

**State of California
Office of Administrative Law**

In re:

State Allocation Board

**Title 2, California Code of Regulations
Sections 1859.2 and 1859.21**

**DETERMINATION ON
REQUEST FOR PRIORITY REVIEW
AND ORDER TO SHOW CAUSE
Government Code Section 11349.7**

OAL File No. Priority Review 2012-1

SUMMARY OF DETERMINATION

On April 17, 2012, at the request of the Senate Rules Committee, the Honorable Darrell Steinberg, Chair, the Office of Administrative Law (OAL) initiated a priority review pursuant to Government Code section 11349.7 and Senate-Assembly Joint Rule 40.1.

The Senate Rules Committee requested review of Item 22 of State Allocation Board (SAB) Form 50-04, *Application for Funding*, which is incorporated by reference into the California Code of Regulations (CCR) at Title 2 CCR section 1859.2 and was previously incorporated by reference at Title 2 CCR section 1859.21. Item 22 of the SAB Form 50-04 is commonly known as the “60% commensurate rule” (hereafter “60% rule”). OAL published notice of the priority review in the California Regulatory Notice Register on April 27, 2012, and completed the priority review within the required 90-day period.

In addition to the Senate Rules Committee’s request for this priority review, two public comment letters were received and considered by OAL as part of the priority review. OAL also reviewed all 1999 rulemaking file records by which the 60% rule was adopted as an emergency and/or final regulation.

OAL finds that the 60% rule meets the Authority, Clarity, Consistency, Reference, and Nonduplication standards of Government Code section 11349.1.

OAL finds that the Necessity standard of sections 11349(a) and 11349.1(a)(1) is met, in as much as the rulemaking files contained substantial evidence of the need for a rule which substantiates that a commensurate amount of work is contained in the project plans and specifications as compared to the number of per pupil grants requested. OAL finds, however, that the Necessity standard is not met with respect to the specifics of the 60% rule itself, because the rulemaking files failed to contain substantial evidence of the need for the specification of a 60 percent, as opposed to some other percentage, minimum cost estimate for the work described in the plans and specifications in relationship to the total grant amount plus the school district’s matching share. OAL

also found that the rulemaking files failed to contain substantial evidence of the need to specifically exclude certain items from the cost estimate.

Although OAL finds that the 60% rule meets the Reference standard of Government Code sections 11349(e) and 11349.1(a)(5), in that Reference was not found to be wholly lacking, OAL did find that Reference was insufficiently specific and complete.

The reasons for OAL's determinations regarding the six Government Code section 11349.1 standards, and information specific to the deficiencies noted above, are discussed below under DETERMINATION ON REQUEST FOR PRIORITY REVIEW.

STATUTORY BACKGROUND

The 60% rule is a regulatory product of Senate Bill 50 (Greene) Chapter 407, Statutes of 1998. SB 50 added Chapter 12.5 (Leroy Greene School Facilities Act of 1998, Education Code section 17070.10 et seq.) to Part 10 of Division 1 of the Education Code. SB 50 also added Part 68 (Class Size Reduction Kindergarten-University Public Education Facilities Bond Act of 1998) of Division 14 of the Education Code. The Class Size Reduction Bond Act appropriates the approximately 6.7 billion dollars in Proposition 1A funds approved by the voters on November 3, 1998 to finance the Leroy Greene School Facilities Act of 1998. Education Code sections 100410 and 100415. SB 50 is referred to in this Determination on Request for Priority Review and Order to Show Cause as the "School Facilities Program" or "SFP."

REGULATORY HISTORY

The 60% rule was added to the SAB Form 50-04 in a series of rulemaking actions. It was first proposed to be added to the Form 50-04 on May 14, 1999, in the context of Modernization, as part of the process of making the emergency SFP regulations permanent regulations. See OAL file no. 99-0826-01C. The 60% rule became a permanent regulation for Modernization projects on October 8, 1999. The 60% rule was added to the Form 50-04 as an emergency regulation, in the context of New Construction, on July 12, 1999. See OAL file no. 99-0701-01E. The 60% rule became effective as a permanent regulation in the context of New Construction on December 22, 1999. See OAL file no. 99-1105-03C.

Currently, the 60% rule is substantially as it appeared in 1999, at least with respect to the requirement that a school facilities construction or modernization project architect or design professional must certify that the cost of the work represented in the plans and specifications, excluding certain items, be at least 60% of the total state grant amount plus the school district's matching share contribution. In 1999, Item 22 did not include interim housing costs in the Modernization cost estimate but did require the project architect or design professional to certify the number of classrooms demolished and not replaced and the number of additional classrooms constructed in the plans and specifications. Certain other aspects of the current 60% rule did not exist in 1999, such as the ORG (overcrowding relief grant) of 2006, in the context of New Construction, and

the Charter School Facility Program Rehabilitation Grant of 2002, in the context of Modernization.

DETERMINATION ON REQUEST FOR PRIORITY REVIEW

A. INTRODUCTION.

Pursuant to Government Code section 11349.7, OAL must review a regulation to determine whether it meets the six standards (Necessity, Authority, Clarity, Consistency, Reference, and Nonduplication) set forth in Government Code section 11349.1. If OAL determines that the regulation does not meet the standards of section 11349.1, it must order the adopting agency to show cause why the regulation should not be repealed. In the case of a regulation for which there is no or inadequate information relating to its Necessity, OAL must specify in its order the information which OAL requires to make a determination. Government Code section 11349.7(a).

B. NECESSITY STANDARD.

(1) Legal Standards:

Government Code section 11349(a) provides:

"Necessity" means the record of the rulemaking proceeding demonstrates by substantial evidence the need for a regulation to effectuate the purpose of the statute, court decision, or other provision of law that the regulation implements, interprets, or makes specific, taking into account the totality of the record. For purposes of this standard, evidence includes, but is not limited to, facts, studies, and expert opinion.

Government Code section 11346.2(b)(1) provides:

Every agency subject to this chapter shall prepare... (b) An initial statement of reasons for proposing the adoption, amendment, or repeal of a regulation. This statement of reasons shall include, but not be limited to, all of the following: (1) A statement of the specific purpose of each adoption, amendment, or repeal, the problem the agency intends to address, and the rationale for the determination by the agency that each adoption, amendment, or repeal is reasonably necessary to carry out the purpose and address the problem for which it is proposed. The statement shall enumerate the benefits anticipated from the regulatory action, including the benefits or goals provided in the authorizing statute.

Title 1 CCR section 10 provides:

(a) In reviewing the rulemaking record for compliance with subsection (b), OAL shall not dispute the decision of a rulemaking agency to adopt a particular

regulatory provision when the information provided as required by subsection (b) is also adequate to support one or more alternative conclusions.

(b) In order to meet the “necessity” standard of Government Code section 11349.1, the record of the rulemaking proceeding shall include:

(1) A statement of the specific purpose of each adoption, amendment, or repeal; and

(2) information explaining why each provision of the adopted regulation is required to carry out the described purpose of the provision. Such information shall include, but is not limited to, facts, studies, or expert opinion. When the explanation is based upon policies, conclusions, speculation, or conjecture, the rulemaking record must include, in addition, supporting facts, studies, expert opinion, or other information. An “expert” within the meaning of this section is a person who possesses special skill or knowledge by reason of study or experience which is relevant to the regulation in question.

(2) Modernization.

In the context of Modernization, on page 38 of the Final Statement of Reasons, in OAL file number 99-0826-01C, SAB stated:

...The cost estimate requirement is necessary from a program integrity standpoint to substantiate that a commensurate amount of work is in the plans and specifications as compared to the number of per pupil grants requested.

(3) New Construction.

In the context of New Construction, SAB’s Finding of Emergency in OAL file number 99-0701-01E, as well as its Initial Statement of Reasons and Final Statement of Reasons in OAL file number 99-1105-03C, contained the following information:

Regulation 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 for purposes not otherwise eligible under the SFP.

...The SAB instructed OPSC to file this amendment [the 60% rule re New Construction] 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 School Facility Program. 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 [600/25] within a grant amount of \$3,120,000. The district is currently leasing a large number of portable classrooms and proposes to buy them out at a cost of \$40,000 each, which equals \$960,000 [24 x \$40,000]. 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.

(4) The rulemaking records contain substantial evidence of the necessity for a rule in the nature of the 60% rule.

Modernization project grants are computed by multiplying numbers of pupils housed in older structures and portables by fixed amounts based on grade levels and require removal of older portables and modernization in ways which enhance the achievement of educational purposes. Education Code sections 17070.15, 17074.10, and 17074.25.

New Construction project grants are computed based on statutory assumptions regarding the costs of construction of teaching stations (spaces constructed or reconstructed to serve as areas in which to provide instruction) for different grade levels and are a function of the number of un-housed pupils under current or projected enrollments. Education Code sections 17071.10, 17071.25, 17071.75, and 17072.10.

The purpose of the SFP is to provide funds for the building and modernizing of classroom capacity for current or projected numbers of students who are un-housed or housed in older structures and portables. The 60% rule requires architect certification that a minimum percentage of the total grant and district matching share is needed for the costs of the work described in the plans and specifications. The uses of new construction and modernization funds are governed by Education Code sections 17070.15, 17072.35 and 17074.25 and primarily consist of the construction of classroom and related facilities for unhoused pupils or the modernization of classroom and related facilities to extend the useful life or enhance the physical environment of the

school and the ability of a structure to achieve educational purposes. OAL finds that SAB's determination, that a rule such as the 60% rule is necessary, is not an unreasonable interpretation and implementation of the SFP statutes and is one means of implementing the SFP statutes to curtail what the SAB described as the generation of artificial project savings (New Construction – OAL file numbers 99-0701-01E and 99-1105-03C) and the need to ensure program integrity by substantiating that a commensurate amount of work is in the plans and specifications as compared to the number of per pupil grants requested (Modernization – OAL file number 99-0826-01C).

(5) The rulemaking records contain inadequate information relating to the Necessity for selecting 60% as the percentage of the total funds needed for the work described in the plans and specifications and for excluding from the cost estimate those items which the 60% rule excludes.

The rulemaking files did not contain an explanation of the need for a minimum of 60%, as opposed to some other percentage, of the total grant amount and district matching share to be required for the work described in the plans and specifications. In addition, the rulemaking files did not contain an explanation of the need to exclude those items which are excluded from the cost estimate. As described in the Order to Show Cause below, SAB must provide OAL with this information in any written response it issues to OAL's Order to Show Cause pursuant to Government Code section 11349.7(b).

(6) OAL did not find the SAB's description of the necessity for the 60% rule was based on the receipt of inaccurate information.

The Senate Rules Committee's request for this priority review and the entities which submitted comments during the priority review public comment period assert that in adopting the 60% rule, the SAB may have received inaccurate information and that the same possibly inaccurate information was provided to OAL for its review of the regulation in 1999. The comments of Richard Gonzalez & Associates, Inc. subsume those of the Los Angeles Unified School District (LAUSD) and the Senate Rules Committee and provide the most complete set of examples of purportedly inaccurate information provided to the SAB and, in turn, to OAL. OAL has considered these assertions under the category of the Necessity standard of section 11349.1(a), because, presumably, the commenters believe SAB would not have adopted the 60% rule but for its receipt of inaccurate information. Both the Richard Gonzalez & Associates, Inc., and LAUSD written comments conclude by citing an example of a purportedly inaccurate statement made to the SAB and assert that the statement "played a major role in the adoption of the regulation by the SAB." The assertions regarding inaccurate information provided to the SAB and, ultimately, to OAL, are set forth in full below:

The SAB, in adopting this regulation, did rely upon inaccurate information.

a. The FINAL STATEMENT OF REASONS, Need for the Regulation, contains a number of inaccurate statements.

i. The first inaccurate statement is: “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.” The SAB 50-04 specifically prohibits a district from making an application for a new construction project with more pupil grants than classroom capacity, except under very limited circumstances that are specified in law and regulation, (as stated by the OPSC in the same paragraph) therefore the statement in the Final Statement of Reasons is in fact inaccurate. In addition, the law and regulations require the Department of Education to review and approve plans for new school projects, and they would not approve a set of plans for a school without specifically addressing the need for adequate support facilities.

The statement quoted above from the SAB’s Final Statement of Reasons is from a larger paragraph. It reads:

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 School Facility Program. 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.

To the extent the commenter’s comment is a denial that plans are being submitted that do not provide the number of teaching stations for the pupils that justified the grants, it is critical to note that, pursuant to Government Code section 11349.1(a), OAL’s reviews of the six Government Code section 11349.1 standards is restricted to the regulation and the record of the rulemaking proceeding. Thus, OAL is prohibited from going outside of the rulemaking record provided to it by the state agency. Because of this restriction, it is important that members of the public submit comments during the public comment period concerning, among other things, any factual matters relevant to the necessity of a proposed regulation. These public comments become part of the record of the rulemaking proceeding which is submitted to the OAL for its review and must be summarized and responded to by the state agency in its Final Statement of Reasons, pursuant to Government Code section 11346.9, which is also added to the record of the proceeding. The current assertion, if any, that plans are not being submitted that do not provide the number of teaching stations for the pupils who justified the grants was not

submitted to the SAB during the public comment period in 1999 and is not part of the rulemaking record for the 60% rule.

To the extent the commenter's comment asserts that it is not possible for districts to submit plans that do not provide the number of teaching stations for the pupils that justified the grants because the Form 50-04 prohibits an application for a new construction project with more pupil grants than classroom capacity (as stated by OPSC in the same paragraph), OAL considered the statement taken from Example 1 in the context of the full paragraph from which it is taken. In Example 1, SAB is stating that the Form 50-04 already requires that a district identify the grade level and number of classrooms in a project, i.e., that SAB already receives those numbers in Sections 2 and 3 of the Form 50-04, but that it lacks a standard to apply to the numbers to determine whether artificial savings are being created. SAB is not saying that the problem is that districts are failing to identify the number of classrooms on the Form 50-04. The problem, as SAB states in the second sentence of the paragraph, is that plans for some projects are being submitted that do not provide the number of classrooms for the pupils that justified the grants or do not include support facilities. The last sentence of Example 1 describes SAB's proposed solution of having the architect review the plans and specifications and certify that the construction will cost at least 60% of the total grant and district matching share, presumably to ensure relation back to the eligibility numbers on which the grant was based. OAL understands the SAB to have determined that the plans and specifications together with the Form 50-04, absent the 60% rule, provide no standard for determining whether the facilities proposed in the plans and specifications fall below a certain cost threshold in relationship to the numbers of pupils identified as needing classroom construction (or modernization), and that the 60% rule provides the necessary threshold.

ii. The second inaccurate statement is: "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." As previously stated, the SAB has not established any limitation on the type of capital outlay projects that are to be deemed ineligible; therefore, this statement is completely misleading and inaccurate. In addition to the facilities normally funded by the SFP, the language in the law contemplated that savings would be used to fund those facilities that would not normally be included through the SFP, such as a second gym, pools or administrative facilities. The language in the law left it up to the school district to define a higher priority capital facility outlay. The only requirement in law is that the funds are used for capital outlay purposes.

The transcript of the meeting at which the SAB adopted this regulation indicates that the SAB was advised by the Assistant Executive Officer of the SAB (the board's advisory employee) that districts were using savings to fund capital facilities not approvable under the SFP program. This advisement was directly in contradiction to the law.

The essence of these assertions is that the SAB was told by the Assistant Executive Officer, or said in its Final Statement of Reasons, that savings from the SFP program cannot be used for swimming pools and athletic fields, etc. The commenter acknowledges that, despite the absence of a limitation on the type of projects that are to be deemed [eligible], there are facilities not normally funded by the SFP and that those facilities are funded, if at all, with savings. The SAB's Final Statement of Reasons and the Assistant Executive Officer are not making what would be the inaccurate statement that savings cannot be used to fund swimming pools and athletic fields, etc. The SAB plays no role in approving or disapproving uses by districts of project savings. The Final Statement of Reasons and Assistant Executive Officer are saying that swimming pools and athletic fields, etc., are capital outlay projects that are not eligible under the SFP or approvable under the SFP. SAB would not, apparently, approve, as part of a proposed construction or modernization project, the construction of a swimming pool under the SFP program with SFP funds awarded to a district on the basis of the pupil-based construction and modernization formulas described above if it meant the number of classrooms and support facilities calculated as needing to be constructed or modernized were not produced. At the same time, SAB would not, apparently, object to the construction of a swimming pool with money saved from an SFP project that had produced the classrooms and support facilities for the numbers of pupils used in the pupil-based construction and modernization formulas described above.

Even assuming that the SAB was given inaccurate information to the effect that savings cannot be used for swimming pools and athletic fields, etc., the SAB, apparently, never considered this information to be true. In the next sentence after the sentence quoted by the commenter, SAB goes on to state: "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." Even if the suspect information is characterized as misleading, SAB was apparently not misled. If SAB was not misled, purportedly misleading information could not have played a major role in the adoption of the regulation by SAB. OAL finds that SAB determined the 60% rule was necessary to curtail the generation of artificial savings and to ensure provision of an adequate number of teaching stations and support facilities for the pupils who generated the grants.

C. AUTHORITY STANDARD.

(1) Legal Standards:

Government Code section 11349(b) provides:

"Authority" means the provision of law which permits or obligates the agency to adopt, amend, or repeal a regulation.

Title 1 CCR section 14(a) provides:

“Authority” shall be presumed to exist only if an agency cites in its “authority” note proposed for printing in the California Code of Regulations:

(1) a California constitutional or statutory provision which expressly permits or obligates the agency to adopt, amend, or repeal the regulation; or

(2) a California constitutional or statutory provision that grants a power to the agency which impliedly permits or obligates the agency to adopt, amend, or repeal the regulation in order to achieve the purpose for which the power was granted.

(2) Analysis.

OAL reviewed the Authority citations provided for Title 2 CCR section 1859.21 (which incorporated by reference and required the use of the SAB Form 50-04 in 1999) and for Title 2 CCR section 1859.2 (which currently incorporates by reference the SAB Form 50-04). OAL also reviewed the Authority citation provided in the Finding of Emergency (OAL file no. 99-0701-01E) and Notice of Proposed Action (OAL file no. 99-1105-03C) for the addition of the 60% rule in the context of New Construction. All files and section 1859.21 provide Education Code section 17070.35 as an Authority citation. In addition, Title 2 CCR section 1859.2 provides Education Code section 17078.64 as an Authority citation.

Education Code section 17070.35 provides:

In addition to all other powers and duties as are granted to the board by this chapter..., the board shall do all of the following:

(a) Adopt rules and regulations, pursuant to [the Administrative Procedure Act], for the administration of this chapter....

By “this chapter,” section 17070.35 means Chapter 12.5, the Leroy F. Greene School Facilities Act of 1998.

Education Code section 17078.64 is authority for the SAB, in consultation with the California School Finance Authority, to adopt regulations to implement Article 12 of Chapter 12.5. Article 12 of Chapter 12.5 governs the administration of the SFP for charter schools.

OAL has determined that Education Code section 17070.35 (as well as section 17078.64) satisfies the Authority standard for the 60% rule (in 1999 and currently), because it authorizes the SAB to adopt regulations to administer the SFP for the public schools. The 60% rule is not outside the scope of the regulatory power conferred on SAB and is an element of administering this program for the reasons discussed above under the Necessity standard.

D. CLARITY STANDARD.

(1) Legal standards:

Government Code section 11349(c) provides:

“Clarity” means written or displayed so that the meaning of regulations will be easily understood by those persons directly affected by them.

Title 1 CCR section 16 provides:

(a) A regulation shall be presumed not to comply with the “clarity” standard if any of the following conditions exists:

(1) the regulation can, on its face, be reasonably and logically interpreted to have more than one meaning; or

(2) the language of the regulation conflicts with the agency's description of the effect of the regulation; or

(3) the regulation uses terms which do not have meanings generally familiar to those “directly affected” by the regulation, and those terms are defined neither in the regulation nor in the governing statute; or

(4) the regulation uses language incorrectly. This includes, but is not limited to, incorrect spelling, grammar or punctuation; or

(5) the regulation presents information in a format that is not readily understandable by persons “directly affected;” or

(6) the regulation does not use citation styles which clearly identify published material cited in the regulation.

(b) Persons shall be presumed to be “directly affected” if they:

(1) are legally required to comply with the regulation; or

(2) are legally required to enforce the regulation; or

(3) derive from the enforcement of the regulation a benefit that is not common to the public in general; or

(4) incur from the enforcement of the regulation a detriment that is not common to the public in general.

(2) Analysis:

OAL determined that the 60% rule meets the APA Clarity standard, because it does not suffer from any of the clarity deficiencies listed in Title 1 CCR section 16(a) and is easily understood by persons directly affected by it. The use of the terms “ORG” [Overcrowding Relief Grant], “High Performance Base Incentive Grant,” “deferred items,” and “interim housing” (in the context of Modernization), which are not defined in Item 22 or elsewhere in the Form 50-04, is not unclear to school districts participating in the program. These terms are defined elsewhere (see Ed. Code, secs. 17079 et seq. and 101012 and Title 2 CCR sec. 1859.2) or are common terms in school facility construction or modernization contexts.

OAL determined that the 60% rule does not conflict with the SAB’s description of the effect of the 60% rule. If it was true that the SAB and SAB staff described the effect of the 60% rule as prohibiting project savings from being used for swimming pools and athletic fields, etc., the 60% rule itself might be argued to conflict with the SAB’s description of its effect, because the 60% rule says nothing about how savings may be used. However, SAB specifically states that it is not opposed to districts using savings for these items (swimming pools and athletic fields, etc.). The resulting 60% rule, which does not prohibit any uses of project savings, is consistent with the SAB’s statement that it is not opposed to districts using savings for items such as swimming pools and athletic fields, etc. SAB’s and SAB’s staff’s descriptions of the effect of the 60% rule were not dictation of the uses of project savings but rather was to prevent the generation of “excessive,” “artificial,” or “windfall” savings and to substantiate that a commensurate amount of work is in the plans and specifications as compared to the number of per pupil grants requested.

E. CONSISTENCY STANDARD.

(1) Legal standards:

Government Code section 11349(d) provides:

“Consistency” means being in harmony with, and not in conflict with or contradictory to, existing statutes, court decisions, or other provisions of law.

Government Code section 11342.2 provides:

Whenever by the express or implied terms of any statute a state agency has authority to adopt regulations to implement, interpret, make specific or otherwise carry out the provisions of the statute, no regulation adopted is valid or effective unless consistent and not in conflict with the statute and reasonably necessary to effectuate the purpose of the statute.

The request for priority review and the commenters in this matter collectively assert that the 60% rule is inconsistent with Education Code sections 17070.63(c) and 17072.20(a).

(2) OAL finds that the 60% rule is not inconsistent with Education Code section 17070.63(c).

Education Code section 17070.63(c) provides: “Any savings achieved by the district’s efficient and prudent expenditure of these funds shall be retained by the district in the county fund for expenditure by the district for other high priority capital outlay purposes.”

The 60% rule does not specify, address, or proscribe how any project savings may be used by a school district. The 60% rule does not mention savings. The request for this priority review and the commenters assert that the SAB found, and was advised by its staff, that the 60% rule was needed to prevent savings from being used for certain items, but the SAB stated that it was not opposed to savings being used for these items. Nothing in the 60% rule dictates how project savings may be spent. Education Code section 17070.63(c) does not guarantee that a school district will realize any savings at all or any minimum amount of savings on a project. The 60% rule impacts savings, if at all, only to the extent that it reduces the amount of savings a school district can realize from a project. That effect of the 60% rule does not conflict with the operation of Education Code section 17070.63(c) on “any savings” achieved by the district’s efficient and prudent expenditure of funds.

(3) OAL finds that the 60% rule is not inconsistent with Education Code section 17072.20(a).

Education Code section 17072.20 provides:

- (a) An applicant school district that has been determined by the board to meet the eligibility requirements for new construction funding set forth in Article 2 (commencing with Section 17071.10) or Article 3 (commencing with Section 17071.75) may submit at any time a request to the board for a project apportionment for all or a portion of the funding for which the school district is eligible.
- (b) The application shall include, but shall not be limited to, the school district's determination of the amount of state funding that the district is otherwise eligible for relating to site acquisition, site development, new construction, and hardship funding provided pursuant to Article 8 (commencing with Section 17075.10), if any. The amount shall be reduced by the amount of the alternative fee collected pursuant to subdivision (a) of Section 65995.7 of the Government Code if a reimbursement election or agreement pursuant to Section 65995.7 of the Government Code is not in effect.
- (c) The board shall verify and adjust, as necessary, and approve the district's application.

OAL disagrees with LAUSD's reading of Education Code section 17072.20(a) in such a way as to create an automatic entitlement to apportionment of the full amount of a district's grant eligibility at any time. Section 17072.20(a) describes this process as a school district's submission of a request for funding which the SAB must verify and adjust, as necessary, and then approve. Section 17072.20(a) creates only a school district's entitlement to submit a request for all or any portion of its funding eligibility at any time; it does not deprive the SAB of all discretion or duties in the processing of requests for apportionments or reduce SAB to simply a funding conduit. Section 17072.20(b) requires certain information which must be included in the application for funding but specifies that the application shall not be limited to that information.

OAL has determined, pursuant to its analysis of the Necessity standard above, that SAB's determination of the necessity to add the 60% rule to the *Application for Funding* was a reasonable interpretation and implementation of the SFP statutes. Rather than act inconsistently with section 17072.20, the 60% rule may implement section 17072.20(c) to the extent that verification of a minimum cost relationship between the work described in the plans and specifications and the total grant amount and district matching share is a related and reasonable function of administering the SFP pursuant to the SAB's authority under Education Code section 17070.35.

F. REFERENCE STANDARD.

(1) Legal standards:

Government Code section 11349(e) provides:

"Reference" means the statute, court decision, or other provision of law which the agency implements, interprets, or makes specific by adopting, amending, or repealing a regulation.

Government Code section 11346.2(a)(2) provides:

The agency shall include a notation following the express terms of each California Code of Regulations section, listing... the specific statutes or other provisions of law being implemented, interpreted, or made specific by that section of the [CCR].

Government Code section 11346.5(a) provides:

The notice of proposed adoption, amendment, or repeal of a regulation shall include the following:... (2) ... reference to the particular code sections or other provisions of law that are being implemented, interpreted, or made specific.

(2) Assertions of the request for priority review and of commenters.

The request for priority review states: “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.” The commenters made nearly identical comments on this issue. The comment of the LAUSD, for example, states:

The regulation does lack reference to law as set forth in Gov. Code 11349.1(a)(5). The original documents submitted to the SAB by the Office of Public School Construction did not contain any reference to a section of law that was being interpreted or clarified. The only reference made was to another SAB regulation pertaining to a different program (existing school facility Modernization) and that this regulation was needed for the same purpose. The two programs are completely different in purpose and eligibility. (Incidentally, there was no law referenced in the adoption of the original referenced regulation for the Modernization Program)

(3) Analysis.

(a) OAL finds that the 60% rule did not lack Reference and did contain reference to sections of law being implemented in the Modernization context by Title 2 CCR section 1859.21 in 1999 and by sections 1859.21 and 1859.2, for both Modernization and New Construction, in the current CCR.

In the context of Modernization, the 60% rule was proposed, on May 14, 1999, to be added to the regulations as part of a “15-day” public notice (pursuant to Government Code section 11346.8(c)) after SAB had published notice of its proposed action to make permanent the original SFP emergency regulations. It became permanent on October 8, 1999. SAB provided no listing of Reference citations with its 15-day notice on May 14, 1999. However, SAB did give notice of amended Title 2 CCR section 1859.21 to show the new revision date (8/99) of the amended Form 50-04 which contained the 60% rule. Section 1859.21 listed four Reference citations: Education Code sections 17070.35, 17070.63, 17072.30, and 17074.15. Of those four statutes, OAL finds that sections 17070.35 and 17070.63 are appropriate Reference citations for the 60% rule. Those statutes are summarized below.

17070.35 – the SAB shall adopt regulations for the administration of this chapter,

17070.63 – (a) funds provided are the state’s full and final contribution to the project and for eligibility for state funds represented by the number of unhoused pupils for which the district is receiving a state grant, and the district must certify that the grant plus the district’s matching share will be enough to complete the project; (b) state funds may not be counted toward the district matching share; (c) any savings due to a district’s prudent and efficient expenditure of funds may be retained by the district for any other purpose.

If the purpose of the SFP is to fund the modernization of classrooms based on the number of students housed in structures more than 25 years old and in portables more than 20 years old (see Education Code section 17074.10), then a rule which ensures that program funds, generated on the basis of those numbers of students, are used to modernize a commensurate number of classrooms is an “administration of this chapter” for purposes of 17070.35.

The 60% rule may also be a component of implementing the requirement in section 17070.63(a) that the state grant plus the district share will be sufficient to complete the entire project, in that at least 60% of that total must be necessary to complete the project, excluding certain items.

Title 2 CCR section 1859.21 no longer incorporates the Form 50-04 by reference in the current CCR, but it does require school districts to use the form in applying for funding. Section 1859.21 continues to list, at least, Education Code sections 17070.35 and 17070.63 as Reference citations. OAL finds, therefore, that current section 1859.21 also meets the Reference standard of Government Code section 11349(e) for the reasons discussed above.

Title 2 CCR section 1859.2 currently incorporates the Form 50-04 by reference. That regulation lists, among many others, the following statutes as Reference citations: Education Code sections 17071.10, 17071.25, 17071.75, and 17072.10 (relevant to New Construction), and sections 17070.15 and 17074.10 (relevant to Modernization). Those statutes are summarized below.

17071.10 – the one-time existing school building capacity baseline determination under section 17071.25 is used for all grant determinations under the program.

17071.25 – to determine building capacity baseline, a district counts, by grade level, all existing permanent teaching stations (including allowable portable classrooms under section 17071.30) in the district. It applies the assumed capacity of each teaching station (25 pupils per teaching station for K through 6th grade, and 27 for 7th through 12th grades). It multiplies the number of teaching stations by grade level times the assumed capacities of 25 or 27 to arrive at the number of housed pupils by grade level in the district’s existing building capacity.

17071.75 – the district calculates enrollment projections for the fifth year after the year of grant application using the cohort survival enrollment projection system. It can also increase the enrollment projection by the number of pupils anticipated from dwelling units proposed under an approved subdivision map. It subtracts the number of adequately housed pupils under its existing building capacity [determined under section 17071.25] from the projected enrollment number to obtain a projected un-housed pupil number.

17072.10 – the district multiplies each un-housed elementary pupil determined under section 17071.75 times \$5,200, and each un-housed middle school pupil by \$5,500, and

each un-housed high school pupil by \$7,200 to determine a district's maximum new construction grant eligibility.

17070.15 - defines modernization as modifications of permanent structures which are 25 years old or portables at least 20 years old in ways that enhance the ability of the structure to achieve educational purposes.

17074.10 – the district multiplies each elementary, middle school, and high school pupil housed in a school building more than 25 years old, and in a portable classroom more than 20 years old, by the following numbers, respectively: \$2,246, \$2,376, and \$3,110, to arrive at a district's modernization grant eligibility. This statute also requires districts to use Modernization funds to place portable classrooms and to certify that the old portable will be removed from classroom use.

In light of the way school districts' grants are calculated, i.e., for New Construction based on statutorily determined costs of construction per pupil based on grade levels and the number of teaching stations needed for un-housed pupils based on current or projected enrollments, and, for Modernization, based on multiplying numbers of pupils housed in old structures and portables by fixed amounts based on grade levels, removing old portables, and modernizing in a way that enhances the achievement of educational purposes, it is not unreasonable to conclude that the intent of the program is to allocate money to build and modernize classroom capacity to meet the demand created by currently high or increasing numbers of students. Therefore, OAL finds that a regulation which requires certification by the architect or design professional that a minimum percentage of the total grant is necessary for the costs of the work described in the plans and specifications (assuming the plans and specifications are for classroom construction or modernization as described above) implements these listed Reference Citation statutes.

(b) OAL finds that the 60% rule met the Reference standard in the New Construction context in Title 2 CCR section 1859.21 in 1999.

The Reference citations, for the addition of the 60% rule for New Construction by way of an emergency rulemaking action in July of 1999, included those Reference citations listed after the text of Title 2 CCR section 1859.21 and discussed above, i.e., Education Code sections 17070.35 and 17070.63. For the reasons discussed above, therefore, OAL finds that the 60% rule, as it related to New Construction in 1999, was supported with Reference citations.

Also, the SAB's Finding of Emergency and its subsequent Notice of Proposed Action for the addition of the 60% rule in the context of New Construction list Education Code section 17009.5 as a Reference citation. That statute is summarized below.

17009.5 – (a) after 11/4/98, the SAB shall only approve projects under Chapter 12.5 [the SFP Chapter]; (b)-(e) concern pre-11/4/98 approvals and the transition to the new Chapter; (f) special rules for West Contra Costa.

The listing of section 17009.5 adds an additional, albeit non-specific, Reference citation for the 60% rule for New Construction, in that Chapter 12.5 governs the SFP. By listing this statute, SAB indicates that section 1859.21, and its incorporated Form 50-04 and 60% rule, implement all the statutes of Chapter 12.5. OAL finds this Reference citation to be insufficiently specific. Government Code section 11346.2(a)(2) requires that a state agency include a notation following each regulation which lists "the specific statutes" being implemented, interpreted, or made specific by that regulation. Government Code section 11346.5(a) requires that the state agency's notice include reference to "the particular code sections" being implemented, interpreted, or made specific.

(c) OAL finds that the Reference citations listed for the regulation which incorporates the 60% rule meet the standard for Reference in Government Code section 11349(e) but are incomplete.

OAL finds that a more complete list of Reference citations following the operative regulations (Title 2 CCR sections 1859.2 and 1859.21) could include the following:

For section 1859.2, Education Code sections 17070.35 and 17070.63 should be added as Reference citations for the reasons discussed above concerning their relevance as Reference citations for section 1859.21. Education Code section 17072.20 should be added as a Reference citation for section 1859.2 because it requires school districts to apply for funding (i.e., to use a Form 50-04). That statute also authorizes the SAB to verify a school district's application, which could include verification of the relationship between a project's plans and specifications and the pupil numbers used to generate the grant.

For section 1859.21, Education Code sections 17070.15, 17071.10, 17071.25, 17071.75, 17072.10, 17072.20, and 17074.10 should be added as Reference citations for the reasons discussed above regarding their appropriateness as current or recommended Reference citations for section 1859.2.

It should be noted that changes to the Authority or Reference citations listed after a regulation may be made by state agencies as changes without regulatory effect pursuant to Title 1 CCR section 100(a)(5).

G. NONDUPLICATION STANDARD.

(1) Legal standards:

Government Code section 11349(f) provides:

"Nonduplication" means that a regulation does not serve the same purpose as a state or federal statute or another regulation. This standard requires that an agency proposing to amend or adopt a regulation must identify any state or federal statute or regulation which is overlapped or duplicated by the proposed

regulation and justify any overlap or duplication. This standard is not intended to prohibit state agencies from printing relevant portions of enabling legislation in regulations when the duplication is necessary to satisfy the clarity standard in paragraph (3) of subdivision (a) of Section 11349.1. This standard is intended to prevent the indiscriminate incorporation of statutory language in a regulation.

Title 1 CCR section 12 provides:

(a) A regulation shall “serve the same purpose,” as that term is used in Government Code Section 11349(f), where it either repeats or rephrases in whole or in part a state or federal statute or regulation.

Item 22 of the SAB Form 50-04 is not duplicated in any other state or federal statute or regulation. OAL finds that the 60% rule meets the nonduplication standard of Government Code section 11349(f).

ORDER TO SHOW CAUSE

Having reviewed Item 22 of the State Allocation Board Form 50-04, and the regulations in Title 2 of the California Code of Regulations which previously or currently incorporate the form by reference and/or require it to be used by school districts when applying for SFP funds, the Office of Administrative Law has determined that:

THE AFOREMENTIONED REGULATION does not meet the Necessity standard of Government Code section 11349(a) because no information relating to the Necessity for the specifics of the 60% rule, as discussed above, was contained in any rulemaking record affecting the adoption of this rule.

IT IS HEREBY ORDERED that the State Allocation Board show cause why Item 22 of the State Allocation Board Form 50-04 should not be repealed. A written response, if any, must be made to the Office of Administrative Law, 300 Capitol Mall, Suite 1250, Sacramento, CA 95814, FAX (916) 323-6826, or to dmentink@oal.ca.gov Attention: Dale Mentink, Senior Staff Counsel, within sixty days of receipt of this Order to Show Cause by the State Allocation Board pursuant to Government Code section 11349.7(a) and (b). Pursuant to Government Code section 11349.7(a), any written response by the State Allocation Board shall include specific explanations of the need for the following:

- 1) the selection of 60%, as opposed to any other percent, as the minimum percent of the total grant amount provided by the State and the district's matching share that the work in the plans and specifications must cost in the estimate of the architect of record or design professional for the project; and
- 2) the exclusion from the cost estimate of those items excluded, i.e., planning, tests, inspection, and furniture and equipment.

IT IS FURTHER ORDERED, pursuant to Government Code section 11349.7(c), that interested parties may submit written comments in connection with this matter to this office at the above address within 30 days of the date of publication of this Determination on Request for Priority Review and Order to Show Cause in the California Regulatory Notice Register, and that this office shall notify the State Allocation Board within two working days of the receipt of information submitted by the public regarding this matter.

Date: July 10, 2012

Dale P. Mentink
Senior Staff Counsel

FOR: Debra M. Cornez
Director

Original: Lisa Silverman,
Executive Officer
Copy: Lisa Jones