they didn't think you were being reasonable or
14 that the school district wasn't being reasonable in the
15 request, you wouldn't get it granted.

16 So to me these are livable time frames. You take
17 care of the anomaly by making you come to the Chair and Vice
18 Chair and say, hey, it's not going to work on this occasion
19 or the school district.

20 The other suggested change I'd have you consider,
21 in the second paragraph where it says within five working
22 days, there's a sentence that says that the date the item
23 will be heard, I don't think staff can determine when a
24 matter's going to go the Board. That's really the Chair and
25 the Vice Chair.

1 It seems to me a better term might be the date
2 when the item will be placed on the SAB workload. That way
3 it gives the district certainty that you're saying when you
4 expect it to be. The Chair, Vice Chair, the Board look at
5 the 90-day workload and then the Chair and the Vice Chair
6 determine what the specific monthly agenda is.

7 So those two changes may keep you honest, that is
8 this time frame as suggested by Ms. Kaplan, but either you
9 or the district have the opportunity to state the reasons
10 why you're getting a postponement. Anything unreasonable
11 would I think be denied.

12 MS. KAPLAN: And I agree.

13 MR. HARVEY: So -- and I like your idea of having
14 a noodle on it.

15 SENATOR HANCOCK: I actually like your suggestion.
16 I am wondering if --

17 ASSEMBLY MEMBER BROWNLEY: Let the record show --

18 MS. KAPLAN: Agreement by high five.

19 SENATOR HANCOCK: If we could have a motion to
20 adopt Option 1 as amended and direct this come to the full
21 SAB for adoption with any comments or suggestions that OPSC
22 might specifically have.

23 I wonder if there's any comments from the public
24 on this item.

25 Well, seeing and hearing none --

1 MR. HARVEY: I would make that motion.

2 MS. KAPLAN: All right.

3 MR. HARVEY: Do you understand what the motion is?
4 It's to add the ability of OPSC to in written form --

5 MS. KAPLAN: I would believe it would be
6 Recommendation 1, 2, and 3.

7 MR. HARVEY: Pardon me?

8 MS. KAPLAN: That would be under recommendation,
9 where it's approve Option 1, direct OPSC to bring Option 1
10 to the full SAB for adoption and direct OPSC in following in
11 the recommendation -- after following the recommendation by
12 the full SAB, do a written timeline to then provide it back
13 to the SAB for discussion and consideration.

14 MR. HARVEY: With those amendments.

15 MS. KAPLAN: Yes, with the amendments -- as
16 amended.

17 Senator Hancock.

18 SENATOR HANCOCK: Aye.

19 MS. KAPLAN: Assembly Member Brownley.

20 MR. HARVEY: Is that safe?

21 ASSEMBLY MEMBER BROWNLEY: I'm not saying
22 anything.

23 MS. KAPLAN: Abstain?

24 ASSEMBLY MEMBER BROWNLEY: Abstain.

25 MS. KAPLAN: Scott Harvey.

1 MR. HARVEY: Aye.

2 MS. KAPLAN: Motion passes.

3 SENATOR HANCOCK: The third item, the audit
4 exception. If we could have a comment on that.

5 MS. KAPLAN: Yeah. Madam Chair, you first brought
6 this up and it started as -- when I started looking into
7 something as you brought as kind of a mercy clause and
8 that's why on page 3, you'll see that I've included the
9 mercy clause discussion at the SAB from May 27, 2009.

10 And in looking and reviewing things, there really
11 is no legal basis or term in law that is a mercy clause. So
12 I wanted to look at the authority of the full State
13 Allocation Board, what you have the authority to do, and
14 specifically this was brought up in terms of material
15 inaccuracy.

16 And so I looked at how the Board has handled
17 material inaccuracy before. I also looked at when school
18 districts get audits and having running the audit working
19 group subcommittee have familiarized myself with audit
20 terminology and what happens in normal audits and you have
21 what's called an audit exception.

22 It's a finding of -- kind of tweak, where
23 something wasn't right, but it didn't rise to the failure of
24 a knowing mistake, a somebody stealing money. It was a
25 tweak. A lot of times, I can tell you as a school board

1 member, which you may remember, Assemblywoman Brownley, is
2 your PTAs sometimes make mistakes when they're doing the
3 audits and it comes in when the auditor comes in and does
4 your yearly an audit. You have an audit exception with your
5 PTAs and how they handle money and how they turn it in and
6 so there's a correction to that.

7 And so when I have drafted for discussion is that
8 the Board in considering material inaccuracies, if they
9 believe that it's in the Board's discretion in the finding
10 of material accuracy, while OPSC has no discretion and must
11 bring it to you, you do in regulations and in statute have
12 the ability to find that there was a mistake.

13 It may not have risen to the level of a material
14 inaccuracy, so you find an audit exception and in an audit
15 exception, you are still responsible for paying back money
16 or fines, but it doesn't have the hammer that Senator
17 Hancock was hoping to find a middle ground on this.

18 So I drafted this for discussion. I'm not a
19 complete expert on this, but as I was talking to auditors
20 and others, they said this was fairly consistent and normal
21 within the school district world. EAAP, the Education Audit
22 Appeals Panel, also said this is fairly normal and I didn't
23 see anything within statute or regulations that would
24 prevent you from doing this.

25 So the only thing that this is really setting up

1 is a procedure -- a process that would be included in
2 determination of material inaccuracy as it's brought to you;
3 that an audit exception or a finding of audit exception
4 would be allowable by the Board.

5 MR. HARVEY: Okay. Are there comments from
6 members?

7 ASSEMBLY MEMBER BROWNLEY: So I guess there
8 would -- would there be guidelines to that or it would just
9 be our deliberation in the moment to go in one direction or
10 the other?

11 MS. KAPLAN: It's the discretion of the Board. If
12 the Board wishes to develop guidelines, you know, I think
13 that we can -- as we develop and adopt this that maybe if
14 it's adopted by the full Board, to request OPSC to develop
15 guidelines for discussion to be brought back.

16 SENATOR HANCOCK: I would actually like to move
17 that we --

18 MR. FERGUSON: Public comment.

19 SENATOR HANCOCK: Fine. Public comment. Sorry
20 about that. I was going to let you talk afterwards anyway,
21 but do tell us. Before we vote; right?

22 MR. FERGUSON: Chris Ferguson, Department of
23 Finance. With regard to this recommendation, we believe
24 that the Audit Subcommittee and the audit procedures that
25 we're working through would resolve any of these types of

1 issues that move forward.

2 Part of that proposal was to develop an audit
3 appeals panel, develop an audit process, guidelines for
4 audits for school districts to abide by, and for those
5 audits to be reviewed by.

6 In doing so, I think that would resolve this issue
7 and I think it would be more appropriate to do that through
8 that Subcommittee and through that process.

9 SENATOR HANCOCK: I'm glad you said that. That
10 was what I was going to say in the motion, that I think that
11 a good discussion has been laid out. I know that Senator
12 Lowenthal's also very interested in having the Audit
13 Subcommittee look at this and -- ah-ha, a highly tabbed
14 book. Mr. Harvey may have some comments. But that perhaps
15 we could at this point get the greater input from the Audit
16 Subcommittee. I think it would be appropriate.

17 MR. HARVEY: First of all, I thank you, Chris,
18 because I don't disagree with what you said and what your
19 motion may include. I think perhaps having an audit policy
20 in your rules and procedures isn't the right avenue and
21 there may be another venue for it.

22 But tying it to the material inaccuracy, you know,
23 I'm going to have to go law school apparently because again
24 I read the material inaccuracy section before coming to the
25 meeting today and there's a lot of shall words in here.

1 It talks about the Board shall impose the
2 following penalties and it talks about the cases where those
3 penalties shall be imposed. We're trying to find the right
4 way of doing things. I don't disagree.

5 I just rhetorically ask if we're wanting to have
6 an audit exception or something that's not a stigmatized as
7 calling it a material inaccuracy, must we do it
8 legislatively.

9 Do we have the power to do it given all of the
10 shall words. In fact the statute is so darned prescriptive,
11 it says if we make this finding, the Board shall prohibit
12 the school district from self-certifying. Then it has two
13 subparagraphs that back you down.

14 If you found the material inaccuracy but there's
15 no fund release, then you reduce the amount of the
16 apportionment. You don't make that penalty quite as bad and
17 then subparagraph D says if the school district was found to
18 have provided material inaccuracies when no funding
19 apportionment or fund release has been made, then nothing
20 happens.

21 So here we have this rather four-stage
22 prescriptive thing that has a lot of shall words in it and I
23 just want to make sure that if we attach it to this, do we
24 have to do it legislatively.

25 MS. KAPLAN: And if you don't mind, I can tell you

1 what my thought process was when I came to this.
2 Specifically if you look at Ed Code 170751(a) which states
3 material inaccuracy, it talks about if a funding application
4 to have been falsely certified, where there -- no way is
5 there a definition of falsely certify and if there is a
6 finding of falsely certified, then that goes down to
7 material inaccuracy penalties which goes into regulation.

8 So if the Board finds material inaccuracy, then it
9 falls into the shall, you have to do this, in the
10 regulations. But the Board has discretion under Ed Code
11 define falsely certified and if there's a finding of falsely
12 certified, then it generally equals a finding of material
13 inaccuracy.

14 But if the Board finds that there was no falsely
15 certified or it was not falsely done, then there is no
16 material inaccuracy and you can find as an audit exception.

17 SENATOR HANCOCK: Ms. Silverman.

18 MS. SILVERMAN: Well, I think the statute also
19 doesn't -- it's not really clear. It doesn't really specify
20 audit exception as an offramp, so to say.

21 SENATOR HANCOCK: Yeah.

22 MS. SILVERMAN: So I think that's why I think
23 Mr. Harvey was raising that issue is because in statute
24 there is no offramp right now. You're right. You can
25 either render an MI or not render an MI, but I think if

1 you're going to have a clear policy on audit exception, I
2 think, you know, it needs to be established. I think it'd
3 probably be established in regulation -- provide clarity for
4 those folks and even for the Board --

5 SENATOR HANCOCK: Um-hmm.

6 MS. SILVERMAN: -- you know, as opposed to just --

7 SENATOR HANCOCK: So you're saying by regulation
8 or by legislation?

9 MS. SILVERMAN: By statute. There has to be some
10 interpretation in statute to give some wiggle room as far as
11 what's the interpretation, whether or not you could do an
12 audit exception.

13 MS. KAPLAN: It could be either/or because if you
14 want, you can change material inaccuracy in legislation and
15 define and give the option more clearly or it can be defined
16 in regulation however, but I do believe -- but, you know, I
17 wanted to have the discussion here and then it can go to the
18 Audit Subcommittee for further discussion and working on the
19 procedures.

20 SENATOR HANCOCK: I think that is -- I just want
21 to bring us back to my recollection of how we got into this,
22 which was an application that came in late and was therefore
23 discounted and in the discussion in the appeal by the
24 district turned out to be a small district, one secretary
25 who was in the middle of chemotherapy and had been too ill

1 or maybe not too ill. Maybe we should have said too bad,
2 you know, get an in-fill secretary when your secretary has
3 chemotherapy.

4 But the Board actually felt as though this was a
5 good faith application that's been taken on and hence mercy
6 clause.

7 But it isn't finding that anybody did anything
8 wrong. It's a recognition that there are some circumstances
9 in which one would want an offramp, as Ms. Silverman
10 suggested.

11 MR. HARVEY: Well, briefly, you may remember, I
12 voted for that because it was not a material inaccuracy and
13 I determined that it was substantial compliance. That was
14 the term I used.

15 The fact that they had gone through all of these
16 hoops and it was one single piece of paper, the 5-50
17 something or other and because she was ill and they -- I
18 agreed. In that case the right thing to do was to
19 acknowledge it was substantial compliant, but it wasn't
20 attached to a material inaccuracy.

21 So I think we're all agreeing that we need to find
22 some way of dealing with this. Maybe statute, maybe
23 regulation, but outside of the procedures and then to make
24 sure we do it in a --

25 SENATOR HANCOCK: Legal way.

1 MR. HARVEY: -- legal way.

2 SENATOR HANCOCK: All right. Well, one of the
3 great things about legislation is, you know -- and maybe
4 it's regulation too. If you can describe exactly what
5 you're trying to achieve --

6 MR. HARVEY: Right.

7 SENATOR HANCOCK: -- sometimes you can then figure
8 out how to enact it and I think this is a very good
9 beginning of the discussion and I'm very happy to ask
10 Senator Lowenthal's Audit Committee to take a look at it in
11 light of this discussion.

12 It may not be something that we want to include in
13 the audit process. We may want to go back and do something
14 else and if we could get some opinions on that from the
15 Subcommittee, I think it would move us forward as well.

16 MR. HARVEY: You get a spot bill, Assembly Member
17 Brownley, do you want to throw this one in --

18 ASSEMBLY MEMBER BROWNLEY: I'll let Senator
19 Lowenthal take care of that.

20 MR. HARVEY: I mean I read that and I thought my
21 goodness gracious.

22 MS. KAPLAN: So I will transfer this over to
23 Senator Lowenthal and his chief consultant Mavonne.

24 SENATOR HANCOCK: Okay. Do we need just a motion
25 to do that, to make clear that we have referred this item to

1 the Audit Subcommittee.

2 MS. KAPLAN: Um-hmm.

3 SENATOR HANCOCK: That we refer this item to the
4 Audit Subcommittee, ask them to receive input from OPSC,
5 from districts, and consider whether this is something that
6 should be handled in regulation or through the audit
7 process.

8 MR. HARVEY: Or even legislation maybe?

9 SENATOR HANCOCK: Or legislation, yeah.

10 MR. HARVEY: Second.

11 MS. KAPLAN: Senator Hancock.

12 SENATOR HANCOCK: Aye.

13 MS. KAPLAN: Assemblywoman Brownley.

14 ASSEMBLY MEMBER BROWNLEY: Aye.

15 MS. KAPLAN: Scott Harvey.

16 MR. HARVEY: Aye.

17 MS. KAPLAN: Item passes three/zero and will be
18 transferred over to the Audit Sub. Thank you.

19 SENATOR HANCOCK: Thank you so much and I want to
20 thank the members of the Committee really for your
21 thoughtful discussion and --

22 MR. HARVEY: If there is any.

23 ASSEMBLY MEMBER BROWNLEY: And if the public has
24 any thoughtful --

25 SENATOR HANCOCK: And Ms. Kaplan and Ms. Silverman

1 for their help and our staff for their help and I'm
2 wondering if there are any comments from the public before
3 we adjourn.

4 MR. HARVEY: Oh, DOF, my goodness.

5 MR. FERGUSON: If I may, I'd just like to
6 reiterate some past concerns from the Chair in relation to
7 rules and operating procedures of the State Allocation
8 Board.

9 In particular, all of the statewide infrastructure
10 entities, boards and commissions, that apportion statewide
11 bond funds are either chaired by the State Treasurer or the
12 Department of Finance.

13 As such we believe that the State Allocation Board
14 should continue to be chaired by the Department of Finance.

15 SENATOR HANCOCK: Thank you. That's very good
16 input and we appreciate it. All right. No other comments
17 from the public, the meeting is adjourned and thank you.

18 MR. HARVEY: Thank you.

19 (Whereupon, at 3:56 p.m. the proceedings were recessed.)

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