BEFORE THE
EDUCATION AUDITS APPEALS PANEL
STATE OF CALIFORNIA

In the Matter of the Appeal of: FRESNO COUNTY OFFICE OF EDUCATION, Appellant.	Case No. 00-03 OAH No. N2000050273

DECISION

The attached Proposed Decision of the Administrative Law Judge is hereby adopted by the EDUCATION AUDIT APPEALS PANEL as its Decision in the above-entitled matter.

This Decision shall become effective on May 25, 2001.

IT IS SO ORDERED May 25, 2001.

OAH 15 (Rev. 6/84)

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PROPOSED DECISION

Presiding Administrative Law Judge Stephen J. Smith, Office of Administrative Hearings, State of California, conducted preliminary proceedings and issued preliminary rulings in this matter as set forth hereinbelow.

Ronald V. Placet, Staff Counsel, Office of the State Controller, State of California, represented the State Controller.

Kerry Ganahl, Legal Counsel, and Jan Biggs, Administrative Advisor, represented the Fresno County Office of Education.

Frank Furtek, Senior Deputy Attorney General, represented the Department of Finance, State of California.

On July 17, 2000, Presiding Administrative Law Judge Smith conducted a Prehearing Conference in this matter. Mr. Placet and Ms. Ganahl were present. The appearing parties argued the nature and scope of the case.

On July 25, 2000, Presiding Administrative Law Judge Smith issued a Prehearing Conference Order. His Order stated that with regard to the audit report the parties "dispute the meaning and application of two different and conflicting statutes that appear to govern the manner in which Average Daily Attendance (hereafter 'ADA') is to be counted in the

unique setting of this school's operation." His Order further stated that the parties would prepare a stipulated statement of facts with any supporting exhibits to be submitted to him by August 15, 2000. His Order also directed that simultaneous opening briefs be filed by September 15, and simultaneous responsive briefs be filed by September 25, 2000. He ordered that oral argument be scheduled two weeks later.

On July 27, 2000, Presiding Administrative Law Judge Smith issued a Notice scheduling oral argument for October 12, 2000.

On August 17, 2000, the State Controller's Office and the Fresno County Office of Education agreed to waive time for the submission of the Joint Stipulation of Facts. The submission date was changed to September 15, 2000.

On September 15, 2000, Presiding Administrative Law Judge Smith ordered that the Joint Stipulation of Facts be filed on October 16, 2000, and that the parties' Opening Briefs be filed on the same date. He further ordered that simultaneous Responsive Briefs be filed on October 30, 2000.

On September 29, 2000, Presiding Administrative Law Judge Smith ordered that oral argument be rescheduled for November 20, 2000.

On October 9, 2000, Presiding Administrative Law Judge Smith received and reviewed the Joint Stipulation of Facts.

On October 13, 2000, Judge Smith received the Opening Brief on behalf of the Fresno County Office of Education.

On October 17, 2000, Judge Smith approved the delayed filing of the Opening Brief on behalf of the State Controller's Office. On October 18, 2000, Judge Smith received and reviewed the Opening Brief of the State Controller's Office.

On November 20, 2000, Presiding Administrative Law Judge Smith transferred the case with directions to Administrative Law Judge M. Amanda Behe for further proceedings and decision. On that date evidence was received and the oral arguments of the parties were heard in Sacramento, California. Shawn D. Silva, Staff Counsel, Office of the State Controller, State of California, represented the State Controller. Kerry Ganahl, Legal Counsel, and Jan Biggs, Administrative Advisor, represented the Fresno County Office of Education.

The record remained open for receipt of the Reply Briefs of the parties. The record was thereafter held open for receipt of the filings of the parties on computer disk.

FACTUAL FINDINGS

1. The California State Controller's Office conducted an audit of the Fresno County Juvenile Court and Community School Program for the period of July 1, 1997 through June 30, 1998. The Audit Report, which was dated November 2, 1998, was submitted to the State Department of Education.

2. With regard to Fresno County Office of Education (FCOE) Juvenile Court School Program the November 2, 1998, State Controller's Office Audit Report concluded that:

a. FCOE teachers did not follow the attendance accounting procedures that the FCOE submitted to the State Department of Education for approval.

b. Unit B at Worsley Juvenile Hall "did not meet the minimum school day of 240 minutes required by Education Code section 48645.3. The B-Unit is comprised of hard-core juveniles who are isolated from the rest of the jail's juvenile population and receive individual instruction. The juveniles individually meet with an instructor for 60 minutes each day rather than for the 240 minutes required by the Education Code. As a result, the instructional minutes are not in compliance with Education Code section 48645.3. Therefore, the ADA[1] is unallowable and should be quantified."

c. On-site observation by auditors "disclosed that the capacity of the B-Unit is six juveniles, whereas the B-Unit class rosters recorded more than six juveniles. Students outside the B-Unit were improperly recorded and reported as B-Unit students for apportionment purposes."

The Audit Report found that for the 1997-98 fiscal year FCOE claimed Average Daily Attendance (ADA) in the Worsley Unit B of 7.34. The Audit Report made a finding that such ADA was equivalent to $34,427 of overstated apportionment received, and recommended that a revised ADA be submitted by FCOE.

3. On October 28, 1999, the State Controller's Office advised the FCOE of the final report of its audit of the Juvenile Court School Program, and of the appeal rights afforded by Education Code section 41344(d).

4. On April 24, 2000, FCOE by the Superintendent of Schools filed a letter stating its intent to appeal, pursuant to Education Code section 41344, the State Controller's Office audit finding that its Juvenile Court School Program was out of compliance in the area of instructional minutes.

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[1] California school districts receive money based upon the average daily attendance (ADA) figures they report to the State. Education Code section 41601 requires school districts to report the ADA of students annually to the Superintendent of Public Instruction to obtain the allocation of state educational funding to which they are entitled. Average Daily Attendance refers to the number of students in attendance over a specified period of time.

5. On June 9, 2000, the State Controller's Office audit of FCOE's Juvenile Court Program was incorporated in the Statement of Issues filed in this proceeding.

6. The parties stipulated that FCOE is charged by the California Education Code[2] with providing educational services to all youth offenders incarcerated in the Fresno County Juvenile Hall.

7. The parties stipulated that each youth offender placed in the County Juvenile Hall is enrolled in the Court School program, which is operated by FCOE.

FCOE represented in its Opening Brief that each juvenile offender is enrolled in its Court School Program upon his or her placement into a residential unit at Juvenile Hall and begins receiving classroom instruction the following day.

8. The parties stipulated that Juvenile Hall is owned, operated and controlled by the Fresno County Board of Supervisors through the Fresno County Probation Office.

9. The parties stipulated that Unit B at Worsley is a component of the Juvenile Hall operated by County Probation. When full, Unit B will accommodate a total of six juvenile offenders. Unit B is an administrative segregation unit where the most violent and dangerous juvenile "hardcore offenders" are placed while incarcerated in Juvenile Hall. Typically, these juvenile offenders have acted out and evidenced such extreme and dangerous behavior that Probation has determined that they cannot be mixed with the general population of Juvenile Hall.

10. The parties stipulated that whether or not a juvenile offender is moved into Unit B is a decision made exclusively by Probation staff. Furthermore, how long a youthful offender remains in Unit B is determined exclusively by Probation.

The parties stipulated that because of the extremely violent and dangerous behavior of the youths housed in Unit B, and due to the risk of serious injury or death to others posed by these individuals, they are not permitted to be in contact with another youth. Therefore, students housed in Unit B are released by Probation one at a time and for limited periods of time to attend class. The decision when to release a Unit B student and for how long is exclusively that of the County Probation staff.

11. The parties stipulated that FCOE employs one full-time credentialed teacher who is permanently assigned to Unit B and who provides education services to Unit B students when they are released to attend class. This teacher is in Unit B for the entire school day and is prepared to offer up to 285 minutes of classroom instruction.

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[2] Education Code section 48645 et seq.

12. The parties stipulated that FCOE has counted, for Average Daily Attendance revenue calculation purposes, each Unit B student released during the school day to attend class regardless of how long Probation has permitted the student to remain in class.

13. The parties stipulated that the State Controller's Office conducted an audit of the Fresno County Juvenile Court and Community Schools Program in accordance with Education Code section 41344(a)(1). That audit was conducted for the period of July 1, 1997 through June 30, 1998. The auditors concluded that the FCOE program was in non-compliance with the required instructional day of 240 minutes per day for Unit B students.

14. The parties stipulated that during the State Controller's Office audit Pete Lempesis, the Unit B teacher at the time, was interviewed. Mr. Lempesis stated that generally there were six juveniles present in Unit B at any one time, and that they individually received approximately 60 minutes of instructional time daily. At the end of the 60 minutes, a juvenile had to be taken back to his cell so that another juvenile could come out for instruction.

15. The parties stipulated that the number of instructional minutes a student receives per day depends upon the number of juveniles housed in Unit B and how many Unit B juveniles are allowed by Probation to leave their cells in order to attend class. Attendance records indicate that there were never fewer than two juveniles who were present and ready to receive instruction in Unit B on any given day.

JURISDICTION OF THE EDUCATION AUDIT APPEALS PANEL; EDUCATION CODE SECTION 41344

16. Education Code section 41344(d) provides that:

> "Within 60 days of the date on which a local education agency receives a final audit report resulting from an audit or review, a local agency may appeal a finding contained in the final report to a panel consisting of the Superintendent of Public Instruction, the Director of the Department of Finance, and a Chief Administrative Officer of the Fiscal Crisis and Management Assistance Team established pursuant to Section 42127.8, or one of their designees. Within 90 days of the date on which the appeal is received by the panel, a hearing shall be held at which the local agency may present evidence or arguments if the local education agency believes that the final report contains any finding that was based on errors of fact."

17. In its opening brief filed on October 17, 2000, the State Controller's Office argues, apparently for the first time, that the appeal of FCOE must be dismissed because the Education Audit Appeals Panel is not the proper forum in which to raise a question of law. The State Controller's Office contends that where the facts are not in dispute, and actually were stipulated, the remainder of the appeal must be questions of law. It argues that the only possible construction of the concluding sentence of Education Code section 41344(d),

specifically the phrase "any finding that was based on errors of fact," is that the Panel's jurisdiction is limited to disputed facts. The State Controller's Office opines that the statutory language precludes the Panel from considering questions of law, i.e. those aspects of FCOE's appeal which concern interpretation of the Education Code.

18. As a threshold matter, the Education Audit Appeals Panel accepted FCOE's appeal and set it for hearing. FCOE's April 24, 2000, letter of appeal specifically identified an appeal pursuant to Education Code section 41344. The letter also clearly stated that the subject of the appeal was the State Controller's Office audit finding that FCOE's Juvenile Court School Program "was out of compliance in the area of instructional minutes." In short, the Education Audit Appeal Panel made at least a preliminary determination of jurisdiction by accepting the appeal rather than rejecting it as outside the scope of its authority.

19. In response to the State Controller's Office interpretation, FCOE argues that the parties are bound by a stipulation at the Prehearing Conference and the Prehearing Conference Order, both of which place the dispute before the Education Audit Appeals Panel. FCOE's reply brief represented that at the Prehearing Conference the issue was discussed in depth and all parties stipulated "that the best way to resolve the issue at hand would be for the ALJ to make a determination on the unresolved question of law."

20. As noted in the procedural history set forth above, Presiding Administrative Law Judge Stephen Smith conducted the Prehearing Conference on July 17, 2000. In that proceeding the State Controller's Office was represented by Ronald V. Placet, Staff Counsel. The Presiding Administrative Law Judge did not have a transcript or recording made of the Prehearing Conference.

The only indication of the parties' positions in the record is Judge Smith's July 25, 2000, Prehearing Conference Order. That order stated that the parties "dispute the meaning and application of two different and conflicting statutes that appear to govern the manner in which Average Daily Attendance (hereafter 'ADA') is to be counted in the unique setting of this school's operation." It further stated that "The evidentiary hearing shall be conducted by consideration of a stipulated statement of facts, written exhibits and the legal arguments of the parties." The cited language clearly contemplated that the appeal would include interpretation of the Education Code and its application to the stipulated facts.

21. The State Controller's Office did not request reconsideration of the Prehearing Conference Order or file a writ seeking review. Rather, in compliance with the Order it filed the Stipulation of Facts signed on October 6, 2000, by Shawn Silva[3]. FCOE's brief suggested that Mr. Silva was unaware of the stipulation because he was not present at the Prehearing Conference.

22. The State Controller's Office argument that FCOE's appeal must be dismissed because the Education Audit Appeals Panel lacks jurisdiction over questions of law was

[3] Mr. Silva then and thereafter replaced Mr. Placet in representation of the State Controller's Office in this case.

apparently not raised until its opening brief was filed on October 17, 2000. For the reasons set forth in the following paragraphs, it is unnecessary to address the untimely manner in which the State Controller's Office raised the jurisdictional issue.

23. While the State Controller's Office's opening brief does not directly address the issue of the stipulation at the Prehearing Conference described by FCOE's brief[4], it obliquely suggests that such an agreement was made. That inference can be made from the assertion that "Not even consent of the parties can enlarge the jurisdiction of the Panel. (citation)" (State Controller's Office Opening Brief, p. 5, emphasis supplied) For the reasons set forth in the following paragraphs, it is unnecessary to address the latter issue.

24. The narrow construction of Education Code section 41344(d) advanced by the State Controller's Office relies on a phrase modifying the word "finding" in the last sentence, and ignoring that the word is unmodified in the first sentence. The first sentence states that a local education agency "may appeal a finding contained in the final report" to the Education Audits Appeals Panel. The first sentence identifies the subject of appeals to be heard by the Panel, and it is not limited to only those findings based on errors of fact. A resolution of the apparent conflict is indicated by the text of the last sentence. The last sentence describes that the local agency "may present evidence or arguments." In administrative hearings parties present "evidence" regarding disputed factual matters and "arguments" regarding legal issues. Parties do not present "arguments" regarding "errors of fact."

The narrow construction of Education Code section 41344(d), and resulting limitation on the jurisdiction of the Education Audits Appeals Panel advanced by the State Controller's Office, is not persuasive. It ignores the clear meaning of the word "finding" in the first sentence and the inclusion of the term "arguments" in the last sentence.

25. Finally, and most importantly, the nature of the subject "final audit report resulting from an audit or review" (Education Code section 41344(d)) resolves any potential inconsistency between the use of the word "finding" in the two sentences of subsection (d). The November 2, 1998, State Controller's Office Audit Report contains "findings" which involve questions of fact and law. In such findings the auditors identified data, and then applied their interpretation of the Education Code to that data.

The State Controller's Office Audit Report and its transmittal letters contain nine references to specific provisions of the Education Code. In each instance the statutory provision is applied to identified facts or situations and the auditors draw a legal conclusion. For example, the Audit Report describes the schooling provided to residents of Unit B at Worsley. The auditors then cite Education Code section 48645.3, and interpret that statutory provision to conclude, "the instructional minutes are not in compliance with Education Code section 48645.3. Therefore, the ADA is unallowable..."

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[4] See Finding 19.

An interpretation of Education Code section 42344(d) which permits FCOE to appeal only a "fact" in one sentence, but not the auditors' interpretation of the Education Code as applied to that fact in the next sentence, would be incongruous. The construction urged by the State Controller's Office would limit FCOE's appeal in precisely that manner. The only meaningful appeal of an Audit Report as contemplated by Education Code section 41344(d) would permit the appellant to challenge the data and the analysis, including interpretations of the Education Code, that results in the disputed audit findings.

26. In sum, the State Controller's argument that FCOE's appeal must be dismissed for lack of subject-matter jurisdiction is not persuasive. Deference is given to the Education Audit Appeal Panel's decision to accept the appeal pursuant to Education Code section 41344(d), rather than rejecting it as outside the scope of its authority. The tortured construction of Education Code section 41344(d) urged by the State Controller's Office; that a phrase modifying the word "finding" in the last sentence controls even where the word is unmodified in the first sentence; is illogical. In addition, the subject Audit Report is largely a recitation of the auditors' interpretations of the language of the Education Code as applied to the "facts" of FCOE's operation of its Juvenile Court School Program.

The interpretation of Education Code section 41344(d) advanced by the State Controller's Office is rejected. The Education Audit Appeals Panel may consider the entirety of the appeal it accepted from FCOE, including the questions of law raised by the application of provisions of the Education Code to the FCOE Juvenile Court School Program.

THE BURDEN OF PROOF; EDUCATION CODE SECTION 41344(d)

27. Education Code section 41344(d) specifically provides that the party that appeals the audit "present evidence or arguments." That provision places the burden of proof on FCOE as appellant in the subject case.

CALCULATING ATTENDANCE FOR PURPOSES OF FUNDING; EDUCATION CODE SECTIONS 48645.3 and 46010.3

28. Education Code section 48645.3 provides, in relevant part, that the Court School's minimum school day "shall be 240 minutes" which is to be calculated on "the basis of the average number of minutes of attendance during not more than 10 consecutive days in which classes are conducted."

29. FCOE enrolls each minor placed in Fresno County Juvenile Hall in its Court School program. Unit B, the segregation unit for unusually violent minors, is usually at its capacity of six juvenile offenders. The decision whether to place a juvenile offender in Unit B and the duration of that segregation is made by Probation staff rather than FCOE.

Depending upon behavior, juveniles can remain in Unit B from one day to the entirety of their incarceration.

30. Because they are isolated from the general Juvenile Hall population for safety reasons, Unit B residents receive individual instruction rather than attend conventional Court School classes. Attendance records for the audit period indicate that at least two juveniles were present and ready to receive instruction in Unit B on any given day.

Unit B instruction is provided by one FCOE teacher available for up to a total of 285 minutes of classroom instruction daily. A Unit B student is released by Probation one at a time for approximately 60 minutes of individual instruction daily, and then returned to his cell so that another juvenile can be released for instruction. The number of instructional minutes a student receives daily depends upon the current Unit B population and Probation's decisions to release individuals to meet with the teacher.

31. During the audit period FCOE counted, for calculation of Average Daily Attendance revenue, each Unit B student released during the school day to receive instruction regardless of how many minutes of instruction the student received. State Controller's Office auditors concluded that FCOE was in non-compliance with the required instructional day of 240 minutes per day with regard to the Unit B students.

32. Pursuant to the stipulated facts, the Unit B juveniles could not have received 240 minutes of instruction within the meaning of Education Code section 48645.3, which defines the minimum schoolday for juvenile court schools. In fact, Unit B students received 60 minutes of instruction per day. Even if there were only two residents of Unit B, the greatest amount of instruction each could have received would have been 143 minutes each.

33. FCOE claims that it is entitled to full ADA for all Unit B students even though they do not receive a full 240 minutes of instruction. FCOE theorizes that it can claim full ADA if a Unit B student is present for any part of the day. FCOE argues that its customary 60 minutes of instruction daily defines the minimum day for Court School students for ADA purposes. Despite the clear definition of the minimum schoolday in Education Code section 48645.3, FCOE attempts to import the language of section 46010.3 to support its views.

FCOE argues that Education Code section 46010.3 authorizes it to count for ADA purposes minors who are only able to attend class for part of the instructional day because they are segregated in Unit B. FCOE opines that even though its program operation in practice provides only 60 minutes of instruction to Unit B students, section 46010.3 entitles it to count each such minor as if he had been present for the full 285 minutes the teacher offered services.

34. Education Code section 46010.3 provides that:

"Notwithstanding subdivision (a) of section 46010 or any other provision of law, for purposes of calculating days of attendance in order to compute any apportionment of

state funding under this code, a pupil enrolled in a regular day class, including opportunity classes and classes conducted in county community schools, for the minimum day that is applicable to that pupil, is deemed to be present for the entire schoolday, unless he or she is absent for the entire schoolday."

35. FCOE's interpretation is correct only if all Unit B students are enrolled in a school day that is at least 240 minutes long. Section 46010.3 applies only to students who are "enrolled in a regular day class . . . for the minimum day that is applicable to that pupil." Under section 48645.3 a juvenile court school day "shall be 240 minutes." Since no Unit B student received, or had any expectation of receiving, a full 240 minutes instruction no student could be "enrolled" in a minimum school day. In consequence, section 46010.3 is inapplicable to calculation of ADA for FCOE's Unit B students.

36. FCOE further asserts that it is authorized by Education Code section 46010.3 to count, for full ADA purposes, Unit B minors who receive less than 240 minutes of instruction a day merely because court school services are mandated by that Code. The argument ignores the clear and limiting language of Education code section 41344(d). That a local education agency is required to provide services does not empower it to ignore clear statutory provisions regarding entitlement to ADA.

37. FCOE emphasizes in its briefs that it is the responsibility of the Probation Department rather than its teacher that controls the release of Unit B students for instruction. While that is stipulated by the parties, the agency responsible for release of Unit B students does not resolve the question of entitlement to ADA.

38. FCOE argues that because "flexibility" in calculating instructional minutes is permitted for county-hospital patients (Education Code section 46192) and charter schools (section 47612.5) the requirement of 240 minutes of instruction should be ignored for Unit B students. FCOE bases its conclusion on the view that "all the school is required to do is 'offer' a full day of instruction." Its view ignores the clear language of Education Code section 48645.3 and is therefore unpersuasive.

39. By statutory mandate FCOE must provide educational services to incarcerated juveniles including Unit B residents. FCOE argues that the only alternative to its method of calculating ADA is to hire supplementary teachers to provide every Unit B student with individualized one-on-one instruction for the full instructional day. FCOE believes it would not be reimbursed for the "colossal" cost of such services. The manner in which a local educational agency could provide educational services to incarcerated juveniles is beyond the scope of the subject appeal. Clearly Education Code section 48645.3 does not provide an exception to its terms based on the cost of providing educational services.

"COUNTING" AND DISTINGUISHING JUVENILES IN UNIT B

40. FCOE enrolls Juvenile Hall residents in its Court School program upon admission, regardless of the unit in which a student is placed. FCOE argues that in consequence ADA must be calculated as if the students were a homogeneous group, despite its provision of clearly different educational services to Unit B residents. In support of its view FCOE notes that it does not engage in a "separate enrollment" for Unit B students. Its argument is not persuasive; the issue is the educational service provided rather than the agency's bookkeeping processes.

41. FCOE further argues that ADA for all juveniles must be calculated in the same manner because "No student arrives at the Juvenile Hall as a B Unit student" but is segregated thereafter on the basis of behavior. Again, entitlement to ADA is established by the amount of educational service offered. Clearly the educational program for Unit B is separate and apart from the general operation of the Court School. Moreover, the auditors has no difficulty distinguishing those students, the duration of their residence in Unit B, and the services provided to them for purposes of calculation of ADA in conformance with Education Code section 48645.3. FCOE assertion that the State Controller's Office urges a "selective application" of section 48645.3. The view is without merit. The provision applies equally to all aspects of the Court School. Its impact is significant only where FCOE does not provided the minimum day of instruction.

LEGAL CONCLUSIONS

Education Code section 48645.3, the specific provision of law which defines the minimum schoolday for juvenile court schools, clearly states that the applicable minimum schoolday is 240 minutes, which is to be calculated on "the basis of the average number of minutes of attendance during not more than 10 consecutive days." Students in Unit B of Fresno County Office of Education's Court School program do not meet the minimum school day of 240 minutes required by Education Code section 48645.3. Unit B students are not in fact enrolled in a school day that is at least 240 minutes long. The exigencies of their administrative segregation result in such juveniles receiving only an average of 60 minutes of education per day.

FCOE's view that it is entitled to full ADA by the expedient of defining every minor in Juvenile Hall as "enrolled" in its Court School is erroneous. The facts to which FCOE stipulated clearly establish that while in Unit B juveniles do not and can not attend its regular Court School program. In fact, Unit B residents are segregated from the population of its regular Court School program.

FCOE's claim that because a teacher is present to offer up to 285 minutes of instruction it is entitled to full ADA for every inmate in Unit B is not persuasive because historically such juveniles do not actually receive 240 instructional minutes. FCOE's theory,

if taken to its logical extension, would let it "count" every dropout standing on a street corner because it "offers" instruction whether or not it is received.

FCOE's claim that that all Juvenile Hall students are "in one single integrated educational program consisting of a 285 minute instructional day" is disingenuous. FCOE clearly provides only 60 minutes of instruction to each Unit B student. Similarly, its assertion that Education Code 46010.3 means that a Unit B student receiving only 60 minutes of instruction should be counted as receiving instruction for the entire school day is wholly unpersuasive. Because the threshold requirement of a "minimum day" as defined by the more specific provisions of Education Code section 48645.3 was not met, the more general language of section 46010.3 does not apply to FCOE's program for Unit B students.

ORDER

The appeal of the Fresno County Office of Education is DISMISSED.

Dated: April 6, 2001

M. AMANDA BEHE
Administrative Law Judge
Office of Administrative Hearings