

Final Statement of Reasons 2009-2010 Audit Guide

Sections 19815, 19816, 19816.1, 19828.3, 19828.4, 19837.2, 19837.3, 19839, 19845.1, 19845.2 and 19846

The Initial Statement of Reasons is included in the file. The information contained therein is supplemented as set forth below.

At the June 8, 2009, meeting of the Education Audit Appeals Panel (EAAP), the Panel considered regulations to update the audit guide for K-12 local education agency (LEA) audits for the 2009-10 fiscal year. The Panel adopted emergency regulations and authorized staff to begin the regular rulemaking process for the eventual adoption of the same text as permanent regulations. The emergency regulations took effect on filing with the Secretary of State on June 29, 2009.

On July 9, 2009, nonsubstantive amendments to Section 19816 were submitted to the Office of Administrative Law, which were approved and filed with the Secretary of State on August 20, 2009. Subparagraph (e) had been amended in the emergency regulations effective with the 2009-10 audit guide to conform the language used in the report on internal control to current audit standards. The nonsubstantive amendments reinstated the former subparagraph (e) with the addition of language indicating its applicability to fiscal years 2003-04 through 2008-09; relettered the amended subparagraph (e) to (f), and added language indicating its applicability to fiscal year 2009-10 and following; and relettered the remaining subparagraphs of Section 19816 from (f) through (n) to (g) through (o).

The Notice of Proposed Rulemaking for the permanent regulations was published in the California Notice Register on June 19, 2009. No public hearing was held. Seven written comments were received.

At the August 24, 2009, EAAP meeting, the Panel considered the public comments and adopted final audit guide regulations for fiscal year 2009-10. The Panel decided not to complete the Certification of Compliance for new sections 19821.5 and 19825.1, and for subparagraphs (d) and (e) of Section 19828.4. Therefore, the text of the permanent regulations does not include these provisions (or the reference to these provisions that had been included in §§ 19816(g)(7) and 19816.1(a)(7)), and these provisions will expire by operation of law on December 29, 2009.

Technical, Theoretical, or Empirical Studies, Reports, or Documents.

EAAP did not rely on any technical, theoretical, or empirical studies, reports, or documents in proposing the adoption of these regulations.

Request That Regulations Become Effective Upon Filing

EAAP requests that the regulations in the current rulemaking file become effective upon filing. Education Code Section 14502.1 requires EAAP to adopt audit guide regulations pursuant to the rulemaking procedures of the Administrative Procedure Act by July 1 of the fiscal year to be audited. These regulations will replace the emergency audit guide regulations that became effective June 29, 2009. Together with the remainder of Chapter 3, Division 1.5, of Title 5 of

the California Code of Regulations, these regulations constitute the audit guide for the audit of the current fiscal year.

Alternatives Determination

The Education Audit Appeals Panel has determined that no alternative would be more effective in carrying out the purpose for which these regulations are proposed or would be as effective and less burdensome than the proposed regulations.

Local Mandate Determination

The proposed regulations do not impose any mandate on local agencies or school districts.

Response to Comments Received During the Public Notice Period: June 19, 2009, to August 3, 2009

Seven written comments were received:

Diane Lacombe, Director, External Business Services, El Dorado County Office of Education

Scott Hannan, Director, School Fiscal Services Division, California Department of Education

Brooks M. Allen, Catherine E. Lhamon, ACLU Foundation of Southern California; John T. Affeldt and Tara Kini, Public Advocates, Inc.

Richard L. Hamilton, Acting General Counsel and Director, California School Boards Association, and Education Legal Alliance

Thomas Todd, Department of Finance

John T. Affeldt, Managing Attorney, Public Advocates

Jim Thomas, Deputy Superintendent, Business Services, San Joaquin County Office of Education

No one commented on the proposed changes in sections 19815, 19816, 19816.1, 19828.3, 19837.2, 19845.1, and 19846, or on the proposed changes in successor sections 19837.3 and 19845.2.

Comments addressed to more than one section (proposed §§ 19821.5, 19825.1, 19828.4):

Mr. Hannan referred to the State Controller's Office meetings held pursuant to Education Code Section 14502.1 with representatives of the specified agencies and organizations (informally called the Audit Committee), which resulted in submission of suggested audit proposals for the 2009-10 audit guide, and to the flexibility provisions created by Senate Bill 4 of the 2009-10 Third Extraordinary Session (SBX3 4, Chapter 12, Statutes 2009). He stated that his

comments are “related to the ambiguity that has resulted from the flexibility provisions in SBX3 4.” His letter specifically addressed sections 19821.5, 19825.1, and 19828.4. (Hannan letter, page 1, second paragraph.) Mr. Hannan asked that these three sections not be included in the 2009-10 audit guide. His comments as to each proposed regulation are addressed below.

Mr. Hamilton submitted comments on behalf of the California School Boards Association and its Education Legal Alliance, the California Association for School Business Officials, the California County Superintendents Educational Services Association (CCSESA, specifically its Business and Administration Steering Committee [BASC]), and the California Society of Certified Public Accountants, “as well as others representing local educational agencies who are involved in audit issues on a statewide basis and participate with these organizations in the Audit Clearinghouse Task Force.” (Hamilton letter, page 1, first paragraph.) Mr. Hamilton adopted Mr. Hannan's comments regarding sections 19821.5, 19825.1, and 19828.4. (Hamilton letter, page 2, first paragraph.) His additional comments regarding Section 19828.4 are addressed separately, below.

Mr. Thomas stated that his comment was submitted on behalf of CCSESA's BASC. He expressed concurrence with Mr. Hannan's comments, and stated that “county office CBO's continue to express confusion over the interpretation of the statutory changes” related to the CalWORKs, Community Day Schools, and Instructional Materials programs” (sections 19821.5, 19825.1, 19828.4). He stated that it would “create a great deal of additional confusion and expended resources if these provisions are included in the Audit Guide prior to all parties having an opportunity to work together to obtain clarification and common understanding of the requirements.” (Thomas email.)

Comments on specific sections of the proposed regulations:

§ 19821.5. California Work Opportunity and Responsibility to Kids (CalWORKs).

Comments: Mr. Hannan stated that there is a conflict between the flexibility provided to the Regional Occupational Centers and Programs (ROC/P) and the Adult Education program and the exceptions for CalWORKs. He stated that this “has created problems in determining the appropriate funding process. CDE has yet to determine the mechanism to fund CalWORKs ADA [Average Daily Attendance] and the necessary corresponding statutory language.” (Hannan letter, page 1, third paragraph.) Mr. Hannan also stated that “proposed Section 19821.5 currently has no clear statutory authority.” Additionally, Mr. Hannan stated that both CalWORKs ROC/P and CalWORKs Adult Education are smaller than the size of program typically recommended for inclusion in the audit guide. (Hannan letter, page 1, fourth paragraph.)

Mr. Todd stated his understanding that ADA for both ROC/P and Adult Education “will no longer be collected as both of these programs are included in the flexibility provisions of the 2009-10 budget trailer bill [SBX3 4]. Without the collection of ADA, we do not see an auditable basis for verifying each LEA's maintenance of effort related to reimbursement funding (not subject to flexibility).” Mr. Todd further stated, “As a result, we believe it would be appropriate to delete this section from the proposed Audit Guide.” (Todd email, third paragraph.)

EAAP Response: EAAP will remove the audit procedures for CalWORKS from the 2009-10 audit guide. At the time the text of the regulation was drafted, representatives of the California Department of Education had indicated that decisions critical to determining procedures would not be made until July. Because of the statutory requirement that the audit guide be in place by July 1 of the fiscal year to be audited (Educ. Code § 14502.1(b)), the program was included in the emergency regulations and the proposed permanent regulations. This same language was part of the emergency regulations for the 2009-10 audit guide, and became effective June 29, 2009.¹ The existing Title 5 Section 19821.5 will not be certified and will expire by operation of law on December 29, 2009.

Section 19825.1. Community Day Schools

Comments: Mr. Hannan stated that “it appears that a minimum day of 360 minutes may not be required for non-mandatorily expelled students” who attend community day schools because Education Code Section 42605(d) states that local education agencies that use the flexibility provisions [to use the enumerated funds for any educational purpose] will be deemed to be in compliance with the program and funding requirements in statutory, regulatory and provisional language. Mr. Hannan stated that, for community day schools, the flexibility applies only to the funding source for non-mandatorily expelled students, and from this it appears that the 360-minute minimum day may not apply to non-mandatorily expelled students. Mr. Hannan also noted that CDE's legal office is reviewing the issue, that there is “widespread belief among local education agencies that the minimum 360 minute day is no longer required,” and that until there is greater clarity, it would be better not to include subparagraphs (a) through (d) in Section 19825.1. (Hannan letter, page 2, first paragraph.)

EAAP Response: EAAP will remove the audit procedures for community day schools from the 2009-10 audit guide. Subdivision (a) of Education Code Section 42605 provides that the funding received from, among others, Budget Act Item 6110-190-0001 (for local assistance for community day schools) may be used for any educational purpose, and subdivision (d) further provides that local education agencies that use this flexibility provision “shall be deemed to be in compliance with the program and funding requirements contained in statutory, regulatory, and provisional language, *associated with the items enumerated.*” (Emphasis added.)² Education Code Section 48663(a) provides “The minimum schoolday in a community day school is 360 minutes of classroom instruction provided by a certificated employee of the

¹ The statutory authority for Section 19821.5 is in Education Code Section 42605, subdivision (e): “Notwithstanding subdivision (d), the following requirements shall continue to apply: (1) For Items 6110-105-0001 [ROC/P] and 6110-156-0001 [Adult Education], the amount authorized for flexibility shall exclude the funding provided for instruction of CalWORKs eligible students pursuant to schedules (2) and (3), and provisions 2 and 4.”

² The enumerated community day school budget item provides the additional funds for the purposes specified in Education Code Section 48664, subdivision (a) (“In addition to funds from all other sources,” an amount for actual attendance during the 5th and 6th hours by any community day school pupil other than those who were mandatorily expelled), subdivision (c) (an amount for up to two hours daily “following completion of the full six-hour instructional day” [7th and 8th hours] for those pupils who remain under the supervision of an LEA employee), and subdivision (d) (amounts allocated pursuant to a waiver of the funding limitations set forth in Educ. Code § 48664 – this provision is not addressed in the audit guide). (Educ. Code § 48664(f).) These budget act funds will be paid, for the 2008–09 fiscal year to the 2012–13 fiscal year, inclusive, based on “the same relative proportion that the local educational agency received in the 2007-08 fiscal year.” (Educ. Code § 42605(b)(4), effective July 28, 2009 (ABX4 2, Chapter 2, Statutes of 2009).) During those five fiscal years then, LEAs will not be required to submit claims for these *additional* community day school funds, and will be deemed in compliance with the requirements associated with the provisions funded by Budget Act Item 6110-190-0001.

district reporting the attendance of the pupils for apportionment funding.” The apportionment funding for regular average daily attendance by all community day school pupils (as well as the funding for actual attendance in the 5th and 6th hours by mandatorily expelled pupils) is not from the enumerated budget act item. From this, it would appear that the 360-minute minimum schoolday requirement for community day schools is not affected by the flexibility provisions of Education Section 42605. Given that the matter has not yet been clarified by CDE, the existing Title 5 Section 19825.1, included in the emergency regulations for the 2009-10 audit guide effective June 29, 2009, will not be certified, and will expire by operation of law on December 29, 2009.

Section 19828.4. [subparagraphs (d) and (e)] Instructional Materials

Comments: Ms. Lacombe stated her understanding of the new provisions (which are in subparagraphs (d) and (e) of successor § 19828.4) that “if a district purchases instructional materials with any of the funds made flexible by SBX3 4 (which is a larger amount than only the IMFRP amount), they may only be instructional materials on the approved list adopted by the State Board/standards aligned as described in the regulation. Furthermore, if any of the funds made flexible by SBX3 4 are used to purchase instructional materials that are not on the approved list, the amount spent will be disallowed....” (Lacombe email, second paragraph.) She then stated “...it seems to me like an unintended consequence that may need to be addressed. Additionally, there are some technical issues surrounding how it could even be determined that a district purchased unapproved instructional materials from these funds given that the funding and subsequent expenditures are no longer tracked by account code.” (Lacombe email, fourth paragraph.)

Mr. Hannan stated that districts could use general funds or other funds to purchase instructional materials, and that an audit finding could be prevented or resolved by shifting expenditures to another valid funding source. He further stated that auditing of instructional materials expenditures was omitted from the 2008-09 audit guide “due to the flexibility provisions” and asked that it be omitted from the 2009-10 audit guide. (Hannan letter, page 2, third and fourth paragraphs.)

Mr. Hamilton agreed with Mr. Hannan's comments. He further stated that leaving this provision in the audit guide for 2009-10 would be a costly procedure for districts when a resulting finding could be easily voided by a journal entry.

Mr. Todd acknowledged that he was aware of the concerns expressed by several interested parties regarding the potential effectiveness of the audit procedure, and stated that “these steps do provide a means for verifying an important underlying policy goal regarding the sufficiency of approved materials. Although the trailer bill [SBX3 4] does provide important budgeting flexibility, it also requires that the sufficiency requirements delineated in Section 60119 of the Education Code are adhered to. To ensure this objective, we believe it is essential for these proposed audit steps to be adopted.” (Todd email, numbered paragraph 2.)

EAAP Response: EAAP will remove the audit procedures for “Purchase of Instructional Materials” (subparagraphs (d) and (e) of new Section 19828.4) from the 2009-10 audit guide. All of the commenters expressed concern that the flexibility provisions and the exception made with regard to purchasing instructional materials has lead to confusion, which has not yet been

clarified. Subparagraphs (d) and (e) of existing Title 5 Section 19828.4, included in the emergency regulations for the 2009-10 audit guide effective June 29, 2009, will not be certified, and will expire by operation of law on December 29, 2009.

Section 19839. Public Hearing Requirement – Receipt of Funds

Comments: Mr. Affeldt cited Education Code Section 42605(e)(4)(A) as enacted in February 2009 in SBX3 4 and compared it to language in the Section 42605 as amended by ABX4 2 (effective July 28, 2009). Mr. Affeldt noted that the proposed language for this new audit guide section “includes no language requiring the governing board to approve *each* transfer and proposed use of funding from each of the 39 categorical programs enumerated in Section 42605. Instead, it permits a governing board to approve or disapprove the entire amount in a single step, treating the 39 programs as a single entity.”

EAAP Response: No change has been made. EAAP notes that the requirement of Education Code Section 42605(e)(4)(A) regarding approval of fund transfers was repealed July 28, 2009 (Stats. 2009, Ch. 2 (ABX4 2), Sec. 15). The statute requires discussion, and approval or disapproval of the “proposed use” of funding, which is reflected in the regulation. The July 28, 2009, amendments to Education Code Section 42605(c) modified subdivision (2) by adding the phrase “and make explicit for each of the budget items in paragraph (2) of subdivision (a) the purposes for which the funds will be used.” The term “make explicit” as compared to the discussion and approval of the “proposed use” is not defined in the statute and is subject to interpretation in each instance. No further audit guidance will be given at this time.

Comment unrelated to the proposed regulatory changes:

One comment received during the comment period was addressed to a part of a successor regulation, subparagraph (a) of Section 19837.3, which contains no proposed changes. This subparagraph was adopted as part of the supplement to the 2004-05 audit guide regulations (proposed February 10, 2005) and has not been modified since. As stated in the Initial Statement of Reasons for the present proposed rulemaking, only subparagraphs (b) and (c) contain proposed changes – those changes were to specify the name of the document used to evaluate school facilities, and to update cross references to another regulation, respectively.

The comment directed to subparagraph (a) of Section 19837.3 suggests an amendment that would modify the procedures for verifying the accuracy of data regarding teacher misassignments and the numbers of vacant teacher positions. The suggested amendment does not meet the requirement of Government Code Section 11346.8(c)(2) that changes be “sufficiently related to the original text that the public was adequately placed on notice that the change could result from the originally proposed regulatory action.”³

³ Government Code Section 11346.8(c) provides “No state agency may adopt, amend, or repeal a regulation which has been changed from that which was originally made available to the public pursuant to Section 11346.5, unless the change is (1) nonsubstantial or solely grammatical in nature, or (2) sufficiently related to the original text that the public was adequately placed on notice that the change could result from the originally proposed regulatory action. If a sufficiently related change is made, the full text of the resulting adoption, amendment, or repeal, with the change clearly indicated, shall be made available to the public for at least 15 days before the agency adopts, amends, or repeals the resulting regulation. Any written comments received regarding the change must be responded to in the final statement of reasons required by Section 11346.9.”