

**Education Audit Appeals Panel
State of California**

Appeal of 2005-06 Audit Finding 2006-3 by:

EAAP Case No. 07-22

San Luis Obispo County Office of
Education,
Appellant.

OAH No. 2007110161

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). On November 19, 2008, EAAP issued a Notice of Rejection of Proposed Decision and invited additional briefing by December 4, 2008, particularly with regard to substantial compliance in the context of the particular facts in the record and the provisions of Education Code Section 60119¹ with regard to the timing of the public hearing. Appellant filed a timely argument.

FACTUAL FINDINGS

1. Appellant San Luis Obispo County Office of Education (SLOCOE) provides services to ten school districts and three joint powers agencies mandated by state and federal law. In this context SLOCOE operates various educational programs and supports the Special Education Local Plan Area (SELPA). SLOCOE operates under a locally elected five-member governing board (Board).

2. Vavrinek, Trine, Day & Co., L.L.P. (VTD) conducted SLOCOE's annual audit for the fiscal year ending June 30, 2006, pursuant to the provisions of Section 41020. The audit was conducted by VTD's certified public accountant Heidi E. White.

3. The audit report included Finding 2006-3:

In our review of board minutes and board resolution #05-18, we noted that the COE's board meeting and the public notice to hold a public meeting for the availability of instructional materials stated and began at 1:30 [p.m.]. The time

¹ Unless otherwise specified, all statutory references are to the California Education Code.

noted does not give all parents and teachers an opportunity to attend; therefore, the COE did not comply with Education Code Section 60119.

...

Recommendation: We recommend that the COE public hearing on the availability of instructional materials been [sic] held at a time that gives parents and teachers an opportunity to attend the hearing without interfering with school or work, otherwise, the COE could be ineligible to receive program funding.

Questioned Costs: \$37,847

4. On October 8, 2007, SLOCOE filed an appeal of Finding 2006-3 pursuant to Section 41344(d). The appeal letter also stated that the California Department of Education had indicated other findings related to insufficiency of textbooks or instructional materials. SLOCOE asserted its belief that it was in substantial compliance with Section 60119. (State's Exhibit K.)

5. A hearing was held on September 23, 2008, at which John Barnhart, who had recently retired from his position as Assistant Superintendent for Educational Services, appeared on behalf of SLOCOE. Mr. Barnhart testified and presented documents, admitted as administrative hearsay to the extent allowed by Government Code Section 11513(d).²

Mr. Barnhart testified that appellant does not contest the essential facts that led to this hearing; i.e., that SLOCOE's public hearing in October 2005 was held at a time that was contrary to the express requirements of Section 60119. He asserted appellant's belief that it was in substantial compliance because it immediately recognized its error and has corrected it over the past two years. In support of this testimony, Mr. Barnhart provided a copy of SLOCOE's Resolution No. 07-10, approved May 3, 2007, in which the Board recognized its error; corrected it by convening its October 5, 2006, public hearing at 4:30 p.m.; and resolved to "request a State waiver for the 2005-2006 school year for Instructional Materials Sufficiency Waiver of Retroactive Audit Penalty." Further, Mr. Barnhart testified that the State Board of Education has granted specific waivers to other school districts and county offices of education for noncompliance with all requirements of Section 60119.³

6. SLOCOE's public hearing was conducted on Thursday, October 6, 2005, during a Board meeting that commenced at 1:30 p.m. At the Board meeting held that date, the public hearing was opened for public input at 2:25 p.m. No public input was received and the public hearing was declared closed at 2:26 p.m. (State's Exhibit G.)

² Government Code Section 11513(d), states in pertinent part, "Hearsay evidence may be used for the purpose of supplementing or explaining other evidence but over timely objection shall not be sufficient in itself to support a finding unless it would be admissible over objection in civil actions...." Respondent Department of Finance objected to each of these documents based upon lack of foundation and hearsay.

³ SBE waivers of Section 60119 are granted pursuant to the provisions of Section 41344.3.

7. The adopted minutes of SLOCOE's October 6, 2005, Board meeting, show that Assistant Superintendent Barnhart assured the Board that there were adequate instructional materials for daily instructions in each of its classrooms. However, Mr. Barnhart advised that the 1:1 correlation requirement of the *Williams* lawsuit was not met, due to the particular student population at SLOCOE. The minutes reflected that a "plan will be developed by staff to remedy the deficiencies identified throughout this process and will be presented to the Board for their review and approval." The Board then adopted Resolution No. 05-18 Determining the Availability of Instructional Materials for 2005-06. (State's Exhibit G, third page.) SLOCOE's appeal letter clarified that, "The San Luis Obispo County Board of Education did certify that we had insufficiency of textbooks or instructional materials." (State's Exhibit K.) Under the heading "Fiscal Implications," an Agenda Item Back-up Sheet stated "There will be a negative fiscal impact, as we will need to replace/add new textbooks and materials in the next few years. ... A price list is scheduled to be released in February 2006." (State's Exhibit F.)

8. Mr. Barnhart also testified that he painstakingly reviewed SLOCOE documents and reconstructed its student enrollment data, number of students by grade level, and the materials that were available to it at the time of the October 6, 2005, Board resolution. As a result of these efforts, SLOCOE concluded that it was actually in full or substantial compliance with Section 60119 in 2005-2006. (Also see State's Exhibit K.) In support of his testimony, Mr. Barnhart provided charts of this recalculation (for example, itemizing all of the books in various subject areas; their status as State approved or not approved; the grade level or remediation level for which the books were used; and the number of books and students). On cross-examination, Mr. Barnhart testified that he could not actually verify that SLOCOE had sufficient materials at the time of the resolution in October 2005. (Official Transcript, 42:17 to 44:21.)

9. With one exception, appellant's charts were created after the audit and were not available to the auditor, Ms. White. Appellant declined the opportunity to cross-examine Ms. White, who was present at the hearing. The majority of these charts were prepared by individuals other than Mr. Barnhart and they were not called to testify. As a consequence, these charts are of little evidentiary value.

LEGAL CONCLUSIONS

1. The authority for this appeal is provided by sections 41344(d) and 41344.1(b).

2. Section 41344(d) provides that the local education agency which 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." This provision places the burden of proof on SLOCOE as the appellant in this matter.

3. During the 2005-2006 school year, SLOCOE received state funds from the Pupil Textbook and Instructional Materials Incentive Program Act (Act), Section 60117, et seq. (Added by Stats. 1994, c. 927 (AB 2600), § 7.) Under the Act, “County offices of education may, at their option, be eligible to receive funds pursuant to this article,” and “the terms ‘governing board of a school district’ and ‘governing board’ are deemed to include county boards of education.” (§ 60118; added by Stats. 1995, c. 325 (AB 391), § 1.) An account created in the State Instructional Materials Fund is used to fund the Act. (§ 60252(a); added by Stats. 1994, c. 927 (AB 2600), § 3.)

Portions of the Act relevant to this appeal were amended by Senate Bill 550 (Stats. 2004, c. 900, § 18, effective September 29, 2004), as part of the settlement of a class action lawsuit (*Williams v. California*) for equal access to instructional materials and other educational quality needs.

4. Allocations are made from the Pupil Textbook and Instructional Materials Incentive Program Account to those districts that satisfy certain criteria, including providing an assurance that the district has complied with Section 60119. (§ 60252(a)(1).) Further, Section 60119 provides that the governing board of a school district is required to take all of the following actions to be eligible for funding for the purposes of the Act:

(a) hold a public hearing or hearings at which it “shall encourage participation” by parents, teachers, interested members of the community, and bargaining unit leaders,” and make a determination, through a resolution, as to whether each pupil in each school in the district has sufficient textbooks or instructional materials, or both, that are aligned to the content standards in mathematics, science, history-social science, and English/language arts (including English language development), that are consistent with the content and cycles of the curriculum framework adopted by the state board. (§ 60119 (a)(1)(A).)

(b) convene the public hearing “on or before the end of the eighth week from the first day pupils attend school for that year.” (§ 60119(a)(1)(B).)

(c) provide 10 days’ notice of the public hearing or hearings, with the “time, place, and purpose” clearly identified in the notice, which “shall be posted in three public places in the school district.” (§ 60119(b).)

(d) hold the hearing “at a time that will encourage the attendance of teachers and parents and guardians of pupils who attend the schools in the district and [the hearing] *shall not take place during or immediately following school hours.*” (Emphasis added; § 60119(b).)⁴

⁴ The provision regarding the timing of the public hearing was added by S.B. 550.

(e) If the governing board determines that there are insufficient textbooks or instructional materials, or both, it must pass a resolution notifying classroom teachers and the public about the percentage of pupils who lack sufficient standards-aligned textbooks or instructional materials in each subject area and the reasons that each pupil does not have sufficient textbooks or instructional materials, or both, and “take any action to ensure that each pupil has sufficient textbooks or instructional materials, or both, within two months of the beginning of the school year....” (§ 60119(a)(2)(A).)⁵

5. Pursuant to Section 41344.1(c), the state is only obligated to make apportionments when there has been compliance with all legal requirements. A “condition may be deemed satisfied if the panel finds that 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 it acted in good faith to comply with the conditions established in law or regulation necessary for apportionment of funding.” (Ibid.) EAAP has not further defined “substantial compliance” by issuing regulations or precedential decisions.

6. In its written argument, SLOCOE contends that the meeting time and notice provisions in Section 60119(b) are not conditions for receipt of funding because only subdivision (a) refers to eligibility for funds. The provision of subdivision (b) that the hearing be held at a time that will encourage attendance by teachers and parents and not “during or immediately following school hours” is in furtherance of the requirement, in subdivision (a)(1)(A), to “hold a public hearing or hearings at which the governing board shall encourage participation by parents, teachers, members of the community interested in the affairs of the school district, and bargaining unit leaders.” Moreover, Section 60252 conditions allocation of funding on compliance with Section 60119, not only the provisions of subdivision (a).

7. SLOCOE also argues that the failure to hold the public hearing outside of and not immediately after school hours resulted because staff merely overlooked the timing requirement. Being unaware of the requirement does not excuse compliance, nor does it demonstrate good faith efforts to comply with the requirement. (§ 41344.1(c).)

8. The requirement that the public hearing mandated by Section 60119 “shall not take place during or immediately following school hours” is a material requirement of the

⁵ The direction to provide the textbooks or materials “within two months of the beginning of the school year” was added by S.B. 550; it replaced the previous requirement to provide the materials “within a two-year period from the date of the determination” of the insufficiency. (See Stats. 1994, c. 927 (AB 2600), § 2.)

Act. This addition to Section 60119 was enacted as an urgency statute effective September 29, 2004. (S.B. 550.⁶)

9. SLOCOE’s Resolution No. 05-18, adopted October 6, 2005, stated that SLOCOE had insufficient textbooks or instructional materials. SLOCOE attempted to but did not demonstrate that this resolution was in error, and did not show that it took “action to ensure that each pupil has sufficient textbooks or instructional materials, or both, within two months of the beginning of the school year...” as required by Section 60119(a)(2)(A).

10. As set forth in the Factual Findings and Legal Conclusions as a whole, SLOCOE did not meet its burden of proof to establish errors of fact or interpretation of law regarding its compliance with Section 60119 as revealed in the audit by VTD. Appellant did not meet its burden of proving that it substantially complied with the public hearing requirement of Section 60119 in October 2005. Additionally, SLOCOE failed to comply with the requirement to provide sufficient textbooks or materials within two months of the beginning of the school year. Accordingly, a waiver or reduction of penalty is not available.

11. Pursuant to Education Code Section 41344(a)(2), SLOCOE may seek approval from the Superintendent of Public Instruction and the Director of the Department of Finance for a repayment plan of equal annual payments over a period of up to eight years, if repayment of the full liability in the current fiscal year would constitute a severe financial hardship.

ORDER

The appeal of San Luis Obispo County Office of Education from Fiscal Year 2005-2006 Audit Finding 2006-1 is DENIED, effective 12-15-08.

Date: 12-15-08

Original Signed

Diana L. Ducay, Chairperson
for Education Audit Appeals Panel

⁶ As indicated in the Legislative Counsel’s Digest to S.B. 550 at section (9), prior to this amendment, existing law only required “the governing board of a school district to hold a public hearing and make a determination as to whether each pupil in each school in the district has or will have prior to the end of that fiscal year sufficient textbooks or instructional materials in each subject that are consistent with the content and cycles of the curriculum framework adopted by the State Board of Education. ...” A letter from the plaintiffs’ attorneys in *Williams v. California*, admitted as administrative hearsay (State’s Exhibit L), asserted that prior to the amendment, state law allowed districts to hold hearings whenever they wanted to and that the addition of this timing requirement was crucial in that teachers and parents would no longer be prevented from attending and having the opportunity to participate by sharing their valuable firsthand accounts and concerns.