Education Audit Appeals Panel
State of California

Appeal of 2003-04 Audit Findings 04-56 and 04-57 by: West Fresno Elementary School District, Appellant.	EAAP Case No. 05-22 OAH No. N2006060678

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: 26 Feb. 2007.

IT IS SO ORDERED.

26 Feb. 2007
Date

Thomas E. Dithridge, Chairperson
for Education Audit Appeals Panel

BEFORE THE
EDUCATION AUDIT APPEALS PANEL
STATE OF CALIFORNIA

In the Matter of the Audit Appeal of: WEST FRESNO ELEMENTARY SCHOOL DISTRICT, Appellant, v. STATE CONTROLLERS' OFFICE, Respondent, and DEPARTMENT OF FINANCE, Respondent/Intervenor.	EAAP No. 05-22 OAH No. N2006060678

PROPOSED DECISION

This matter was heard before Marilyn A. Woollard, Administrative Law Judge for the Office of Administrative Hearings (OAH), State of California, on September 5, 2006, in Sacramento, California.

Kent Ashworth, State Administrator, California Department of Education, represented appellant West Fresno Elementary School District (West Fresno).

Gary Hori, Staff Counsel, represented respondent Office of State Controller (Controller), and was assisted by the Controller's Audit Manager, Carolyn Baez, CPA.

Roy S. Liebman, Deputy Attorney General, represented the Department of Finance, intervener.

Oral and documentary evidence was received. Following oral argument, the record was closed.[1]

FACTUAL FINDINGS

1. The Division of Audits of the State Controllers' Office conducted its annual Financial and Compliance Audit of the West Fresno Elementary School District (West Fresno) for the 2003-2004 school year.[2]

2. In Audit Finding 04-56, the Controller determined that West Fresno did not offer a sufficient amount of instructional minutes for kindergarten and for first through third grades during the 2003-2004 fiscal year. As a consequence, West Fresno was assessed a fiscal penalty of $80,433 for kindergarten and of $47,394 for grades one through three. The total fiscal penalty imposed on West Fresno as a consequence of this finding was $127,827.

3. In Audit Finding 04-57, the Controller determined that West Fresno failed to comply with provisions of former Education Code section 44579.1, which provided reimbursement for certain staff development activities, such as teaching strategies, classroom management and other training designed to improve pupil performance, during two staff development days West Fresno provided on August 20, 2003, and August 22, 2003.[3] In addition, the auditors found that West Fresno's records of attendance were not properly maintained, and that the length of the staff development day fell short of the time required by Education Code section 44579.1. Consequently, West Fresno was assessed a fiscal penalty of $20,052.

4. On June 6, 2006, West Fresno's State Administrator, Kent Ashworth, filed an appeal of the audit findings with the Education Audit Appeals Panel (EAAP), in which he challenged audit findings 04-56 and 04-57.

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[1] The matter was submitted for decision on October 23, 2006.

[2] A "financial and compliance audit" shall "be consistent with the definition provided in the "Standards for Audits of Governmental Organizations, Programs, Activities, and Functions" promulgated by the Comptroller General of the United States." (Educ. Code § 14501, subd. (a).) A "compliance audit" means "an audit that ascertains and verifies whether or not funds provided through apportionment, contract, or grant, either federal or state, have been properly disbursed and expended as required by law or regulation or both," including verification of specific items. (Educ. Code § 14501, subd. (b).)

[3] Former Education Code section 44579.1 and the Instructional Time and Staff Development Reform Program of which it was a part, were repealed effective January 1, 2006, by the terms of former Education Code section 44579.6.

5. On June 26, 2006, the Controller filed the statement of issues in this matter setting forth the basis for its findings 04-56 and 04-57.

6. On July 17, 2006, OAH Presiding Judge Roman granted the Department of Finance's motion to intervene in this matter, pursuant to Education Code Section 41344.1, subdivision (b).

7. In approximately March of 2003, West Fresno was placed under the administration of the California Department of Education (CDE), and William Griffin was appointed as West Fresno's CDE State Administrator. On June 9, 2005, Mr. Ashworth was appointed as West Fresno's CDE State Administrator. Mr. Ashworth assumed possession of the files and papers regarding West Fresno that had originally been in Mr. Griffin's possession.

Mr. Ashworth raised equitable arguments about the penalties imposed, and he challenged some of the facts used by the auditors to reach their conclusions. Mr. Ashworth has no personal knowledge regarding any of the facts or events underlying the challenged audit findings. Mr. Ashworth has no knowledge about who created any of the documents he inherited from Mr. Griffin, about how those documents were created, or about the sources or accuracy of the information used to create those documents.

8. State Controller audit manager Carolyn Baez is a certified public accountant (CPA) who managed and reviewed the work of the three field auditors who conducted the 2003-2004 financial and compliance audit of West Fresno. Ms. Baez reviewed their work papers for completeness and helped prepare the final audit report. Ms. Baez has twenty years of experience in the Controller's division of audits, with the most recent eight years in the area of educational audits.

In conducting its audit of West Fresno, Controller's Division of Audits follows Generally Accepted Auditing Standards (GAAS), Generally Accepted Government Auditing Standards (GAGAS), and the Standards and Procedures for Audits of California K-12 Local Educational Agencies guide published by the EAAP.[4] Consistent with these standards, the auditors generally reviewed representative random samples of documents.

In addition to these standards, the auditors reached their conclusions by reviewing West Fresno's bell/class schedules they received from the district office, as well as samples of teacher's lesson plans, and their own classroom observations.

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[4] Education Code Section 14502.1, 14503; *Modesto City Schools v. Education Audits Appeal Panel* (2004) 123 Cal. App.4th 1365 at 1383. Effective March 15, 2004, the audit guide, for annual audits required by Education Code Section 41020, is set forth in California Code of Regulations, title 5, Chapter 3, "Audits of California K-12 Local Education Agencies," Section 19810, et seq.

Pursuant to the Standards and Procedures for Audits, the auditors selected five separate days for in-class observation, during which they observed when class instruction actually began and when class was dismissed, as well as class activities such as eating breakfast. These observations were correlated with the bell/class instructional schedules provided by the district, the school calendar and the teachers' lesson plans to determine the actual instructional minutes.

Audit Finding 04-56: Insufficient Instructional Minutes

9. Incentive funding for longer instructional day and year is provided by Education Code section 46200, et seq. The formula for apportionment is generally based upon the required instructional minutes in the 1986 - 1987 fiscal year, as follows: 36,000 minutes for kindergarten, and 50,400 minutes for first through third grades. (Educ. Code § 46201, subd. (a)(3).)

For any school district that receives an apportionment pursuant to the 1986-87 fiscal year baseline and then reduces the amount of instructional time offered below this minimum baseline, "in the 2001-2002 fiscal year, or any fiscal year thereafter, the Superintendent of Public Instruction shall withhold from the district's revenue limit apportionment for the average daily attendance of each affected grade, the sum of that apportionment multiplied by the percentage of the minimum offered minutes at this grade level that the district failed to offer." (Educ. Code § 46201, subd. (d).)

The 1986 - 1987 instructional minutes baseline may be supplanted by that used in 1982 - 1983, as indicated in Education Code section 46201, subdivision (b)(1).

10. The auditors found that, for the 2003-2004 fiscal year, West Fresno offered 35,775 minutes of kindergarten instructional time. This was compared to the 43,120 kindergarten instructional minutes West Fresno offered in fiscal year 1982-1983. The auditors found that, in 2003-2004, West Fresno offered its kindergarten pupils 7,345 fewer instructional minutes than necessary to receive incentive funding.

11. The auditors found that, for the 2003-2004 fiscal year, West Fresno offered 48,600 minutes of instructional time to its first through third grade pupils. This was compared to the 50,400 instructional minutes required by the State to meet the minimum Fiscal Year 1986 - 1987 requirements. As a result, West Fresno's first through third grade students received 1,800 fewer instructional minutes than required to receive incentive funding.

12. The primary basis for these instructional minute deficiencies was the inclusion of some "breakfast time" during class that was not on the class/bell instructional time schedule (kindergarten), or that was on the schedule prior to the start of instruction but actually took place after the start of the instructional day (grades 1 – 3). Minutes used for breakfast were disallowed because "breakfast time" is not considered instructional time.

Additional instructional minute deficiencies were based upon auditor observations that the second grade classes were dismissed at 2:00 p.m., instead of the 2:10 dismissal time in the instructional schedule provided by the district.

13. Mr. Ashworth raised concerns about whether the auditors had used "approved" class/bell schedules from the district, and regarding an asserted "missing" 30 minutes in the morning. While only one of the three schedules used by the auditors was signed by Mr. Griffin, it was not disputed that the auditors had received these schedules from the district during their audit. West Fresno provided insufficient evidence to establish factual error by auditors using the standards and guidelines outlined in Factual Finding 8.

West Fresno's offered document, entitled "2003-2004 Schedules," provided typed and handwritten notations purporting to show that it had provided more instructional minutes than reflected in the audit. This document lacked any foundational showing that it was the type of evidence that could reasonably be relied on in this matter.[5] For example, there is was no evidence to indicate why this schedule was not provided to the auditors, if it had existed at the time of the audit. In addition, had this document been admitted, it would have been entitled to little evidentiary value, for the reasons set forth in Factual Finding 7.

14. West Fresno further argued that it was fundamentally unfair to impose the kindergarten instructional minutes penalty because, in 1982 -1983, it provided a full-day kindergarten, with instructional minutes that were much higher than the state standard. As a consequence, use of the 1982-83 instructional minutes as a baseline from which to measure its current instructional minutes in 2003-2004 was unfair. This argument is not within the scope of issues for this appeal.

[5] In an administrative proceeding, the hearing need not be conducted according to technical rules relating to evidence and witnesses; however, the evidence offered must be "the sort of evidence on which responsible persons are accustomed to rely in the conduct of serious affairs." (Govt. Code § 11513, subd. (c).) Hearsay evidence is admissible; however, upon timely objection, *it may be limited in scope*. (Govt. Code § 11513, subdiv. (d).)

Audit Finding 04-57: Staff Development Program Requirements

15. Pursuant to the Instructional Time and Staff Development Reform Program (Program), former Education Code Section 44579.1, subdivision (c) defined allowable staff development activities as

> staff development instructional methods, including teaching strategies, classroom management and other training designed to improve pupil performance, conflict resolution, intolerance and hatred prevention, and academic content in the core curriculum areas that are provided by the school district or county office of education.

To receive funds, the Program required that the district maintain records of attendance for each eligible participant, who was required to be present for the full staff development day. "Each staff development day shall be at least as long as the full-time instructional workday for certificated or classified instructional employees of the district…" (Educ. Code § 44579.1, subd. (e).)

16. The auditors used the same standards and guidelines as indicated in Factual Finding 8; however, sampling was not necessary because West Fresno only claimed three staff development days. Accordingly, all agendas, documents and sign in sheets pertaining to these development days were reviewed by the auditors. The auditors determined that the district claimed reimbursement for activities that were not eligible for the staff development reform program, and that the district did not provide contemporaneous documentation to support the activities claimed.

A. For the August 20, 2003, staff development day, the auditors found that two of the 6.5 hours incurred were not eligible under the program due to lack of contemporaneous documentation, because they involved a staff development meeting at the middle school. The agenda provided no supporting documentation of what occurred or was discussed at the staff meeting. The two hour disallowance reduced the day to 4.5 hours, which was less than the full contracted day required by the Program to claim funding. This finding resulted in a disallowance of $5,080, of the $15,863 claimed for this day by the district.[6]

B. For the August 22, 2003, staff development day, the auditors found that the entire day was not eligible. Based upon their discussions with district staff, and a review of the agenda, the auditors concluded that the day involved a "discussion on a

[6] Originally, the auditors had disallowed this entire staff development day for both the elementary and middle schools. On April 4, 2006, the disallowed amount was decreased after the auditors received supporting documents from the elementary school that revealed that approved activities were discussed at their staff meeting. The audit finding was revised to reflect the auditors' new conclusion that only the middle school's development day should be disallowed.

policy overview" and "site meetings" at the elementary and middle schools that did not meet the staff development criteria. Due to the lack of documentation by the district, the auditors could not determine what was discussed at these sessions. Documents that were later reconstructed and provided to the auditors were not contemporaneous, and did not provide sufficient information to determine compliance. Accordingly, the activities on the agenda did not comport with approved activities under Section 44579.1. This finding resulted in a disallowance of the entire $14,964 claimed for this day by the district.

C. Of the total $47,776 claimed by West Fresno, the auditors determined that West Fresno should repay the State $20,052.

17. West Fresno argued that there should be no disallowance for the middle school for August 20, 2003, because whatever had happened on that date at the elementary school had also been discussed at the middle school because they are on the same campus. This argument was unsupported by any reliable evidence. It should be noted that the auditors reached similar recordkeeping findings in the 2002-2003 audit. Consequently, West Fresno should have been aware of the importance of its recordkeeping obligations. Finally, because all of August 22, 2003 was disallowed, there is no factual support for West Fresno's argument that two days can be combined to make one staff development day.

APPLICABLE LAW

1. Education Code section 41344, subdivisions (a), (c), and (d), provides:

(a) If, 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, the Superintendent and the Director of Finance, or their designees, shall jointly establish a plan for repayment of state school funds that the local educational agency received on the basis of average daily attendance, or other data, that did not comply with statutory or regulatory requirements that were conditions of the apportionments, or for payment of a penalty arising from an audit exception. A local educational agency shall request a plan within 90 days of receiving the final audit report or review, within 30 days of withdrawing or receiving a final determination regarding an appeal pursuant to subdivision (d), or, in the absence of an appeal pursuant to subdivision (d), within 30 days of withdrawing or receiving a determination of a summary review pursuant to subdivision (d) of Section 41344.1. At the time the local educational agency is notified, the Controller shall also be notified of the plan. The plan shall be established in accordance with the following:

(1) The Controller shall withhold the disallowed or penalty amount at the next principal apportionment or pursuant to paragraph (2), unless subdivision

(d) of this section or subdivision (d) of Section 41344.1 applies, in which case the disallowed or penalty amount shall be withheld, at the next principal apportionment or pursuant to paragraph (2) following the determination regarding the appeal or summary appeal. In calculating a disallowed amount, the Controller shall determine the total amount of overpayment received by the local educational agency on the basis of average daily attendance, or other data, reported by the local educational agency that did not comply with one or more statutory or regulatory requirements that are conditions of apportionment.

(2) If the Superintendent and the Director of the Department of Finance concur that repayment of the full liability or payment of the penalty in the current fiscal year would constitute a severe financial hardship for the local agency, they may approve a plan of equal annual payments over a period of up to eight years. The plan shall include interest on each year's outstanding balance at the rate earned on the state's Pooled Money Investment Account during that year. The Superintendent and the Director of the Department of Finance shall jointly establish this plan. The Controller shall withhold amounts pursuant to the plan.

(3) If the Superintendent and the Director of the Department of Finance do not jointly establish a plan, the Controller shall withhold the entire disallowed amount determined pursuant to paragraph (1), or the penalty amount, at the next principal apportionment.

[¶] . . . [¶]

(c) 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.

(d) Within 60 days of the date on which a local educational agency receives a final audit report resulting from an audit or review of all or any part of the operations of the local educational agency, or within 30 days of receiving a determination of a summary review pursuant to subdivision (d) of Section 41344.1, a local educational agency may appeal a finding contained in the final report, pursuant to Section 41344.1. Within 90 days of the date on which the appeal is received by the panel, a hearing shall be held at which the local educational agency may present evidence or arguments if the local educational agency believes that the final report contains any finding that 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. 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.

2. Section 41344.1, subdivisions (a), (b), and (c), provide:

(a) The Education Audit Appeals Panel is hereby established as a separate state agency. Its membership shall consist of the Superintendent, the Director of the Department of Finance, and the Chief Executive Officer of the Fiscal Crisis and Management Assistance Team established pursuant to Section 42127.8 or their designees. The panel shall have the authority to expend funds, hire staff, make contracts, sue and be sued, and issue regulations in furtherance of its duties.

(b) The panel shall hear appeals filed pursuant to subdivision (d) of Section 41344. The Controller shall be a party to all appeals. The department and the Department of Finance may, at their election, timely intervene as a party in any appeal. The panel shall consider audit appeals pursuant to the administrative adjudication provisions of the Administrative Procedure Act (Chapter 4.5 (commencing with Section 11400) and Chapter 5 (commencing with Section 11500) of Part 1 of Division 3 of Title 2 of the Government Code), except that it may adopt regulations specifying special pleadings that shall govern audit appeals. The panel may approve settlements and make findings of fact and interpretations of law.

(c) 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 educational agency can demonstrate it acted in good faith to comply with the conditions established in law or regulation necessary for apportionment of funding. The panel may further define "substantial compliance" by issuing regulations or through adjudicative opinions, or both. If the panel finds there has been substantial compliance, the panel may waive or reduce the reimbursement or penalty amount and may also order other remedial measures sufficient to induce full compliance in the future. Other remedial measures may include restoration of a reduction or penalty amount if full compliance is not rendered in the future, ordering special audits, and requiring special training.

3. *Burden of Proof*: Education Code section 41344, subdivision (d), provides that the local educational agency which appeals the audit "may present evidence or argument" at the hearing. This provision places the burden of proof on West Fresno as the appellant in this matter.

LEGAL CONCLUSIONS

1. Education Code sections 41344, subdivision (d), and 41344.1, subdivision (c), provide the authority for the appeal hearing in this matter. Pursuant to Education Code section 41344.1, subdivision (c), the state is only obligated to make apportionments when there has been compliance with all legal requirements. Education Code section 41344.1, subdivision (c), further provides that, "[A] condition may be deemed satisfied if the panel finds that there has been compliance or substantial compliance with all legal requirements." Substantial compliance is defined as, "nearly complete satisfaction of all material requirements of a funding program that provide an educational benefit substantially consistent with the program's purpose." Furthermore, if a 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, a minor or inadvertent noncompliance may be found to be in "substantial compliance."

2. The EAAP has not further defined "substantial compliance" by issuing regulations or through adjudicative opinions.

3. As set forth in Factual Findings 9 through 14, West Fresno did not meet its burden of proof to establish errors of fact or interpretation of law regarding the instructional minutes requirement, or that it substantially complied with those requirements. Consequently, the total penalty of $127,827 in Audit Finding 04-56 is affirmed.

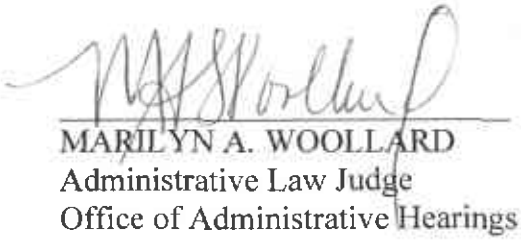
4. As set forth in Factual Findings 15 through 17, West Fresno did not meet its burden of proof to establish errors of fact or interpretation of law regarding the staff development day requirements or that it substantially complied with those requirements. Consequently, the total penalty of $20,052 in Audit Finding 04-57 is affirmed.

5. Pursuant to Education Code section 41344, subdivision (a)(2), West Fresno 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 West Fresno Elementary School District from Audit Findings 04-56 and 04-57 is DENIED.

DATED: November 27, 2006



MARILYN A. WOOLLARD
Administrative Law Judge
Office of Administrative Hearings