

California Department of Education

Executive Office

SBE-005 (REV. 1/2018)

Skilled and Trained Workforce Waiver

# California State Board of Education November 2019 AgendaItem #W-07

## Subject

Request by the **Standard Elementary School District** to waive California *Education Code* (*EC*) Section 17407.5, which requires that a “skilled and trained workforce” be used in connection with projects utilizing the lease-leaseback construction delivery method.

## Waiver Number

1-8-2019

## Type of Action

Action, Consent

## Summary of the Issues

The Standard Elementary School District (Standard ESD) is planning to use the lease-leaseback construction delivery method (*EC* Section 17406, et seq.); however, that method requires that a “skilled and trained workforce” be used.

## Authority for Waiver

California *EC* Section 33050

## Recommendation

* Approval: No
* Approval with conditions: No
* Denial: Yes

The California Department of Education (CDE) recommends that the State Board of Education (SBE) deny Standard ESD’s request for a waiver of *EC* Section 17407.5 on the grounds that “[p]upil or school personnel protections are jeopardized” [*EC* Section 33051(a)(4)]. As discussed below, the “skilled and trained workforce” requirement is reasonably viewed as a “pupil or school personnel protection” that would be jeopardized by the requested waiver in this case.

## Summary of Key Issues

Standard ESD plans to use the lease-leaseback construction delivery method. As part of this delivery method, the district must comply with *EC* sections 17406, et seq., including *EC* Section 17407.5. *EC* Section 17406 states, in part, that “the governing board of a school district may let…to a person, firm, or corporation real property that belongs to the school district if the instrument by which this property is let requires the lessee therein to construct on the demised premises, or provide for the construction thereon of, a building or buildings for the use of the school district during the term of the lease, and provides that title to that building shall vest in the school district at the expiration of that term…”

*EC* Section 17407.5 was added in 2015 by Assembly Bill 566 “to address issues such as the sole sourcing of projects to less than qualified contractors and violations of labor laws for public works projects by significantly raising the standards for contractors, increasing the quality of construction, and protecting taxpayers and workers on lease-leaseback projects.” (Assembly Appropriations Committee, May 2015, p.2).

*EC* Section 17407.5(a) states that “the governing board of a school district shall not enter into an agreement pursuant to Section 17406…with any entity unless the entity provides to the governing board of the school district an enforceable commitment that the entity and its subcontractors at every tier will use a skilled and trained workforce to perform all work on the project or contract that falls within an apprenticeable occupation in the buildings and construction trades, in accordance with Chapter 2 (commencing with Section 2600) of Part 1 of Division 2 of the *Public Contract Code*.” The referenced chapter of the *Public Contract Code* (*PCC*) applies “when a public entity is required by statute or regulation to obtain an enforceable commitment that a bidder, contractor, or other entity will use a skilled and trained workforce to complete a contract or project” [*PCC* Section 2600(a)].

The full definition of “skilled and trained workforce” is found at *PCC* Section 2601(d), which is reproduced in Attachment 3.Essentially, however, that phrase means that all workers performing work in an apprenticeable occupation in the building and construction trades are either skilled journeypersons or apprentices registered in an apprenticeship program approved by the California Department of Industrial Relations’ (DIR) Division of Apprenticeship Standards, and that for work performed on or after a particular date, an increasing minimum percentage of the skilled journeypersons employed by the general contractor and each subcontractor are graduates of an apprenticeship program. “Skilled journeyperson” means a worker who has either graduated from an approved apprenticeship program for the applicable occupation or has at least as many hours of “on-the-job experience” in the applicable occupation as would be required to graduate from such a program [*PCC* Section 2601(e)].

A school district’s governing board may request that the SBE waive one or more waivable *EC* sections. The SBE may deny a school district’s waiver request if it specifically finds that one or more of seven conditions enumerated in *EC* Section 33051(a) would exist. As relevant here, one of those conditions is that “[p]upil or school personnel protections are jeopardized” [*EC* Section 33051(a)(4)]. The *EC* does not define “pupil or school personnel protections,” nor does it specify how to analyze whether any such “protection” is “jeopardized.”

Because the “skilled and trained workforce” requirement is reasonably seen as a law tending to, or intended to, increase the safety, adequacy or craftsmanship of classrooms and other school facilities, it can and should be viewed as a “pupil or school personnel protection” within the meaning of *EC* Section 33051(a)(4). Furthermore, because the district’s request would eliminate the protection entirely, the protection is “jeopardized” by the request, regardless of costs or difficulties alleged by the district in complying with the law.

Standard ESD’s request generally expresses concern that there may be difficulties finding qualified workers in the immediate area, which the district asserts may increase costs for its elementary school modernization project, yet the request does not present specific facts nor data to support that concern. The request does report that Lori Rivera, Deputy Labor Commissioner for the DIR’s Public Works Enforcement Unit, has “acknowledged the challenges the district faces in complying with the skilled and trained workforce requirements.” However, CDE staff has reached out to Ms. Rivera regarding that representation and she conveyed that she did not recall consulting with Standard ESD regarding any of its specific difficulties in complying with the skilled and trained workforce requirement. While the request states that the district is located “far from the state’s major population centers,” it is, in fact, located approximately three miles from downtown Bakersfield, a city with a population of more than 380,000 people. Additionally, CDE notes that the Building & Construction Trades Council for Kern, Inyo, and Mono Counties (Tri-County Trades Council)—which addressed the SBE in March 2019 in connection with Mammoth Unified School District’s (Mammoth USD) similar waiver request—is also based in Bakersfield. The Tri-County Trades Council previously advised CDE in connection with that earlier waiver request that they represent 6,000 skilled men and women in the construction trades, including 1,000 active apprentices (according to the Division of Apprenticeship Standards) throughout the three counties in its jurisdiction.

Standard ESD’s primary argument is that, because the skilled and trained workforce requirement does not apply to all school construction delivery methods, such as the traditional “design-bid-build” method, the requirement cannot truly be a “pupil or school personnel protection.” However, the fact that the Legislature did not impose the skilled and trained workforce requirement on every school construction delivery method does not make the requirement any less of a “protection” in those instances in which it does apply. The issue is not whether schools constructed in the absence of a skilled and trained workforce requirement are “unsafe” because they fall below some minimum safety threshold. Rather, the issue is whether or not the requirement, when it applies, is properly viewed as an added protection. For reasons previously discussed, CDE believes that it is.

Furthermore, in response to the March 2019 waiver request from (Mammoth USD), which also sought to waive *EC* Section 17407.5 and was denied by the SBE, Assemblymember Patrick O’Donnell, the author of AB 566, observed in a letter to the SBE that: “[T]he health and safety of schoolchildren, teachers, administrators, construction workers, and the general public could be jeopardized in substandard school facilities that are built by improperly trained construction workers. In fact, that was the motivating reason behind AB 566. . . . The use of a skilled and trained workforce in any industry should be the standard, not the exception. . . . *EC* Section 17407.5 helps ensure that standard.”

For the reasons stated above, the CDE recommends that the SBE find that the requested waiver jeopardizes pupil or school personnel protections, and that the SBE deny the waiver.

**Demographic Information**

Standard ESD has a student population of 3,093 and is located in the City of Bakersfield.

**Because this is a general waiver, if the SBE decides to deny the waiver, it must cite one of the seven reasons in *EC* Section 33051(a), available at** <https://leginfo.legislature.ca.gov/faces/codes_displaySection.xhtml?lawCode=EDC&sectionNum=33051.>

## CDE Recommendation

The CDE recommends that the SBE deny Standard ESD’s request for waiver of *EC* Section 17407.5 on the ground that “[p]upil or school personnel protections are jeopardized” [*EC* Section 33051(a)(4)].

## Summary of Previous State Board of Education Discussion and Action

The SBE has received one previous waiver request regarding *EC* Section 17407.5 and the “skilled and trained workforce” requirement, from Mammoth USD in March 2019. It was denied.

## Fiscal Analysis

There is no statewide fiscal impact of waiver denial.

## Attachments

* **Attachment 1:** Summary Table (1 page)
* **Attachment 2:** Standard Elementary School District General Waiver Request
1-8-2019 (7 pages). (Original waiver request is signed and on file in the Waiver Office.)
* **Attachment 3:** *Public Contract Code* Section 2601 (3 pages)

# Attachment 1: Summary Table

California *Education Code* (*EC*) Section 17407.5

| **Waiver Number** | **District** | **Period of Request** | **Bargaining Unit Representatives** | **Local Board, Public Hearing, and Advisory Committee Approval** |
| --- | --- | --- | --- | --- |
| 1-8-2019 | Standard Elementary School District | **Requested:**June 3, 2019 toJune 30, 2021**Recommended:**Not applicable | Service Employees International Union #521Vivian Rushing, President3/5/2019**Neutral**Standard Teachers AssociationMeriellen Cohrs, President3/5/2019**Neutral** | Local Board Approval Date: 3/13/2019Public Hearing Date: 3/13/2019Public Hearing Advertised: Notice in a newspaper and notice posted onlineAdvisory Committee:Citizens Bond Oversight Committee7/30/2019**No Objections** |

Created by the California Department of Education

August 10, 2019

# Attachment 2: **Standard Elementary School District General** **Waiver Request 1-8-2019**

**California Department of Education**

**WAIVER SUBMISSION – General**

CD Code: 1563792

Waiver Number: 1-8-2019

Active Year: 2019

Date In: 8/1/2019 11:51:04 AM

Local Education Agency: Standard Elementary School District

District Address: 1200 North Chester Avenue

Bakersfield, CA 92026

Start: 6/3/2019

End: 6/30/2021

Waiver Renewal: No

Waiver Topic: Other Waivers

*Ed Code* Title: Other Waivers

*Ed Code* Section: 17407.5

*Ed Code* Authority: 33050

*Education Code* or *CCR* to Waive: [(a) The governing board of a school district shall not enter into an agreement pursuant to Section 17406 or 17407 with any entity unless the entity provides to the governing board of the school district an enforceable commitment that the entity and its subcontractors at every tier will use a skilled and trained workforce to perform all work on the project or contract that falls within an apprenticeable occupation in the building and construction trades, in accordance with Chapter 2.9 (commencing with Section 2600) of Part 1 of Division 2 of the *Public Contract Code*.]

Outcome Rationale: Please see attached Exhibit A.

Student Population: 3,093

City Type: Small

Public Hearing Date: 3/13/2019

Public Hearing Advertised: Notice in a newspaper and notice posted online

Local Board Approval Date: 3/13/2019

Community Council Reviewed By: Citizens Bond Oversight Committee and other community organizations (Please see attached Exhibit B.)

Community Council Reviewed Date: 7/30/2019

Community Council Objection: N

Community Council Objection Explanation:

Audit Penalty Yes or No: No

Categorical Program Monitoring: No

Submitted by: Ms. Sarah Polito

Position: Attorney

E-mail: spolito@f31aw.com

Telephone: 760-304-6005

Bargaining Unit Date: 03/05/2019

Name: Service Employees International Union (SEIU) #521

Representative: Vivian Rushing

Title: President

Position: Neutral

Bargaining Unit Date: 03/05/2019

Name: Standard Teachers Association

Representative: Meriellen Cohrs

Title: President

Position: Neutral

**EXHIBIT A**

**A. Skilled and Trained Workforce Requirements Apply to Lease-Leaseback Projects Generally, and Non-Compliance Carries Penalties**

*Education Code* section 17407.5 requires school districts using the lease-leaseback ("LLB") construction delivery method to use a "skilled and trained workforce." Pursuant to *Public Contract Code* section 2602(a)(2), contractors and subcontractors on LLB projects must submit monthly reports demonstrating that they have supplied a sufficient "skilled and trained workforce." *Public Contract Code* section 2602( c) requires that, if monthly reports do not demonstrate compliance, the school district must:

* Withhold further payments until a plan to achieve substantial compliance is provided;
* Withhold 150 percent of the value of the monthly billing for the entity failing to comply, and
* Forward a copy of the report to the Labor Commissioner for issuance of a civil wage and penalty assessment.

By contrast, as discussed in further detail below, none of these requirements apply to projects using the traditional design-bid-build ("DBB") construction delivery method.

As such, the majority of California school district projects, which are constructed using DBB, are constructed without a "skilled and trained workforce," as defined by statute.

Here, the Standard School District ("District"). was previously successfully completing projects using LLB. Before 2019, the failure to comply with LLB's skilled and trained workforce requirements did not involve financial penalties. ,As such, the District and contractors made best efforts to comply with the skilled and trained workforce requirements, and were not penalized if these specific types of workers were not available in· the local workforce.

However, after LLB's skilled and trained workforce requirements were first added in 2016, the District experienced difficulty meeting these requirements due to a lack of the required workmen. The District is located in the small community of Oildale, serving north Bakersfield in California's Central Valley, far from the state's major population centers. Now the District is in the process of commencing its Standard Elementary School modernization project ("Project") and is concerned that the newly enacted financial penalties, combined with the increased required workforce percentages for 2019 and 2020, will unfairly impact school district projects where there are not sufficient workmen to the meet the skilled and trained workforce requirement, as the District anticipates is the case for the Project.

Still, the District is simultaneously making efforts to identify and generate interest from the workers needed for the Project. For example, the District sent a letter on
February 20, 2019 to the Kem County Builders Exchange, a local trade journal that advertises public works projects for contractors, sending Project information and seeking assistance.

In sum, the District intends to make efforts and work with its contractors to meet the statutory requirements for the Project. However, as stated above, the District is concerned that the difficulties the District has experienced trying to obtain the types of workers with the specific training required, along with the financial penalties that are now possible, will unfairly affect projects in areas where the workforce does not have that particular training, like the District's Project.

Finally, we reiterate that most California school district projects are completed without the use of this type of workforce. Public works laws require all workers on school district projects to be properly licensed, regardless of the construction delivery method used. Therefore, all workers on school district projects are already skilled and trained to perform their work in a typical sense, based on licensing requirements and other safety protocols found in.public works laws. The District's Project will still comply with the public works and safety requirements required law for all school construction projects. The District only requests a waiver from the skilled and trained workforce requirement.

**B. This Waiver Is Mandatory Because Projects Without Skilled and Trained Workforce Requirements Do Not Jeopardize Pupil or School Personnel Protections**

Pursuant to *Education Code* Section 33050, this waiver *must* be granted unless the State Board specifically finds any of the following:

(1) The educational needs of the pupils are not adequately addressed.

(2) The waiver affects a program that requires the existence of a schoolsite council and the schoolsite council did not approve the request.

(3) The appropriate councils or advisory committees, including bilingual advisory committees, did not have an adequate opportunity to review the request and the request did not include a "written summary of any objections to the request by the councils or advisory committees.

(4) *Pupil or school personnel protections are jeopardized.*

(5) Guarantees of parental involvement are jeopardized.

(6) The request would substantially increase state costs.

(7) The exclusive representative of employees, if any, as provided in Chapter 10.7 (commencing with Section 3540) of Division 4 of Title I of the *Government Code*, was not a participant in the development of the waiver. [1]

The District is aware that SBE recently denied a waiver application at its March 2019 meeting (Item #W-02) on the grounds that granting the waiver would jeopardize pupil or personnel protections.

DBB projects are authorized by *Public Contract Code* Section 20111 *et seq.* DBB projects are known as the traditional method of school construction in California. DBB projects are a very common (likely the most common) construction project delivery method used by schools in California.

DBB projects are *not* subject to "skilled and trained workforce" requirements.

*Inherent* in a finding that, by their nature, projects without a "skilled and trained workforce" requirement jeopardize pupil or school personnel protections, would be a finding that DBB projects jeopardize pupil or personnel protections.

We do not believe that such a finding is justified or one that the Board would intentionally make.

Further, we are aware of no evidence specific to the District (or even statewide), that would suggest that projects without the skilled and trained workforce requirement result in school projects or facilities that are less safe. There is also no evidence that any of the other exceptions listed in *Education Code* Section 33050 apply in this instance.

Thus, this 'waiver is mandatory because projects without a skilled and trained workforce requirement (such as traditional school construction projects) do not necessarily jeopardize pupil or personnel protections, and there is no evidence to support such a conclusion in this particular case.

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 [1] We note that the applicant District's ability to demonstrate that it could not comply with the provision of the *Education Code* sought to be waived is not among the justifiable reasons for denying a waiver application pursuant to Section 33050.

**EXHIBIT B**

The Standard School District ("District'') has consulted extensively with local and state organizations regarding the District's challenges in implementing the skilled and trained workforce requirement in Assembly Bill 566 ("AB 566") and we have summarized those efforts below.

On March 13, 2019, the District held a public hearing at a publicly noticed meeting, solely to address any public questions or concerns on the issue of the District's'intent to submit a general waiver of *Education Code* Section 17407.5 to the California Department of Education. There was no opposition to the waiver request, and the District's Board of Trustees then passed a resolution supporting the waiver.

The District has an active Citizens Bond Oversite Committee ("CBOC") which was formed for the District's 2006 GO Bond Election and continued its oversight during the 2017 GO Bond Election. The CBOC is supportive of the District's current construction and modernization project and provides insight, and thoughtful questions relating to the scope, energy efficiency and cost-conscious aspects of design, safety and construction of all school facilities. The District spoke with the CBOC members regarding the District's decision to request this waiver arid the members expressed their overwhelming support of the request, articulating the following specific reasons for their support of the waiver:

1.) Approval of the waiver will allow the District to keep the commitments it made to voters and members of the Oildale community by building projects of sufficient size within the promised completion timelines.

2.) Complying with the skilled and trained workforce requirement is particularly challenging because of the small number of skilled workmen in Kern County, and may require involvement of contractors from out of the area, which may drive up the cost of the project.

3.) With the number of construction projects currently active in the local area there is simply not a sufficient "skilled and trained workforce," as defined in AB 566, to meet the demand.

4.) Through prequalification requirements, the District is still able to ensure that the workmen selected for the project are sufficiently qualified in their trade.

The District also consulted with the Kern County Builders Exchange ("KCBE"), a community organization composed of members of the local construction trades, regarding the skilled and trained workforce requirement, strategies for compliance, and the District's proposed waiver. Specifically, District staff communicated with KCBE's Executive Director, Mikin Plummer, who believes there is not enough unionized labor in the Bakersfield area, and of those workmen available, many are already committed to other more traditional construction projects.

The District also consulted with the Deputy Labor Commissioner of the DIR Public Works Enforcement Unit, Lori Rivera, on May 2, 2019, regarding the difficulties that the District is facing in trying to meet the skilled and trained workforce requirement in AB 566. The Deputy Labor Commissioner also acknowledged the challenges the District faces in complying with the skilled and trained workforce requirements.

Finally, the District has also been in communication with Mike Maggard, County Supervisor for the 3rd District who has been supportive of the District's construction and modernization projects and the District's efforts to work with local, qualified contractors.

# Attachment 3: ***Public Contract Code* Section 2601**

***Public Contract Code* Section 2601**

For purposes of this chapter:

(a) “Apprenticeable occupation” means an occupation for which the Chief of the Division of Apprenticeship Standards of the Department of Industrial Relations had approved an apprenticeship program pursuant to Section 3075 of the Labor Code before January 1, 2014.

(b) “Chief” means the Chief of the Division of Apprenticeship Standards of the Department of Industrial Relations.

(c) “Graduate of an apprenticeship program” means either of the following:

(1) An individual that has been issued a certificate of completion under the authority of the California Apprenticeship Council for completing an apprenticeship program approved by the chief pursuant to Section 3075 of the *Labor Code*.

(2) An individual that has completed an apprenticeship program located outside California and approved for federal purposes pursuant to the apprenticeship regulations adopted by the federal Secretary of Labor.

(d) “Skilled and trained workforce” means a workforce that meets all of the following conditions:

(1) All the workers performing work in an apprenticeable occupation in the building and construction trades are either skilled journeypersons or apprentices registered in an apprenticeship program approved by the chief.

(2)

(A) For work performed on or after January 1, 2017, at least 30 percent of the skilled journeypersons employed to perform work on the contract or project by every contractor and each of its subcontractors at every tier are graduates of an apprenticeship program for the applicable occupation. This requirement shall not apply to work performed in the occupation of teamster.

(B) For work performed on or after January 1, 2018, at least 40 percent of the skilled journeypersons employed to perform work on the contract or project by every contractor and each of its subcontractors at every tier are graduates of an apprenticeship program for the applicable occupation, except that the requirements of subparagraph (A) shall continue to apply to work performed in the following occupations: acoustical installer, bricklayer, carpenter, cement mason, drywall installer or lather, marble mason, finisher, or setter, modular furniture or systems installer, operating engineer, pile driver, plasterer, roofer or waterproofer, stone mason, surveyor, teamster, terrazzo worker or finisher, and tile layer, setter, or finisher.

(C) For work performed on or after January 1, 2019, at least 50 percent of the skilled journeypersons employed to perform work on the contract or project by every contractor and each of its subcontractors at every tier are graduates of an apprenticeship program for the applicable occupation, except that the requirements of subparagraph (A) shall continue to apply to work performed in the following occupations: acoustical installer, bricklayer, carpenter, cement mason, drywall installer or lather, marble mason, finisher, or setter, modular furniture or systems installer, operating engineer, pile driver, plasterer, roofer or waterproofer, stone mason, surveyor, teamster, terrazzo worker or finisher, and tile layer, setter, or finisher.

(D) For work performed on or after January 1, 2020, at least 60 percent of the skilled journeypersons employed to perform work on the contract or project by every contractor and each of its subcontractors at every tier are graduates of an apprenticeship program for the applicable occupation, except that the requirements of subparagraph (A) shall continue to apply to work performed in the following occupations: acoustical installer, bricklayer, carpenter, cement mason, drywall installer or lather, marble mason, finisher, or setter, modular furniture or systems installer, operating engineer, pile driver, plasterer, roofer or waterproofer, stone mason, surveyor, teamster, terrazzo worker or finisher, and tile layer, setter, or finisher.

(3) For an apprenticeable occupation in which no apprenticeship program had been approved by the chief before January 1, 1995, up to one-half of the graduation percentage requirements of paragraph (2) may be satisfied by skilled journeypersons who commenced working in the apprenticeable occupation before the chief’s approval of an apprenticeship program for that occupation in the county in which the project is located.

(4) The apprenticeship graduation percentage requirements of paragraph (2) are satisfied if, in a particular calendar month, either of the following is true:

(A) At least the required percentage of the skilled journeypersons employed by the contractor or subcontractor to perform work on the contract or project meet the graduation percentage requirement.

(B) For the hours of work performed by skilled journeypersons employed by the contractor or subcontractor on the contract or project, the percentage of hours performed by skilled journeypersons who met the graduation requirement is at least equal to the required graduation percentage.

(5) The contractor or subcontractor need not meet the apprenticeship graduation requirements of paragraph (2) if, during the calendar month, the contractor or subcontractor employs skilled journeypersons to perform fewer than 10 hours of work on the contract or project.

(6) A subcontractor need not meet the apprenticeship graduation requirements of paragraph (2) if both of the following requirements are met:

(A) The subcontractor was not a listed subcontractor under Section 4104 or a substitute for a listed subcontractor.

(B) The subcontract does not exceed one-half of 1 percent of the price of the prime contract.

(e) “Skilled journeyperson” means a worker who either:

(1) Graduated from an apprenticeship program for the applicable occupation that was approved by the chief or located outside California and approved for federal purposes pursuant to the apprenticeship regulations adopted by the federal Secretary of Labor.

(2) Has at least as many hours of on-the-job experience in the applicable occupation as would be required to graduate from an apprenticeship program for the applicable occupation that is approved by the chief.

*(Amended by Stats. 2018, Ch. 882, Sec. 1. (AB 3018) Effective January 1, 2019.)*