

**Education Audit Appeals Panel
State of California**

Appeal of 2006-07 Audit Finding 2007-11
by:

Torrance Unified School District,

Appellant.

EAAP Case No. 08-02

OAH No. 2010011281

Decision

Pursuant to Government Code Section 11517(c)(2)(B), the Education Audit Appeals Panel has waived the reimbursement amount and has adopted the balance of the attached Proposed Decision of the Administrative Law Judge as its Decision in the above-entitled case, after making the following minor and technical changes pursuant to Government Code Section 11517(c)(2)(C): in Paragraph 2 of the Legal Conclusions, references to “EEAP,” “the EEAP,” and “the EAAP” (pages 6 – 9) have been changed to “EAAP,” and the number “111” has been changed to “11” (page 8, second paragraph).

Effective date: August 30, 2010.

IT IS SO ORDERED.

August 30, 2010

Date

Original Signed

Diana L. Ducay, Chairperson

BEFORE THE
EDUCATION AUDIT APPEALS PANEL
STATE OF CALIFORNIA

In the Matter of the Appeal
of:

TORRANCE UNIFIED SCHOOL
DISTRICT,

Appellant,

v.

OFFICE OF THE STATE CONTROLLER,

Respondent,

and

DEPARTMENT OF FINANCE,

Intervenor.

Case No. 08-02

OAH No. 2010011281

PROPOSED DECISION

This matter was heard by Vincent Nafarrete, Administrative Law Judge of the Office of Administrative Hearings, in Los Angeles on June 3, 2010.

Appellant Torrance Unified School District was represented by Dr. Donald A. Stabler, Ed.D., Deputy Superintendent of Administrative Services. Respondent Office of the State Controller was represented by Gary D. Hori, Attorney, who appeared by telephone. Intervenor Department of Finance was represented by Ernest Martinez, Deputy Attorney General.

At the conclusion of the hearing, the record was held open for respondent to file additional information. On June 10, 2010, respondent filed the Declaration of Hadley Hui, C.P.A., which was marked and admitted as Exhibit 7. All of respondent's and appellant's exhibits were admitted into evidence.

The Administrative Law Judge on his own motion marks the Formal Appeal letter of the Torrance Unified School District dated September 30, 2009, as Exhibit C and admits the exhibit into evidence. The appeal letter was filed with the Office of

Administrative Hearings when the Education Audit Appeals Panel requested that the appeal be set for an administrative hearing.

Oral and documentary evidence having been received, the Administrative Law Judge submitted this matter for decision on June 10, 2010, and finds as follows:

FACTUAL FINDINGS

1. In or about June 2007, the certified public accounting firm of Moss, Levy, and Hartzheim of Beverly Hills (accounting firm) conducted an independent state compliance audit of the financial books and records, funds, and pupil attendance procedures of the Torrance Unified School District (school district), a local education agency, for the 2006-2007 school year, as required by Education Code section 41020. The accounting firm conducted the audit in accordance with the Standards and Procedures for Audits of California K-12 Local Educational Agencies 2006-07 (Cal. Code Regs., tit. 5, Ed. Code, §§ 19810 et seq.) and generally accepted auditing and professional standards.

2. (A) As part of its audit, the accounting firm audited the school district's compliance with kindergarten continuance or retention procedures for the 2006-2007 school year. The accounting firm reviewed the attendance and pupil records of the students in all of the kindergarten classes in six of the school district's elementary schools, including the school district's use of the form entitled, "Parental Agreement for Pupil to Continue in Kindergarten," which is required by Education Code section 48011.

(B) The accounting firm determined that 12 kindergarten students at the school district's Victor Elementary School were continued in kindergarten after the 2005-2006 school year. Of those 12 kindergarten students, ten students were continued in kindergarten after their parents or guardians signed the Parental Agreement for Pupil to Continue in Kindergarten form in March 2006. These parents agreed to have their children continue in kindergarten for the next school year but not longer than one year after the children's kindergarten anniversary date. The accounting firm found that the remaining two students were continued in kindergarten after their parents signed a different agreement form.

(C) No deficiencies or exceptions were found with respect to kindergarten continuance or the use of the proper parental agreement form at the other five elementary schools audited by the accounting firm.

3. On an undetermined date, the accounting firm issued its audit report for the school district for the fiscal year ending June 30, 2007. Among the state award findings and questioned costs, the accounting firm found under Audit Finding 2007-11 that, "During our examination of kindergarten retention forms at Victor

Elementary School, we noted that two kindergarten retention agreements did not have the anniversary dates because the School did not use the standard kindergarten retention forms." The accounting firm recommended that the school district "require all elementary schools use the standard kindergarten retention agreements for each child that repeats kindergarten" and determined that the "questioned costs" for the two students was \$10,775.45, based on the dollar revenue limit for average daily attendance, or approximately \$5,387 per student.

4. On or about October 6, 2009, the school district filed a timely formal appeal of Audit Finding 2007-11 with the Education Audit Appeals Panel pursuant to Education Code sections 41344 and 41344.1.

5. On February 9, 2010, the Statement of Issues, Case No. 08-02, was made and filed by Gary D. Hori in his official capacity of Attorney for the California State Controller. The Statement of Issues incorporated Audit Finding 2007-11 regarding kindergarten retention.

6. (A) At all times relevant herein, the school district advised and provided instruction to elementary school principals and teachers during "principal meetings" that a kindergarten student who has completed one school year shall be admitted to first grade under Education Code section unless the parent or guardian of the child and the school district agree that the child may continue in kindergarten for not more than an additional school year. The school district provided elementary school principals and teachers with copies of the Agreement for Pupil to Continue in Kindergarten form (Exhs. 4 and B). These parental agreement forms contain a line for the child's kindergarten attendance anniversary date, the date until which the child will continue in kindergarten and which cannot be more than one year beyond the anniversary date, and the information for parent or guardian as follows:

"California law provides that after a child has been lawfully admitted to a kindergarten and has attended for a year, the child shall be promoted to the first grade unless the school district and the child's parent/guardian agree to have the child continue to attend kindergarten for not longer than one additional year. This rule applies whether a child begins kindergarten at the beginning of a school year or at some later date, so that a child who begins kindergarten in January, for example, shall be promoted the following January unless there is formal agreement to have him or her continue. Because kindergarten-age children often do not develop at steady or predictable rates, the California Department of Education recommends that approval to continue not be given until near the anniversary date of a child's first year of kindergarten."

The school district's parental agreement forms (Exhs. 4 and B) conform to the Parental Agreement Form or Parental Agreement for Pupil to Continue in

Kindergarten (Exh. 5), which is approved in form and content and published by the California Department of Education and reflects amendment to the Education Code. The accounting firm did not find, and there was no allegation raised during the hearing, that the school district's parental agreement forms, which were provided by and used by the school district to continue the 10 students in kindergarten, were deficient or failed to meet the requirements of Education Code sections 46300 and 48011.

(B) The parental agreement forms were kept and available to principals and teachers at the school district's offices. The school district also advised the administrators and teachers to tell the parent or guardian that the retention of a child in kindergarten was a joint decision of the parent or guardian and school district and to discuss the parent agreement form and the concept of kindergarten retention with the parent or guardian.

7. (A) During the 2005-2006 school year, the principal at Victor Elementary School was Ada Garza. Garza was the principal at Victor Elementary School for five years beginning in or about 2003 and an elementary school principal for 21 years. She retired in 2008.

(B) In March 2006, Principal Garza conducted kindergarten retention conferences with the parents and teachers of 12 kindergarten pupils at Victor Elementary School. As was her custom and practice, Principal Garza held the conferences at the end of the progress reporting period in March of each school year in order to discuss whether the child should be retained in kindergarten for the next school year. For each kindergarten retention conference, Garza discussed with the parents their child's academic progress and available educational supports and the school's recommendation that the child be retained in kindergarten for the next school year. She also advised the parents that they had the right to have their child promoted to first grade and that the decision to retain the child in kindergarten had to be a joint decision of both the parents and the school. During these conferences, Garza referred to *Informational Bulletin No. 424* of the Los Angeles County Office of Education (Exh. A), which pertains, in part, to kindergarten continuation, and had on hand the Parental Agreement for Pupil to Continue in Kindergarten forms (Exh. 4). If the parents were primarily Spanish speakers, Garza, who is fluent in Spanish, was able to speak and translate for them. If the parents spoke another language, the principal obtained the services of the appropriate interpreter for the conference.

(C) Of the 12 kindergarten retention conferences held at Victor Elementary School in March 2006, the parents of 10 kindergarten pupils agreed to have their children continue in kindergarten for the next school year and signed proper Agreements for Pupil to Continue in Kindergarten. These parental agreements set forth the children's kindergarten anniversary date and the stipulation that the children continue in kindergarten until no later than one year after the kindergarten anniversary date. The parents of two children, who were in a "Preppy" or pre-

kindergarten class, wanted more time to consider the school's recommendations that their children continue in kindergarten and to review the children's academic progress over the next three months. As such, the parents of these two children did not sign the parental agreements presented by the principal during the March 2006 conferences.

8. (A) In or about May 2006, the parents of the two children informed their Preppy class teacher that they had decided to continue their children in kindergarten for the next school year. The Preppy class teacher found two old or out-dated Agreements for Pupil to Continue in Kindergarten in her files and had the parents of the two children sign the agreements (Exh. 3). These two non-standard kindergarten retention agreements were the two audit exceptions later discovered by the accounting firm during its audit of the school district and are the subject of this appeal. The principal or an administrator was not present when the parents met with their children's teacher and signed the non-standard kindergarten retention agreements.

(B) Unlike the Parent Agreements forms provided by the school district, the two non-standard kindergarten retention agreements used by the Preppy class teacher did not contain the children's kindergarten attendance anniversary dates, the provision that kindergarten continuation may not be for more than one year beyond the kindergarten attendance anniversary date, or the information for parent or guardian.

(C) Shortly thereafter, at the end of the 2005-2006 school year, Principal Garza received the two non-standard kindergarten retention agreements and signed them, approving kindergarten continuation of the two children. When she received the two agreements, Garza noticed that they were not the Parental Agreements provided by the school district and used by her at the March 2006 kindergarten retention conferences. However, the principal did not bring the matter of the use of the unapproved kindergarten retention form to the attention of the school district.

9. In its appeal letter, the school district indicated it has been using the approved parental agreement form to continue pupils in kindergarten and has assigned a staff person in its fiscal services department to review all kindergarten continuation forms for compliance.

* * * * *

Based on the foregoing findings of fact, the Administrative Law Judge makes the following determination of issues:

LEGAL CONCLUSIONS

1. Grounds exist to grant, in part, appellant school district's appeal pursuant to Education Code section 41344 and 41344.1, in that the school district demonstrated by the preponderance of the evidence that it substantially complied with the condition under Education Code sections 46300, subdivision (g), and 48011, to have on file the agreements of the parents that their children may continue in kindergarten for not more than one more school year in a written form and content approved by the California Department of Education, based on Findings 1 – 9 above.

2. Discussion--This matter concerns an appeal by the school district, which contests an audit report finding and concomitant apportionment disallowance or repayment, to the Education Audit Appeal Panel (EEAP) under Education Code sections 41344 and 41344.1.¹ As the appellant, the school district has the burden of proof in this proceeding. (§ 41344, subd. (d).)

Section 46300, subdivision (g), provides that, in computing the average daily attendance of a school district, there shall be included the attendance of pupils in kindergarten after they have completed one school year in kindergarten only if the school district has on file for each of those pupils an agreement made pursuant to section 48011, approved in form and content by the Department of Education, and signed by the pupil's parent or guardian, that the pupil may continue in kindergarten for not more than one additional school year.

Section 48011 provides, in pertinent part, that a child who has been admitted to kindergarten and completed one school year therein, shall be admitted to the first grade of an elementary school unless the parent or guardian of the child and the school district agree that the child may continue in kindergarten for not more than an additional school year.

Section 41344.1, subdivision (c), states that compliance with all legal requirements is a condition to the state's obligation to make apportionments. A condition may be deemed satisfied if the EEAP 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

¹ All further section references are to the Education Code.

good faith to comply with the conditions established by law or regulation necessary for apportionment of funding.

The EEAP may further define “substantial compliance” by issuing regulations or through adjudicative opinions, or both. If it finds there has been substantial compliance, the EEAP 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. (§ 41344.1, subd. (c).)

Here, the California State Controller and Department of Finance have submitted decisions of the EEAP in support of Finding 2007-11 and their contention that the school district did not substantially comply with the condition to have used and have on file parental agreements for kindergarten continuation in a form and content approved by the Department of Education under sections 46300, subdivision (g), and 48011. These decisions ostensibly discuss substantial compliance in the context of the specific factual situations. However, the factual circumstances of each of these decisions are distinguishable from the facts in this appeal.

In the Decision dated January 24, 2005, in the *Matter of the Statement of Issues Against Kelseyville Unified School District*, Case No. 02-06, OAH No. N2002070130, the audit revealed that seven of the kindergarten retention forms used by the local educational agency (LEA) lacked the required parent or guardian information and contained the erroneous statement that the final decision of kindergarten retention rested with school authorities. In the present appeal, the unapproved parent agreement form did not contain any false or erroneous information or any statement or inference that the school district could unilaterally decide to continue a pupil in kindergarten. In addition, the principal in a meeting with the parents and teacher advised the parents that it was joint decision of both the parents and the school whether to continue a pupil in kindergarten for another year.

In the Decision in the *Matter of the Statement of Issues Against Allensworth Elementary School District*, Case No. 04-07, OAH No. N2004080047 (January 24, 2005), the LEA retained two students for a second year of kindergarten and used a “retention-in-kindergarten form” that was substantially divergent from the form approved by the Department of Education. The form stated that the teacher met with the parents to discuss the student’s retention in kindergarten and that the parents agreed to kindergarten retention but did not contain the information for parent or guardian. The EEAP concluded that the form did not meet the “nearly complete satisfaction” standard under section 41344.1, subdivision (c), and that the LEA did not demonstrate that it acted specifically or intended to comply with the conditions under section 46300 for apportionment funding.

In the present matter, the school district used the state-approved parental agreement for 10 of 12 children continued in kindergarten. The principal met with all 12 parents in kindergarten retention conferences, discussed the parents' rights to have their children promoted to first grade and to agree to kindergarten continuation, and had on hand during the conference the state-approved parental agreement form for signing. The parents of two other pupils wanted more time to think about kindergarten continuation and did not sign the parental agreement and the school district acceded to their decisions. Later, it was the pupils' teacher who had the parents sign the unapproved form. As such, appellant school district demonstrated that its administrative personnel acted specifically to comply and intended to comply with the use of the Department of Education approved parental agreement form.

In Case No. 06-12, OAH No. N2006090603, an audit revealed that the Corcoran Joint Unified School District did not use the parental agreement approved in form and content by the Department of Education to retain 11 students in kindergarten. Instead, the LEA created and/or used its own kindergarten retention form that was called "Recommendation for Retention/Placement." The front page of the form contained a statement that read, "The parent(s) understand that their child will be retained or placed due to not meeting the grade level standards", which was followed by a line or space for the parent's signature. For three of the 11 pupils, the LEA did not have any parental agreement forms in its records. For seven of the remaining eight pupils continued in kindergarten, the LEA used its own recommendation form but failed to note or enter the date until when the pupils would continue to attend kindergarten; the date was apparently left blank. The EAAP observed that the plain purpose of the parental agreement requirement in section 46300, subdivision (g), is to ensure that parents are given effective notice of their right not to have their children held back in kindergarten. In denying the LEA's appeal, the EAAP concluded that statement on the LEA's recommendation form that the parents were to understand their children would be retained in kindergarten vitiated any notice provided by the information set forth in the form and also precluded any finding of substantial compliance.

In the present appeal, the unapproved agreement form of the Torrance Unified School District used for the two pupils was called "Agreement for Pupil to Continue in Kindergarten" and contained a statement that the parent had to "agree" to have his or her child continued in kindergarten for the 2006-2007 school year. In other words, the unapproved agreement form notified the parents that kindergarten continuation for their children was a matter of parental agreement and would be for only next school year. While the school district's form did not contain the Information for Parent or Guardian, the principal and teacher discussed the parents' rights and children's options at the March 2006 kindergarten retention conferences.

The facts in the Decision in the *Matter of the Fiscal Year 2003-2004 Audit Appeal by Union School District*, Case No. 05-11, OAH No. N2005040140 (September 12, 2005), most closely resemble those of the present appeal. The Union

School District used its own kindergarten retention form to continue nine students in kindergarten. The LEA contended that its personnel met with the children's parents and received their approvals to retain their children in kindergarten for an additional year. The LEA also contended that its retention form provided essentially all of the information contained in Parental Agreement approved by the Department of Education.

The EEAP disagreed, concluding, in part, that the Union School District did not substantially comply with the requirements of section 46300, subdivision (g), and 48011 by using its own kindergarten retention form. First, the EAAP found that the LEA did not "competently show" how it instituted meetings with parents to transmit required information and obtain consent of the parents for kindergarten continuation. Second, the LEA's form was very different from the Parental Agreement approved by the Department of Education. It did not contain the information for parent or guardian or inform the parents of their right to have their child promoted to first grade unless the parents reached an agreement with the school district. Third, the LEA's form required the parents to file an appeal with the school principal if they disagreed with the school district's decisions to retain their children in kindergarten. Such an appeal was and is not authorized by the Education Code. The Panel found that the LEA failed to follow statutory requirements by using a retention form which omitted essential and legally required information and language that would have notified parents of their rights to have their children promoted to first grade and to decide with the LEA whether to continue their children in kindergarten. The EAAP found that the LEA, in using a defective retention form of its own making, did not act in good faith to comply with the law and compared the LEA's efforts to "an ill-defined scheme for retention of students in kindergarten."

In the present appeal, the Torrance Unified School District provided competent and credible testimony from its school principal that she held kindergarten retention conferences with the parents in March 2006 during which she advised the parents not only about their children's academic progress and options but also their rights to be promoted to first grade and to agree to kindergarten continuation. In the two instances that the unapproved form was used to obtain the parents' agreement, the parents were not provided with any misinformation and the unapproved form used by the teacher did not contain any false or misleading information

In order to receive state apportionment funding for 2006-2007 for its average daily attendance of pupils in kindergarten who had already completed one school year in kindergarten, the school district was required to have on file for each of these continued pupils an agreement under section 48011 that was approved in form and content by the Department of Education and signed by the parents of the continued pupils. (§ 46300, subd. (g).) Compliance with this legal requirement to use and to have the parents sign the approved parental agreement was a condition for receiving state apportionment. (§ 41344.1, subd. (c).) Here, the preponderance of the evidence demonstrated that the school district substantially complied with this legal

requirement. As shown by the independent audit of six of its district's elementary schools, there were only two pupils from one class in one elementary school who were continued in kindergarten for 2006-2007 and whose parents did not sign the state-approved parental agreement. Ten other pupils from the same elementary school were likewise continued in kindergarten after their parents signed a state-approved parental agreement. In other words, the school district complied with the legal requirement to use the state-approved parental agreement in 10 out of 12 cases, or 83 percent. The audit found no exceptions in any other kindergarten class at that one elementary school or at any of the five other elementary schools that were the subject of the audit.

The evidence further showed that the school district acted in good faith to comply with the legal requirement to use the proper agreement form. The school district provided training to school administrators and teachers and had copies of the proper agreement form available for them to use at their school sites. The principal at the elementary school in question met individually with the parents, discussed the rights of the parents and their children, and used the proper agreement form for 10 of 12 children. There was no evidence that the school district tried to circumvent the law, abridged any statutory rights or requirements, or provided any false or misleading information to parents. The two instances of parents of two pupils signing the wrong kindergarten continuation form occurred towards the end of school year school and after the principal's conferences when an individual teacher found older or out-dated agreements in her own files. Under the circumstances, the failure to use the proper agreement form in these two instances was minor and inadvertent. No evidence was adduced that the school district or school principal had a practice of using any outdated or improper agreement forms or gave consent to the teacher to use these old forms.

Based on Findings 1 – 9 above, the school district thus demonstrated by the preponderance of the evidence that it substantially complied with the requirement to use the proper and legally-mandated kindergarten continuation agreement form and acted in good faith to comply with statutory or regulatory requirements. The school district's appeal will be granted. However, that the school district or principal failed to have the parents of the two kindergarteners sign the proper agreement form after discovering the use of the wrong form at the end of the school year is an aggravating factor that warrants a reduced apportionment disallowance rather than a full waiver.

* * * * *

Wherefore, the following Order is hereby made:

ORDER

The appeal of the Torrance Unified School District from Finding 2007-11 (Kindergarten Retention) of the Audit Report dated June 30, 2007, is granted, in part, based on Conclusions of Law 1 and 2 above, jointly and for all. The determination that appellant Torrance Unified School District be disallowed average daily attendance funding or questioned costs of \$10,775.45 shall be reduced by 50 percent to \$5,387.73. Appellant Torrance Unified School District shall pay or reimburse this reduced amount no later than sixty (60) days after the effective date of this Decision and Order.

Dated: July 8, 2010

Original Signed
Vincent Mafarrete
Administrative Law Judge
Office of Administrative Hearings