

**Comments on
Interagency Commission on School Construction (IAC)
Draft COMAR Regulations
Implementing the 21st Century School Facilities Act**

October 30, 2018

The Maryland Association of Boards of Education (MABE) strongly supported passage of the 21st Century School Facilities Act (House Bill 1783, Ch. 14, 2018 Laws of Maryland) because it was grounded in implementing many of the recommendations of the 21st Century School Facilities Commission which were informed by the priority issues identified by local school systems. MABE actively participated in the Commission's work to review existing educational specifications; identify best practices and efficiencies from the construction industry; identify a long-term plan for jurisdictions with growing or declining enrollment; identify innovative financing mechanisms including public-private partnerships and alternatives to general obligation debt; and evaluate the appropriate role for state agencies in the school construction process.

The new law includes many provisions which MABE strongly supported, including:

- Establishing a baseline \$400 million annual CIP program goal, and aligning increases in this baseline with school facility evaluation findings;
- Limiting the mandated role of state agency review and approval of plans to increase efficiency and achieve cost savings;
- Allowing designated school systems to administer their school construction programs under delegated autonomy;
- Removing the burden of automatically designating each school as an emergency shelter, and the resulting and often unwarranted costs;
- Clarifying and reaffirming the state's endorsement of the use of intergovernmental, bundling, and bulk purchasing;
- Enhancing the role of the Interagency Commission on School Construction (IAC) as a source of technical assistance to local school systems;
- Promoting greater flexibility in defining "green building" standards, and financially incentivizing net-zero school facilities; and
- Basing future legislative and policy initiatives on the findings and recommendations of the workgroup on educational specifications and the workgroup on the assessment and funding of school facilities.

The new law also reflects several provisions that were removed or amended by the legislature at the request of MABE and local school systems. Importantly, the law called on the restructured IAC to adopt regulations including new definitions, processes and standards. MABE greatly appreciates the IAC's outreach and opportunity for input on the draft regulations prior to the IAC's scheduled approval for publication in the Maryland Register. This process is firmly in keeping the law's intent that the IAC shall develop its rules, regulations, and procedures in consultation with representatives of local school systems.

In this context, MABE supports the overall thrust of the proposed regulations, and respectfully requests the consideration of the following comments and requested amendments which are intended to clarify definitions, identify concerns with planning procedures and standards, and to improve alignment with the statute.

MABE Comments

Terminology – Utilization

In the proposed regulations, under COMAR 14.37.01, the term “utilization” is defined as follows:

“Utilization” means the percentage of normal operating hours during which an assignable space in a facility is occupied by the full number of occupants for which it is programmed. When aggregated, the utilization for all assignable spaces in a facility can produce an overall utilization rate for the facility.”

MABE believes this definition is incorrect and, based on the professional judgment of school facility planners, the following definition is requested:

“Utilization” means the total number of students attending a school divided by the State Rated Capacity of a school facility.”

The Role of the Educational Facilities Master Plan (EFMP)

The proposed regulations reflect the new law’s limitation on the short-term scope of the Capital Improvement Plan (CIP) but inappropriately shift the long-term budget planning function of the former CIPs to the Educational Facilities Master Plans (EFMP). The statute authorizes the IAC to adopt regulations: “(ix) Requiring the development and submission of long-range plans, including a requirement for the annual submission of a 10–Year Educational Facilities Master Plan; and (x) Requiring the submission of an annual Capital Improvement Plan Program, which may only be required to include plans for specific projects and requests for planning and construction projects for the upcoming fiscal year.”

MABE believes these provisions were intended to streamline and improve the efficiency of the process, not result in the shifting of the budget function of the CIP to the EFMP. Therefore, school systems are opposed to the expanded scope of the EFMP under these regulations. Proposed COMAR 14.37.02.02.A would require: “Analysis of future school facility needs, including all planned capital improvements for the 10 year period, including estimated costs for projects anticipated to begin in the next 5 years.” Specifically, MABE opposes the proposal to require that the EFMP includes at least five years of estimated costs, and requests that this provision be removed.

In addition, MABE is concerned that the proposed changes in the roles of the CIP and EFMP also create unintended and unworkable burdens on local school systems to complete this work in conjunction with available state budget information, and requests that the IAC’s timeline include a staggered set of deadlines that allow for the appropriate availability of local school system staff to complete these plans.

MABE believes that further dialogue between the IAC members, staff from the PSCP, Department of General Services (DGS), and Maryland Department of Planning (MDP), and local school system leadership and staff is essential to developing a reporting, surveying, and data gathering process and timeline that balances the State’s need for data, facility assessments, and annual and long-range plans, and the reasonable capacity of local school systems.

Changes in the Maximum State Allocation

Under current regulations the Board of Public Works may approve an increase in the maximum state construction allocation for a project based on the determination of the IAC or State Superintendent. The proposed regulations necessarily reflect the removal of the Board of Public Works from the process, but

would also, under COMAR 14.37.02.08.C, no longer allow such adjustments for systemic projects, and would remove any specified role for the State Superintendent. MABE requests that the phrase “other than a system renovation project” be removed from the proposed regulations under COMAR 14.37.02.08.C.

In addition, MABE requests that the State Superintendent be included in the new regulations in order to ensure that a project’s educational impact may continue to play a clear role in the decision-making process. COMAR 14.37.02.08.C should be amended to include: “The State Superintendent of Schools determination that the educational impact of the project extends beyond the school and its immediate community.”

Cooperative Use Space

MABE understands that in the draft regulations the section on Cooperative Use Space may have been inadvertently deleted. In this context, MABE strongly supports retaining the current language under COMAR 23.03.02.06.O as new COMAR 14.37.02.06.N:

“N. Cooperative Use Space.

(1) The maximum State construction allocation for an approved project may include the State's share of eligible costs to construct or renovate up to 3,000 gross square feet of co-located or shared space to support LEA or community initiatives to serve school children and the general community.

(2) This cooperative use space is in addition to the size of typical school-function areas provided by the LEA.

(3) There shall be a written agreement between the county board and the space occupant that establishes the term and conditions.”

Ineligible Expenditures – Furnishings

MABE believes that the proposed regulations, under COMAR 14.37.02.11, inappropriately retain in the definition of “ineligible expenditures” items including “equipment” and “furnishings”. The 21st Century School Facilities Act addressed the expanded eligibility of movable equipment and furnishings by adopting new language under section 5-303 which allows the IAC to define by regulation what constitutes an eligible and ineligible public school construction or capital improvement cost.

Specifically, the new law provides that “In order for the cost of an item or a system funded with the proceeds of general obligation bonds to be considered an eligible cost, it must have a median useful life of at least 15 years.” This provision was adopted, in part, to facilitate the consideration and approval of innovative and cost-effective classroom and learning environment designs incorporating furnishings and equipment rather than the longstanding preference for built-in storage.

School Safety Grant Program – Limited to State Cost Share

The proposed regulations, under COMAR 14.37.02.19, could be interpreted to require a local government funding share requirement for the school safety grants established in statute. To be clear, the law enacted in 2018 does not establish a local match or funding share requirement. Instead, the law refers to the IAC’s broad discretion to implement and administer a grant program in consultation with the Maryland Center for School Safety in order to: “Provide grants to county boards for public school security improvements; (2) Develop a procedure for a county board to apply for a grant under the Program; and (3) Develop eligibility requirements for a county board to receive a grant under the Program.”

MABE supports the purpose stated in the proposed regulations: “Purpose. An LEA may use the School Safety Grant Program to complete eligible school safety and security projects” However, in order to ensure that projects are, in fact, completed the IAC should approve grants in the full amount requested rather than based on the State cost share percentage. MABE is greatly concerned about the foreseeable delays and inequities arising from a requirement for local shares of funding for these grants.

Construction Procurement Methods – Best Value

The proposed regulations contain no reference to the new standard for “best value” procurement contained in statute. The proposed revisions to COMAR 14.37.03 refer to the “Choice of Method” section of the regulations as being unchanged. MABE supports a clear reference in the regulations to the newly authorized “best value” method of procurement. Specifically, HB 1783 amended section 5-112 (c) to read as follows:

“(1) A contract for the school building, improvements, supplies, or other equipment shall be awarded to the responsible bidder who provides the best value and conforms to specifications with consideration given to:

- (i) The quantities involved;
- (ii) The time required for delivery;
- (iii) The purpose for which required;
- (iv) The competency and responsibility of the bidder;
- (v) The ability of the bidder to perform satisfactory service;
- (vi) The plan for utilization of minority contractors; and
- (vii) The price offered by the bidder.”

Construction Procurement Methods – Alternative Financing

The proposed regulations under COMAR 14.37.03.04.B do not reflect the statute which was amended to no longer authorize the IAC to approve the use of alternative financing methods. This section continues to read: “The LEA shall obtain State approval before entering into an alternative financing method....” By contrast, the section 4-126 (e)(1)(ii) of the statute was amended to prohibit this state role. Therefore, MABE requests that the following statutory language under section 4-126 be included in the regulations governing alternative financing.

“(e) (1) (i) Except as provided in paragraphs (2) and (3) of this subsection, § 2–303(f) and Title 5, Subtitle 3 of this article and the regulations that govern the Public School Construction Program do not apply to projects that use alternative financing methods under this section.

(ii) Nothing in this section may be construed to authorize or require State approval before an alternative financing method may be used by a local school system.”

Public School Facilities Educational Sufficiency Standards – Purpose

The purpose of the sufficiency standards is misstated in the proposed regulations under COMAR 14.37.07 and should be restated to conform to the statute. MABE is particularly troubled that the proposed regulation includes language deleted from statute prior to passage. Specifically, the proposed definition refers to the purpose of the standards as being “in order to assess existing facilities against a defined standard to identify deficiencies.” Very similar language was deleted from HB 1783 when then subsection 5-310(d) was removed and replaced with the new subsection (d) that became law (see pg. 30-31, HB 1783, Ch. 14 (2018)).

The statutory definition of the purpose of the sufficiency standards is clearly articulated and should be restated in COMAR 14.37.07.01 to read as follows:

“(A) (1) The purpose of the educational facilities sufficiency standards is to establish uniform standards for the assessment of the physical attributes, capacity, and educational suitability of public school facilities in Maryland.

(2) The standards shall include at least the following categories:

- (i) Building condition related to life safety and health;
- (ii) Building systems;
- (iii) Building capacity and utilization, including the ability to house students in permanent space;
- (iv) Academic space, including specialty classroom space; and
- (v) Physical education and outdoor recreational space.”

Emergency Power Generation – Emergency Shelter Designation

The proposed regulations under COMAR 14.37.02.29 would misplace the authority to designate schools as emergency shelters with local governments, when the new law now assigns that authority to local school systems based on the local emergency management plan and the availability of funding. Therefore, MABE requests that the new regulations should be drafted to reflect the statute, which provides, under new section 4-134:

“(a) Each county board shall make a determination of the public schools within the jurisdiction of the county board that should be designated as emergency management shelters.

(b) The determination of the county board shall be based on:

- (1) Consistency with local emergency management plans and criteria; and
- (2) The availability of funding.”

Energy Efficiency Incentives

MABE is concerned that the proposed regulations do not contain provisions relating to the law’s requirement for the IAC to “establish incentives for: (i) the construction of net-zero school buildings; and (ii) the use of energy efficient or other preferred materials in public school construction” under section 5-309. MABE raises this concern both in light of the association’s support for the Knott Commission recommendation to include this provision in the law, and to reiterate the request for clear communication regarding the development of regulations and other agency actions in alignment with the statute.

Conclusion

MABE appreciates this opportunity to provide constructive feedback on the proposed regulations governing the Public School Construction Program in accordance with the recently enacted 21st Century School Facilities Act.

Please direct any questions or concerns regarding these comments to MABE’s Director of Governmental Relations, John R. Woolums, Esq., at jwoolums@mabe.org or 410-841-5414.