

**Education Audit Appeals Panel
State of California**

Fiscal Year 2003-2004 Audit Appeal by:

EASTSIDE UNION SCHOOL DISTRICT

Appellant.

EAAP Case No. 05-13

OAH No. N2005040444

Decision

The Education Audit Appeals Panel has adopted the attached Proposed Decision of the Administrative Law Judge as its Decision in the above-entitled matter.

Effective date: September 12, 2005

IT IS SO ORDERED.

September 12, 2005
Date

(Original Signed)
Thomas E. Dithridge, Chairperson
for Education Audit Appeals Panel

**BEFORE THE
EDUCATION AUDIT APPEALS PANEL
STATE OF CALIFORNIA**

**In the Matter of the Statement of Issues
Against:**

Case No. 05-13

EASTSIDE UNION SCHOOL DISTRICT,

OAH No. L2005040444

Appellant,

vs.

STATE CONTROLLER'S OFFICE,

Respondent.

**CALIFORNIA DEPARTMENT OF
FINANCE,**

Intervenor.

PROPOSED DECISION

This matter was originally scheduled for hearing on June 15, 2005 in Los Angeles, California. On May 13, 2005, pursuant to a stipulation of the parties, the case was continued in order to permit the parties to submit the case on papers without a hearing. The parties were ordered to submit stipulated facts and written briefs in accordance with a specified schedule.

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All papers were timely submitted. The document entitled "Stipulated Facts" was marked and admitted as Exhibit 1. Education Code sections 41344 and 41344.1 were collectively marked as Exhibit 2 and official notice was taken thereof. Excerpts from the June 30, 2004, Eastside Union High School District Annual Financial Report, a final audit report, were collectively marked and admitted as Exhibit 3. An April 4, 2005, letter from N. Rajakumar, Assistant Superintendent of Business Services, Eastside Union School District, to the Executive Officer of the Education Audit Appeals Panel, was marked and admitted as Exhibit 4. A copy of the non-approved Eastside Union School District Student Study Meeting Record, Level 3 form was marked and admitted as Exhibit 5. A copy of the approved Agreement for Pupil to Continue in Kindergarten was marked and admitted as Exhibit 6. Education Code sections 46300 and 48011 were collectively marked as Exhibit 7 and official notice was taken thereof. "Respondent's Brief," filed by Steve Westly, State Controller of California, was marked as Exhibit 8. "Department of Finance's Hearing Brief in Support of Audit Finding 2004-5" was marked as Exhibit 9. A letter-brief submitted by Appellant, Eastside Union School District, was marked and admitted as Exhibit A.

FACTUAL FINDINGS

The Administrative Law Judge makes the following Factual Findings:

A. The issue in this case concerns a form used by Appellant during the time period covered by an annual audit. The form was used in connection with kindergarten students who were retained in kindergarten after one school year instead of being promoted to first grade. Respondent and Intervenor contend that the form did not meet legal requirements. As stated above, the parties do not dispute the facts of this matter and submitted a joint set of Stipulated Facts. Those facts are repeated verbatim below and are incorporated as factual findings herein.

1. The jurisdiction of the Education Audit Appeals Panel (EAAP) to hear this matter is governed by Education Code sections 41344 and 41344.1. [Reference to attached copies omitted.]

2. A local educational agency that receives a final audit report may appeal a finding contained in that audit report and may present evidence or arguments at the hearing if it believes that the final report contains any finding based on errors of fact or interpretation of law. Eastside has waived its right to a formal hearing. The parties have agreed to proceed by stipulated facts and submit simultaneous briefs to resolve this appeal.

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3. Education Code section 41344.1, subdivision (c), provides:

Compliance with all legal requirements is a condition to the state's obligation to make apportionments. A condition may be deemed satisfied if the panel finds there has been compliance or substantial compliance with all legal requirements. "Substantial compliance" means nearly complete satisfaction of all material requirements of a funding program that provide an educational benefit substantially consistent with the program's purpose. A minor or inadvertent noncompliance may be grounds for a finding of substantial compliance provided that the local education agency can demonstrate it acted in good faith to comply with the conditions established in law or regulation necessary for apportionment of funding.

4. Burkey, Cox & Evans, Accountancy Corporation, a private independent auditing firm, conducted an annual audit of Eastside for the fiscal year ending June 30, 2004. The auditing firm issued Finding 2004-5 which questioned two average daily attendance (ADA) credits relating to noncompliant kindergarten continuation forms. . . .

5. Eastside timely appealed Finding 2004-5 by letter dated April 4, 2005. [Reference to attached copies omitted.]

6. A sample of the kindergarten retention forms for student J.P. is representative of the kindergarten retention forms Eastside used during the fiscal year ending June 30, 2004. True and correct copies of these forms with personally identifying information redacted are attached as Exhibit 4.¹

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¹ The document is admitted in the official court record as Exhibit 5.

7. Subsequent to the 2004 audit, Eastside has modified its kindergarten retention forms to include the following language:

Information for parent/guardian:

California law provides that after a child has been lawfully admitted to 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 having 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 a formal agreement to having 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 of a child's first year of kindergarten.

(Emphasis in original.)

This form is to be retained on file for three years as required by state law.

[Reference to attached copies omitted.]

8. Education Code section 46300, subdivision (g), and section 48011 govern the requirements of kindergarten retention. Finding 2004-5 was based on these laws. [Reference to attached copies omitted.]

9. Eastside contends that it substantially complied with the law governing kindergarten retention forms except that the forms used during fiscal year ending June 30, 2004, lacked the quoted language notifying parents or guardians of their right to have the student promoted as set forth above in paragraph 7. Eastside contends that its form otherwise contained all other required elements.

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10. In addition, Eastside informed parents of the need to retain the student in kindergarten for one more year. Prior to retaining a student in kindergarten, Eastside would hold a Student Study Meeting between the principal, teacher(s) and parent informing the parent of the student's progress and recommending retention of the student in kindergarten.

B. The "brief" submitted by Appellant (Exhibit A) was in the form of a single page letter that contained no legal authority in support of its position. However, it is clear from both Exhibit A and the Stipulated Facts that Appellant relies on the "substantial compliance" language in Education Code section 41344.1, subdivision (c). In Exhibit A, Appellant argues three main points that are repeated verbatim below:

1) Eastside Elementary School ("the school") was in substantial compliance in regards to the kindergarten continuation forms in question.

2) The school's procedures were as follows:

a) A team consisting of the principal/administrator, the teacher of the student considered for retention, and another teacher, reviews the progress of the student to be retained.

b) The team's action is documented on a "Student Study Meeting Record".

c) The parent, providing consent that the student shall continue in kindergarten for one more school year, signs this document.

[Reference to attached sample omitted.]

3) Eastside Elementary School has since been advised to include the use of the State required kindergarten continuation form. Thus Eastside Elementary is in compliance with that of the District's additional two elementary schools. [Reference to attached district form omitted.]

LEGAL CONCLUSIONS

Pursuant to the foregoing Factual Findings, the Administrative Law Judge makes the following legal conclusions:

Cause exists to deny Appellant's appeal of Audit Finding 2004-5, pursuant to Education Code section 41344.1, as set forth in Findings A and B.

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Education Code section 48011 states in relevant part:

A child who, consistent with Section 48000, has been admitted to the kindergarten maintained by a private or a public school in California or any other state, and who has 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.

Education Code section 46300 states in pertinent part:

(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.

(g) 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 State Department of Education and signed by the pupil's parent or guardian, that the pupil may continue in kindergarten for not more than an additional school year.

Education Code section 48011 makes it clear that a child is to be promoted to first grade upon completion of one year of kindergarten, unless both the school district and the parent or guardian of the child agree to retain the child in kindergarten for one more school year. Thus, the statute provides the parent or guardian an implied right to decline consent to retention in kindergarten. The parent or guardian's exercise of that implied right will result in the child being promoted to first grade even if school personnel recommend retention.

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In light of the above statutory provisions, if this case turned solely on the use of an unapproved form, substantial compliance could be found pursuant to Education Code section 41344.1, subdivision (c). However, Appellant failed to establish that the parent/guardian was informed in writing of his/her implied right to decline consent to retention of his/her child in kindergarten. If the parent or guardian was not so informed, he/she could easily have assumed that his/her signature on the Student Study Meeting Record did not reflect his/her specific consent to retention, but was simply a reflection of his/her having attended the meeting or having seen and/or received a copy of the document. In other words, the parent or guardian might believe that, by signing the Student Study Meeting Record, he/she was merely performing something akin to a ministerial act.

Since the time of the audit in question, Appellant has terminated the use of the Student Study Meeting Record, for purposes of parental consent to retention in kindergarten, in favor of the Department-approved Agreement for Pupil to Continue in Kindergarten. Although that change should obviate future similar problems, it does not bring Appellant into compliance, or even substantial compliance, with respect to Audit Finding 2004-5.

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ORDER

WHEREFORE, THE FOLLOWING ORDER is hereby made:

1. Appellant, Eastside Union School District's appeal of Audit Finding 2004-5 is denied.
2. Audit Finding 2004-5 is affirmed.

DATED: August 2, 2005

(Original Signed)

H. STUART WAXMAN
Administrative Law Judge
Office of Administrative Hearings