

October 27, 2023

TITLE 2. STATE ALLOCATION BOARD

NOTICE OF PROPOSED REGULATORY ACTION

THE STATE ALLOCATION BOARD PROPOSES TO REPEAL
REGULATION SECTION 1859.169.1, AND AMEND
VARIOUS REGULATION SECTIONS, INCLUDING AN ASSOCIATED
FORM, AND THE GRANT AGREEMENT MASTER TEMPLATES,
TITLE 2, CALIFORNIA CODE OF REGULATIONS,
RELATING TO LEROY F. GREENE SCHOOL FACILITIES ACT OF 1998

PROPOSED REPEAL OF THE FOLLOWING REGULATION SECTION:

- 1859.169.1

PROPOSED AMENDMENTS TO THE FOLLOWING REGULATION SECTIONS:

- 1859.2, 1859.70.2, 1859.103, 1859.104, 1859.184.1, AND 1859.199

PROPOSED AMENDMENTS TO THE FOLLOWING FORMS:

- Form SAB 50-06, *Expenditure Report*, (Rev. 10/22), which is incorporated by reference and referenced in Regulation Section 1859.2
- Grant Agreement, (Rev. 10/22), which is incorporated by reference and referenced in Regulation Section 1859.2

NOTICE IS HEREBY GIVEN that the State Allocation Board (SAB) proposes to repeal and amend the above-referenced regulation sections, including an associated form and the Grant Agreement master templates, contained in Title 2, California Code of Regulations (CCR). A public hearing is not scheduled. A public hearing will be held if any interested person, or his or her duly authorized representative, submits a written request for a public hearing to the Office of Public School Construction (OPSC) no later than 15 days prior to the close of the written comment period. Following the public hearing, if one is requested, or following the written comment period if no public hearing is requested, OPSC, at its own motion or at the instance of any interested person, may adopt the proposals substantially as set forth above without further notice.

AUTHORITY AND REFERENCE CITATIONS

The SAB is proposing to amend the above-referenced regulation sections under the authority provided by Section 17070.35, 17072.13, 17078.64, 17078.72(k) and 17079.30 of the Education Code. The proposal interprets and make specific reference Sections 17009.5, 17017.6, 17017.7, 17021, 17047, 17050, 17051, 17070.15, 17070.35, 17070.51(a), 17070.63, 17070.71, 17070.77, 17070.99, 17071.10, 17071.25, 17071.30, 17071.33, 17071.35, 17071.75, 17071.76, 17072.10, 17072.13, 17072.12, 17072.18, 17072.20, 17072.33, 17073.25, 17074.10, 17074.30,

17075.10, 17076.10, 17077.40, 17077.42, 17077.45, 17078.52, 17078.56, 17078.72, 17078.72(k), 17079, 17079.10, 17079.20, 17079.30, 17280, 56026 and 101012(a)(8) of the Education Code; Section 53311 of the Government Code; and Sections 1771.3 in effect on January 1, 2012 through June 19, 2014 and 1771.5, Labor Code.

INFORMATIVE DIGEST/POLICY OVERVIEW STATEMENT

The Leroy F. Greene School Facilities Act of 1998 established, through Senate Bill (SB) 50, Chapter 407, Statutes of 1998, the School Facility Program (SFP). 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 Office of Administrative Law and filed with the Secretary of State on October 8, 1999.

At its October 26, 2022 meeting, the SAB adopted proposed regulatory amendments that would amend parts of the SFP Regulations, an associated form, and the Grant Agreement master templates. This is a result of the California Court of Appeals' decision related to the SAB's historical practice of collecting financial hardship savings.

Attached to this Notice is the specific regulatory language of the proposed regulatory action, along with the proposed regulatory amendments, the associated form and the Grant Agreement templates. The proposed regulations, the associated form and the Grant Agreement templates can also be reviewed 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>. Copies of the proposed regulations, the associated form and the Grant Agreement templates will be mailed to any person requesting this information by using OPSC's contact information set forth below in this Notice. The proposed regulations amend the SFP Regulations under the California Code of Regulations, Title 2, Chapter 3, Subchapter 4, Group 1, State Allocation Board, Subgroup 5.5, Regulations relating to the Leroy F. Greene School Facilities Act of 1998.

Background and Problem Being Resolved

Regulation Section 1859.103 was created through SB 50, Chapter 407, Statutes of 1998, and provided that school districts could use the State's share of any savings not needed for a project on other capital facility needs of the school district. Savings was deemed to be any portion of the SFP adjusted grant, including a school district's required matching share, not needed to complete the project. School districts could declare savings at any time.

For projects that received financial hardship funding, in lieu of contributing 100 percent of their required matching share, the savings needed to be used to reduce SFP financial hardship grants within the school district for a period of three years, after which the savings would be returned by the school district. The intent of this section was to allow a school district time to apply the savings towards a future financial hardship project.

What is being resolved now is the implementation of the California Court of Appeals' decision invalidating the SAB's historical practice of collecting financial hardship savings as outlined in Regulation Section 1859.103 above. In the case of *San Bernardino City Unified School District v. State Allocation Board*, California Court of Appeal, Third Appellate District, case C092003 (from Sacramento Superior Court case 34-2019-80003183), the Court ruled in favor of the San Bernardino City Unified School District thereby necessitating amendments to parts of the SAB's SFP Regulation Section 1859.103. This also included any other references to the return of any

SFP savings throughout the SFP Regulations, Form SAB 50-06, and the Grant Agreement master templates. The Court ordered the SAB to declare that school districts can retain financial hardship savings.

OPSC is implementing the California Court of Appeals' decision that invalidates the SAB's historical practice of collecting financial hardship savings as outlined in Regulation Sections 1859.70.2, 1859.103, 1859.104, 1859.169.1, 1859.184.1, 1859.199, Form SAB 50-06, and the Grant Agreement master templates. The proposed regulatory amendments make the regulations consistent and compatible with existing State laws and regulations. The California Court of Appeals' interpretation of Regulation Section 1859.103 pertaining to project savings supersedes the SAB's previous interpretation.

Anticipated Benefits of the Proposed Regulations

The proposed regulatory amendments promote transparency by implementing the California Court of Appeals' decision that invalidates the SAB's historical practice of collecting financial hardship savings as outlined in Regulation Section 1859.103. In the case of *San Bernardino City Unified School District v. State Allocation Board*, California Court of Appeal, Third Appellate District, case C092003 (from Sacramento Superior Court case 34-2019-80003183), the Court ruled in favor of the San Bernardino City Unified School District thereby necessitating amendments to parts of the SAB's SFP Regulation Section 1859.103. This also included any other references to the return of any SFP savings throughout the SFP Regulations, Form SAB 50-06, and the Grant Agreement master templates. Further, the Court ordered the SAB to declare that school districts can retain financial hardship savings.

Summary of the Proposed Regulatory Amendments

The SFP Regulations are being amended to revise the revision date for the Form SAB 50-06 and the Grant Agreement master templates; to remove existing language in five regulation sections that conform to the California Court of Appeals' decision related to the SAB's historical practice of collecting financial hardship savings; and in one regulation section provide guidance to school districts that they are required to report the expenditure of project savings annually until all state and required matching funds have been expended. The proposed amendments are as follows:

Existing Regulation Section 1859.2 represents a set of defined words and terms used exclusively for these regulations. The proposed amendments revise the revision date for the Form SAB 50-06 as well as the revision date for the Grant Agreement master templates. These are considered non-substantive changes.

Existing Regulation Section 1859.70.2 sets forth specific criteria allowing new construction projects that included classrooms that were considered ineligible for State funding due to the construction contract being signed in excess of 180 days prior to submittal of an Approved Application to participate and request State funding under the SFP. The proposed amendment removes an existing sentence pertaining to project savings. This is in alignment with the California Court of Appeals' decision that invalidates the SAB's historical practice of collecting financial hardship savings.

Existing Regulation Section 1859.103 identifies SFP project savings and establishes when and how the savings may be utilized. It also specifies how interest earned on financial hardship projects will be treated. Further, it identifies another component for which project savings may

be used towards and provides an exception to the required use of savings that reduces the financial hardship grant for apportionments made for district-owned site acquisition. The proposed amendments remove existing language pertaining to project savings. This is in alignment with the California Court of Appeals' decision that invalidates the SAB's historical practice of collecting financial hardship savings.

Existing Regulation Section 1859.104 sets forth the program reporting requirements for school districts receiving funds under the School Facility Program, including progress reports and expenditure reports. This section also requires recipients of Overcrowding Relief Grant (ORG) Program apportionments to submit a certification that replaced portables were removed from the eligible site and from K-12 service. The proposed amendment adds a new subsection that provides guidance to school districts reminding them that they are required to report the expenditure of project savings annually until all state and required matching funds have been expended.

Existing Regulation Section 1859.169.1 requires that State funds remaining at the completion of charter school projects must be returned to the State. The proposed amendments repeal this section in its entirety. This is in alignment with the California Court of Appeals' decision that invalidates the SAB's historical practice of collecting financial hardship savings.

Existing Regulation Section 1859.184.1 sets forth the application process for school districts with financial hardship approval under the ORG Program. This section permits financial hardship school districts in the ORG Program to obtain advance site acquisition funding in order to acquire sites through condemnation proceedings. Financial hardship districts may lack the funds for an advance deposit required before the courts will issue orders for condemnation, thereby failing to demonstrate ownership of the site for purposes of SFP funding. Further, this section includes the criteria for a complete application, determination of site acquisition funding for condemnation actions, and the limitation that no over-apportionment of site acquisition funds for condemnation may be applied as "savings" to construction related costs for purposes of Regulation Section 1859.103. The proposed amendment removes existing language pertaining to project savings. This is in alignment with the California Court of Appeals' decision that invalidates the SAB's historical practice of collecting financial hardship savings.

Existing Regulation Section 1859.199 identifies the time when a CTEFP project shall be deemed complete, that a completed project is subject to a Program Accountability Expenditure Audit, and that applicant school districts may not retain savings realized by a CTEFP project. The proposed amendment removes an existing sentence pertaining to project savings. This is in alignment with the California Court of Appeals' decision that invalidates the SAB's historical practice of collecting financial hardship savings.

Existing Form SAB 50-06, *Expenditure Report*, (Revised 42/40 10/22), is used by school districts to record the total amount of funding spent on an SFP project (includes State and district shares). The proposed amendments remove existing language under the Instructions on page 1 and the corresponding information/data fields on page 2 of the form that pertain to project savings. This is in alignment with the California Court of Appeals' decision that invalidates the SAB's historical practice of collecting financial hardship savings.

The existing grant agreement templates include sections relevant to funding provided by the New Construction Program, the Modernization Program, the Charter School Facilities Program, and the Career Technical Education Facilities Program. The grant agreements are entered into for every future funding application that is processed; therefore, each grant agreement will

contain the relevant program's sections. The grant agreements were developed to address the Office of Statewide Audits and Evaluation's audit findings by improving program oversight and expenditure accountability. The grant agreement also includes changes that implement the trailer bill language (AB 99, Chapter 15, Statutes of 2017), which the Governor signed into law on June 27, 2017. The grant agreements serve as binding documents and key resources that define the responsibilities of the state and school districts from the determination of the amount of eligible state funding to the reporting of all project funds, including any savings achieved. This ensures transparency and accountability for the program grants being awarded under the SFP. The grant agreements are in alignment with the amended direct Apportionment process. The proposed amendments 1) include conforming language, pursuant to SB 820 (Chapter 110, Statutes of 2020), which changes the collection agency for amounts due to the State for audit findings from the California Department of Education to the OPSC; and 2) remove existing language pertaining to project savings. This is in alignment with the California Court of Appeals' decision that invalidates the SAB's historical practice of collecting financial hardship savings.

Statutory Authority and Implementation

OPSC is implementing the California Court of Appeals' decision that invalidates the SAB's historical practice of collecting financial hardship savings as outlined in Regulation Sections 1859.70.2, 1859.103, 1859.104, 1859.169.1, 1859.184.1, 1859.199, Form SAB 50-06, and the Grant Agreement master templates. The California Court of Appeals' interpretation of Regulation Section 1859.103 pertaining to project savings supersedes the SAB's previous interpretation.

Determination of Inconsistency or Incompatibility with Existing State Regulations

Regulation Section 1859.103 was created through SB 50, Chapter 407, Statutes of 1998, and provided that school districts could use the State's share of any savings not needed for a project on other capital facility needs of the school district. Savings was deemed to be any portion of the SFP adjusted grant, including a school district's required matching share, not needed to complete the project. School districts could declare savings at any time.

For projects that received financial hardship funding, in lieu of contributing 100 percent of their required matching share, the savings needed to be used to reduce SFP financial hardship grants within the school district for a period of three years, after which the savings would be returned by the school district. The intent of this section was to allow a school district time to apply the savings towards a future financial hardship project.

What is being resolved now is the implementation of the California Court of Appeals' decision invalidating the SAB's historical practice of collecting financial hardship savings as outlined in Regulation Section 1859.103 above. In the case of *San Bernardino City Unified School District v. State Allocation Board*, California Court of Appeal, Third Appellate District, case C092003 (from Sacramento Superior Court case 34-2019-80003183), the Court ruled in favor of the San Bernardino City Unified School District thereby necessitating amendments to parts of the SAB's SFP Regulation Section 1859.103. This also included any other references to the return of any SFP savings throughout the SFP Regulations, form (Form SAB 50-06), and the Grant Agreement master templates. The Court ordered the SAB to declare that school districts can retain financial hardship savings.

OPSC is implementing the California Court of Appeals' decision that invalidates the SAB's historical practice of collecting financial hardship savings as outlined in Regulation Sections

1859.70.2, 1859.103, 1859.104, 1859.169.1, 1859.184.1, 1859.199, Form SAB 50-06, and the Grant Agreement master templates. The proposed regulatory amendments will make the regulations consistent and compatible with existing State laws and regulations. The California Court of Appeals' interpretation of Regulation Section 1859.103 pertaining to project savings supersedes the SAB's previous interpretation.

Documents Incorporated by Reference

- *Expenditure Report*, Form SAB 50-06, (Rev. 10/22), referenced in Regulation Section 1859.2 and is incorporated by reference.
- *Grant Agreement*, (Rev. 10/22), referenced in Regulation Section 1859.2 and is incorporated by reference.

IMPACT ON LOCAL AGENCIES OR SCHOOL DISTRICTS

The Executive Officer of the SAB has determined that the proposed regulatory amendments do not impose a mandate or a mandate requiring reimbursement by the State pursuant to Part 7 (commencing with Section 17500) of Division 4 of the Government Code. It will not require local agencies, school districts, or charter schools to incur additional costs in order to comply with the proposed regulatory amendments.

DISCLOSURES REGARDING THE PROPOSED REGULATORY ACTION

The Executive Officer of the SAB has made the following initial determinations relative to the required statutory categories:

- The SAB has made an initial determination that there will be no significant, statewide adverse economic impact directly affecting business, including the ability of California businesses to compete with businesses in other states.
- The SAB is not aware of any cost impacts that a representative private person or business would necessarily incur in reasonable compliance with the proposed action.
- There will be no non-discretionary costs or savings to local agencies.
- The proposed regulatory amendments create no costs to any local agency, school district, or charter school requiring reimbursement pursuant to Section 17500 et seq., or beyond those required by law, except for the required district contribution toward each project as stipulated in statute.
- There will be no costs or savings in federal funding to the State.
- The proposed regulatory amendments create no costs or savings to any State agency beyond those required by law.
- The SAB has made an initial determination that there will be no impact on housing costs.

RESULTS OF THE ECONOMIC IMPACT ANALYSIS

Impact to Businesses and Jobs in California

The proposed regulatory amendments do not impact businesses and jobs in California, nor will the proposed regulatory amendments negatively impact the creation of jobs, the creation of new businesses, and the expansion of businesses in California. It is not anticipated that the proposed regulatory amendments will result in the elimination of existing businesses or jobs

within California. The proposed regulatory amendments promote transparency by implementing the California Court of Appeals' decision that invalidates the SAB's historical practice of collecting financial hardship savings as outlined in Regulation Section 1859.103. In the case of *San Bernardino City Unified School District v. State Allocation Board*, California Court of Appeal, Third Appellate District, case C092003 (from Sacramento Superior Court case 34-2019-80003183), the Court ruled in favor of the San Bernardino City Unified School District thereby necessitating amendments to parts of the SAB's SFP Regulation Section 1859.103. This also included any other references to the return of any SFP savings throughout the SFP Regulations, Form SAB 50-06, and the Grant Agreement master templates. Further, the Court ordered the SAB to declare that school districts can retain financial hardship savings.

The California Court of Appeals' interpretation of Regulation Section 1859.103 pertaining to project savings supersedes the SAB's previous interpretation.

Benefits to Public Health and Welfare, Worker's Safety, and the State's Environment

- The proposed regulatory amendments promote transparency by implementing the California Court of Appeals' decision that invalidates the SAB's historical practice of collecting financial hardship savings as outlined in Regulation Section 1859.103. In the case of *San Bernardino City Unified School District v. State Allocation Board*, California Court of Appeal, Third Appellate District, case C092003 (from Sacramento Superior Court case 34-2019-80003183), the Court ruled in favor of the San Bernardino City Unified School District thereby necessitating amendments to parts of the SAB's SFP Regulation Section 1859.103. This also included any other references to the return of any SFP savings throughout the SFP Regulations, Form SAB 50-06, and the Grant Agreement master templates. Further, the Court ordered the SAB to declare that school districts can retain financial hardship savings.
- There are benefits to public health and welfare because the Court of Appeals' decision stipulates that school districts are no longer required to return project savings from projects that are approved with financial hardship status.
- There is no impact to worker safety from the proposed regulatory amendments.
- There is no impact to the State's environment from the proposed regulatory amendments.

EFFECT ON SMALL BUSINESSES

It has been determined that the proposed regulatory amendments will not have an impact on small businesses in the ways identified in subsections (a)(1)–(4) of Section 4, Title 1, CCR. The proposed regulatory amendments are implemented by OPSC because the California Court of Appeals' decision invalidates the SAB's historical practice of collecting financial hardship savings as outlined in Regulation Sections 1859.70.2, 1859.103, 1859.169.1, 1859.184.1, 1859.199, including the Form SAB 50-06 and the Grant Agreement master templates. The California Court of Appeals' interpretation of Regulation Section 1859.103 pertaining to project savings supersedes the SAB's previous interpretation.

SUBMISSION OF COMMENTS, DOCUMENTS AND ADDITIONAL INFORMATION

Any interested person may present statements, arguments or contentions, in writing, submitted via U.S. mail, e-mail or fax, relevant to the proposed regulatory action. Written comments submitted via U.S. mail, e-mail or fax must be received at OPSC no later than

December 11, 2023. The express terms of the proposed regulations as well as the Initial Statement of Reasons are available to the public.

Written comments, submitted via U.S. mail, e-mail or fax, regarding the proposed regulatory action, requests for a copy of the proposed regulatory action or the Initial Statement of Reasons, and questions concerning the substance of the proposed regulatory action should be addressed to:

Lisa Jones, Regulations Coordinator

Mailing Address: Office of Public School Construction
707 Third Street, 4th Floor
West Sacramento, CA 95605

E-mail Address: lisa.jones@dgs.ca.gov

Fax No.: (916) 375-6721

AGENCY CONTACT PERSONS

General or substantive questions regarding this Notice of Proposed Regulatory Action may be directed to Ms. Lisa Jones at (279) 946-8459. If Ms. Jones is unavailable, these questions may be directed to the backup contact person, Mr. Michael Watanabe, Deputy Executive Officer, at (279) 946-8463.

ADOPTION OF REGULATIONS

Please note that, following the public comment period, the SAB may adopt the regulation substantially as proposed in this notice or with modifications, which are sufficiently related to the originally proposed text and notice of proposed regulatory activity. If modifications are made, the modified text with the changes clearly indicated will be made available to the public for at least 15 days prior to the date on which the SAB adopts the regulations.

The modified regulation(s) will be made available and provided to: all persons who testified at and who submitted written comments at the public hearing, all persons who submitted written comments during the public comment period, and all persons who requested notification from the agency of the availability of such changes. Requests for copies of any modified regulations should be addressed to the agency's regulation coordinator identified above. The SAB will accept written comments on the modified regulations during the 15-day period.

SUBSTANTIAL CHANGES WILL REQUIRE A NEW NOTICE

If, after receiving comments, the SAB intends to adopt the regulation with modifications not sufficiently related to the original text, the modified text will not be adopted without complying anew with the notice requirements of the Administrative Procedure Act.

RULEMAKING FILE

Pursuant to Government Code Section 11347.3, the SAB is maintaining a rulemaking file for the proposed regulatory action. The file currently contains:

1. A copy of the text of the regulations for which the adoption is proposed in ~~strikeout~~/underline.
2. A copy of this Notice.
3. A copy of the Initial Statement of Reasons for the proposed adoption.
4. The factual information upon which the SAB is relying in proposing the adoption.

As data and other factual information, studies, reports or written comments are received they will be added to the rulemaking file. The file is available for public inspection at OPSC during normal working hours. Items 1 through 3 are also available on OPSC's Internet Web site at: <https://www.dgs.ca.gov/OPSC/Resources/Page-Content/Office-of-Public-School-Construction-Resources-List-Folder/Laws-and-Regulations> then scroll down to School Facility Program, Pending Regulatory Changes, and click on the links named 45-day Public Notice, Initial Statement of Reasons and Proposed Regulatory Text.

ALTERNATIVES

In accordance with Government Code Section 11346.5(a)(13), the SAB must determine that no reasonable alternative it considered or that has otherwise been identified and brought to its attention would be more effective in carrying out the purpose for which the action is proposed, would be as effective and less burdensome to affected private persons than the proposed action, or would be more cost-effective to affected private persons and equally effective in implementing the statutory policy or other provision of law. The alternative to these proposed regulatory amendments would be that OPSC does not implement the California Court of Appeals' decision and be in violation of the Court's decision.

AVAILABILITY OF THE FINAL STATEMENT OF REASONS

Upon its completion, the Final Statement of Reasons will be available and copies may be requested from the agency's regulation coordinator named in this notice or may be accessed on the website listed above.