

**Education Audit Appeals Panel  
State of California**

Appeal of Fiscal Year 2003-04 Audit Finding  
Regarding Pupil-Teacher Ratio, in the Report  
of the Audit dated February 15, 2007, by:

California Virtual Academy at Kern,  
Appellant.

EAAP Case No. 07-03

OAH No. L2007060145

**CORRECTED DECISION AS TO APPELLANT’S MOTIONS TO DISMISS**

On December 1, 2008, the Office of Administrative Hearings (OAH) issued a Proposed Decision Based on Appellant’s Supplemental Motion to Dismiss in this matter, thus bifurcating the challenge to jurisdiction from the merits of the appeal. At its meeting on December 15, 2008, the Education Audit Appeals Panel (EAAP) rejected that Proposed Decision in order to decide the matter itself under the provisions of Government Code Section 11517(c)(2)(E). EAAP issued a Notice of Rejection of Proposed Decision on December 18, 2008, inviting additional briefing by January 21, 2009, on any matters the parties believe should be argued but particularly with regard to consideration of the ambiguity of the term “local educational agency” as used in Education Code<sup>1</sup> Section 41344. Additional briefs were received from Appellant California Virtual Academy at Kern (CAVA), and Intervenor Department of Finance.

**FINDINGS OF FACT**

1. Appellant is a California charter school, chartered in 2002 pursuant to the Charter Schools Act of 1992. (Part 26.8 of Division 4 of Title 2 of the Education Code, commencing with § 47600.)
2. In 2006, pursuant to Section 1241.5(c), the Kern County Superintendent of Schools contracted with MGT of America, Inc. (MGT) to perform an audit of Appellant’s 2003-2004 full time equivalent teacher and pupil-to-teacher ratio calculations.
3. On January 26, 2007, Appellant received MGT’s draft report. Appellant submitted its response to the draft report on February 2, 2007.
4. On February 15, 2007, MGT issued its audit report.<sup>2</sup> According to the “Audit

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<sup>1</sup> All statutory references are to the Education Code, unless otherwise specified.

<sup>2</sup> The Report of the Audit of The California Virtual Academy at Kern County (“MGT audit report”) was filed in this matter as an attachment to CAVA’s appeal letter (faxed on April 13, 2007, without the attachment and followed with the original letter with the attachment).

Results” section, “...CAVA's pupil-to-teacher ratio in 2003-04 exceeded the state required threshold, as represented by the prior year pupil-to-teacher ratio of LAUSD's other education programs. As a result, CAVA overclaimed approximately \$1 million in state revenues.”<sup>3</sup> The report cited the limitation on ADA (“average daily attendance”) eligible for apportionment that is found in Section 51745.6 and Title 5, California Code of Regulations, Section 11704,<sup>4</sup> and noted that CAVA received “full funding for the ADA reported in its P-2 funding apportionment claim.”<sup>5</sup> In the “Recommendations” section of the report, the auditor wrote:

To recover the approximately \$1 million in state apportionment overclaimed by CAVA, CDE [California Department of Education] either should require CAVA to reimburse the state or withhold this amount from future funding apportionments.<sup>6</sup>

5. On April 13, 2007, CAVA filed a timely appeal of the pupil-to-teacher ratio (“PTR”) finding with EAAP,<sup>7</sup> stating the filing was to preserve its rights, and contending that the matter was not ripe and that EAAP does not have jurisdiction.

6. On November 2, 2007, Appellant’s Motion to Dismiss Audit Appeal Without Prejudice was heard. The motion was based on the following three arguments:

a. The audit report was not a “final audit report” because Appellant had not been notified by any State agency that the MGT audit report had been certified or adopted by any State agency.

b. The audit report was not a “final audit report” because no State agency had demanded reimbursement from Appellant of any or all of the funds, which, according to the audit report, Appellant over-claimed.

c. Unlike Section 1241.5, subdivisions (a) and (b), Section 1241.5, subdivision (c) did not permit a county superintendent of schools to penalize a charter school following the charter school’s response to an audit report. Absent such authority, jurisdiction could not be established.

7. On November 2, 2007, the Administrative Law Judge ordered additional briefing in accordance with a specified briefing schedule. The briefs were timely received. Additional oral argument was scheduled for February 6, 2008. On February 6, 2008, the parties agreed to waive oral argument and submit on the papers.

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<sup>3</sup> MGT audit report, page 4.

<sup>4</sup> All references to Title 5 are to the California Code of Regulations, Title 5.

<sup>5</sup> MGT audit report, page 5.

<sup>6</sup> MGT audit report, page 9.

<sup>7</sup> CAVA did not appeal the finding that “CAVA claimed approximately \$100,160 in state funds by including 21.07 ADA in its P-2 funding apportionment claim report that did not meet state eligibility requirements.” (MGT audit report, page 8.) The “Executive Summary” indicated this amount was “redundant with (not added to) the overclaimed \$1 million.” (MGT audit report, page 1.)

8. On February 21, 2008, the Administrative Law Judge denied Appellant's Motion to Dismiss Audit Appeal Without Prejudice on grounds that (1) the audit report did constitute a "final audit report" pursuant to Title 5, Section 19800(a)(2), and (2), Appellant's argument with respect to a county superintendent of schools' purported inability to penalize a charter school under Section 1241.5(c) was unpersuasive in that it is not the Kern County Superintendent of Schools who was seeking reimbursement of funds based on the findings in the audit report.

9. The Motion to Dismiss Audit Appeal Without Prejudice having been denied, in its Supplemental Motion to Dismiss, Appellant argues that:

a. Charter schools are exempt from the EAAP audit appeals process pursuant to Section 47610, and

b. The audit report is not a "final audit report" pursuant to Title 5, Section 19800(a)(2) because an improper demand for repayment was made.

10. Appellant also filed a Motion for Declaratory Order. Because the Administrative Law Judge proposed to grant Appellant's Supplemental Motion to Dismiss, he declared the Motion for Declaratory Order moot. Because we do not grant dismissal, the Motion for Declaratory Order is still pending.

11. On November 24, 2008, the Administrative Law Judge heard oral argument on both of Appellant's motions.

### **LEGAL CONCLUSIONS**

1. Appellant seeks dismissal of this matter "in its entirety and without prejudice."<sup>8</sup> An appellant may withdraw its appeal, pursuant to Title 5, Section 19804(b), at any time before a decision is issued. In the present matter, neither a withdrawal nor a dismissal can be made "without prejudice" to reasserting an appeal of the same audit finding before EAAP because the limitations period set out in Section 41344(d) has expired.

2. Cause does not exist to grant Appellant's Supplemental Motion to Dismiss on grounds that the audit report is not a "final audit report" pursuant to Title 5, Section 19800(a)(2). A finding, ruling and order were made on that issue on February 21, 2008. No reason exists to re-visit it.

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<sup>8</sup> Appellant California Virtual Academy @ Kern's Notice of Supplemental Motion to Dismiss, 1:26, and Memorandum of Points and Authorities in Support of Supplemental Motion to Dismiss, 1:22.

## Findings That May Be Appealed to EAAP

3. Section 41344(d) provides that a local educational agency<sup>9</sup> “may appeal a finding contained in the final report, pursuant to Section 41344.1.” An appealable finding is one when, “as the result of an audit or review, a local educational agency is required to repay an apportionment significant audit exception or to pay a penalty arising from an audit exception.” (§ 41344(a).) A finding that a local educational agency violated the limitation on ADA that may be claimed for apportionment set out in Section 51745.6 and Title 5, Section 11704 results in an “apportionment significant audit exception” if the amount of the overclaim is “an amount equal to revenue limit funding for one unit of average daily attendance.” (§ 41341(a)(1).) It is immaterial whether such a finding – or a finding of any other noncompliance with conditions for receipt of state funding – is made in a report of an audit required pursuant to Section 41020, or Section 47634.2(d), or Section 1241.5, or any audit conducted by the State Controller, or any other “audit or review conducted by a governmental agency that provided the local educational agency with an opportunity to provide a written response.” (§ 41344(e).)

## Repayment on Account of Audit Exceptions

4. Appellant argued that CDE could not demand payment of the findings in the MGT audit report. Appellant is incorrect. Charter schools receive state aid apportionments from Section A of the State School Fund.<sup>10</sup> The Superintendent of Public Instruction is required to withhold from apportionments any excesses identified by audit exceptions:

§ 41341. (a)(1) If, during any fiscal year, the amount apportioned to a school district *or to any fund* from Section A of the State School Fund differs either positively or negatively from the amount to which the district or fund was entitled by an amount equal to revenue limit funding for one unit of average daily attendance, the Superintendent of Public Instruction, in accordance with regulations that he or she is hereby authorized to adopt, not later than the first succeeding fiscal year from the fiscal year in which the computational error was made, shall withhold from, or add to, the apportionment made during that fiscal year, the amount of the excess or deficiency, as the case may be. Notwithstanding any other provision of this code to the contrary, excesses withheld or deficiencies added by the Superintendent of Public Instruction under this subdivision shall be added to or allowed from any portion of the State School Fund.

(2) Notwithstanding paragraph (1), excesses may be withheld or deficiencies added to apportionments on account of audit exceptions in any

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<sup>9</sup> The scope of “local educational agency” in Section 41344 is addressed below.

<sup>10</sup> Section 47612(c) provides “A charter school shall be deemed to be a “school district” for purposes of Article 1 (commencing with Section 14000) of Chapter 1 of Part 9, Section 41301, Section 41302.5, Article 10 (commencing with Section 41850) of Chapter 5 of Part 24, Section 47638, and Sections 8 and 8.5 of Article XVI of the California Constitution.” All but one of these citations refer to Section A of the State School Fund.

fiscal year in which they are certified by the Superintendent of Public Instruction.<sup>11</sup> (Emphasis added.)

The amounts apportioned from Section A of the State School Fund for charter schools are deposited into funds or accounts in the appropriate county treasury, or charter-granting or oversight local education agency:

§ 47651. (a) A charter school may receive the state aid portion of the charter school's total general-purpose entitlement and categorical block grant directly or through the local educational agency that either grants its charter or was designated by the State Board of Education.

(1) In the case of a charter school that elects to receive its funding directly, the warrant shall be drawn in favor of the superintendent of schools of the county in which the local educational agency that approved the charter or was designated by the State Board of Education as the oversight agency pursuant to paragraph (1) of subdivision (k) of Section 47605 is located, for deposit *to the appropriate funds or accounts* of the charter school in the county treasury. The county superintendent of schools is authorized to establish appropriate funds or accounts in the county treasury for each charter school.

(2) In the case of a charter school that does not elect to receive its funding directly pursuant to Section 47651, the warrant shall be drawn in favor of the superintendent of schools of the county in which the local educational agency that granted the charter is located or was designated the oversight agency by the board pursuant to paragraph (1) of subdivision (k) of Section 47605, *for deposit to the appropriate funds or accounts* of the local educational agency.

(3) In the case of a charter school, the charter of which was granted by the State Board of Education, but for which the board has not delegated oversight responsibilities pursuant to paragraph (1) of subdivision (k) of Section 47605, the warrant shall be drawn in favor of the superintendent of schools in the county where the local educational agency is located that initially denied the charter that was later approved by the board. *The county superintendent of schools is authorized to establish appropriate funds or accounts in the county treasury for each charter school.* (Emphasis added.)

Section 41344(d) provides “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.” Therefore, during the pendency of an appeal to EAAP, the Superintendent makes no offsets on account of audit exceptions.

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<sup>11</sup> “Certified by the Superintendent of Public Instruction” means certification of apportionments pursuant to § 41339.

5. The provision of Section 47605(b)(5)(I) that a charter petition shall contain a description of the “manner in which annual, independent, financial audits shall be conducted...and the manner in which audit exceptions and deficiencies shall be resolved to the satisfaction of the chartering authority” is not a delegation to local agencies to determine whether and how much state funds must be returned to the State on account of an exception made in an audit of program compliance.

#### Applicability of the EAAP Appeal Process to Charter Schools

6. Appellant contends that Section 47610 exempts charter schools from the EAAP audit appeals process. Section 47610, referred to frequently by the parties as “the mega-waiver,” states:

A charter school shall comply with this part and all of the provisions set forth in its charter, but is otherwise exempt from the laws governing school districts, except all of the following:

- (a) As specified in Section 47611.
- (b) As specified in Section 41365.
- (c) All laws establishing minimum age for public school attendance.
- (d) The California Building Standards Code (Part 2 (commencing with Section 101) of Title 24 of the California Code of Regulations), as adopted and enforced by the local building enforcement agency with jurisdiction over the area in which the charter school is located.
- (e) Charter school facilities shall comply with subdivision (d) by January 1, 2007.

Appellant argues that, because the Legislature did not expressly make the EAAP appeal process applicable to charter schools, the “mega-waiver” exempts charter schools from that process.

7. Since the original enactment of the Section 47610 “mega-waiver,” the Legislature has amended the section to narrow its scope three times,<sup>12</sup> and has expressly included charter schools in a number of other laws governing school districts.<sup>13</sup> Charter

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<sup>12</sup> Added by Stats. 1992, c. 781, (SB 1448), § 1. Amended by Stats. 1996, c.786, (AB 3384), § 5; Stats. 1998, c. 34 (AB 544), § 10; Stats. 2005, c. 87 (SB 1054), § 1; Stats. 2006, c. 538, (SB 1852), § 110. The 2006 amendment added subdivision (e) to § 47610, specifying the date by which charter schools were to comply with the provisions of subdivision (d).

<sup>13</sup> For example, eligibility to receive funding under a number of programs (examples include §§ 404, 421, 8482.3, 8488.7, 37220.6, 37252.2, 37252.8, 37253, 37253.5, 41207, 41520, 41522, 41857, 44396, 44651, 44652, 44510, 49430.7, 51796, 51796.2, 51796.5, 52122.1, 52257, 52295.10, and 99231), eligibility to receive services from the Fiscal Crisis and Management Assistance Team (§ 42127.8), prohibitions on hiring persons who have been convicted of serious or violent felonies (§§ 44830.1, 45122.1, 45125.1), provisions granting authorities (examples include §§ 45038, 45039, and 45040 related to salary payments, and § 49110 regarding issuance of work permits), provisions related to services for foster children and for those with special needs (§§ 48859 and 56026.3), and provisions related to implementation and reporting requirements for the federal No Child Left Behind Act (§§ 52055.57 and 60900).

schools have been included in these laws as part of a list of eligible entities,<sup>14</sup> by inserting “or charter school” following “school district,”<sup>15</sup> by defining the term “school district” to include charter schools,<sup>16</sup> by defining the term “local educational agency” to include charter schools,<sup>17</sup> or by providing “Notwithstanding Section 47610, this section applies to a charter school.”<sup>18</sup>

8. The term “local educational agency” has been defined elsewhere in the Education Code by itemizing a list of agencies that does not include charter schools (for example, § 8236 (a)(3) “‘Local educational agency’ means a school district, a county office of education, a community college district, or a school district on behalf of one or more schools within the school district.”), and it has been defined by merely specifying the exclusion of one agency (§ 41020(b)(5) “For purposes of this section, ‘local educational agency’ does not include community colleges.”). The term has also been used without definition at all (see, for example, §§ 14502.1<sup>19</sup>).

9. As the foregoing examples show, the term “local educational agency” has no fixed meaning, but it is an expansive term – including more than one type of the many agencies that are both educational and local.

10. “Local educational agency” was used without definition in Section 51747.3 when that section was added to the Education Code in 1993. (Stats.1993, ch. 66, § 32, p. 923.) In 1999, the statute was amended to expressly include charter schools in the term “local educational agency.”<sup>20</sup> The Supreme Court held that charter schools were subject to the residence restriction on independent study pursuant to Section 51747.3 during the period before that amendment, from 1993 to 1999. (*Wells v. One2One Learning Foundation* (2006) 39 Cal.4<sup>th</sup> 1164, 1205.) Citing a 1995 opinion by the Attorney General, the Court found that “the statute stated that ‘[t]he provisions of this section are not subject to waiver by the State Board of Education, by the State Superintendent of Public Instruction, or under any provision of Part 26.8 [of the Education Code ] (commencing with [s]ection 47600 )’ ... italics added.” *Id.* The Court agreed with the Attorney General’s observation “that although, in section 47610, the CSA [Charter Schools Act] purported to exempt charter schools from all but a few specified school district laws, subdivision (d) of section 51747.3 expressly provided that the provisions of *that* statute could *not* be waived under the CSA.” *Id.*

11. In 1999, Section 41344 was added to the Education Code by AB 1115, providing for the administrative audit appeals process and establishing EAAP as a three-

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<sup>14</sup> For example, §§ 51796, 51796.2, 51796.5.

<sup>15</sup> For example, §§ 45038, 45039, and 45040.

<sup>16</sup> For example, §§ 37220.6, 41207, 52122.1, 52257.

<sup>17</sup> For example, §§ 404, 421, 44510 and 99231.

<sup>18</sup> For example, §§ 44830.1 and 45122.1.

<sup>19</sup> § 14502.1(a): “The Controller, in consultation with the Department of Finance and the State Department of Education, shall develop a plan to review and report on financial and compliance audits. The plan shall commence with the 2003-04 fiscal year for audits of school districts, *other local education agencies*, and the offices of county superintendents of schools. ...” (Emphasis added.)

<sup>20</sup> Stats. 1999, c. 162 (SB 434), § 2.

member panel.<sup>21</sup> AB 1115 added, amended, or repealed more than 60 sections of the Education Code, as well as sections of other codes and uncodified statutes relating to education. Among other matters, AB 1115 added the current charter school funding model – Chapter 6, commencing with Section 47630, or Part 26.8 of the Education Code (AB 1115, § 32.8). The term “local education agency” or “local educational agency” was used throughout AB 1115, and in almost every instance the term expressly included charter schools (AB 1115, §§ 4, 17, 30, and 43), or was used to specify the agency that granted a charter as distinguished from the charter school (AB 1115, § 32.8, “sponsoring local educational agency;” and § 39, “local educational agency that granted the charter”).

The term “local educational agency” was also used in AB 1115 without definition in adding provisions to the Education Code – in section 24 (adding § 41344), and in section 36 (adding Article 6, commencing with Section 49080, establishing the California School Information Services for the purpose, among other things, of enabling “the accurate and timely exchange of pupil transcripts between local education agencies and to postsecondary institutions.”).

Subdivision (c) of Section 41344 provided “Notwithstanding any other provision of law, this section may not be waived under any authority set forth in this code except that a local educational agency may request a waiver of strict compliance in accordance with Section 41609.”<sup>22</sup>

12. Less than six months later (effective January 1, 2000), the extent of the prohibition in Section 41344(c) was underlined by the clarification provided in new Section 41344.2:

Notwithstanding subdivision (c) of Section 41344 or any other provision of law, the State Board of Education may consider and act upon requests to retroactively waive any provision of this code or any regulation adopted by the State Board of Education that is the basis of an apportionment significant audit if the request was received in writing by the State Department of Education prior to July 7, 1999.<sup>23</sup>

13. In 2001, the Legislature authorized exceptions to Section 41344(c):

Section 41344.3 authorizes SBE to waive certain violations of Section 60119 requirements by school districts, whether the request was received before or after October 7, 2001.<sup>24</sup>

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<sup>21</sup> Stats. 1999, c. 78 (AB1115), § 24, effective July 7, 1999.

<sup>22</sup> Added by Stats. 1981, c. 569, p. 221, § 2; repealed by Stats. 2002, c. 1128 (AB 2834), § 12.

<sup>23</sup> Added by Stats. 1999, c. 646 (AB 1600), § 15.6.

<sup>24</sup> Added by Stats. 2001, c. 574 (SB 273), § 1, effective October 7, 2001.



Section 46206 authorizes SBE to waive the fiscal penalties for noncompliance with the instructional time requirements of the Longer Day and Longer Year programs by school districts and county offices of education.<sup>25</sup>

14. In 2002, the Legislature amended Section 41344, added Section 41344.1 which established EAAP as a separate state agency, and repealed Section 41609.<sup>26</sup> Section 41344(c) now reads

*Notwithstanding any other provision of law, this section may not be waived under any authority set forth in this code except as provided in this section or Section 41344.1. (Emphasis added.)*

15. In 2005, the Legislature authorized SBE to waive the fiscal penalties for noncompliance with the instructional minutes requirements for charter schools, and provided that

(c)...If the audit report for a year in which the additional time is required to be maintained does not verify that the additional time was provided, the waiver granted pursuant to subdivision (b) shall be revoked and the charter school shall repay the fiscal penalty calculated pursuant to subdivision (c) of Section 47612.5, in accordance with subdivision (a) of Section 41344.<sup>27</sup>

16. Section 41344(a) provides that a local educational agency may repay an apportionment significant audit exception or pay a penalty arising from an audit exception over a period of up to eight years if full payment “in the current fiscal year would constitute a severe financial hardship.” If charter schools were not subject Section 41344, it would mean that the Legislature provided that charter schools could, after defaulting on the terms of a waiver, repay fiscal penalties associated with instructional minutes requirements over a period of years, but could not apply for relief from hardship for a substantial repayment due on account of an audit finding under any other program’s requirements.

17. Appellant made indefinite references to reduction of fiscal penalties resulting from charter school audit findings through negotiations with CDE, but made no reference to any present authority for reduction or elimination of audit findings other than that found in sections 41344 and 41344.1.<sup>28</sup> We know of no other administrative forum in which charter schools may challenge audit findings.

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<sup>25</sup> Added by Stats. 2001, c. 573 (SB 178), § 7; and amended by Stats. 2002, c. 942 (AB 1227), § 1.

<sup>26</sup> Stats. 2002, c. 1128 (AB 2834), §§ 10, 11, and 12, respectively.

<sup>27</sup> Added by Stats. 2005, c. 543 (AB 1610), § 6.

<sup>28</sup> Memorandum of Points and Authorities in Support of Supplemental Motion to Dismiss, footnote 2 at page 5; and Reporter’s Transcript, 23:5-23.

18. The use of the term “local educational agency” in the statutory scheme providing for administrative appeals of audit findings evidences a legislative intent to make the process available to all local educational agencies that may wish to challenge audit findings that require the agency to repay an apportionment significant audit exception or to pay a penalty arising from an audit exception.

19. Section 41344(c) expressly provides that, *notwithstanding any other provision of law*, the provisions of *that* statute *cannot* be waived under *any authority* set forth in the Education Code, *except* as provided in Section 41344 or Section 41344.1. Where a statute specifies an exception, no other exception will be implied or presumed. *Wildlife Alive v. Chickering* (1976) 18 Cal.3d 190, 195 [132 Cal.Rptr. 377, 553 P.2d. 537].) Moreover, the waiver authority granted to SBE in Section 47612.6 would be unnecessary if the waiver prohibition in Section 41344(c) did not apply to charter schools.

20. Cause does not exist to grant Appellant’s Supplemental Motion to Dismiss on grounds that Section 47610 exempts charter schools from the EAAP audit appeals process.

**ORDER**

The Motions to Dismiss the appeal of California Virtual Academy at Kern of the Fiscal Year 2003-04 Audit Finding Regarding Pupil-Teacher Ratio, in the Report of the Audit dated February 15, 2007 are denied, effective March 23, 2009.

Date: March 23, 2009

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

**ORDER**

Corrections to Decision As To Appellant’s Motions To Dismiss

Pursuant to the provisions of Government Code Section 11518.5(d), the Decision has been corrected as follows: the word “Education” was omitted from the agency’s title in the heading and has been added, the reference to the case citation in paragraph 19 of Legal Conclusions was stated as “195-196” and has been corrected to read “195,” and the intent expressed in the first sentence at page 1 and in paragraph 10 of the Findings of Fact at page 3 is clarified:

The matter is returned to the Office of Administrative Hearings for proceedings on the merits of the appeal in accordance with Section 41344(d).

**SO ORDERED.**

Date: April 6, 2009

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