

BEFORE THE
EDUCATION AUDIT APPEALS PANEL
STATE OF CALIFORNIA

In the Matter of:

Emery Unified School District,

Re: Appeal of Audit Finding 3,
Fiscal Year 2004-05,

Appellant.

Case No. 06-13

OAH No. N2007010755

DECISION

On August 28, 2007, the Office of Administrative Hearings (OAH) issued a Proposed Decision in this matter. On September 17, 2007, the Education Audit Appeals Panel (EAAP) issued a Notice of Rejection of Proposed Decision in order to decide the case itself under the provisions of Government Code Section 11517(c)(2)(E). EAAP invited additional briefing by October 5, 2007, particularly with regard to substantial compliance in the context of the provisions of Education Code Section 60119.

FACTUAL FINDINGS

1. Perry-Smith LLP, an accounting firm, conducted a compliance audit of the Emery Unified School District (EUSD) for the fiscal year ended June 30, 2005. Finding 3 of that audit concludes that the district failed to comply with certain requirements of Education Code Section 60119(a)(2)(A), concerning the sufficiency of textbooks.¹ The district appeals from Finding 3.

2. School districts that receive funds under the Instructional Materials Funding Realignment Program (IMFRP, § 60420 et seq.) must comply with the requirements of Section 60119.

3. Section 60119 requires the governing board of a school district to hold a public hearing and “make a determination, through a resolution, whether each pupil in each school in the district has sufficient textbooks or instructional materials” in certain specific subject areas, including “history-social science.” (§ 60119(a)(1)(A)(iii).) “Sufficient textbooks or instructional materials” means that “each pupil...has a standards-aligned textbook or instructional materials, or both, to use in class and to take home.” (§ 60119(c)(1).)

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

For FY 2004-05, Section 60119 required the governing board to “make a diligent effort” to hold the hearing on or before December 1st. If the governing board determined that there were insufficient textbooks or instructional materials, Section 60119 required the board to

provide information to classroom teachers and to the public setting forth, in the resolution, for each school in which an insufficiency exists, the reasons that each pupil does not have sufficient textbooks or instructional materials...and take any action...to ensure that each pupil has sufficient textbooks or instructional materials...within two months of the beginning of the school year in which the determination is made. (Former § 60119(a)(2)(A).)

The purpose of Section 60119 is to ensure that, in the identified subject areas, each pupil has a textbook within two months after the beginning of each school year.

4. On December 6, 2004, the governing board of EUSD held a public hearing pursuant to Section 60119 and adopted Resolution No. 6-2004-2005.² The resolution finds that EUSD had insufficient textbooks or instructional materials in history-social science for pupils in kindergarten and grades 1, 2, 3, and 5.³ The resolution states that the district was “1 kit” short for kindergarten and 12, 9, 5, and 18 books short for grades 1, 2, 3, and 5, respectively. The resolution does not state the reasons that the pupils lacked sufficient textbooks.

The board’s resolution goes on to recite that “the California Department of Education is currently in the process of adopting new standards-aligned History/Social Science instructional materials for grades Kindergarten through 8th.” The resolution concludes that

for the 2004-2005 school year, the Emery Unified School District will remedy the lack of History/Social Science instructional materials by establishing a History/Social Science Adoption Committee to select from the newly state-adopted curriculum materials and as soon as their adoption is approved by the Board, purchase sufficient materials to provide each student with a textbook or instructional materials, or both, to use in class and to take home....

The State adopted new, standards-aligned history-social science textbooks in October 2005. EUSD purchased the new textbooks in June 2006.

5. The audit guide regulations adopted by the Education Audit Appeals Panel for FY 2004-05 state, consistent with Section 60119(a), that if a school district does not comply with Section 60119, the district is “not eligible to receive an Instructional Materials Funding Realignment Program allowance for the fiscal year audited.” (Title 5, Cal. Code Regs., § 19828.1(c).) In such a case, the regulations direct the auditor to “[i]nclude a finding in the

² Ex. 4.

³ The district has only one elementary school, Anna Yates Elementary School.

Findings and Recommendations section of the audit report showing the full amount of [IMFRP] allowance received as disallowed.” (*Ibid.*)

Finding 3 of the EUSD audit does not contain such an express finding and recommendation. After finding that EUSD did not comply with Section 60119, Finding 3⁴ states:

Fiscal Impact

The District expended a total of \$48,296 from the Instructional Materials Realignment Funding [sic] Program.

Recommendation

The District should purchase additional instructional materials in order to make them sufficient for the classes determined by the Board of Trustees to have insufficient instructional materials.

Corrective Action Plan

The District will purchase additional instructional materials in Order to make them sufficient for the classes determined by the Board of Trustees to have insufficient instructional materials....

6. In 2004-05, Joe Frantz was the director of curriculum for EUSD; he is now the district’s assistant superintendent for business affairs. Frantz drafted Resolution No. 6-2004-2005 and presented the item to the governing board on December 6, 2004. Frantz testified to the circumstances that led to the adoption of the resolution, and explained how EUSD responded to the shortage in history-social science instructional materials.⁵

For several years prior to the 2004-05 school year, EUSD was in fiscal crisis. The State took control of the district away from the school board and appointed an administrator to control the district’s operations. At some time before the fall semester of 2004, the district achieved a positive fund balance and authority was returned to the school board; the board then appointed a new superintendent. The district still owed about \$1 million to the State, however, and a state trustee remained in place to oversee district operations.⁶

Prior to the 2004-05 school year, EUSD also had academic problems. A School Assistance Intervention Team (SAIT) performed an academic audit in fall 2003. Among other things, the SAIT determined that the district needed to increase instructional time in reading and math at Anna Yates Elementary School. To meet the recommendations of the SAIT academic audit, EUSD determined that it needed to reduce the class time devoted to history and social science.⁷

⁴ Ex. 1, p. 1-6.

⁵ Reporter’s Transcript (RT), pp. 30 – 40.)

⁶ RT, pp. 30-31.

⁷ RT, pp. 31-32.

7. Frantz testified that, when staff found that EUSD lacked sufficient instructional materials for history and social science at Anna Yates, “we had to make a decision.”⁸ The state trustee refused to make general fund monies available to purchase new texts. The State was scheduled to adopt new social studies texts in September 2005, and staff did not want to purchase new texts that would only be used for the remaining six months of the 2004-05 school year. Because of the SAIT recommendations, new social science texts would only be in use for a small portion of the day. In addition, the reading textbook EUSD was using, McGraw Hill SRA’s *Open Court 2002*, had social science content, and every pupil had an *Open Court* textbook. Frantz stated that it made the most sense to staff to “focus on reading and delay the purchase of Social Studies materials.”⁹ Frantz forthrightly acknowledged that it was EUSD’s plan to correct the insufficiency of history-social science textbooks by purchasing new textbooks after they were approved by the State, and that EUSD’s plan could not be accomplished within the two-month period specified by Section 60119.

8. Frantz emphasized that while EUSD decided to delay the purchase of social science reading materials, the district did not delay social science instruction. During the 2004-05 school year, students were taught social science through the reading program. In addition, Frantz stated, teachers in different classrooms rotated social science instruction and social science texts so that, during the time that social science was taught as a separate subject, each pupil had a social science textbook.¹⁰

LEGAL CONCLUSIONS

1. Under Section 41344(d), a local education agency may appeal a finding in an audit report and present evidence or argument in 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.”

Section 41344.1(c) defines “substantial compliance” as follows:

[N]early 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 Appeal Panel] may further define “substantial compliance” by issuing regulations or through adjudicative opinions, or both....

⁸ RT, p. 37, line 21.

⁹ RT, p. 38, lines 24-25.

¹⁰ RT, p. 39, line 1, - p. 40, line 7.

The Education Audit Appeals Panel has not further defined “substantial compliance” by regulation or precedential decisions.

The local education agency bears the burden of proof. (§ 41344(d), Evid. Code, § 500.)

2. Insofar as Finding 3 of the EUSD audit finds that the district failed to comply with Section 60119, it is not based on a factual or legal error. On December 6, 2004, the EUSD governing board found an insufficiency of textbooks or instructional materials in history-social science, but did not take action to remedy the insufficiency within two months of the beginning of the 2004-05 school year, or within two months of December 6, 2004. (Factual Findings 4 and 7.) Audit Finding 3 properly concludes that EUSD failed to comply with Section 60119.

3. It is a matter of concern that Finding 3 of the audit fails to comply with the EAAP audit guideline in certain respects: It does not contain an express finding and recommendation that any funds should be “disallowed,” and it describes the “fiscal impact” of EUSD’s failure to comply with Section 60119 in terms of the district’s expenditures of IMFRP funds, rather than the district’s IMFRP allowance.

4. Through its actions as set forth in paragraphs 7 and 8 of the Factual Findings, EUSD achieved substantial compliance with the requirements of Section 60119.

5. EUSD’s choice not to purchase sufficient history-social science textbooks was a direct dereliction of its statutory obligation to its pupils in that regard.

ORDER

Consistent with the provisions of Education Code sections 41344.1(c) and 60119, Factual Findings 1 through 8, and Legal Conclusions 1 and 5, the amount Emery Unified School District is obliged to repay pursuant to Audit Finding 3 of its fiscal year 2004-05 audit report is reduced to \$10,000, effective October 15, 2007.

Date: October 15, 2007

Original Signed

Thomas E. Dithridge, Chairperson
for Education Audit Appeals Panel