

BEFORE THE
EDUCATION AUDIT APPEALS PANEL
STATE OF CALIFORNIA

In the Matter of the Audit Appeal of:

Fiscal Year 2004-05 Audit Finding 2005-1
by MESA UNION ELEMENTARY
SCHOOL DISTRICT,

Appellant,

CALIFORNIA STATE CONTROLLER,

Respondent,

CALIFORNIA DEPARTMENT OF
FINANCE,

Intervenor.

Case No. 06-14

OAH No. L2007010790

DECISION

On October 19, 2007, the Office of Administrative Hearings (OAH) issued a Proposed Decision in this matter. On November 5, 2007, the Education Audit Appeals Panel (EAAP) issued a Notice of Rejection of Proposed Decision in order to decide the case itself under the provisions of Government Code Section 11517(c)(2)(E). EAAP invited additional briefing by November 19, 2007, particularly with regard to its consideration of substantial compliance in the context of the particular facts of this matter and the provisions of Education Code Section 46200(c). Additional briefs were received from Appellant and Intervenor.

FACTUAL FINDINGS

The Issues and the Parties

1. Finding 2005-1 of the audit report of the Mesa Union Elementary School District (District) for the fiscal year 2004-05 (Exhibit A, p. 66) serves as the Statement of Issues in this matter.

2. The audit report was the result of an annual financial and compliance audit of the District by independent accountants for the fiscal year ending June 30, 2005. Such audits are required by law. (Education Code § 41020.¹)

3. Audit appeals are determined by the Education Audit Appeals Panel (EAAP) under Education Code Section 41344.1(b), and the parties to the action are the State Controller and the local education agency (here, the District). The Department of Finance (Finance) exercised its statutory option to intervene. (§ 41344.1(b); Cal.CodeRegs, tit. 5, § 19805.)

4. The local education agency bears the burden of proof in this proceeding.²

5. The State Controller sent notice to the parties and to OAH that it would not actively participate in this matter. (Exhibit K.)

The Audit Report

6. This case concerns the requirements for the District to obtain additional, “incentive” funding under the Longer Year incentive funding provisions found in Section 46200 et seq. Funds granted to school districts under the Longer Year provisions are in addition to funds normally received by school districts based upon average daily attendance.

7. The Longer Year provisions require a district to provide a minimum of 180 days of instruction, to qualify for the additional funding. Further, the minimum school day for students in grades 4-8 is 240 minutes. (§ 46113.) An alternative method of computing minutes per day for grades 4-8 is found in section 46114(b), which permits the school district to average the number of minutes over 10 consecutive school days, with the average being no less than 240 minutes per day, and with the significant limitation that no individual day may have less than 180 minutes. Therefore, the absolute minimum number of minutes of instruction for any creditable day is 180.

8. The District provided instruction on 180 calendar days in school year 2004-05. On the eight days at issue, grades 4-6 had 178 minutes of instruction and grades 7-8 had 170 minutes of instruction.

9. Because of the District’s failure to comply with the minimum day-length requirement, the affected days are not counted in the total number of days of instruction, and the District therefore did not meet the requirement of providing a minimum of 180 days of instruction. As a result, the Superintendent of Public Instruction is required to recoup the overage paid by reducing payments in subsequent fiscal years. (§ 46200(c).)

¹ All statutory references are to the Education Code unless otherwise indicated.

² § 41344(d); *In the Matter of the Statement of Issues Against: Fresno County Office of Education* (2001) EAAP Case No. 00-03; OAH Case No. N2000050273; Evid. Code § 500.

10. The District's auditor determined that the amount of the reduction in funding is \$61,941, as set forth in Finding 2005-1. (Exhibit A, p. 66.)

11. The parties do not dispute the accuracy of Finding 2005-1.

12. Finding 2005-1 included a recommendation that the District file an amended report showing the revised figures. It also included a section, entitled "District Response," which stated that the District would file an amended report and would institute new procedures to assure compliance with the legal requirements. (Exhibit A, p. 67.)

13. By letter dated June 9, 2006, the auditor informed the State Controller of revisions to the portions of Finding 2005-1, consisting of the recommendation and District response. (Exhibit C.) The new recommendation was that the District request a waiver of the penalties and, if the waiver were not granted, that the District be prepared for the State to withhold the penalties from future payments. The new District Response indicated that the District would file for the waiver, and repeated the earlier information about new procedures to assure compliance with the legal requirements.

The District's Reduction in Day-length

14. The reason for the reduced day-length during the eight school days in issue is that the District started a new program of minimum days, when the students were released from school early on one Wednesday each month, in the 2004-05 school year, so that teachers had additional time for professional development. (Reporter's Transcript (RT), p. 52.)

15. In planning for this new program of minimum days, the District had examined the number of minutes of instruction that would be provided each day. It determined that, with the new reductions on the affected days, grades 4-6 would receive 178 minutes and grades 7-8 would receive 180 minutes.

16. The planning for this new program was already in progress when the District hired a new Superintendent, Dr. John Puglisi, who started on January 20, 2004. (RT, p. 42.) A committee had been formed to study the issue and make recommendations. Dr. Puglisi asked the principal (and committee member), Dennis Kurtz, for more information on the reduction in minutes, and Mr. Kurtz supplied a spreadsheet indicating that the reduced minutes per day for grades 4-5³ would be 178 and the reduced minutes for grades 7-8 would be 180. (Exhibit N, p. 2.) Mr. Kurtz had been the acting Interim Superintendent for about six months before Dr. Puglisi was hired. (RT, pp. 52-55.)

17. The District is small, encompassing a single school in rural Ventura County with about 575 students in grades Kindergarten through 8 and 22 full-time teachers. Dr. Puglisi was aware that the school board wanted input from the community before starting the new

³ The spreadsheet includes columns of minutes for all grades except grade 6. It is not known whether this is a typographical error and whether the reference to grades 4-5 should be to grades 4-6.

program. Dr. Puglisi prepared and sent a survey to parents, probably in late April 2004, setting forth, among other things, the proposed schedule changes for the following school year. The survey stated that “the revised schedule would still exceed state mandated requirements for daily and annual minutes of instruction.” (Exhibit L.)

18. Dr. Puglisi testified that he was generally aware of the requirements for the minimum number of days and minutes of instruction for the Longer Year provisions. He also believed that Mr. Kurtz was aware of those requirements. (RT, p. 93.) Although he reviewed the spreadsheet from Mr. Kurtz, Dr. Puglisi did not note that the 178 minutes of instruction for grades 4-6 was below the legal limit. (RT, p. 88.)

19. Dr. Puglisi testified that, although the spreadsheet indicated that grades 7-8 would receive 180 minutes of instruction on the reduced days, the audit found that grades 7-8 received 170 minutes on reduced days due to a difference in the amount of minutes that was credited for the times when those students were passing from one class period to another. Dr. Puglisi testified that districts get instructional time credit for some of this “passing” time, which he stated “is usually between two and three minutes normally”. (RT, p. 55.)

20. Dr. Puglisi first became aware of the shortfall in required minutes when the audit results were made available. Dr. Puglisi worked with the business office to prepare the District's responses, both to the original auditor's recommendation and then to the revised recommendation.

21. Dr. Puglisi testified that his failure to realize that the 178 minutes for grades 4-6 listed on the spreadsheet was below the minimum was inadvertent. (RT, pp. 56-57.) He also was not aware that in listing 180 minutes for grades 7-8 on the spreadsheet, Mr. Kurtz had not properly computed the times for students to pass from class to class. Had he been aware of these issues earlier, it would have been easy to re-adjust the reduced day schedule to add the necessary minutes. Once the errors became known, adjustments were made to the reduced day schedule to add the required minutes. There would have been no additional cost to the District in revising the schedule for the 2004-05 school year to increase the day-length to meet the minimum required by law. (RT, pp. 58-59.)

22. For the entire 2004-05 school year, the District exceeded the total annual instructional minutes requirements for the Longer Day incentive funding provisions of § 46200 et seq. by 3,079 minutes for grades 4-6 and 3,740 minutes for grades 7-8. (Exhibit A, p. 47.)

Process for Waiver of the Penalty

23. Waiver of a penalty imposed for failure to provide the minimum amount of instructional days can be obtained from the State Board of Education (SBE) under Section 46206. That section states that the intention of the Legislature is for districts to make up any shortfall of days during the same school year in which it occurs, instead of seeking a waiver of any resulting penalties. However, a district may apply to SBE for a waiver of penalties on the condition that the district provide an equivalent number of additional days of instruction in

each of two succeeding school years – a total of 16 additional days, in this instance. (§ 46206(b).)

24. The District ultimately did not seek a waiver under Section 46206.

Substantial Compliance with Legal Requirements

25. Section 41344 establishes the process for payment of a penalty imposed as a result of an audit. A waiver of this payment is mentioned in subdivision (c), which states: "Notwithstanding any other provision of law, this section may not be waived under any authority set forth in this code except as provided in this section or Section 41344.1."

26. Section 41344.1(c), states:

Compliance with all legal requirements is a condition to the state's obligation to make apportionments. A condition may be deemed satisfied if the panel finds there has been compliance or substantial compliance with all legal requirements. "Substantial compliance" means nearly complete satisfaction of all material requirements of a funding program that provide an educational benefit substantially consistent with the program's purpose. A minor or inadvertent noncompliance may be grounds for a finding of substantial compliance provided that the local educational agency can demonstrate it acted in good faith to comply with the conditions established in law or regulation necessary for apportionment of funding. [EAAP] may further define 'substantial compliance' by issuing regulations or through adjudicative opinions, or both. If [EAAP] finds there has been substantial compliance, [EAAP] may waive or reduce the reimbursement or penalty amount and may also order other remedial measures sufficient to induce full compliance in the future. Other remedial measures may include restoration of a reduction or penalty amount if full compliance is not rendered in the future, ordering special audits, and requiring special training.

27. Intervenor Finance contends that the District cannot avail itself of the "substantial compliance" basis for waiver because the waiver provision of Section 46206 is exclusive and the District did not seek such a waiver.

28. This contention is rejected. As noted above in Factual Finding 25, the substantial compliance basis for a waiver is specifically anticipated under Section 41344(c).

29. Intervenor Finance contends that the District may not avail itself of the "substantial compliance" defense because the Longer Day program includes requirements for 240 minutes of instruction per day, with an alternative that permits an absolute minimum of 180 minutes. In essence, Finance argues that, because the statutes permit this lower amount as an absolute minimum, no lower amount should be allowed under any circumstances.

30. This contention is rejected. There is no basis on which to conclude that the defense of “substantial compliance” would be available for all of the elements of all school funding apportionment programs except for this one. The statutory language includes certain requirements that must be met, without limitation to the particular elements of any given apportionment program.

31. In the alternative, Intervenor Finance contends that the District has not established a factual basis for application of the substantial compliance waiver.

LEGAL CONCLUSIONS AND DISCUSSION

1. To determine whether the District has substantially complied with the requirements of the Longer Year provisions requires analysis of several phrases and concepts within Section 41344.1(c) (see Factual Finding 26), and application of the facts in that analysis.

2. First, the District's actions, even though not in complete compliance, must amount to “nearly complete satisfaction of all material requirements of a funding program that provide an educational benefit substantially consistent with the program's purpose.” The purpose of the Longer Year provisions is to provide an incentive, by offering additional funding, for school districts to provide more days of instruction, for the educational benefit of those districts’ pupils.

3. That the District’s total instructional minutes for school year 2004-05 included more than 3,000 minutes of instruction beyond the minimum requirements of the Longer Day program, has no application to the “nearly complete satisfaction” standard for substantial compliance. The Longer Year and the Long Day provisions are fully set forth in the law each independent of the other; to conflate them would be to defeat the Legislature’s clear intent that they be met separately.

4. The statute sets forth another possible means of establishing substantial compliance – that is, proving first that the noncompliance was “minor or inadvertent,” and second that the school district acted “in good faith to comply with the conditions established in law or regulation necessary for apportionment of funding.”

5. The facts and the testimony of Dr. Puglisi established the element of good faith. The District made an effort, albeit an insufficient one, to comply with requirements for instructional days. The modifications needed to restore compliance were minor and would have entailed no additional cost to the District.

6. The District met the “minor or inadvertent” requirement with regard to grades 4-6: The structural shortfall of two minutes as against an absolute minimum of 180 minutes, less than 20 minutes total over the eight days involved, is minor. The shortfall of ten minutes in grades 7-8, however, is five times as great – a total of an hour and 20 minutes within just eight days. Moreover, with only Dr. Puglisi’s testimony that the grades 7-8 shortfall resulted from mis-crediting “passing” intervals, and that a normal passing interval is of 2-3 minutes’

duration – but no further detailing of the mis-crediting or explanation of how it occurred – the District failed to carry its burden of demonstrating inadvertence in that regard.

ORDER

WHEREFORE, THE FOLLOWING ORDER is hereby made:

The appeal of the Mesa Union Elementary School District of the fiscal year 2004-05 audit finding 2005-1 is granted as to grades 4-6, and is denied as to grades 7-8, and the penalty is reduced to \$26,340, effective November 27, 2007.

Date: November 27, 2007

Original Signed

Thomas E. Dithridge, Chairperson
for Education Audit Appeals Panel