

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 the proposed regulations, including the adoption of a new form as well as amendments to an associated form for the Facility Hardship and Seismic Mitigation Programs under the umbrella of the School Facility Program (SFP). These programs address health and safety projects submitted by school districts. Currently, there are about 22-24 health and safety projects that have been accepted and are at various stages of processing. Office of Public School Construction (OPSC) staff are aware of several other applications waiting to submit pending approval of these regulations.

At its May 27, 2020 meeting, the SAB approved proposed regulatory amendments on an emergency basis. Currently, the regulations combine both the Facility Hardship and Seismic Mitigation Programs together under SFP Regulation Section 1859.82. This makes it difficult for applicants to navigate and clearly differentiate what information is needed for which program, thereby creating significant delays with processing the application timely. The proposed regulations provide clarity to school districts applying to the programs and incorporate changes to the overall organization and structure of the regulation text, which improves user readability. In addition, the proposed regulations expand flexibility in program options, and increase funding for some areas of these programs, which would be in alignment with the cost estimates OPSC has received. In some instances, the proposed changes may limit funding opportunities by providing stricter accountability for State bond funds.

Some of the proposed funding criteria and program criteria are highlighted below:

- Increased funding at the higher “F3 level of difficulty” for rehabilitation projects
- Increased small size projects funding for replacement projects
- Increased funding for Excessive Cost Hardship due to Geographic Location for rehabilitation projects
- Allows portable buildings to be eligible for funding
- Allows replacement grants to be used for rehabilitation projects
- Limits reimbursement applications to those submitted within 12 months of receiving the Division of State Architect approval or within six months of project completion
- Projects that are caused by unusual circumstances beyond the control of the district are eligible
- Cost estimates must be submitted in the standardized template approved by the SAB

Failure to approve these proposed regulations as emergency regulations will mean that health and safety projects will continue to be submitted under the current regulations where there will be the inefficient use of time spent back-and-forth between school districts and OPSC staff working together to receive and process an acceptable application package. It also means that 1) these health and safety projects may not receive enough funding based on the cost estimates received; 2) school districts can only use replacement funding to replace a building unless they appeal to the SAB; 3) portable buildings with health and safety issues will remain ineligible for funding; 4) the program will continue to allow reimbursement projects that do not have a current

health and safety issue to be funded; and 5) there will not be a stricter accountability of State bond funds because the current regulations do not provide clear limitations on the eligibility of projects.

Background and Problem Being Resolved

Under the Facility Hardship Program, projects can be repaired or replaced with new classrooms and related facilities. For purposes of our reading audience's understanding, Rehabilitation means the repair of an existing building or structure; Replacement means to demolish the existing building or structure and replace it. Projects may not increase the capacity of the site unless the building was considered undersized at the time the issue was identified; and Seismic Mitigation means work to address deficiencies in buildings of the Most Vulnerable Category 2 Buildings (which is defined in SFP Regulation Section 1859.2) which may not perform well in the event of an earthquake. These programs provide funding calculated based on the minimum work necessary to mitigate the health and safety issues.

The proposed regulations help to resolve the complex and complicated reading of the current regulation section (1859.82) for the Facility Hardship and the SMP. School districts have commented about how cumbersome the Facility Hardship Program and the SMP is to navigate and it needs to be clearer not only in what constitutes an acceptable application submittal package but clarity in what the requirements are for each program and how funding is calculated.

The reorganization and restructure improve the clarity of both programs purposes as well as improve user readability. The Facility Hardship Program has been separated from the SMP in order to clearly delineate the requirements for each program such as program eligibility, application requirements, and funding calculations. The funding of health and safety projects is largely based on cost estimates calculated based on level of difficulty, complexity, timing, and numerous other factors. For equity across the State, the SAB uses the publication from Sierra West Publishing to determine the cost of the work. The current level of difficulty that OPSC funds health and safety projects is at "F2". One of the components of the proposed regulations increases funding from an F2 to an F3 level of difficulty, which appears more appropriate for the projects. OPSC has been noticing that many school districts have been struggling to ensure these health and safety projects are within the cost allowances that the programs have historically provided, and agrees that the F3 level is more in alignment with the required work and timing of these application types.

OPSC, on behalf of the SAB, conducted three stakeholder meetings to discuss and receive stakeholder input regarding the issues school districts were having when applying for Facility Hardship and SMP funding. The stakeholder meetings were conducted on January 10, 31 and February 7, 2020 in Sacramento, and were publicly noticed, transcribed and webcasted, with the information posted on OPSC's website.

These proposed regulations are a result of that collaboration with stakeholders and other interested parties.

OPSC performed a search on whether the proposed regulations were consistent and compatible with existing State laws and regulations. After performing the search, OPSC, on behalf of the SAB, has determined that there are no other regulations addressing K-12 health and safety issues of school facilities and that the SFP is the primary funding program at the State level. Therefore, the proposed regulations are determined to be consistent and compatible

with existing State laws and regulations and provide greater transparency to school districts. Proceeding with the implementation of the proposed regulations, along with the associated form and the new cost estimate form, will enhance applicants' awareness when partnering with the State while defining the responsibilities of funding applicant health and safety projects. This will ensure program oversight and expenditure accountability of State bond funds.

OPSC, on behalf of the SAB, will notify school districts and other interested parties of its intent to submit the proposed regulations, along with an associated form and the new cost estimate form to the Office of Administrative Law (OAL) in July 2020, pursuant to Government Code Section 11346.1(a)(2). The proposed regulations along with an associated form and the new cost estimate form will be attached and may also be viewed on OPSC's website at: <https://www.dgs.ca.gov/OPSC/Resources/Page-Content/Office-of-Public-School-Construction-Resources-List-Folder/Laws-and-Regulations>, scroll down to School Facility Program and under that heading click on the links for the Finding of Emergency, the Five-Day Emergency Notice, and the proposed regulation text with associated forms.

Authority and Reference Citations

Authority: Sections 17070.35, 17072.13, 17075.10, 17075.15, 17078.64, 17078.72 and 17592.73, Education Code.

Reference: Sections 17009.5, 17017.6, 17017.7, 17021, 17047, 17050, 17051, 17052, 17070.15, 17070.35, 17070.50, 17070.51, 17070.51(a), 17070.71, 17070.77, 17071.10, 17071.25, 17071.30, 17071.33, 17071.35, 17071.40, 17071.75, 17071.76, 17072.10, 17072.12, 17072.13, 17072.14, 17072.15, 17072.18, 17072.20, 17072.30, 17072.32, 17072.33, 17072.35, 17073.15, 17073.25, 17074.10, 17074.15, 17074.16, 17074.25, 17074.30, 17074.56, 17075.10, 17075.15, 17076.10, 17077.40, 17077.42, 17077.45, 17078.52, 17078.56, 17078.72, 17078.72(k), 17079, 17079.10, 17079.20, 17079.30, 17250.30, 17251, 17280, 42268, 42270, 56026, 101012(a)(1) and 101012(a)(8), Education Code; Section 53311, Government Code; and Sections 1771.3 in effect on January 1, 2012 through June 19, 2014 and 1771.5, Labor Code.

Information 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.

At its May 27, 2020 meeting, the SAB approved proposed regulatory amendments on an emergency basis. Currently, the regulations combine both the Facility Hardship and Seismic Mitigation Programs together under SFP Regulation Section 1859.82. This makes it difficult for applicants to navigate and clearly differentiate what information is needed for which program, thereby creating significant delays with processing the application timely. The proposed regulations provide clarity to school districts applying to the programs and incorporate changes to the overall organization and structure of the regulation text, which improves user readability. In addition, the proposed regulations expand flexibility in program options, and increase funding for some areas of these programs, which would be in alignment with the cost estimates OPSC has received. In some instances, the proposed changes may limit funding opportunities by providing stricter accountability for State bond funds.

Bond Funds Impacted

- Class Size Reduction Kindergarten-University Public Education Facilities Bond Act of 1998 (Proposition 1A)
- Kindergarten-University Public Education Facilities Bond Act of 2002 (Proposition 47)
- Kindergarten-University Public Education Facilities Bond Act of 2004 (Proposition 55)
- Kindergarten-University Public Education Facilities Bond Act of 2006 (Proposition 1D)
- Kindergarten through Community College Public Education Facilities Bond Act of 2016 (Proposition 51)

Summary of the Proposed Regulations

A summary of the proposed regulatory amendments are as follows:

Existing Regulation Section 1859.2 represents a set of defined words and terms used exclusively for these regulations. The proposed regulatory amendments 1) redefine “Facility Hardship” to include both replacement and rehabilitation projects, and adds School Buildings, components of School Buildings, and site conditions as projects that may be funded; 2) adds a new Form SAB 58-01, *Facility Hardship Cost Estimate*, which is incorporated by reference, to ensure consistency when funding projects by specifying that the cost estimate must use construction estimates from Sierra West Publishing and by clarifying soft costs eligible for funding; 3) defines “Portable Classroom Replacement Grant” as the initial per square foot grant for classroom area as of 2020 (this grant will be adjusted annually based on the Class B Construction Cost Index); 4) defines “Portable Toilet Replacement Grant” as the initial per square foot grant for toilet area as of 2020 (this grant will be adjusted annually based on the Class B Construction Cost Index); and 5) expands the definition of “Rehabilitation Cost” to provide 60 percent of the eligible costs verified on the new Form SAB 58-01.

Existing Regulation Section 1859.51 provides adjustment factors that increase or decrease a school district’s baseline eligibility for new construction. The proposed regulatory amendments provide the mechanism to adjust the new construction eligibility for an increase based on the number of pupils eligible for grants or by the capacity of buildings removed from K-12 classroom use as a result of an eligible Facility Hardship or an SMP project.

Existing Regulation Section 1859.61 provides adjustment factors that increase or decrease a school district’s baseline eligibility for modernization. The proposed regulatory amendments provide the mechanism to adjust the modernization eligibility or remove buildings from a school district’s classroom inventory so the buildings do not accumulate modernization eligibility as they are being replaced or permanently removed from K-12 classroom use as a result of an eligible Facility Hardship or an SMP project.

Existing Regulation Section 1859.76 provides new construction additional grants for specific types and amounts of site development costs. The proposed regulatory amendments update references to the newly restructured Facility Hardship and SMP regulation sections.

Existing Regulation Section 1859.77 sets forth the criteria and permissible uses of New Construction Grant funds in accordance with Education Code Section 17072.35 and other specified purposes, including multipurpose room, gymnasium, library (minimum essential facilities), and in addition, for Alternative Education schools, counseling offices and/or

conference rooms. The proposed regulatory amendments update references to the newly restructured Facility Hardship Program regulation sections.

Existing Regulation Section 1859.80 stipulates what qualifies a school district to demonstrate for hardship assistance. The proposed regulatory amendments update the references to the newly restructured Facility Hardship and SMP regulation sections.

Existing Regulation Section 1859.81 permits school districts to qualify for Financial Hardship status in order to receive additional State funding for school facility projects, upon meeting specific financial criteria. The proposed regulatory amendments update the references to the newly restructured Facility Hardship and SMP regulation sections.

Existing Regulation Section 1859.82 establishes that the Facility Hardship and SMP only provides funding in cases of extraordinary circumstances that have caused an imminent health and safety threat. The proposed regulatory amendments delete the prior language and restructure/reorganize the entire section by rewriting this section as an introduction to both the Facility Hardship and SMP and adding additional subsections, maintaining the provision that funding is provided only in cases of extraordinary circumstances that have caused an imminent health and safety threat.

Proposed adoption of Regulation Section 1859.82.1 informs school districts what a “School Building” means for purposes of the Facility Hardship Program. Other criteria include, but is not limited to 1) general factors generating program eligibility as well as placing new limits to program eligibility such as disallowing projects solely to replace components that have reached the end of their useful life, for performance of routine maintenance or repair, issues resulting from the deferment of routine maintenance or repair, lack of current code compliance, or the addition of components that were not previously existing; 2) code compliance costs triggered by eligible facility hardship projects may be included as part of the qualified application; 3) time limit on timeframe for application submission for completed projects; 4) specifies the application documents required to submit a complete Facility Hardship application for the replacement of School Buildings, for School Buildings that are lost, destroyed, or unable to be repaired, and for School Buildings where the estimated cost to rehabilitate exceeds 50 percent of the cost to replace the building; 5) the required information that must be contained in the industry specialist’s report/findings; 6) for projects where the main health and safety threat is due to mold on the site, OPSC must conduct a site visit prior to the remediation of the mold in order to be eligible for funding; 7) the required information that must be contained in the governmental concurrence letter; 8) mandates and specifies the requirements for completing the standardized cost estimate (Form SAB 58-01) which will be used to evaluate the total cost to mitigate the health and safety threat through rehabilitation; 9) specifies that a cost/benefit analysis is required demonstrating that the cost to rehabilitate the affected structure exceeds 50 percent of the cost to replace the structure; 10) specifies all other documents required for an Approved Application are also required components for a complete Facility Hardship application; 11) specifies that any application submitted that does not contain all the required documentation will be returned without review; 12) specifies how eligible applications for Facility Hardship Program replacement projects will be funded; 13) specifies how eligible applications for Facility Hardship Program rehabilitation projects will be funded; 14) specifies funding offsets (i.e., where funds are received through an insurance claim, where the district has capacity to house their displaced pupils, or if funds are received by the disposition or sale of affected property) for applications receiving replacement or rehabilitation funding through the Facility Hardship Program; 15) specifies eligibility adjustments to a school district’s SFP per-pupil grants as a result of funding received for a Facility Hardship project; 16) specifies criteria in which a Facility

Hardship project may receive advance funding for site and/or design; 17) specifies the required documents that a school district would need to submit for a Facility Hardship application for advance funding for site and/or design; 18) specifies how eligible Facility Hardship applications will be funded requesting an advance design; 19) specifies how eligible Facility Hardship applications will be funded requesting advance site acquisition; 20) specifies deadlines for the submission of a complete full funding application for eligible Facility Hardship projects that received advance site and/or design funding; 21) specifies the reduction to eligible costs incurred for Facility Hardship projects that received site and/or design funding that do not meet required timelines; and 22) states that funding of any application in the section is offset by advance design or site funding previously provided.

Proposed adoption of Regulation Section 1859.82.2 informs school districts what a “School Building” means for purposes of the SMP. Other criteria include, but is not limited to 1) general factors generating program eligibility including limits to program eligibility; 2) specifies the criteria a project must meet in order to qualify as an SMP project; 3) specifies the application documents required to submit a complete SMP application for the replacement of School Buildings; 4) specifies the documents required to submit an SMP application for the replacement of School Buildings that have been lost, destroyed, or unable to be repaired; 5) specifies the documents required to submit an SMP application for the replacement of School Buildings with interior square footage to be mitigated; 6) specifies that any application submission that does not contain all required documentation will be returned without review; 7) specifies how eligible SMP replacement applications will be funded; 8) specifies that replacement funding may be used towards the rehabilitation of the affected facility provided that the underlying health and safety threat has been fully mitigated; 9) specifies the eligibility criteria and the documents required to submit an SMP application for the rehabilitation of School Buildings and exterior square footages of School Buildings, including lunch shelters, covered walkways, or site conditions; 10) specifies how eligible SMP rehabilitation applications will be funded; 11) specifies funding offsets for applications receiving replacement or rehabilitation funding under the SMP; 12) specifies eligibility adjustments will be made to a school districts SFP per-pupil grants as a result of funding received for an SMP project; 13) specifies criteria in which an SMP project may receive advance funding for site and/or design and also sets forth the documents required to submit an SMP application for advance funding for site and/or design; 14) specifies how eligible SMP applications for advance design and/or site acquisition funding will be funded; 15) specifies deadlines for the submission of a complete full funding application for eligible SMP projects that receive advance site and/or design funding; 16) specifies the reduction to eligible costs incurred for SMP projects receiving advance site and/or design funding; and 17) specifies that the full funding received for eligible SMP projects will be offset by any advance funding previously received for the project(s).

Proposed adoption of Regulation Section 1859.82.3 allows for Facility Hardship and SMP conceptual approvals. This section specifies that school districts may request SAB approval to determine Facility Hardship or SMP eligibility in advance of project funding. The SAB approval does not represent a reservation of bond authority; it only confirms that the project meets the eligibility criteria for the Facility Hardship or the SMP. In addition, the conceptual approval does not provide priority processing once the request is received; the application will be processed in date order received regardless of any prior conceptual approval. Lastly, this section specifies the conceptual application submission requirements for potential Facility Hardship and SMP replacement or rehabilitation projects.

Existing Regulation Section 1859.83 provides an additional grant amount to the SFP new construction and modernization grants, as a result of unusual circumstances that created

excessive project costs beyond the control of the school district. The proposed regulatory amendments update the references throughout this section for the new Facility Hardship and SMP regulation sections.

Existing Regulation Section 1859.90.3 sets forth the programs that must participate in the priority funding process. The proposed regulatory amendments update the references throughout this section for the new Facility Hardship and SMP regulation sections.

Existing Regulation Section 1859.93 sets forth the funding order of received applications requesting modernization funding. The proposed regulatory amendments update the references throughout this section for the new Facility Hardship and SMP regulation sections.

Existing Regulation Section 1859.106 provides that expenditures for SFP program projects be made in accordance with certain Education Code sections and that adjustments be made to Facility Hardship and SMP grant amounts. The proposed regulatory amendments update the references throughout this section for the new Facility Hardship and SMP regulation sections.

Existing Form SAB 50-04 *Application for Funding*, (incorporated by reference) is submitted by school districts to apply for State funding for new construction and modernization projects. The proposed regulatory amendments address the regulatory structure of the Facility Hardship and the SMP and clearly indicate the appropriate selections for use when submitting conceptual approvals and funding requests for these two programs.

Proposed adoption of Form SAB 58-01, *Facility Hardship Cost Estimate*, (incorporated by reference) provides instructions to school districts on the use of this Form. It is the standardized form for the submission of rehabilitation cost estimates for the Facility Hardship and the SMP. This Form formalizes the calculation of grants provided for soft costs that a school district is eligible to request and will provide a consistent structure required by the two programs.

Prioritization of Facility Hardship Projects

Funding is provided for Facility Hardship projects, including SMP projects that replace or rehabilitate school facilities in critical cases where there is a serious risk to the health and safety of pupils. The SAB, at its August 4, 2010 meeting, approved placing Facility Hardship and SMP projects with unfunded approvals at the top of the cumulative Unfunded List (Lack of AB 55 Loans) at all times, with placement order determined by SAB approval date and next by date order received.

Mandate on Local Agencies or School Districts

The Executive Officer of the SAB has determined that the proposed 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 school districts to incur additional costs in order to comply with the proposed regulations.

Cost Estimate

The Executive Officer of the SAB has assessed the potential for significant adverse economic impact that might result from the proposed 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.

Documents Incorporated by Reference

Application for Funding, Form SAB 50-04, (Rev. 05/20), referenced in Regulation Section 1859.2 and is incorporated by reference.

Facility Hardship Cost Estimate, Form SAB 50-08, (New 05/20), referenced in Regulation Section 1859.2 and is incorporated by reference.

Technical Documents Relied Upon

- OPSC’s stakeholder item, dated January 10, 2020, entitled “Facility Hardship and Seismic Mitigation Programs.”
- OPSC’s stakeholder item, dated January 31 and February 7, 2020, entitled “Facility Hardship and Seismic Mitigation Program” (both items have the same title name).
- The SAB’s Action Item, dated May 27, 2020, entitled “Proposed Amendments to the School Facility Program for the Facility Hardship Program and Seismic Mitigation Program.”

Benefits of the Proposed Regulations

There are benefits associated with these proposed regulations. The proposed regulations promote a stricter accountability of State bond funds for health and safety projects, while streamlining processes that increase efficiencies for the programs. Additionally, there are benefits to health, safety, and welfare of California residents (school children and school faculty) because school facilities will be built stronger and safer. School districts utilize construction and trades employees to work on school construction projects and although the proposed regulations do not directly impact worker’s safety, existing law provides for the availability of a skilled labor force. Further, public health and safety is enhanced because a properly paid and trained workforce will build school construction projects that are higher quality, structurally code-compliant and safer for use by pupils, staff, and other occupants on the site. Lastly, the State will benefit because these facilities will be constructed thereby increasing the State’s inventory of school facilities.