

**Education Audit Appeals Panel
State of California**

Appeal of 2005-06 Audit Finding 2006-10 by:

Perris Union High School District,

Appellant.

EAAP Case No. 07-19

OAH No. 2008010484

DECISION

On October 22, 2008, the Office of Administrative Hearings (OAH) issued a Proposed Decision in this matter. At its meeting on November 17, 2008, the Education Audit Appeals Panel (EAAP) rejected the Proposed Decision in order to decide the case itself under the provisions of Government Code Section 11517(c)(2)(E). EAAP issued a Notice of Rejection of Proposed Decision on November 19, 2008, inviting additional briefing by December 15, 2008, particularly with regard to substantial compliance in the context of the particular facts of this matter and the provisions of Education Code Section 47612.5(b); and Title 5, California Code of Regulations, sections 11963 and 11963.1. Additional briefs were received from Appellant Perris Union High School District and Intervenor Department of Finance.

FACTUAL FINDINGS

1. Vavrinek, Trine, Day & Co., LLP (VTD), conducted an annual financial and compliance audit of Perris Union High School District (District) for the fiscal year that ended June 30, 2006. Such audits are required by law. (Education Code §§ 41020, 47634.2(d).¹)

2. The District granted a petition in 1994 to establish Choice 2000 as a charter school within the District pursuant to the Charter Schools Act of 1992 (Part 26.8 of Division 4 or Title 2 of the Education Code, commencing with § 47600.)

3. The District timely appealed audit Finding 2006-10, which found that the District's Choice 2000 Online Charter High School (Choice 2000) did not maintain independent study contracts. Finding 2006-10 stated, in part,

This charter school is in effect a seat time program with contemporaneous attendance records and a regular course bell schedule. There are no independent study contracts maintained for the students enrolled in the program, however the charter does have an SB 740 funding determination thereby designating the charter as a non-classroom based charter. í Based upon the

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

California Department of Education determination, independent study regulations must be followed to account for attendance in a "non-classroom based" charter program, therefore all 189.83 ADA reported by the school for 2005/06 should be considered non-allowable for funding purposes.²

Correspondence from the State Controller's Office (SCO) to the VTD auditor stated the dollar value of the ADA (average daily attendance) as \$1.2 million.³

4. A hearing was held on May 27 and 28, 2008.⁴ The district did not contest the finding that it did not maintain independent study agreements for any of its pupils who generated ADA claimed through Choice 2000. At the hearing, the District presented various documents, the testimony of the VTD audit partner who was in charge of the District's fiscal year 2005-06 audit, and District administrative personnel regarding the operation of Choice 2000, including their attendance recordkeeping methods, and the communication process between teachers and students. The District contended that Choice 2000 was an on-line, "seat time" instructional program, and that it was therefore not subject to independent study requirements. The auditor testified that the requirement that pupils be "under the immediate supervision and control" of their teachers was satisfied, in his opinion, by the contact between the student in his or her home (or other location) and the remote teacher at the schoolsite (or other location).⁵

5. The District acknowledged that there are only two types of attendance that enable public schools to receive state funding, stating that one is "seat time" or classroom attendance, and the other is independent study.⁶ As stated in the audit finding, quoted above, the District submitted an "SB 740 funding determination request," without which the nonclassroom-based instruction provided by a charter school cannot be funded.⁷ Although the District's witnesses described a process of hourly attendance recordkeeping for reporting purposes, its claim for apportionment of state funds identified all of the Choice 2000 ADA as nonclassroom-based.⁸

6. Respondent SCO and Intervenor DOF argued that, as a nonclassroom-based charter school, Choice 2000 was subject to the conditions of apportionment prescribed in statute and regulation for independent study.

² Respondent's Ex. D, p. 4.

³ Appellant's Ex. 3, attachment.

⁴ The Reporter's Transcript, volume 1 for May 27, 2008, and volume 2, for May 28, 2008, will be designated as RT 1 and RT 2, respectively.

⁵ RT 1, at 27:23-28:20.

⁶ Appellant Perris Union High School District's Argument in Response to EAAP's Rejection of Proposed Decision (District's Argument in Response to Rejection of PD), 14:3-7.

⁷ § 47612.5(d)(1). (Stats. 2001, c. 892 (SB 740), § 2.5.)

⁸ Appellant's Ex. 11, "Attendance Charter School Block Grant - Working Copy," line A-9 reported total ADA as 189.83. Line A-10, which calls for the portion of total ADA this is Classroom-Based (pursuant to the provisions of § 47634.2(c)), is blank. Although the document entered into evidence by the District was called a "Working Copy," the District did not dispute that Choice 2000 provided nonclassroom-based instruction. (District's Argument in Response to Rejection of PD, 16:7.)

LEGAL CONCLUSIONS

1. Sections 41344(d) and 41344.1(b) provide the authority for this appeal. Section 41344(d) provides that a local educational agency (LEA) that appeals an audit finding may present evidence or argument at a hearing if the local educational agency believes that the finding 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.
2. Section 41344.1(c) provides:

Compliance with all legal requirements is a condition of the state's obligation to make apportionments. A condition may be deemed satisfied if the [Education Audit Appeals 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 that it acted in good faith to comply with the conditions established in law or regulation necessary for apportionment of funding. The [Education Audit Appeals Panel] may further define "substantial compliance" by issuing regulations or through adjudicative opinions, or both. í

EAAP has not further defined "substantial compliance" by regulation.

3. The District bears the burden of proof. (§ 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, p. 8; Evid. Code § 500.)

4. The District stated, without citation to authority, "The law provides for two types of attendance accounting procedures that enable public schools to receive State funding: (1) Regular seat time average daily attendance ("ADA"), where students receive instruction in a classroom environment, and (2) independent study, where ADA credit is not based on actual attendance, but on an estimated time value of work completed by the student."⁹ The District misstates the law.

Conditions of Apportionment – Classroom-Based Instruction

5. The laws that "enable public schools to receive State funding" do not provide "accounting procedures" but specify the conditions of apportionment ó the eligibility requirements ó that must be met. Traditionally, only the attendance of pupils who were

⁹ District's Argument in Response to Rejection of PD, 14:3-7.

engaged in assigned educational activities while in the presence of a properly credentialed public school agency employee could be included in the computation of ADA:

§ 46300(a) In computing average daily attendance of a school district or county office of education, there shall be included the attendance of pupils while engaged in educational activities required of those pupils and under the immediate supervision and control of an employee of the district or county office who possessed a valid certification document, registered as required by law.

The requirement in Section 46300(a) that pupils be “engaged in educational activities required of those pupils and under the immediate supervision and control of [a properly certificated] employee” was added to the Education Code in 1951.¹⁰

The same phrase was used fifty years later in specifying conditions of apportionment for “classroom-based instruction” in charter schools.¹¹ The attendance that may be included in the computation of ADA for “classroom-based instruction” in charter schools is spelled out in Section 47612.5(e), subparagraphs (1) and (3):

§ 47612.5(e)(1) Notwithstanding any other provision of law, and as a condition of apportionment, “classroom-based instruction” in a charter school, for the purposes of this part, occurs only when charter school pupils are engaged in educational activities required of those pupils and are under the immediate supervision and control of an employee of the charter school who possesses a valid teaching certification in accordance with subdivision (l) of Section 47605. For purposes of calculating average daily attendance for classroom-based instruction apportionments, at least 80 percent of the instructional time offered by the charter school shall be at the schoolsite, and the charter school shall require the attendance of all pupils for whom a classroom-based apportionment is claimed at the schoolsite for at least 80 percent of the minimum instructional time required to be offered pursuant to paragraph (1) of subdivision (a) of Section 47612.5.

...

(3) For purposes of this part, a schoolsite is a facility that is used principally for classroom instruction.

6. Section 51745 provides that the governing board of a school district or a county office of education may offer independent study. Despite the requirement of Section 46300(a) that pupils be “under the immediate supervision and control” of their teachers, apportionment credit may be claimed when the independent study of the pupil is under *general supervision*:

¹⁰ Educ. Code 1943, § 6904, Stats. 1951, c. 228, p. 487, § 7.

¹¹ Stats. 2001, c. 892 (SB 740), § 2.5.

§ 51747.5(a) The independent study by each pupil or student shall be coordinated, evaluated, and, notwithstanding subdivision (a) of Section 46300, shall be under the general supervision of an employee of the school district or county office of education who possesses a valid certification document pursuant to Section 44865 or an emergency credential pursuant to Section 44300, registered as required by law.

(b) School districts and county offices of education may claim apportionment credit for independent study only to the extent of the time value of pupil or student work products, as personally judged in each instance by a certificated teacher.

Title 5, California Code of Regulations, Section 11700(c)¹² defines “independent study” as “an alternative to classroom instruction consistent with the district’s course of study.”¹³ Charter schools that offer independent study were made subject to laws and regulations governing independent study by Section 47612.5(b).

7. The provision in Section 47612.5(e)(1) that classroom-based instruction “occurs only when charter school pupils are engaged in educational activities required of those pupils and are under the immediate supervision and control of an employee of the charter school” is when considered in light of the history of the phrase as it originated in Section 46300(a), and when compared to the provision of independent study law, applicable to both regular public schools and to charter schools, that “independent study by each pupil or student shall be coordinated, evaluated, and, notwithstanding subdivision (a) of Section 46300, shall be under the general supervision of a certificated employee” (§ 51747.5(a)) can mean only that the pupils must be in the physical presence of their teachers to satisfy the conditions of apportionment for “classroom-based instruction” in a charter school.

This understanding of the conditions set out in the first sentence of Section 47612.5(e)(1) is reinforced by the further provisions of that section “[f]or the purposes of calculating average daily attendance for classroom-based instruction apportionments,” that at least 80 percent of the instructional time offered by the charter school must be at the schoolsite, and that pupils for whom classroom-based apportionment is claimed be required to attend at the schoolsite for at least 80 percent of the minimum instructional time required by law. Further, “schoolsite” is defined in subparagraph (3) of that same section as “a facility that is used principally for classroom instruction.”

SBE further clarified the meaning of “at the schoolsite” for purposes of identifying the portion of ADA that is nonclassroom-based and thus would not be funded unless the charter school obtained a funding determination as required by Section 47612.5(d)(1). Title 5, Section 11963 provides

(b) The requirement to be “at the schoolsite” is satisfied if either of the following conditions is met.

¹² All references to Title 5 are to the California Code of Regulations.

¹³ In this regard, the District correctly stated “independent study, where ADA credit is not based on *actual attendance*.” See District’s Argument in Response to Rejection of PD, 14:5-6, emphasis added.

- (1) The facility in which the pupils receive instruction is:
 - (A) Owned, rented, or leased by the charter school principally for classroom instruction;
 - (B) Provided to the charter school by a school district pursuant to Education Code section 47614 principally for classroom instruction; or
 - (C) Provided to the charter school free-of-charge principally for classroom instruction pursuant to a written agreement.

When not being used by the charter school for classroom instruction, the facility may be rented, leased, or allowed to be used for other purposes (e.g., for evening adult classes not offered by the charter school, local theater productions, or community meetings) and still be deemed to be principally for classroom instruction.

- (2) The charter school facility meets the criteria in paragraph (1) of subdivision (b) and the pupils are on a field trip during which *the pupils remain under the immediate supervision and control of the employee of the charter school and are carrying out an educational activity required of the pupils.* (Emphasis added.)

This use of the phrase “under the immediate supervision and control of the employee of the charter school” is again consistent with the understanding that “under the immediate supervision and control” means the physical presence of the properly credentialed charter school employee with the pupils.

8. The District contended that Choice 2000 was a “seat time” program and not subject to independent study requirements. The term “seat time” is not used in any statute authorizing apportionment of funds for ADA. The District’s description of the on-line instruction offered through Choice 2000 made clear that Choice 2000 did not meet the requirements specified in law for apportionment for classroom-based instruction. Preparing attendance documentation as if the program met the requirement of “under the immediate supervision and control” of properly certificated employees of the charter school does not satisfy the conditions of apportionment for classroom-based instruction set out in Section 47612.5(e), subparagraphs (1) and (3).

9. The District did not evidence nearly complete satisfaction of the material requirements for apportionment of funding as classroom-based instruction set out in Section 47612.5(e), subparagraphs (1) and (3)). The District did not demonstrate that its failure to comply with the requirements for apportionment of funding for Choice 2000 as classroom-based instruction was minor or inadvertent, as the District made clear that the program was purposely structured and operated as an on-line program with teachers and pupils in locations remote from each other, and not as a schoolsite program.

Conditions of Apportionment – Nonclassroom-Based Instruction

10. “Non-classroom-based instruction” is defined in Section 47612.5(e)(2):

For the purposes of this part, “nonclassroom instruction” or “nonclassroom-based instruction” means instruction that does not meet the requirements

specified in paragraph (1). The State Board of Education may adopt regulations pursuant to paragraph (1) of subdivision (d) specifying other conditions or limitations on what constitutes nonclassroom-based instruction, as it deems appropriate and consistent with this part.

Section 47612.5(d)(1) provides that SBE shall adopt regulations that

define and establish general rules governing nonclassroom-based instruction that apply to all charter schools and to the process for determining funding for nonclassroom-based instruction other than the nonclassroom-based instruction allowed by paragraph (1) of subdivision (e). Nonclassroom-based instruction includes, but is not limited to, independent study, home study, work study, and distance and computer-based education. í

Section 47612.5(b) requires compliance with independent study law:

(b) Notwithstanding any other provision of law and except to the extent inconsistent with this section and Section 47634.2, a charter school that provides independent study shall comply with Article 5.5 (commencing with Section 51745) of Chapter 5 of Part 28 and implementing regulations adopted thereunder. The State Board of Education shall adopt regulations that apply this article to charter schools. To the extent that these regulations concern the qualifications of instructional personnel, the State Board of Education shall be guided by subdivision (l) of Section 47605.

Pursuant to the authority in Section 47612.5 and its general rulemaking authority in Section 33031, the State Board of Education adopted Title 5, Section 11963.1:

This article does not change the requirement that nonclassroom-based instruction in charter schools comply with the provisions of Article 5.5 (commencing with Section 51745) of Chapter 5 of Part 28 of the Education Code.

SBE explained in its Initial Statement of Reasons in adopting Title 5, Section 11963.1:

This section clarifies that the introduction (in statute) of a new name for instruction that is carried on outside of the classroom setting (i.e., nonclassroom-based instruction) does not change the fact that all such nonclassroom-based instruction is subject to the requirements of Article 5.5 (commencing with Section 51745) of Chapter 4 of Part 28 of the Education Code (i.e., the laws governing independent study). This is consistent with the provisions of Education Code Section 51747.3 which (notwithstanding any other provision of law) state, in effect, that independent study requirements pertain no matter how independent study may be characterized.¹⁴

¹⁴ Appellant's Ex.37, Request for Judicial Notice, attached Exhibit B, third page.

11. The conditions of apportionment that apply to nonclassroom-based instruction in charter schools are those spelled out in Section 51745 and following. In addition to the provisions of Section 51747.5 discussed above, the claim of apportionment for ADA generated by pupils while engaged in independent study is subject to a number of other conditions: a limitation on the number of ADA that may be claimed for funding according to the prescribed pupil-teacher ratio (§ 51745.6); required adoption of certain written policies including the requirement of a written agreement with each student that includes certain prescribed elements (§ 51747); restrictions on apportionments related to the provision of funds or things of value to pupils engaged in independent study or their parents, and restrictions related to residency (§ 51747.3); and that the pupil be identified in the written records of the district, county office, or charter school by grade level, program placement, and school (§ 51748). Regulations adopted by the Superintendent of Public Instruction pursuant to Section 51749.3, and by the State Board of Education pursuant to Section 47612.5(b), implement and clarify these requirements. (Title 5, § 11700 and following.) Charter schools that offer independent study are also subject to the “daily engagement” rule of Title 5, Section 11960.¹⁵

12. Specifically relevant to Finding 2006-10, Section 51747 provides

A school district or county office of education shall not be eligible to receive apportionments for independent study by pupils, regardless of age, unless it has adopted written policies, and has implemented those policies, pursuant to rules and regulations adopted by the Superintendent of Public Instruction, that include, but are not limited to, all of the following:

í

(c) A requirement that a current written agreement for each independent study pupil shall be maintained on file including, but not limited to, all of the following: í [subparagraphs (1) through (8) specify the required elements]. (Emphasis added.)

13. The District does not dispute that it did not maintain a current written agreement for each pupil in Choice 2000. Despite assertions that Choice 2000 was not subject to independent study law, the District claimed, indirectly, to have complied with two independent study requirements: the “contiguous county rule” (§ 51747.3(b); see RT 1, 170:5-10 where the superintendent testified regarding the impact of that law on Choice 2000); and the pupil-teacher ratio limitation (§ 51745.6 and Title 5, § 11704; see District’s Reply Brief (marked as Ex. 39), footnote 3 at page 6 where the District asserted that the provisions of Title 5, Section 11963.5 did not affect Choice 2000 because it met the pupil-teacher ratio requirement). The District did not comply with all of the conditions of apportionment applicable to Choice 2000.

14. The District did not evidence nearly complete satisfaction of the material requirements specified in law for apportionment of funds for nonclassroom-based instruction.

¹⁵ The District contended that this regulation is the basis for funding regular ADA for charter schools. (District’s Argument in Response to Rejection of PD, 14:12-16.) However, the District also submitted in evidence correspondence from the California Department of Education to Charter School Administrators and Authorizers that explained that both the “daily engagement” rule of Title 5, Section 11960 and the time value judgments required by Section 51747.5(b) apply to charter school independent study. (Appellant’s Ex. 37, Request for Judicial Notice, attached Exhibit D, dated December 4, 2004.)

The District did not demonstrate that it acted in good faith to comply with the conditions established in law necessary for apportionment of funding; its noncompliance cannot be adjudged minor or inadvertent. The District made clear that the requirements of independent study law and regulation were deemed by the District not to apply to Choice 2000.

SB 740 Funding Determination

15. Senate Bill 740 was enacted in 2001. (Stats. 2001, c. 892.) Relevant here, SB 740 amended Section 47612.5 and added Section 47634.2, establishing a process for adjusting charter school funding. To be eligible to receive funding for nonclassroom-based instruction, charter schools must submit a funding determination request and receive approval from the State Board of Education (SBE). (§ 47612.5(d)(1), Title 5, §11963.2.) The request, commonly referred to as an “SB 740 funding determination,” requires the submission of various revenue and expenditure information and other data. (Title 5, § 11963.3.) Based on ratios determined from certain revenues and expenditures, and consideration of other information, the Advisory Commission on Charter Schools makes a recommendation to SBE to approve funding at a certain percentage level or to deny the request. (§§ 47612.5, 47634.2, and §§ 11963 and following.)

The percentage adjustment is applicable to funding allocated on the basis of ADA

that is generated by pupils engaged in nonclassroom-based instruction, as defined by paragraph (2) of subdivision (d) of Section 47612.5,¹⁶ including funding provided on the basis of average daily attendance pursuant to Sections 47613.1, 47633, 47634, and 47664. (§ 47634.2(a)(1).)

Sections 47613.1, 47633, 47634 (now repealed), and 47664 do not provide a basis for *generating* ADA, nor do they prescribe attendance accounting methods. These sections prescribe funding methodologies: revenue limit, or block grant (also called “general purpose entitlement”).

16. In 2003, SBE promulgated regulations pursuant to its rulemaking authority in sections 33031, 47612.5 and 47634.2. These regulations implemented the SB 740 funding determination process for adjustment of funding levels, and included clarification of two new terms introduced in SB 740 – “classroom-based” and “nonclassroom-based instruction” (discussed above).¹⁷

The Audit Guide

17. Section 47634.2(d) provides “charter schools shall be subject with regard to subdivisions (c) and (d) of Section 47612.5 and this section, to audits conducted pursuant to

¹⁶ SB 740 incorporated amendments to § 47612.5 as proposed by SB 740 and SB 955. (Stats. 2001, c. 892, § 8.) The definition of “nonclassroom-based instruction” is found in § 47612.5(e)(2).

¹⁷ Title 5, §§ 11963, 11963.1, 11963.2, 11963.3, 11963.4, 11963.5, 11963.6. These regulations were amended in 2005, with, among other changes, the addition of a new § 11963.5 to address funding determination requests for nonclassroom-based virtual or on-line charter schools, and the renumbering of former §§ 11963.5 and 11963.6 to §§ 11963.6 and 11963.7.

Section 41020.ö EAAP included these charter school provisions in the 2005-06 annual Audit Guide adopted as regulation by EAAP pursuant to Section 14502.1. The Audit Guide ö *Standards and Procedures for Audits of California K-12 Local Educational Agencies*, Title 5, §§ 19810 ö 19854 ö provides direction to accountants in the auditing of compliance with state statutory or regulatory requirements; it does not create substantive program requirements.

Title 5, Section 19851¹⁸ was added by emergency regulation effective May 6, 2005, and was applicable to fiscal year 2005-06 audits. (Title 5, § 19816.1(c).). The 2005-06 Audit Guide was finalized with only minor, nonsubstantive changes from the emergency regulations, effective October 11, 2005. Supplemental regulations, to address changes made in conditions of apportionment during the 2005-06 fiscal year, were adopted as emergency regulations in February 2006, and were finalized June 9, 2006. Contrary to the arguments of the District that Title 5, Section 19851, of the Audit Guide created substantive law, that section directed auditors to review ADA reported to the California Department of Education öas generated through nonclassroom-based instruction (independent study), [and] perform the following proceduresí .ö Consistent with sections 47612.5 and 51745 and following, and Title 5, sections 11700 and following and 11963.1, the procedures that followed required auditors to determine whether charter schools had complied with the many elements of independent study law that are conditions of apportionment, including the requirement to maintain a written agreement for each pupil containing all of the elements required by Section 51747(c). Finally, the auditor was directed, if any noncompliance were identified, to öInclude a statement in the Findings and Recommendations section of the audit report of the number of units of Average Daily Attendance that were inappropriately reported for apportionment and an estimate of their dollar value.ö

18. The District contends that SCO and CDE are in error in rejecting the professional judgment¹⁹ of the VTD auditor who conducted the District's 2005-06 audit.²⁰ Audits of K-12 LEAs are required to be conducted pursuant to the Audit Guide, which consists of duly adopted regulations. (§§ 14502.1, 14503(a), 41020(g)(1), 47634.2(d); Gov. Code § 11343.6.) Title 5, Section 19814 of the Audit Guide does not authorize the auditor to make a choice of law, but a choice of audit *procedures*.²¹

19. There are only two choices for funding charter school ADA: one is öclassroom-based instructionö and the other is önonclassroom-based instruction.ö As a matter of law,

¹⁸ Renumbered in the 2006-07 Audit Guide to Title 5, Section 19852, effective March 1, 2007.

¹⁹ The concept of auditors' professional judgment with application to government audits is addressed in *Government Auditing Standards*. Title 5, § 19816(a) provides, ö-Government Auditing Standardsö means the publication by the Comptroller General of the United States, United States General Accounting Office, originally issued in 1972 and revised from time to time, commonly known as the -Yellow Book,øthat contains standards for audits of government organizations, programs, activities, and functions and that is referenced in Education Code sections 14501, 14503, and 41020(b)(4).ö

²⁰ District's Argument in Response to Rejection of PD, 21:13 ö 22:15. The auditor testified regarding the rejection by SCO of the initial audit report. (RT 1, 36:23 to 38:12.) Appellant's Ex. 3, SCO February 7, 2007, letter to the auditor.

²¹ Title 5, § 19814 instructs the auditor: öFor each state compliance requirement, the auditor shall follow the procedures included in this audit guide, unless, in the exercise of his or her professional judgment, the auditor determines other *procedures* are more appropriate in particular circumstances.ö (Emphasis added.)

ADA generated through nonclassroom-based instruction in charter schools is subject to the law governing independent study.

20. Accordingly, the appeal of the District is denied based on the Factual Findings 1-6 and Legal Conclusions 1-19, set out here.

ORDER

WHEREFORE, THE FOLLOWING ORDER is hereby made:

The appeal of Perris Union High School District of the fiscal year 2005-06 audit finding 2006-10 is denied, effective 2-4-2009.

Date: 2-4-2009

Original Signed
Diana L. Ducay, Chairperson
for Education Audit Appeals Panel