April 16, 2012

Debra Cornez, Director
Office of Administrative Law
300 Capitol Mall, Suite 1250
Sacramento, California 95814-4339

Dear Director Cornez,

We respectfully request that you conduct a priority review, per Government Code Section 11349.7, of item 22 in State Allocation Board Form 50-04, Application for Funding, incorporated by reference in California Code of Regulations title 2, section 1859.2. This regulation, known as the “60 Percent Commensurate” regulation, requires certification that the School Facility Program project cost estimate, developed by the architect of record or the design professional, indicates that the estimated costs for construction of the school facility project are at least 60 percent of the total grant amount provided by the State and the district’s matching share.

It has come to our attention that the regulation may lack reference to law, a required standard assessed in an OAL review as set forth in Government Code Section 11349.1. In addition to a possible lack of reference to law, this regulation may actually contradict Education Code section 17070.63(c) which provides that school districts shall retain any project savings achieved by the district’s “efficient and prudent expenditure” of funds and use those savings for other “high priority capital outlay purposes.”

Of further concern is it appears that the State Allocation Board may have received inaccurate information when considering the adoption of this regulation in June, 1999. Subsequently, the OAL was provided the same, possibly inaccurate, information when conducting its original review of the regulation in 1999.

The attached Final Statement of Reasons, submitted to the OAL in 1999 by the Office of Public School Construction on behalf of the State Allocation Board, describes the reason for the regulation “to prevent districts from circumventing the intent of the law in regard to grant
apportionments and the use of project savings.” The document goes on to provide, under “Example 1,” the types of uses of savings that are “not eligible” under the School Facility Program. The ineligible savings uses listed include swimming pools, enhanced athletic field development and enhanced non-teaching station facilities.

We do not find any reference in law that prohibits capital outlay from including swimming pools and enhanced athletic fields. While there may be merit in considering legislation to limit the use of project savings, the law does not currently provide such a limit. On the contrary, the law states that “any savings” obtained by the district “shall” be used for other high priority capital outlay purposes.

Furthermore, please see the attached State Allocation Board transcript dated June, 1999, pp. 30-31. In his presentation to the board, Mr. Hancock, assistant executive officer to the State Allocation Board, states that the 60 Percent Commensurate regulation was necessary because some school districts used savings for “areas not approvable under the program.”

We believe Mr. Hancock’s statement to the board justifying the 60 Percent Commensurate regulation may have been inaccurate for reasons previously stated.

Sincerely,

Darrell Steinberg, Chair
Senate Rules Committee

cc: Senator Alan Lowenthal, Chair, Senate Education Committee

Attachments
APPLICATION FOR FUNDING, FORM SAB 50-04 (REV. 10/99)

Specific purpose of the regulation

To amend the Application For Funding, Form SAB 50-04, to require that all requests for new construction funding include a cost estimate for the work in the plans and specifications and any deferred items of construction that is at least 60 percent of the state and district funding for the project. To amend the form to make non-substantive changes.

Need for the regulation

Regulation Section 1859.103 provides that a district may expend the savings not needed for a project on other high priority, capital facility needs of the district. Several situations have surfaced that allow districts to receive an excessive amount of project savings, thereby diverting significant amounts of proposition 1A funding to purposes not otherwise eligible under the SFP.

On June 23, 1999, the State Allocation Board (SAB) adopted an amendment to the instructions on the Application For Funding, Form SAB 50-04, which adds a requirement that the plans and specifications (P & S) must include a cost estimate for the construction work represented in the P & S that is at least 60% of the total grant amount and the district's matching share. The SAB instructed the OPSC to file this amendment as an emergency to immediately prevent districts from circumventing the intent of the law in regard to grant apportionments and the use of project savings.

Example 1: Pupil grants are calculated to provide classrooms plus all necessary support facilities for a specific number of pupils. Plans for some projects are being submitted that do not provide the number of teaching stations for the pupils that justified the grants or do not include support facilities. By eliminating these facilities a large amount of artificial savings is created. Some districts are proposing to use these project savings on items such as swimming pools, enhanced athletic field development, enhanced non-teaching station facilities and other facilities or development not eligible under the SFP. The SAB is not opposed to using savings for these items, but not at the expense of providing adequate teaching stations and support facilities for the pupils who generated the grants. The Application For Funding, Form SAB 50-04, already requires the applicant district to identify the grade level and number of classrooms in the project in sections two and three, respectively. Adding the 60% requirement will ensure that adequate facilities are constructed with the grant amount provided by the state and the district's matching share.
Example 2: A school district receives a new construction grant to provide classrooms for 600 elementary pupils which requires that 24 teaching stations be provided within a grant amount of $3,120,000. The district is currently leasing a large number of relocatable classrooms and proposes to buy them out at a cost of $40,000 each, which equals $960,000. If this were allowed under current regulations, the district would realize project savings of $2,160,000. The OPSC does not believe that it was the intent of the law to allow a windfall of savings such as this. In this example, 60% of the grant amount is $1,872,000.

The 60% requirement for modernization projects has already been included as an amendment to the final regulations that were submitted to the Office of Administrative Law on June 15, 1999.

During the public comment period staff identified six non-substantive clerical errors and changes that require amending page 1 of 4 of the Form 50-04. These changes have been included in the certification request and are identified by underline and strikeout in paragraph 1, sentence two and three, paragraph 3, sentence three, paragraph 4, sentence eight and paragraph 5, sentence three and six.

Technical documents relied upon

None

Section 1859.21. SPP Application For Funding
Section 1859.50. Calculations to Determine New Construction Baseline Eligibility
Section 1859.70. General
Section 1859.74.1. Site Acquisition Guidelines
Section 1859.76. Additional Grant for Site Development Costs
Section 1859.81.1. Separate Apportionment for Site Acquisition and Design Costs
Section 1859.100. Restricted On-going and Major Maintenance Fund
Section 1859.101. Districts that are Exempt from the Specified Annual Deposit
Section 1859.102. Maintenance Plan

Specific purpose of the regulation

To amend the date referenced in these regulations for the Application For Funding, Form SAB 50-04 (Rev. 10/99)

Need for the regulation

It is necessary to amend all regulations that reference a form when the form is being amended.

Technical documents relied upon

None

Alternatives to the proposed regulatory action that would be as effective and less burdensome to private persons.
The SAB finds that no alternatives it has considered would be more effective in carrying out the purpose of the proposed regulations or would be as effective and less burdensome to affected private persons than the proposed regulations.

Alternatives to the proposed regulatory actions that would lessen any adverse economic impact on small business.

The SAB determined that the proposed regulations do not affect small businesses.
ASSEMBLY MEMBER WILDMAN: Aye.

ASSEMBLY MEMBER FIREBAUGH: Aye.

KAREN MCGAGIN: Aye.

DUWAYNE BROOKS: Aye.

SENATOR ALPERT: Aye.

SENATOR JOHNSTON: Aye.

CHAIR PORINI: Aye. Opposed? Next item?

MR. HANCOCK: Madam Chair, the last item on Tab 12, page 331, has to do with a recommendation for a change to the regulations for new construction projects. We referred to it as a commensurate requirement simply because we are trying to define a method by -- a definition that would require the cost of a new construction project funded by the Board under the school facilities program to have a relationship to the amount of grants that are distributed for that project.

In this particular case, we are suggesting that the definition on page 332 of -- part way down in the underlined portions, which would be the change to our regulation, that that definition be 50 percent of the total grants provided. In other words, the work in the plans and specs should represent 60 percent or more of the total grants. This is done for a similar reason that we had under the modernization program where there
were some concerns that some of the projects were --
represented only a very small portion of the grants and
the remaining money was being claimed as savings for
use in other areas not approvable under the program.

This then would be a suggestion to adopt a regulation
similar for the new construction program.

CHAIR PORINI: All right. Are there any
questions or comments by members? Is there anyone in
the audience who wants to testify on this issue? Okay.

Do I have a motion?

ASSEMBLY MEMBER FIREBAUGH: I'll move it.

CHAIR PORINI: We have a motion.

DUWAYNE BROOKS: I second.

CHAIR PORINI: And a second. All those in favor
indicate with aye.

ASSEMBLY MEMBER WILDMAN: Aye.

ASSEMBLY MEMBER FIREBAUGH: Aye.

KAREN MCGARIN: Aye.

DUWAYNE BROOKS: Aye.

SENATOR WRIGHT: Aye.

SENATOR JOHNSTON: Aye.

CHAIR PORINI: Aye. Opposed?

MR. DUTTON: Madam Chair, that is the end of the
agenda for today. However, I would like to direct the
Board's attention to the items behind the yellow cover
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