

PARENTS AND STUDENTS FOR GREAT SCHOOLS

A collaboration of:

**Californians
for Justice**



ACCE
Alliance of
Californians for
Community
Empowerment

**PUBLIC
ADVOCATES**
MAKING RIGHTS REAL



February 8, 2010

Honorable Arne Duncan
Secretary of Education
U.S. Department of Education
400 Maryland Avenue, S.W.
Washington, D.C. 20202

Honorable Thelma Meléndez
Assistant Secretary for Elementary and Secondary Education
U.S. Department of Education
400 Maryland Avenue, S.W.
Washington, D.C. 20202

Re: Request to Require Revisions to California's SFSF Phase 2 Application & to Reject Phase 2 Funding and California's Race to the Top Application Pending Revisions

Dear Secretary Duncan and Assistant Secretary Meléndez:

Parents and Students for Great Schools, a statewide coalition, joined by Youth Together and Bay Area Parent Leadership Action Network (PLAN) and the Campaign for Quality Education Coordinating Committee, represent more than half a million low-and moderate income California students and families in 36 of 40 State Senate Districts and State Assembly Districts.

We request that the Department require California to revise its Phase 2 State Fiscal Stabilization Fund (SFSF) application **by increasing its support for public K-12 education to meet the minimum Maintenance of Effort (MOE) requirements under the ARRA**, including, if necessary, the criteria for any waiver of the MOE requirement. **Until California does so, the Department should delay release of Phase 2 SFSF funds and delay consideration of the State's Race to the Top (RTTT) application.**¹

¹ As you know, the Department has made approval of both phases of its SFSF application a precondition for award of a Race to the Top grant. 74 Fed. Register 221(Nov. 18, 2009) at 59692, 59720, 59799.

The State's January 12, 2010 Phase 2 application does not comply with the minimum level of effort toward school funding in 2009-10 or 2010-11 as required to receive American Recovery and Reinvestment Act (ARRA) funds, nor does it meet the minimum requirements for the requested FY 2010-11 Maintenance of Effort (MOE) waiver under the ARRA.

While California is in dire need of SFSF and RTTT support from the ARRA, the State must demonstrate it has earned the right to obtain these funds, among other things, by continuing to support public education at the level of spending effort exerted in prior years. We sincerely hope California will step up to meet the minimum funding requirements to be eligible for ARRA funds and that the State will ultimately receive both SFSF and RTTT support. However, to award California ARRA funds under its present application renders Congress' MOE and waiver provisions hollow and opens the door for other states similarly to obtain federal stimulus funds while thwarting Congressional conditions.

Specifically, we are concerned with the following manipulations that subvert Congressional requirements:

- (1) The State has appropriated some \$2.7 billion in funds under the Quality Education Investment Act (QEIA) to fiscal years 2004-05 and 2005-06, but deferred payment of those funds to fiscal years 2008-09 to 2013-14. Under the State's treatment of deferrals set forth in prior SFSF applications as approved by the Department, such funds are counted for MOE purposes as effort in the *earlier* years, *not* the years the funds were eventually provided to districts. The State, however, has treated the QEIA deferrals inconsistently—as effort made in the year of expenditure. Treating QEIA deferrals consistently with other California deferrals, as required by this Department's guidance, renders the State's true 2005-06 baseline MOE over \$1 billion higher than previously reported and requires QEIA expenditures to be subtracted from FYs 2008-09, 2009-10, and 2010-11. This correction results in the State failing to meet minimum K-12 MOE requirements for not just 2010-11, as conceded, but also for 2009-10.
- (2) Even without regard to the above analysis, the State fails to meet K-12 MOE requirements for 2009-10 when it inappropriately counts \$250 million of 2010-11 QEIA expenditures, artificially pre-paid at the end of June 2010, as effort made in support of public education for 2009-10 instead of for 2010-11. This money is specifically earmarked for QEIA obligations that districts are required to undertake in 2010-11. Pre-paying these funds is being done solely to manipulate the State's figures so as to appear to meet 2009-10 MOE and should be rejected.
- (3) The State concedes it will not meet K-12 MOE requirements for 2010-11. It also does not meet the criteria for an MOE waiver. California is *not* proposing to meet Congress' waiver eligibility criterion—that is, that it spend the same percentage of *all available revenues* on K-12 education in the waiver year as in the preceding year. Instead, California improperly bases its waiver eligibility on proposed *expenditures* rather than *revenues*. Expenditures, which are subject to voluntary manipulation by the State, are neither an authorized basis for a waiver application

by Congress or this Department nor a close proxy to the State's revenues for 2010-11.

Finally, we observe that California has, by any objective measure, made massive cuts to its support for K-12 education in the last two years, to well below the level of the State's spending not only in 2005-06 but as recently as 2007-08. Even if the State's manipulations appear to qualify California for waiver eligibility, the Secretary is not obligated to grant the waiver. Rather, under these circumstances, where the State's support has declined substantially in real terms and where the Governor's budget proposes tax reductions but no new increases, the Secretary should withhold approval until California demonstrates greater effort to support public education.

We turn to explore these matters in greater detail.

1. The State is Not Meeting MOE Requirements for 2009-10 as well as 2010-11 as it Inconsistently and Improperly Counts QEIA Deferrals Toward These Years.

In settling a legal challenge that the State had failed to support public education with sufficient funding under California's Constitutional minimum funding guarantee, the State enacted the Quality Education Investment Act in 2006. QEIA is an important and innovative program aimed at improving academic achievement in many of the State's lowest-performing and neediest schools. The legislation makes clear to which fiscal years the \$3 billion settlement amount are to be appropriated. Specifically, SB 1133 (2006) appropriated \$300 million to 2007-08, \$1,620,928,000 to 2004-05 and the remainder (\$1,079,072,000) to 2005-06.² The latter two amounts were "appropriated for" but not actually paid out in those years; instead these payments to districts are being spread across six fiscal years 2008-09 to 2013-14.³ The QEIA settlement agreement expressly provides that the \$1.6 billion for 2004-05 and the \$1.079 billion for 2005-06 "shall be deemed to be appropriations made and allocated" in those fiscal years, respectively.⁴

Because, by operation of law, the funds have been deemed appropriated in the prior years, they must be counted as support for education in those prior years despite the fact that districts do not receive the funds until later years. The State has thus treated the QEIA money as a deferral and, consistent with its treatment of deferrals, these QEIA funds need to be counted as falling in the earlier fiscal year when the funds are booked not the later fiscal year when the funds are received. As you may recall, many of us wrote a letter to you last summer on June 24, 2009 complaining, among other things, about the State's treatment of deferrals in its SFSF application. Specifically, we asserted that the State should not be allowed to meet MOE for 2008-09 by counting \$2.9 billion in deferrals from that year as effort made in 2008-09 when the State would not be providing the funds to districts until 2009-10. The Department rejected our concerns and approved the State's application, including its use of deferrals.⁵

² http://info.sen.ca.gov/pub/05-06/bill/sen/sb_1101-1150/sb_1133_bill_20060929_chaptered.pdf at Section 52055.765(g); *see also id.* Leg. Counsel Digest ¶(3).

³ *Id.*

⁴ QEIA Settlement Agreement, ¶2(e) (May 10, 2006) (available upon request).

⁵ *See* Acting Asst. Secretary Conaty Letter to Cynthia Bryant, June 4, 2009; Acting Asst. Secretary Conaty Letter to John Affeldt, July 17, 2009.

As your Guidance has counseled: “The sources of data that a State uses to make the determinations must be consistent from year to year.”⁶ Thus, the State cannot treat deferrals one way on some occasions and on other occasions treat deferrals the opposite way depending simply on which treatment will bolster the State’s ability to meet MOE.

The correction compelled by properly treating QEIA funds as effort made in the years to which the Legislature has appropriated and allocated these funds means that the State’s 2005-06 MOE baseline should be increased from \$32.968 billion⁷ by \$1,079 billion to \$34.047 billion and that the State should not be allowed to count QEIA expenditures in any of the ARRA fiscal years at issue, 2008-09 through 2010-11. With such corrections, it becomes clear that the State has not only failed to meet MOE in 2010-11, but also in 2009-10 as its projected effort for the year, \$32.773 billion, falls below the corrected 2005-06 baseline of \$34.047 billion. At the same time, the State’s projected K-12 effort needs to be corrected further downward to \$32.523 billion or \$5,492 per pupil to reflect the subtraction of \$250 million in proposed QEIA expenditures.

2. The State is Not Meeting MOE Requirements for 2009-10, as Well as 2010-11, as It Improperly and Artificially Counts \$250 Million in QEIA Expenditures for 2010-11 Toward 2009-10.

Even without regard to the foregoing analysis concerning the State’s misallocation of QEIA funds in calculating MOE, the State misallocates QEIA funds in another way to meet MOE for 2009-10. The State inappropriately counts \$250 million of 2010-11 QEIA expenditures, slated to be artificially pre-paid at the end of June 2010, as effort made in support of public education for 2009-10 instead of for 2010-11. *This money is specifically earmarked for QEIA obligations that districts are required to undertake in 2010-11.* Artificially sending districts these funds on the last day of FY 2010 does not undo the fact that the districts cannot legally (and should not by any prudent counsel) expend the funds for any other purpose than meeting their QEIA obligations in 2010-11. The State’s proposal to “pay forward” these QEIA funds is being done solely to massage its figures into an appearance of meeting 2009-10 MOE. These funds represent effort made to support education activities in 2010-11 and any attempt to count them toward 2009-10 effort should be rejected.

3. The State Has Not Demonstrated That It Meets the Maintenance of Effort Requirement or MOE Waiver Eligibility for 2010-11.

The ARRA requires that California provide at least as much state support toward K-12 education in 2010-11 as it did in 2005-06. Section 14005(d)(1)(A). As the January 12, 2010 California SFSF Phase 2 application demonstrates, California is not planning to do so. Whereas in 2005-06 the State asserts it spent \$32.968 billion in the aggregate on K-12 education⁸ or \$5,527 per pupil (computed by average daily attendance or ADA), in 2010-11 the State expects to spend only

⁶ U.S. Department of Education, *Guidance on the Maintenance-of-Effort Requirements in the State Fiscal Stabilization Fund Program*, OMB Number: 1810-0691, Jan., 2010, at 3, available at <http://www2.ed.gov/policy/gen/leg/recovery/statutory/moe-guidance.pdf>.

⁷ See California SFSF Revised Application (September 2009).

⁸ See California SFSF Application (revised September 2009)

\$32.176 billion in the aggregate and \$5,428 per pupil.⁹ (As noted above, in fact, the true 2005-06 State baseline is \$34.047 billion or \$5,708 per pupil.)

Instead, the State has requested that the Secretary waive Maintenance of Effort requirements for 2010-11. Though the State seeks to demonstrate it meets the criteria for an MOE waiver for 2010-11, its figures fall far short of satisfying waiver eligibility. As you know, Congress did not accord the Secretary with unbridled discretion to grant an MOE waiver. Rather, the ARRA provides that:

The Secretary *shall not* grant a waiver or modification under this section unless the Secretary determines that the State...receiving such waiver or modification will not provide for elementary and secondary education, for the fiscal year under consideration, a smaller percentage of the total revenues available to the State...than the amount provided for such purpose in the preceding fiscal year.

Section 14012(c) (emphasis added). Thus, the Secretary has no authority to grant a waiver unless the State can demonstrate that it will spend at least the same percentage of total state revenues on public education as it did the preceding year.¹⁰

The State's Waiver application reveals that it projects spending \$41.634 billion in 2009-10 and \$41.917 billion in 2010-11 on K-12 and higher education. The State's application asserts that the "total revenues available to the State" for education and other purposes is \$88.214 billion for 2009-10 and \$83.071 billion for 2010-11. These latter figures are *not*, however, the total *revenues* available to the State but merely the General Fund *expenditures* the State projects to spend for the two years.¹¹ When total State revenues available in the General Fund for 2009-10 and 2010-11 are used (\$88.084 billion and \$89.322 billion)¹² instead of expenditures, over 5 billion more dollars are recognized as available to the State for support of public education. As such, **the State fails to meet the MOE waiver criteria.** *Whereas the State plans to spend 47.2% of total available revenues on public education in 2009-10, California plans to spend a smaller percentage of total revenues—46.9%—in the following year, contrary to the minimum MOE waiver requirement.*

There is no authority that allows California to base its waiver application on expenditures. Section 14012(c) of the ARRA expressly requires that waiver eligibility be based on "total revenues available to the State" and does not reference or permit use of expenditures—particularly where expenditures are not reflective of revenues. Expenditures are, as evidenced

⁹ See California SFSF Phase 2 Application (January 12, 2010) at 3, 7. (The aggregate figure for K-12 spending for 2010-11 is determined by subtracting the 2010-11 State support for higher education figure on page 3 (\$9.741 billion) from the total 2010-11 State support for public education figure on page 7 (\$41.917 billion).

¹⁰ The Department's guidance has interpreted the ARRA waiver provision to mean that the percentage computed against total available state revenues is to reflect total state spending on K-12 and higher education combined. U.S. Department of Education, *Guidance on the Maintenance-of-Effort Requirements in the State Fiscal Stabilization Fund Program*, OMB Number: 1810-0691 at 8, Jan., 2010.

¹¹ Department of Finance, *Governor's Budget 2010-11: Summary Charts* (Jan. 8, 2010), available at <http://www.ebudget.ca.gov/pdf/BudgetSummary/SummaryCharts.pdf> at 12 Figure SUM-02. (The State has added to its proposed expenditures in the Governor's budget a few off-budget additions not relevant to this point.)

¹² *Id.* at 13 Figure SUM-03.

here, within the voluntary control of the State and can be manipulated down or up in a given year to achieve the appearance of federal compliance. Revenues are much less subject to manipulation. Congress' intent was obviously to permit waivers only where a state could demonstrate it was putting forth at least the same amount of effort on K-12 education relative to total available revenues as it did the prior year. While the Department's guidance has also permitted effort to be measured by "appropriations," obviously the Department's doing so cannot operate to conflict with the plain language in the ARRA.¹³ Thus, the use of "appropriations" in waiver applications would only be authorized by Congress where appropriations are a reasonable proxy for the State's revenues or in the case where—as you urged Pennsylvania do in your June 18, 2009 letter to Governor Rendell—a state exceeds its available revenues to support public education by appropriating additional monies from a rainy-day fund.

4. The State is Not Making Efforts to Maintain Funding for Education Sufficient to Warrant Exercise of the Secretary's MOE Waiver Discretion for 2010-11.

Each of the above mentioned concerns should be reason to require modification of California's application for SFSF Phase 2 funds in a way that ensures the State will make additional efforts to fund education. Allowing California to treat deferrals inconsistently, to pay forward subsequent year obligations, and to base its waiver application on significantly lowered expenditures rather than on all available revenues will open the door for other states to undertake similar machinations and to subvert the Maintenance of Effort requirements in the ARRA.

Yet, even if all of these concerns were disregarded, California's overall lack of willingness to take measures to maintain its education funding is reason for the Secretary to use his discretion to deny the State's application for a waiver for 2010-11. As recently as 2007-08, the State spent \$50.344 billion on K-12 education with the State's General Fund share constituting \$37.752 billion of that amount.¹⁴ The Governor's recently released budget proposes to spend in 2010-11 \$43.974 billion on K-12 education with a State's General Fund share of \$32.023 billion.¹⁵ This constitutes a \$6.3 billion annual decrease in overall K-12 spending equal to a 13% decline as well as a 15% decline in the State's direct effort. By any objective measure, California is undertaking massive cuts to its support for K-12 education.

In proposing additional substantial cuts to education, the 2010 budget proposal by Governor Schwarzenegger includes no new taxes and in fact includes reductions in taxes.¹⁶ The Governor's proposal also seeks to eliminate a state sales tax on gasoline and substitute it with an excise tax on gasoline in order to move revenues out of the General Fund and into the State's special funds category. This maneuver's primary purpose and effect is to render the Proposition

¹³ It is well-settled that agency regulations—and even more so agency guidance—"may not serve to amend a statute, *Koshland v. Helvering*, 298 U.S. 441, 447 (1936), nor add to the statute 'something which is not there.' *United States v. Calamaro*, 354 U.S. 351 (1957)." *California Cosmetology Coalition v. Riley*, 110 F.3d 1454, 1460 (9th Cir. 1997).

¹⁴ California Legislative Analyst's Office, *The 2010-11 Budget: Overview of the Governor's Budget* (Jan. 12, 2010) at Figure 4, OV-19, available at http://www.lao.ca.gov/reports/2010/bud/budget_overview/bud_overview_011210.pdf.

¹⁵ *Id.*

¹⁶ California Budget Project, *Governor's Proposed Budget Includes Deep Cuts, Assumes More Federal Funds* (Jan 13, 2010) at 2, available at http://www.cbp.org/pdfs/2010/100108_Gov_Budget.pdf.

98 minimum school funding guarantee inapplicable to those funds and thereby enable the State to avoid having to spend an additional \$836 million in support of public education.¹⁷ Clearly the State is not making or maintaining efforts to support public education, but rather, is seeking to employ all available machinations to avoid doing so.

We applaud the federal government's efforts to support our children in a time of need, and we hope California will receive SFSF Phase 2 funding and, as well, RTTT funding at some point in the future. Before that happens, however, we urge you to require the State to revise its application and its effort so that it will truly be maintaining its support for public education in line with the ARRA's requirements.

If you have questions about our positions, please do not hesitate to contact John Affeldt at (415) 431-7430.

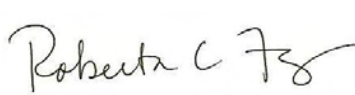
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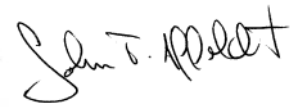
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Parents and Students for Great Schools is a coalition of leading grassroots and advocacy organizations —Californians for Justice, PICO California, Alliance of Californians for Community Empowerment, and Public Advocates — working to ensure that students and parents have a voice on education reform. The coalition works from two basic premises: (1) every child in California deserves the opportunity to succeed in school, and (2) California schools must respond to the needs and expectations of those most directly affected: parents and students. See <http://parentsandstudents.org/>.

¹⁷ *Id.* at 1, 2-3; see also California Department of Finance, *Governor's Budget Summary 2010-11*, 79 (Jan. 2010) available at <http://www.ebudget.ca.gov/pdf/BudgetSummary/RevenueEstimates.pdf>.