

**Education Audit Appeals Panel
State of California**

Appeal of 2013-2014 Audit Finding 2014-002
by:

Terra Bella Union Elementary School
District,
Appellant.

EAAP Case No. 15-07
OAH No. 2015-09-0898

Decision

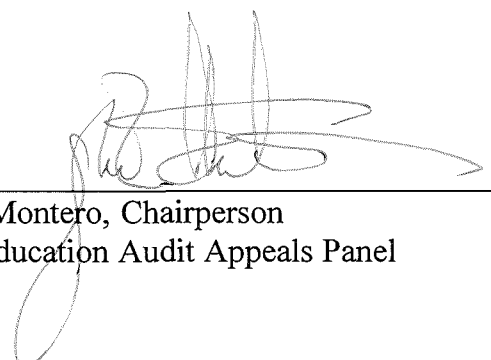
The Education Audit Appeals Panel has adopted the attached Proposed Decision of the Administrative Law Judge as its Decision in the above-entitled matter, with the caveat that the language of "Issues" paragraph 2 on page 2 is not an accurate statement of the substantial compliance test nor of the applicable standard applied in the case. (Education Code § 41344.1(c); compare § 41344(d) requiring good faith to file an appeal.)

Effective date:

IT IS SO ORDERED.

Date

8/29/2016


Joel Montero, Chairperson
for Education Audit Appeals Panel

BEFORE THE
EDUCATION AUDIT APPEALS PANEL
STATE OF CALIFORNIA

In the Matter of the Audit Appeal of:
Fiscal Year 2013-2014 Audit Finding 2014-
002 by

OAH No. 2015090898

TERRA BELLA UNION ELEMENTARY
SCHOOL DISTRICT,

Appellant,

v.

CALIFORNIA STATE CONTROLLER,

Respondent,

CALIFORNIA DEPARTMENT OF
FINANCE,

Intervenor.

PROPOSED DECISION

Administrative Law Judge Gene K. Cheever, Office of Administrative Hearings (OAH), State of California, decided this matter on the parties' written submissions, including a stipulation of facts and documents and concurrent opening and reply briefs. By agreement of the parties, the case was submitted for decision on June 17, 2016.

Scott J. Merrill, Staff Counsel, represented respondent California State Controller (Controller).

Renu R. George, Deputy Attorney General, represented intervenor California Department of Finance (Finance).

Megan E. Macy and Sean B. Mick, Attorneys at Law, Lozano Smith, LLP, represented appellant Terra Bella Union Elementary School District (School District).

FACTUAL FINDINGS

1. The School District appeals audit finding 2014-002 (Audit Finding 2014-002) contained in the School District's audit report prepared by M. Green and Company, LLP, (Auditor), for the fiscal year ending June 30, 2014, (FY 2013-14 Audit). In Audit Finding 2014-002, the Auditor found that the School District had not appropriately accounted for its "unduplicated pupil" count pursuant to the Local Control Funding Formula (LCFF) set forth in Education Code section 42238.02.¹ The finding resulted in a fiscal impact of \$75,717.

Issues

2. Whether Audit Finding 2014-002 contains any finding based on errors of fact or interpretation of law. If not, whether the School District believed in good faith that it was in "substantial compliance" with all legal requirements, when it claimed a 100 percent "unduplicated pupil" count for all its students. (*See*, Ed. Code, § 41344, subd. (d).)

The School District and Its Provision 3 Status for Federal NSLP Purposes

3. The School District is a California elementary school district providing education to pupils from transitional or pre-kindergarten through eighth grade. It operates Terra Bella Elementary School (pre-kindergarten through fifth grade) and the Carl Smith Middle School (sixth through eighth grade), located generally in the census designated place known as Terra Bella within the County of Tulare, California (CDP). It had a total of 910 students enrolled in its two schools during fiscal year 2013-14 for LCFF purposes.

4. During fiscal year 2013-2014, the School District operated as a Provision 3 school pursuant to the federal National School Lunch Program (NSLP). This means that, in order to participate as a Provision 3 school, the School District was required under federal law to provide free school lunches to 100 percent of its students regardless of any particular student's socioeconomic status being above the federal income eligibility guidelines for NSLP purposes.

5. Pursuant to the Code of Federal Regulations, title 7, section 245.9, subdivision (e), a participating Provision 3 school in California may extend its participation in Provision 3 after the end of its 5-year period from the last "base year" by submitting to the California Department of Education (CDE) certain pre-approved socioeconomic information substantiating that the income level with the CDP, as adjusted for inflation, has remained stable, declined, or has had only negligible improvement since the most recent base year. The School District's last base year for its Provision 3 participation in the NSLP was established during fiscal year 1998-99, when the percentage of population within the CDP for whom poverty status was determined was approximately 26.1 percent. In 2011, the School District applied to the CDE to extend its participation in Provision 3 for the NSLP. At that time, the percentage of population within the CDP for whom poverty status was

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

determined was approximately 39.6 percent. This was well above the base year data and the state and national averages for percentage of population living at or below poverty during the same period. On August 26, 2011, the CDE approved the School District's request and extended the School District's Provision 3 participation in the NSLP through June 30, 2015.

The LCFF and CDE's Established Procedures and Timeframes

6. On July 1, 2013, Governor Edmund G. Brown, Jr. signed the LCFF legislation (Assembly Bill 97 and Senate Bill 91).² It took effect immediately. The LCFF established a state funding formula for the purpose of providing state funding to local educational authorities (LEAs), including supplemental and concentration grants. The School District was a LEA within the meaning of the LCFF for fiscal year 2013-14. On September 26, 2013, Governor Brown signed legislation (Senate Bill 97) that amended the LCFF. It also took effect immediately and amended provisions of the LCFF. On June 20, 2014, Governor Brown signed legislation (Senate Bill 859) that amended the LCFF. It also took effect immediately, which was just prior to the end of fiscal year 2013-14 (June 30, 2014). It also amended provisions of the LCFF. The parties dispute which version of the LCFF applies to Audit Finding 2014-002. They also dispute whether the Auditor erred in using an incorrect version of the LCFF.

7. Section 42238.01, subdivision (a), as originally enacted on July 1, 2013, defined "Eligible for free or reduced-price meal" for purposes of section 42238.02 as:

determined to meet federal eligibility criteria for free or reduced-price meals as specified in Section 49531, as that section read on January 1, 2013, except in regard to meals in family day care homes.

Section 42238.01, subdivision (a), as amended on September 26, 2013, defined "Eligible for free or reduced-price meals" for purposes of section 42238.02 as:

determined to meet federal income eligibility criteria or deemed to be categorically eligible for free or reduced-price meals [as specified in Section 49531, as that section read on January 1, 2013, except in regard to meals in family day care home] under

² The parties' requests for notice are granted. Official notice is taken of the portions provided of Assembly Bill No. 97, as Chaptered, July 1, 2013; Senate Bill No. 91, as Chaptered, July 1, 2013; Senate Bill No. 97, as Chaptered, September 26, 2013; Assembly Committee on Budget, Floor Analysis of Senate Bill No. 97, August 28, 2013; Senate Budget and Fiscal Review Committee, Floor Analysis of Senate Bill No. 97, September 11, 2013; Senate Bill No. 859, as Chaptered, June 20, 2014; Child Nutrition Programs; Eligibility Guidelines; the U.S. Dept. of Agriculture information on Provisions 1, 2, and 3 Special Assistance Alternatives; Governor Brown's press release on Local Control Funding Formula; and the Analysis of Assembly Bill 97, June 13, 2013. (Gov. Code, §11515.)

the National School Lunch Program, as described in Part 245 of Title 7 of the Code of Federal Regulations.³

Section 42238.01, subdivision (a), as amended on June 20, 2014, defined “Eligible for free or reduced-price meals” for purposes of section 42238.02 as:

determined to meet federal income eligibility criteria or deemed to be categorically eligible for free or reduced-price meals under the National School Lunch Program, as described in Part 245 of Title 7 of the Code of Federal Regulations. A school participating in a special assistance alternative authorized by Section 11(a)(1) of the Richard B. Russell National School Lunch Act (Public Law 113–79), including Provision 2, Provision 3, or the Community Eligibility Option, may establish a base year for purposes of the local control funding formula by collecting household income data to determine whether a student meets free and reduced-price meal income eligibility criteria at least once every four years, if the school determines free and reduced-price meal eligibility for each new enrolled or disenrolled pupil between base year eligibility determination collections. A school that uses the special assistance alternative shall maintain information on each student’s income eligibility status and annually submit information on that status in the California Longitudinal Pupil Achievement Data System pursuant to paragraph (2) of subdivision (b) of Section 42238.02 or subparagraph (A) of paragraph (3) of subdivision (b) of Section 2574, as applicable. To the extent permitted by federal law, a school may choose to establish a new base year for purposes of the National School Lunch Program at the same time the school establishes a new base year for purposes of the local control funding formula. A school may use National School Lunch Program application forms to collect household income data as permitted under the National School Lunch Program. If the use of National School Lunch Program application forms is not permitted, a school shall use alternative income data collection forms.

8. Section 42238.02, subdivision (b)(1), as originally enacted on July 1, 2013, stated in relevant part:

For purposes of this section, “unduplicated pupil” means a pupil enrolled in a school district or a charter school who is either

³ Underscore indicates language added to the prior version, and brackets indicate where language has been removed from the prior version.

classified as an English learner, eligible to receive a free or reduced-price meal, or is a foster youth.

Section 42238.02, subdivision (b)(1), as amended on September 26, 2013, stated in relevant part:

For purposes of this section “unduplicated pupil” means a pupil enrolled in a school district or a charter school who is either classified as an English learner, eligible ~~[to receive]~~ for a free or reduced-price meal, or is a foster youth.

Section 42238.02, subdivision (b)(1), did not change as a result of the June 20, 2014, legislation in Senate Bill 859.

Thus, in order for a student to be classified as “eligible for a free or reduced-price meal” pursuant to section 42238.02, subdivision (b)(1), as amended as of September 26, 2013, and as amended as of June 20, 2014, the student must either have been: (1) determined to meet federal income eligibility criteria for free or reduced-price meals under the NSLP as described in Part 245 of Title 7 of the Code of Federal Regulations, or (2) deemed to be categorically eligible for free or reduced-price meals under the NSLP as described in Part 245 of Title 7 of the Code of Federal Regulations.

9. The LCFF, as amended on September 26, 2013, and as amended on June 20, 2014, provided supplemental and concentration grants to LEAs for certain targeted disadvantaged students, referred to as “unduplicated pupils,” who are enrolled in the school district as of the specified enrollment date and are classified as: (1) English learners; (2) eligible for free or reduced-price meals (FRPM); or (3) foster youths. A single student may qualify for more than one of these three classifications, but can be counted only once for purposes of the LCFF supplemental and concentration grants at issue. (Ed. Code, § 42238.02, subd. (b)(1).) The supplemental and concentration grants are calculated based on the percentage of unduplicated students enrolled in the LEA on the enrollment date. (Ed. Code, § 42238.02, subd. (b)(5).)

10. Throughout the School District’s fiscal year 2013-14, the Code of Federal Regulations, title 7, section 245.2, defined “Income eligibility guidelines” to mean, “the family-size income levels prescribed annually by the Secretary [of the United States Department of Agriculture] for use by States in establishing eligibility for free and reduced price meals and for free milk.” On March 22, 2013, the Secretary of the United States Department of Agriculture announced the income eligibility guidelines that were to be used by school districts participating in the NSLP for fiscal year 2013-14. (78 Fed.Reg. 17628-17631 (Mar. 22, 2013), amended March 29, 2013, 78 Fed.Reg. 19179.)

11. Section 42238.02, subdivision (b)(2), as originally enacted on July 1, 2013, stated:

Commencing with the 2013-14 fiscal year, a school district or charter school shall annually report its enrolled free and reduced-price meal eligibility, foster youth, and English learner pupil-level records to the Superintendent using the California Longitudinal Pupil Achievement Data System.

Section 4223802, subdivision (b)(2), as amended on September 26, 2013, stated:

Under procedures and timeframes established by the Superintendent, commencing with the 2013-14 fiscal year, a school district or charter school shall annually [report] submit its enrolled free and reduced-price meal eligibility, foster youth, and English learner pupil-level records for enrolled pupils to the Superintendent using the California Longitudinal Pupil Achievement Data System.

Section 42238.02, subdivision (b)(2), did not change as a result of the June 20, 2014 legislation in Senate Bill 859. The amendments made to section 42238.02 as a result of Senate Bill 859 affected neither the manner in which “unduplicated pupil” counts were determined nor the procedures and timeframes by which school districts were to submit their pupil-level records for enrolled pupils using the California Longitudinal Pupil Achievement Data System (CALPADS).

12. On August 8, 2013, Cindy Kazanis, Director of the Educational Data Management Division, CDE, sent a letter to County and District Superintendents on how data from CALPADS will be used in the LCFF. The letter included an attachment that provided information on how to determine whether students in Provision 3 schools are FRPM-eligible. The attachment advised that those students eligible for FRPM classification must be deemed to be categorically eligible for FRPM under the NSLP or the school districts were required to determine at the individual student level that each student met the federal income eligibility criteria required by the NSLP and input that data into CALPADS.

13. On September 27, 2013, State Superintendent of Public Instruction Tom Torlakson (State Superintendent) sent a letter to County and District Superintendents with Provision 3 schools announcing an extended deadline for certifying their CALPADS data that will be used for the LCFF, from February 7, 2014, to March 21, 2014. The letter referred Provision 3 school district officials to where they could find guidance on collecting student-level data to determine whether their students met FRPM income eligibility requirements.

14. In October 2013, the CDE issued a Management Bulletin to school food service directors and school district business officials. The bulletin advised these school officials that beginning in fiscal year 2013-14, Provision 3 schools would be “required to collect household income data for individual students during non-base years in order to identify low-income students in CALPADS.” The bulletin explained in detail how the

school districts should collect the student level socioeconomic data to determine each student's FRPM federal income eligibility. The bulletin also stated that "LEAs that do not collect and report individual student socioeconomic status data in CALPADS may not receive the funding that they may be eligible to receive under the LCFF."

15. The School District was also directed to the LCFF Frequently Asked Questions (FAQs) web page that provided focused information related to unduplicated pupils at schools with Provision 3 status. The answers to the FAQs changed from time to time and were intended to give CDE's guidance to LEAs on various matters relating to the LCFF, including how to determine whether students in Provision 3 schools are FRPM eligible under the NSLP. The webpage also provided a link with access to four sample forms (Household Income Collection Data Forms) that LEAs could use to collect the income data required to determine whether a student is eligible for FRPM and is therefore considered a disadvantaged student under the LCFF. In January 2014, the FAQ webpage included a section entitled "Unduplicated Pupils at Schools with Provision 2 and 3 Status." The FAQ was: "How will the students receiving free and reduced-price meals in Provision 2 and 3 schools be counted for LCFF purposes?" The answer advised Provision 3 school districts that they must determine at the student-level whether a student meets the income eligibility criteria for the NSLP through an alternative process and submit a program record in CALPADS for those that do. One of the purposes of tracking this at the student-level "stems from the need to track the academic achievement of the socioeconomically disadvantaged student group...."

Audit Finding 2014-002

16. The School District's enrollment was 910 pupils for the period subject to the FY 2013-14 Audit. The School District's Superintendent reported 100 percent (910 students) "unduplicated count" in CALPADS for fiscal year 2013-14 for LCFF purposes.

17. The School District engaged the Auditor to perform the FY 2013-14 Audit. The EAAP published the "Standards and Procedures for Audits of California K-12 Local Education Agencies (2013-2014)" dated February 10, 2014, and corrected July 3, 2014, (Audit Standards) which were the auditing guidelines applicable to the FY 2013-14 Audit. The Auditor used and relied upon the Audit Standards to perform the audit, including an audit procedure for the Auditor to:

Select a representative sample, to achieve a high level of assurance, from the students indicated as a "No" under the "Direct Certification" column, that are **only** free or reduced priced meal eligible (FRPM) identified under the "NSLP Program" column and verify there is supporting documentation such as a Free and Reduced Price Meal (FRPM) eligibility application under a federal nutrition program or an alternative household income data collection form that indicates the student was eligible for the designation. [Bold in original.]

The Auditor also relied on a printed version of section 42238.02 in effect as of June 20, 2014.

18. During the audit, the Auditor took a random sample of 60 of the School District's students that were eligible under Provision 3 for FRPM and that were indicated as a "No" under the direct certification column; 29 of such students were determined to be ineligible for purposes of the LCFF. Audit Finding 2014-002 indicates that the cause for ineligibility was the "income verification forms were not obtained for all students." The Auditor's working papers further describe that 23 of the "ineligible" students did not have verification forms and six of the "ineligible" students who did have such income verification forms did not qualify based on yearly family income. Based upon this sample, the Auditor extrapolated the percentage error over the entire student population to make Audit Finding 2014-002. It stated, "After extrapolation, the error in the unduplicated pupil count based on eligibility for FRPM is 123 students. This results in a fiscal impact of \$75,717." The Auditor recommended that the School District "ensure that income verification forms are obtained for all students in the future. We also recommend that the [School] District remit the funds back to the state."

19. On December 1, 2014, the Auditor issued the FY 2013-14 Audit. Audit Finding 2014-002 is contained at pages 64-65 of the FY 2013-14 Audit. The School District's Board of Trustees approved the FY 2013-2014 Audit at its regular meeting held in January of 2015.

20. In response to Audit Finding 2014-002, the School District stated it had complied with the LCFF "relative to identifying pupils who are eligible to receive free and reduced price meals" under the provisions of the NSLP. It further stated that the CDE's requirement that pupils "in schools who qualify for free/reduced meals must provide financial information that is not required to receive a meal (breakfast, lunch, etc.) is intrusive and violates their privacy rights." The School District further responded that because many of its students are immigrants, "the request for such information violates our pupil's civil rights, punishing them for their immigrant status and requiring the [School] District to make inquiries that would tend to 'chill' enrollment in our schools."

21. On February 26, 2015, the Controller sent a letter to the School District and notified it of its summary review rights and formal appeal rights. On March 23, 2015, the School District timely requested that the EAAP perform a summary review of Audit Finding 2014-002 based on an assertion that the School District had substantially complied with section 42238.02. On August 6, 2015, the EAAP sent the School District a letter notifying it that the conditions "for finding substantial compliance are not clearly met" and directed the School District to either file a formal appeal to the EAAP or pay the \$75,717. On September 9, 2015, the School District timely sent a letter to the EAAP to formally appeal Audit Finding 2014-002.

Discussion

22. Section 42238.02, subdivision (b)(2) (as amended September 26, 2013), directed the State Superintendent to establish “procedures and timeframes” for school districts to comply with the LCFF. It did not require the State Superintendent to do so through regulatory enactments in the California Code of Regulations. The CDE issued procedures and timeframes on September 27, 2013, October 2013, and on its FAQs web page consistent with the legislative directive. In addition, although the CDE’s August 8, 2013 letter predated the LCFF’s September 26, 2013, directive, the CDE’s subsequent communications referred to and incorporated the CDE’s August 8, 2013 letter. Thus, the CDE also established procedures through its use of the August 8, 2013 letter after September 26, 2013. The CDE’s contemporaneous interpretation of the newly enacted LCFF is entitled to deference even if its interpretation is not controlling on review. (*Crumpler v. Board of Administration, Public Employees’ Retirement System* (1973) 32 Cal.App.3d 567, 578.)

23. The LCFF, as amended September 26, 2013, sets forth the applicable statutory provisions that governed the School District’s request for supplemental and concentration grants pursuant to section 42238.02. Based on the language of sections 42238.01 and 42238.02 and the amendments made to these sections effective September 26, 2013, the School District cannot rely solely on its Provision 3 status for NSLP purposes to claim a 100 percent “unduplicated pupil” count for section 42238.02 purposes. To be classified as an “eligible for free or reduced-price meals” “unduplicated pupil” pursuant to section 42238.02, the LCFF required a determination for each student of whether the student met “federal income eligibility criteria” for free or reduced priced meals pursuant to the NSLP. The amendments made to the LCFF effective June 20, 2014, did not change this requirement.

24. The School District did not provide evidence of student-by-student level determinations for all the students it claimed as eligible for free or reduced-price meals. The School District did not provide evidence that had the Auditor reviewed additional documentation, such as the School District’s Provision 3 status, or used the September 26, 2013 version of the LCFF instead of the June 20, 2014 version, that Audit Finding 2014-002 would have changed. The Auditor correctly interpreted section 42238.02 and the Audit Standards in finding that, based on its sample of 60 students, the School District’s lack of compliance resulted in a \$75,717 fiscal impact. The School District did not present sufficient evidence to show that Audit Finding 2014-002 contains any finding based on an error of fact or interpretation of law.

25. The School District also did not present sufficient evidence to establish that it had a good faith belief that it was in “substantial compliance” with sections 41344, subdivision (d), and 41344.1, subdivision (c). The LCFF’s requirement to submit documentation at a student-by-student level was a material requirement of section 42238.02. Collecting the socioeconomic data at the student-level was one of the purposes of the LCFF to assist in tracking the academic achievement of the targeted disadvantaged groups. The State Superintendent notified school districts of the procedures necessary to comply, but the

School District submitted student-by-student level documentation for only a portion of the students that it claimed as eligible for FRPM.

LEGAL CONCLUSIONS

1. Section 41344, subdivision (d), provides:

Within 60 days of the date on which a local educational agency receives a final audit report resulting from an audit or review of all or any part of the operations of the local educational agency, or within 30 days of receiving a determination of a summary review pursuant to subdivision (d) of Section 41344.1, a local educational agency may appeal a finding contained in the final report, pursuant to Section 41344.1. Within 90 days of the date on which the appeal is received by the panel, a hearing shall be held at which the local educational agency may present evidence or arguments if the local educational agency believes that the final report contains any finding that was based on errors of fact or interpretation of law, or if the local educational agency believes in good faith that it was in substantial compliance with all legal requirements. A repayment schedule may not commence until the panel reaches a determination regarding the appeal. If the panel determines that the local educational agency is correct in its assertion, in whole or in part, the allowable portion of any apportionment payment that was withheld shall be paid at the next principal apportionment.

2. Section 41344.1, subdivision (c), provides in relevant part:

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. The panel may further define "substantial compliance" by issuing regulations or through adjudicative opinions or both.

3. Section 41344, subdivision (d) requires the LEA that appeals the audit “may present evidence or argument” at a hearing before the EAAP and places the burden of proof on the School District in this matter. (*In the Matter of the Appeal of: Fresno County Office of Education* (2001) EEAP Precedential Decision 5-25-2001.)

4. As set forth in the Factual Findings and Legal Conclusions as a whole, and in particular Findings 22 through 25, the School District failed to meet its burden of establishing that Audit Finding 2014-002 is based on errors of fact or interpretation of law. The School District also did not meet its burden of establishing that it believed in good faith that it was in substantial compliance with all legal requirements of section 42238.02. The State Superintendent established the procedures and timeframes necessary to comply, which included providing the information on a student-by-student level. This was a material requirement of section 42238.02. The School District did not comply. As a result, a waiver or reduction of penalty is not available.

ORDER

The appeal of Terra Bella Union Elementary School District from audit finding 2014-002 is DENIED.

DATED: July 15, 2016

DocuSigned by:
Gene Cheever
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GENE K. CHEEVER
Administrative Law Judge
Office of Administrative Hearings