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STATE OF MICHIGAN
DEPARTMENT OF ENERGY, LABOR & ECONOMIC DEVELOPMENT
EMPLOYMENT RELATIONS COMMISSION

Micheal J. Falvo
Fact-Finder

In the Matter of Fact Finding

Case No. D11 L-1356

Board of Education of Fraser Public Schools

and

Fraser Paraprofessional Association, MEA-NEA

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FACT FINDING RECOMMENDATION

INTRODUCTION

Nearly four years ago the Michigan Education Association (MEA/NEA) was certified as the exclusive bargaining representative for a group of designated paraprofessional employees. After numerous bargaining sessions and the efforts of a mediator the parties have been successful in resolving many but not all of the provisions of a collective bargaining agreement. In the hope that a neutral perspective would aid in finding a mutually acceptable resolution the Association filed a Petition for Fact Finding on June 5, 2012 and the Commission appointed the undersigned on October 18, 2012. A prehearing conference was held on November 2, 2012 and the matter scheduled for hearing on February 11, 2013. The parties requested extensions of the

original date set for submission of post-hearing briefs in order to facilitate additional bargaining and they were received on May 16, 2013. The District submitted a response brief on May 21, 2013 and the Association filed its reply on May 23, 2013. The parties were unable to stipulate to a list of comparable school districts and the record contains collective bargaining provisions and financial information for more than a dozen Macomb County School Districts. The exhibits comprise over one thousand pages.

Although the parties are well versed in the terminology of special education the job titles should be described at the outset. For purposes of this discussion the job titles are grouped in the seniority classifications proposed by the District.

Day Care Providers, Pre-School Aides and Caregivers. The District wants to classify these three positions into the "*Pre-School Aides*" classification. These employees work in the District's licensed pre-school and day care programs. The District describes those positions as requiring the least amount of skill and experience. A high school diploma is required.

Focus Four Aides. This is a program for four-year-olds and is independent of the pre-school or day care programs. This position requires specialized training or experience. The District proposes to establish a single classification for this position.

Lead Caregiver. This position requires a bachelor degree in Childhood Education or Child Development or an associate degree in Early Childhood Education or Child Development. In addition, experience in a credentialed program is required. The parties have tentatively agreed that if and when the Lead Caregiver fully complies with all state requirements the position will be considered supervisory and removed from the unit. The District proposes to establish a single classification for this position.

SSLI Center Program Aide. Individuals in this position work with students having Severe Speech & Language Impairments (SSLI) under the direct supervision of an SSLI classroom teacher. Specific training is required. This position is funded by the Macomb Intermediate School District (MISD) and employees are provided health insurance, vacation days, holidays, and other benefits as established by the Intermediate School District. No other bargaining unit member receives those benefits.

Special Education Aides. The parties agree that the following positions will be in this classification. Resource Room Aides, Early Childhood Special Education (ESCE) Aides (ECSE), Cognitively Impaired Aides (CI), and Autism Spectrum Disorder (ASD) Aides. These employees work directly under the supervision of a classroom teacher and assist in classroom duties.

Least Restrictive Environment (LRE) Aides. These employees are assigned to one student who experiences an advanced level of impairment requiring individualized attention. The LRE Aide is assigned for a minimum of an entire school year or longer.

The Association proposes the following four job classifications.

Pre-School Aides. Included in this seniority classification are Day Care Providers, Pre-School Aides, and Caregivers. (The parties agree on this classification).

Focus Four Aides/Associate Teacher and Lead Caregiver (unless given supervisory responsibility).

SSLI Special Education (MISD) Aides. (The parties agree on this classification).

Special Education Aides (including Early Childhood Special Education (ESCE) Aides, Cognitively Impaired (CI) Aides, Autism Spectrum Disorder (ASD) Aides, and Least Restrictive Environment (LRE) Aides.

SUMMARY OF POSITIONS

Although it will be necessary to give further details in connection with specific provisions, I believe it would be useful to briefly summarize the parties' main contentions in support of their positions.

ASSOCIATION

Contrary to the District's argument, fact-finders have historically and continuously applied the Act 312, Section 9 factors. Public Act 116 of 2011 requires Act 312 arbitration panels to accord financial ability "the most significance if the determination is supported by competent, material, and substantial evidence." Consideration of these factors requires that financial ability be assessed in the context of what the District has agreed to do and is doing with other employee groups in terms of benefits and salaries and to other districts with the Macomb Intermediate School District.

The District's insistence on improving wages and benefits in this bargaining unit ignores that in 2004-2005 the top rate went from $11.22 to $12.39 and has stayed at that amount. Even when the concessions made by other bargaining units are factored in the majority of comparable employees -- both internal and external -- have historically made and currently make more per hour and work per work year than any member of this group.

The District has refused to agree to numerous reasonable provisions concerning the rights of bargaining unit members that have nothing to do with money. The District has refused to agree to provisions that apply to other employees and the vast majority of external comparables

for similar employees. A prominent example is the District's insistence that employees within the special education paraprofessional positions be classified in separate seniority categories. This renders seniority almost meaningless for placement, layoff, and recall. The Association's proposed language does not make seniority the determinative factor because it recognizes the need for its members to possess the qualifications reasonably necessary to do the work and the ability to do work.

The District's proposed language limiting arbitration to long-term suspensions and discharges is out of step with internal and external comparables. It would leave bargaining unit members with no remedy except a circuit court lawsuit for breach of contract. The District's only demand concerning arbitration was the "loser pays" provision and when the Association agreed after months of negotiation it proposed limiting the scope of arbitration. This prompted the presently pending unfair labor practice charge.

The Association seeks group medical, dental, life and vision insurance in accordance with existing law for all employees that work 6 or more hours daily or 30 hours weekly. Employees who work less than 6 hours but more than 3 hours would be eligible for one-half of the District's contribution as defined by existing law toward insurances. This would bring this group of employees in line with District employees who work 30 hours or more weekly. There is no excuse to continue to treat the members of this bargaining unit (with the exception of the employees who work in the Severe Speech and Language Impaired (SSLI) program who receive benefits) as "second class citizens." That they did not organize until 2009 cannot be an excuse to fail to provide the same types of benefits that other employees receive. Under the same rationale, the Association asks the fact-finder to recommend that members of this bargaining unit receive the same holiday and compensable leave that other District employees receive.

DISTRICT

There can be little doubt that this has been one of the most challenging times to establish a new collective bargaining association and a new collective bargaining agreement. At the time negotiations started unemployment in Michigan was at a level higher than most if not all

other states, Chrysler and General Motors had recently filed for bankruptcy protection, and housing prices had fallen by 20 to 50 percent. All of this affected the state, and in turn school districts. Specifically, this District has experienced stagnant state aid and steadily rising costs. Despite prudent spending and aggressive cost cutting and efforts to market schools of choice to increase student population, expenses have exceeded revenue twice in the last four years and are projected to do so this year. The District is in a "structural deficit." The fund balance has been steadily reducing and has fallen below the recommended level for Michigan public schools for many years. The required retirement contribution for all employees is expected to continue to increase every year for several years. It is imperative that the proposals of both parties recognize this reality.

The District is willing to improve the wages and/or benefits for this Unit but on a modest basis which recognizes the amount of relief previously provided to the District from almost every other represented group. The Association's position seems to be that now that it is organized the same level of benefits provided to other bargaining units, as well as other Districts throughout Macomb County, must be awarded immediately. Wage and benefit increases are negotiated and implemented over time and are not usually accomplished in a first contract with a new bargaining unit. It is particularly important to follow that pattern because otherwise the current fragile financial condition will only grow more precarious.

The disputes over language issues are extremely important. Given the diverse nature of the work performed by bargaining unit members the District needs continued flexibility regarding layoffs, bumping rights, transfer, and filling of vacancies, especially in special education positions. Not every employee is cut out for the special rigors of dealing with special needs students. Recognized flexibility and discretion is needed to fulfill the District's mission to look out and serve students, parents, and teachers in the most efficient manner possible.

THE DISTRICT'S FINANCES

Even though I have thoroughly considered the information put forth at the hearing, carefully considered the dozens of exhibits containing tables, charts, and graphs, and studied the

thorough and well thought-out post-hearing briefs, it be a fool's errand to purport to explain what the parties live with and understand much better than me. I will not attempt to do so.

The District's finances depend upon state revenue. The Foundation Allowance decreased from $8,459 in 2010-2011 to $7,989 in 2011-2012 and did not increase in 2012-2013. The District asserts that the outlook for substantial increases in the next few years is at best uncertain and federal stimulus money in the last few years has ended. The District also has a declining student population. The 2012-2013 projected an increase of 100 students but less than half of that increase was realized.

The members of this bargaining unit participate in MPSERS. Required retirement contributions have skyrocketed from approximately $4.8 million in 2009-2010 to almost $7.2 million in 2012-2013.

The District asserts that it should have a fund balance between 15% and 20% of the operating budget to cover payroll and other expenses that occur throughout the year. The projected fund balance for 2013-2014 is 6.64%. In two years the fund balance has shrunk from 8.6% to 6.64%. This is described as a structural deficit. This reduction has occurred despite concessions made by all bargaining units except teachers.

The Association attributes the District's structural deficit to the decision to hire more teachers and more subcontracted non-special education Aides. It asserts that the District's predictions of a fund deficit have not occurred. According to the Association, the "mythical 15%" fund balance is an invention by auditors to justify hoarding rather than spending money. When compared to other Macomb County School Districts the District is in a greatly improved status because of its school of choice enrollees. The District has the ability to pay for every program and bargaining unit it favors but an unwillingness to make a reasonable offer of settlement to the Association.

NON-ECONOMIC ISSUES

Although there can be economic ramifications that flow from most contractual issues I believe it would be useful to first discuss issues that do not directly involve wages and benefits.

1. Scope of arbitration

The Association strongly opposes the District's proposal to limit arbitration to "grievances contesting employee discharges or long-term unpaid suspensions (more than 3 days)." The District emphasizes that this demand is consistent with the current trend in the District for newer bargaining units. The collective bargaining agreement for Library Technicians contains the proposed language. The District concedes that arbitration of any contractual dispute is the more traditional approach but contends that the negotiation of a first contract affords the opportunity to build in more flexibility. The District is particularly concerned that arbitration could be demanded whenever management exercises its discretion concerning a job placement or bumping choice. On the other hand, the Association sees this as leaving bargaining unit members without recourse (other than litigation) to enforce any rights it manages to secure under the agreement.

It is probably unnecessary to point out that one would expect that a labor arbitrator has firmly held views concerning his profession. As a fact-finder I have attempted to the extent possible to set aside any personal views and objectively consider the merits of the respective positions. It is on the basis of that evaluation that I recommend the District reconsider and withdraw its demand to limit arbitration to the specified disciplinary matters.

The District is willing to agree to the following provision. "The Arbitrator shall have no authority to arbitrate any complaint that is not an alleged violation, misinterpretation or misapplication of the specific and express provisions of this Agreement." As I understand its proposal, the arbitrator's de-facto authority would extend (and in a limited manner) only to one sentence in the Agreement. ("The parties agree that any discipline including discharge shall be for just cause and that the employee and Association will be provided copies of all discipline in writing with copies of any investigation and findings at the time discipline is imposed.") I believe there is a tension between those two sentences. For example, suppose the Association contends that the overtime provision has been misapplied in a particular instance. The arbitrator has the authority to arbitrate a dispute involving that "specific and express" provision yet the authority is

illusory because a grievance not involving certain disciplinary actions cannot proceed beyond Step 3 of the grievance procedure.

The District understandably points out that the Library Technician agreement contains this limitation. While relevant, too much weight should not be placed on a single collective bargaining agreement. Bargaining units are not alike in all respects. Ildiko Knott explained the point some years ago in a Fact-Finding Report involving the Lenawee County Board of Commissioners. (MERC Case No. L92 F-0095, July 5, 1983), p.5.

> Bargaining units are not identical, nor are their negotiations. Each has a patter of give and take of its own. The negotiation process must be flexible enough to recognize both similarities and differences. Neither an equal share nor equal sacrifice are necessarily valid ones. Each bargaining unit has its own rationale for wages and other determinations in collective bargaining. What one bargaining unit might gain or not gain in their negotiations with the County depends on the particular circumstances of their negotiations, their bargaining history and their job market. These circumstances cannot be automatically transferred to another unit. Each group must be judged on objective standards appropriate to that group.

I am unaware of the circumstances surrounding the Library Technicians agreement or the negotiation history. The nature of the work is different. It may also be that those employees think contractual interpretation disputes are unlikely to arise in their work setting.

The District has expressed the concern that affording employees in this unit the same opportunity to arbitrate grievances afforded to the overwhelming majority of other District employees could result in frequent arbitrations challenging discretionary placement decisions. Yet the proposed categorical limitation goes far beyond that and forecloses all non-disciplinary grievances irrespective of whether a discretionary decision is involved. The Association cannot be faulted for insisting upon a binding dispute resolution mechanism and the rationale for its opposition is not necessarily the fear that the District will unmercifully trample upon the rights of union members. Rather, it is based on the indisputable fact that neither management nor labor invariably has the right answer on matters of contractual interpretation. Although neither side likes to lose, unionized employees accept the fact that they are bound by the decision of a mutually selected neutral. From the *employer's* perspective this is preferable to a disgruntled workforce that believes (frequently wrongly) that they have been denied the benefit of their bargain with the District. With regard to the concern that there will be a flood of demands for

arbitration, the inclusion of the "loser pays" language is in my opinion a considerable disincentive for the Association to arbitrate meritless or weak grievances. I will address the concern that an arbitrator will interfere with the exercise of management discretion shortly.

While the District is encouraged to change its proposed language concerning the scope of arbitration, the Association is encouraged to agree to a limitation on the arbitration of "minor" disciplinary penalties. It is commonplace, for example, to exclude reprimands from arbitration. If the District is amenable to adopting the Fact-Finding recommendation the Association in turn should also seriously consider excluding what the parties have described as "short-term" suspensions. There is room for discussion whether the appropriate number is one, two, or three days.

2. Job classifications and layoff/recall.

The parties' difference of opinion on the proper scope of arbitral review seems to be principally based on job placement, layoff, and bumping concerns. The Association has as its priority the protection of seniority rights and job security. That is understandable. The District has as its priority the need to maintain the necessary discretion to best serve the specialized needs of its students. That is also understandable. My involvement in the process as an outsider convinces me that both sides are looking for a fair resolution. They should be commended for coming to terms on the seniority classifications for most positions. The classifications of Pre-School Aides and SSLI Special Education Aides have been resolved.

It has been pointed out that the Lead Caregiver position is a supervisory position that should be removed from the bargaining unit if and when the person holding the position fully complies with state requirements. In light of the similarities between the described job duties and qualifications of the Lead Caregiver position and the Focus Four Aide position, I recommend that the Association's position that they be grouped in the same seniority classification be adopted.

The remaining issue classification concerns the Least Restrictive Environment (LRE) Aides. This is not an easy issue on which to find a middle ground but that can be accomplished if one focuses on interests rather than the positions the parties have staked out. One begins with the recognition that federal and state policy requires that school districts develop an individualized

education plan for students with disabilities that allows them to attend school in a general education environment with the assistance needed to succeed. The testimony offered by both sides at the hearing made clear that the relationship between the LRE Aide and student is extraordinarily close and that continuity is important. In some cases the best interests of the student require that the LRE Aide continue with the same student for periods of years. On the other side of the coin is the Association's legitimate concern that seniority be considered when layoffs are necessary. Everyone recognizes the consequences of losing a job. The Association has shown its recognition of the special relationship by including language that exempts LRE Aides from being bumped at any time during the school year.

The following recommendation accommodates both parties' interests. The District makes the persuasive point that the LRE position requires skills and personality attributes that are not necessarily possessed by other Aides in the seniority classification proposed by the Association. That is undoubtedly correct. But some surely do. There are circumstances where continuity and incompatibility do not require the disqualification of more senior employees in this classification. For example, the assigned student may have graduated or moved to another district over the summer. Perhaps the parents would not mind a different LRE Aide being assigned. The recommended resolution is to include LRE Aides in the classification proposed by the Association but to expand upon the modification suggested by the Association. Although I have no expertise in special education, I do not think it is required to discern that if it is not in the student's best interests to change the LRE Aide during a school year it probably is not in the student's best interests to change the following year. I recommend that Article 6(F)(4) as proposed by the Association be modified along the following terms.

> 3. Notwithstanding the foregoing, Special Education employees in the Least Restrictive Environment (LRE) and SSLI classroom aides classifications shall not be bumped at any time during a school year. In addition, Special Education employees in the Least Restrictive Environment (LRE) classification shall not be bumped during the period beyond the school year if it is determined that not continuing the assignment to an individual student would be detrimental to the student's interests as established in the individualized education plan. The standard for placement as the result of bumping shall conform to the requirements stated in Article 7(C)(3). The District's determination under this paragraph may be grieved through Step 3 of the grievance procedure.

Undoubtedly neither side wants to compromise its position. The compromise is limited to the LRE Aide classification. This modification addresses the District's "continuity" concern and allows it to exercise appropriate discretion in the best interests of students. The Association agrees that the employee seeking to bump into a position can only exercise seniority rights if he or she is "fully qualified to perform the available job." Article 7(C)(3) will assure that the employee seeking to bump into the position has prior experience in dealing with disabled children. The qualifications listed in the job description are: minimum high school diploma; Crisis Prevention Intervention (CPI) trained; previous experience with students who have an emotional impairment, fetal alcohol syndrome, or autistic spectrum disorder who have behavioral problems; and the physical strength to handle a child throwing a temper tantrum. Perhaps not all -- but some Special Education Aides who have worked with children having the described conditions presumably possess the experience and personal attributes that a child who experiences an advanced level of impairment needs. The proposed language appropriately accommodates the Association's countervailing interest in having seniority and qualifications -- not merely seniority -- considered in the face of loss of employment. With this modification I recommend that Article 5(J) and Article 6 be adopted as proposed by the Association.

Article 7 -- Vacancies, Transfers, Newly Created Positions and Bidding Procedures.

Although there are a few minor points of contention that will be noted, the real stumbling block concerns whether there should be arbitral review of these placement decisions. The Association persuasively established during the hearing that it is customary in the District to afford arbitral review of job placement decisions and that their members are concerned that they be fairly and objectively considered for openings. The District asserts that there is no necessity for review because its judgments will be fair and objective and should not be overridden by an individual without training or experience in special education. Excluding the "Pre-School Aides" classification (in which placement decisions would be subject to normal arbitral review), I recommend that the Union's interest be accommodated by permitting arbitral review but the District's interest be accommodated by constraining the authority with which arbitrators are

customarily empowered. The rationale for treating "Pre-School Aides" differently is that there is less concern that an incumbent employee bumping into a position would be unqualified.

It is not an unusual position for management to resist surrendering the capacity to make unilateral and final decisions. But arbitration is an established method of self-government long recognized by the District. There is no indication that the District has on its bargaining agenda an effort to excise arbitration from its other collective bargaining agreements and I recommend that the District not pursue a course that treats the lowest paid organized group -- in the Union's words -- as second class employees. This does not engender loyalty and would be likely to be perceived as denigrating the importance of employees who are responsible for special needs students.

The authority of an arbitrator is derived from the collective bargaining agreement and the parties are at liberty to make that authority as broad or as narrow as they deem appropriate. The Association's current proposal is that transfer decisions be reviewed for abuse of discretion. In my experience that term is more often used in judicial rather than arbitration proceedings. I suggest that the provision be reworded to incorporate the "arbitrary and capricious" standard of arbitral review. There is a well-established body of arbitral precedent explaining that this is a highly deferential standard. To make the point emphatic, I recommend the inclusion of language that in challenging placement decisions placement decisions the Association must rebut by substantial evidence the presumption that the District has exercised sound discretion based on specialized knowledge concerning pupil needs. The District has an equal say in selection of arbitrators and is in a position to avoid the appointment of arbitrators who are not observant of stipulated constraints on their authority. This is an appropriate compromise that affords the District considerable latitude in placement decisions but offers the Association some recourse in the unlikely event that favoritism rather than qualifications infects the process.

I recommend that the parties adopt the language proposed by the District that vacant positions are to be filled within 60 days after a decision is made to fill the position. The 10-day period proposed by the Association is unworkable in light of the realistic time frame to manage the hiring process for applicants not already employed by the District. Furthermore, if deemed

necessary by the District, clarifying language should be added that the District retains the right to determine whether or not to fill a vacancy. That language reiterates the discretion the District already has under the management rights article. With these changes I recommend the other language agreed upon by the parties or proposed by the Association be adopted.

Article 8 -- Transfers (or Promotions) Outside the Bargaining Unit

The District uses the word "transfers" in the title of the article. The Association maintains the proper word is "promotions." I recommend that the Association adopt the District's proposed language. An argument about whether a particular transfer is or is not a promotion based on what is and is not "more favorable" to the employee is in my view not worth having. Experience shows that inclusion of words like "other factors" is not a good idea because both sides are entitled to know the scope of the agreement.

Article 9 -- Grievance Procedure

The main issue concerning the scope of arbitral review has already been discussed. The only remaining issue is Article 9(C)(6). The District proposes inclusion of a provision stating: "Any back pay award shall be limited to the date of the occurrence giving rise to the grievance or ten working days prior to the filing of the written grievance, whichever is shorter." The Association proposes that the provision state: "Any back pay award shall be limited to six months prior to the date of the written grievance."

Article 9(B)(3) requires that a written grievance be filed within ten days following the act or condition which is the basis of the grievance. In light of the time limitation the District finds the Association's demand for a six month back pay limitation inexplicable. The Association's post-hearing brief does not explain the rationale. However, the District has not explained how it could be liable for back pay for a period that is greater than ten days prior to the occurrence or written grievance. I have not found the proposed back pay limitation language in any of the other District collective bargaining agreements and there has been no indication that problems have resulted. I recommend that the parties resolve the dispute by deleting the provision.

Article 13 -- Hours and Overtime

The first points of contention concerns the District's right to reduce working hours. The District reserves the right to reduce hours in the event of an emergency crisis, financial crisis, or a change in the conditions of a special education student. First, the Association proposes to amend that language to clarify that the right to reduce hours pertains to individual bargaining unit members. Second, the Association proposes that before a reduction in hours take place it have the opportunity to discuss the matter with representatives of the Board. Third, it proposes to be able to submit to the grievance procedure whether there is an actual emergency or financial crisis. The first two changes are recommended. The third is not. An arbitrator is not the appropriate individual to decide whether finances have devolved to a "crisis" situation for several reasons. The politically accountable members of the Board are elected to make such judgments and it is not the proper function of a labor arbitrator to usurp that responsibility. Nothing in the specialized training or experience of most arbitrators affords them the expertise to make decisions on curriculum and other priorities. Finally, arbitrators decide disputed issues on the basis of ascertainable standards. The word "crisis" is too amorphous to meet that criterion.

Based on the record made at the hearing, I recommend the Association withdraw the proposal to mandate extra school days. The Association maintains that the District knows that its members are in school working one or two days before and after the school year but does not want to pay for this time even though it benefits the students. On the other hand the District maintains that in light of their responsibilities Pre-School Aides, Focus Four Aides and most Special Education Aides should begin work on the first student school day and end on the last student school day. The District does not acknowledge that it "knows" that the employees are coming in one or two days before the students arrive and after they leave. Article 2 reserves onto the Board the authority to decide the means and methods for the performance of work. School administrators must use taxpayers' funds prudently. In the absence of record evidence, I have not credited the Association's claim that the District wants employees to perform uncompensated services but I recommend the District amend its proposed language. It currently provides that "no bargaining unit member will be expected to work without being requested to work." Individual teachers might misunderstand the sentence in a manner that would contravene the stated policy

by "encouraging" employees to work without compensation. I recommend the sentence be changed to "no bargaining unit member will be permitted to work without being requested to work."

The District states in its post-hearing brief that recent discussions have led to a recognition that some Day Care and Preschool aides may not have any control over working overtime if a parent does not timely pick up the child. The parties have tentatively discussed how to rectify this situation.

Article 14. Miscellaneous

Article 14(E) concerns the posting of vacancies in the event that a new position is created through grant funding. The parties agree that the position will be considered a bargaining unit position and posted. The parties did not address in detail their positions on the scope of the District's prerogative to unilaterally set compensation and fringe benefits. Without a better understanding of the supporting rationale for their positions I do not believe any discussion would be beneficial.

The Association points out that the reference to Public Act 4 in Article 14(F) should be removed because that act was repealed by the adoption of Proposal 1 in November, 2012. The point is well-taken.

The District believes that the collective bargaining agreement should reflect the protections afforded to individuals who desire to refrain from the payment of dues or who desires to relinquish membership in the bargaining unit. There was no indication in the presentations that this matter has been discussed and it is appropriate that they do so to avoid an unenlightened recommendation.

Article 21. Duration

In light of the time it has taken to negotiate this collective bargaining agreement and in recognition that there is more work to be done, I recommend that the parties agree that the expiration date of the agreement be June 30, 2016.

ECONOMIC ISSUES

Whether merited or otherwise, the District has taken the Association to task for declining to prioritize its wage and benefit requests. The District describes the Association's April 9, 2012 response to that request as merely a reiteration of it demands that gives no indication of those areas in which the most relief is needed. With regard to economic issues, the Association wrote:

> The Frasier Paraprofessional Association/MEA's members desire to have an agreement that provides working conditions, pay and benefits that are similar to those that prevail for other employee groups within the District as well as for comparable employees in districts within Macomb County.
>
> . . .
>
> The Fraser Paraprofessional Association/MEA is confident that an objective review of the contracts within the District and throughout I.S.D. supports its members getting personal leaves and having those that are not used be carried over to succeeding years; "act of god" days paid as others in the District; reasonable bereavement leave on the occasion of the death of a family member; jury duty as paid time off; the option to be paid in twenty-six (26) pays; holiday benefits and vacation comparable to other groups in the District; benefits comparable to other employee groups, including health, dental, optical, life, and disability insurance for all employees who work at least six (6) hours with a proration of benefits for those that work less; as well as wage rates that would put bargaining unit members in a position comparable to that which other District employees enjoy within the I.S.D.
>
> The Association has not proposed longevity or added compensation for additional education, but would consider having some part of pay increases based on such considerations as they would reduce the upfront cost and encourage both employee loyalty and professional development.

The letter also shows that the Association is not oblivious to the realities of the collective bargaining process. It did not propose longevity pay and has withdrawn its demand on vacations. It has not proposed to have accumulated time paid out at separation. And the Association acknowledges what the District aptly describes as "an old adage in labor law that significant wage and benefit increases are negotiated and implemented over time and are not usually accomplished in a first contract with a new bargaining unit." While the Association's "priority remains having an enforceable contract that protects agreed upon wages, hours, terms and conditions of employment," at the same time "the Association also realizes that it is not bargaining a first contract in the best of all possible times and therefore understands that we likely will not achieve all we need to achieve to get parity in one contract." That mutual recognition of

the nature of negotiating a new agreement is a starting point for the wage and benefit recommendations. It would have taken many days of hearing to gain a comprehensive understanding of the bargaining history of all of the labor organizations in the Fraser Public Schools but the exercise would have undoubtedly revealed that some of the benefits in those contracts were "bought and paid for" in the give and take of the collective bargaining process. Expectations of negotiating an initial agreement that has full parity with bargaining units that have achieved benefits incrementally are unrealistic.

There is a complicating fact in this negotiation. The Association is seeking wage and benefit improvements at a time when unionized employees, other than teachers, have granted concessions in light of the District's financial difficulties. The District takes exception with the Association's assertion that the District has declared that it will not grant increases to this group until the concessions are restored. No productive purpose would be served by delving into that disagreement since the District is willing to improve the wages and/or benefits on a "modest basis which recognizes the amount of relief previously provided to the District from almost every other internal represented group." The Association's point that even after concessions comparable employees are in a better position than these employees is well-taken. I have also considered the Association's argument that concessions were achieved by threats of subcontracting as well as the District's rejoinder that only the Transportation and Operations & Maintenance groups were involved in privatization discussions.

Recognizing that the applicable statutes are different in terms of purpose and procedure, fact-finders nevertheless frequently set out and consider the factors that pertain to compulsory arbitration proceedings involving public safety employees. I concur in the view that the Section 9 criteria -- to a greater or lesser degree depending on the particular bargaining situation -- are appropriate considerations in the fact finding process as well.

(a) The lawful authority of the employer.

(b) Stipulations of the parties.

(c) The interests and welfare of the public and the financial ability of the unit of government to meet those costs.

(d) Comparison of the wages, hours and conditions of employment involved in the proceeding with the wages, hours and conditions of employment of the other employees performing similar services and with other employees generally;

(i) In public employment in comparable communities.
(ii) In private employment in comparable communities.

(e) The average consumer prices for goods and services, commonly known as the cost of living.

(f) The overall compensation presently received by the employees, including direct wage compensation, vacations, holidays and other excused time, insurance and pensions, medical and hospitalization benefits, the continuity and stability of employment, and all other benefits received.

(g) Changes in any of the foregoing circumstances during the pending of the proceeding.

(h) Such other factors, not confined to the foregoing, which are normally or traditionally taken into consideration in the determination of wages, hours and conditions of employment through voluntary collective bargaining, mediation, fact-finding, arbitration, or otherwise between the parties, in the public service or in private employment.

In addition to the Act 312 factors, fact finding reports repeatedly mention an approach labeled "the art of the possible." Fact-finder George T. Roumell, Jr. has described the notion as recognizing the ordinary give and take that occurs during the negotiation process coupled with the realization that seldom do parties achieve everything they would like to attain in a successor agreement. Adherents to this approach contend that an "outsider" serving as a fact-finder best preserves sound principles of collective bargaining by attempting to discern the settlement the parties would have reached if their negotiations had been successful. He explained this in *Southfield Public Schools* (MERC Fact Finding Case No. D06 B-0148, May 15, 2007), p. 4.

> The "art of the possible" in concept means that if the parties were left to their own devices and the public employees involved had the right to strike, as a strike deadline loomed the parties would attempt to compromise in order to avoid a disruption in public service and loss of employee income. The concept is that, in compromising, the parties would review their respective positions and attempt to reach a resolution based on the art of the possible, as the art of the possible is the essence of compromise.

Clearly one of the things the Association wants to achieve is an improvement in wages. Unlike other public sector unions where changes to retirement benefits are prominent, employees are already covered by the state retirement system. This is a significant benefit that costs the District from $3,500 to $4,700 per employee. It would be expected that some things are more or

less important to the membership depending on their personal circumstances. A married employee who is covered by medical insurance from the spouse's employer would likely place medical coverage lower on the list than someone without medical insurance. It would be helpful in formulating an informed recommendation to know the number of bargaining unit members who are self-insured or uninsured but I do not. In the absence of the breakdown I assume that having health coverage is high on the list of priorities for employees who pay for their own medical insurance or who cannot afford it at all. The reasons are self-evident.

Both post-hearing briefs address the federal Patient Protection & Affordable Care Act. The District states:

> The fact-finder can take judicial notice that with the full implementation of PPACA in January of 2014, many of the Aides may be eligible for health care as a result of that implementation. The District will be obligated to provide health care coverage to at least 95% of employees working over 30 hours per week. To recognize that some of these employees will receive health care benefits whether or not the parties negotiate for same in a CBA, it seems to be a reasonable compromise that the fact-finder would recommend that employees be entitled to health coverage "as provided by law." That will, assuredly, increase the number of Association members securing health care.

The Association's post-hearing brief states: "The Association recognizes that the Federal Affordable Health Care Act will require the District to provide medical insurance to all the Association members that the Association members that the Association is seeking to have the District provide medical insurances to, beginning no later than January 1, 2014." Nevertheless it requests that the fact-finder recommend that the District provide medical insurance, dental insurance, life insurance and long-term disability insurance commensurate with the benefit levels of other District employees.

On July 2, 2013 the Department of Health & Human Services announced that the January 1, 2014 date for the so-called "employer mandate" was being moved to January 1, 2015. Accordingly, assuming that the parties reach agreement and the implementation date is not again moved back, there is a gap of 17 months under which the District's proposed "as provided by law" language would leave employees without any health care coverage. Bargaining unit members involved in the care and education of children provide essential services and for some the responsibilities are particularly challenging. The District justifiably expects -- and gets --

dedicated employees who take their important responsibilities seriously and they are no less valuable to the success of the District than maintenance employees, bus drivers, and food service workers. Although I agree that these employees should not expect to negotiate a contract that affords the same level of benefits secured in mature agreements, providing at least some health insurance is a clearly justified demand. It should be kept in mind that the postponement of the deadline for the employer mandate is a one-year reprieve from a significant expense that the District would have incurred in 2014.

Keeping in mind that the art of the possible is the essence of compromise, I recommend that *all* bargaining unit members who work 6 or more hours daily or 30 or more hours weekly receive the limited medical benefits delineated on page 21 of the current agreement between the District and AFSCME Michigan Council #25 and Local 3846, Sub-chapter 14 -- Food Service for employees hired after March 23, 2009, *except as modified as follows:*

- Coverage is limited to employees who are not eligible to be covered by another employer paid medical insurance plan.
- Employees shall certify this fact in writing upon request and the failure to do so shall mean the employee is not eligible for such coverage.
- Coverage is for medical and prescription (not optical or dental) for the employee only (single coverage).
- Employees taking such coverage shall pay 20% of the applicable premium cost on a pre-tax basis by payroll deduction.
- The employee shall have the option of purchasing medical and prescription insurance at group rates, subject to the approval of the appropriate insurance companies, for the employee's spouse and dependents.
- The medical and prescription coverage will be the same as indicated in that agreement with the option to "buy up" to the described alternate plans at the employee's expense.
- Employees who work fewer than 6 hours daily or fewer than 30 hours weekly shall receive pro rata medical and prescription coverage.
- Employees will not receive cash payments for declined benefits.
- Employees may purchase the described optical insurance at their own expense if permitted by the insurance carrier.
- Employees may purchase the described dental insurance at their own expense if permitted by the insurance carrier.
- Employees may purchase the described life insurance at their own expense if permitted by the insurance carrier.
- Employees may purchase disability insurance at their own expense if permitted by the insurance carrier.

This is substantially less coverage than provided to food service workers hired after March 23, 2009 and all other unionized workers with the exception of Library Technicians. It is a substantial first step toward lessening the existing inequality. It is not excessive. A newly hired food service

worker has substantially more insurance coverage than a bargaining unit member with 20 years seniority. The rationale for not including optical and life insurance is that the food service agreement has a 40-hour requirement for this coverage and the cost to the employee, if desired, is affordable. The annual premium for optical insurance is $43 for single coverage and $139 for family coverage. The annual cost of life insurance in the policy amount of $15,000 is approximately $21.00.

According to the District's exhibit, the maximum annual cost of extending medical and prescription coverage to 40 bargaining unit members is approximately $164,000. The number overstates the actual cost because an unknown number of employees will be ineligible based on employer insurance provided for the spouse. In light of the District's somber financial situation a recommendation for 2-person or family coverage is not supportable at this time. Two-person coverage would more than double the annual cost ($393,000) and family coverage would triple it ($491,000).

It is true that this recommendation imposes a substantial expense during a period of shrinking revenues. But it is by no means excessive and in comparison to other Macomb County school districts is modest. **TABLE 1** shows benefits for other school districts selected by the District for purposes of comparison. It should be noted that none of the districts limit medical coverage to single coverage. The table does not take into consideration differences in required employee contributions.

TABLE 1 -- COMPARABLE EMPLOYER PAID INSURANCE BENEFITS

	Medical	Dental	Vision	Life	Disability
Roseville	YES	YES	YES	YES	YES
Romeo	YES	YES	YES	YES	YES
Warren Woods	YES	YES	YES	YES	YES
Clintondale	YES	YES	YES	NO	YES
Lakeview	YES	YES	YES	YES	NO
Fitzgerald	YES	YES	YES	YES	YES
Chippewa Valley	NO	NO	NO	YES	NO

As explained I have proceeded under the unverified assumption that medical insurance is high on the Association's list of priorities. To the extent that I have proceeded under a mistaken assumption the recommendations concerning other fringe benefits might not fit. If I understood the District's position it is most concerned about the bottom line rather than how costs are allocated.

Only so much can be accomplished in a first bargaining agreement. That is particularly true at a time when school finances are challenged and other unionized employees have taken concessions. In light of that and after considering the internal comparables and the external comparables indicated by both parties, I make the following recommendations concerning benefits. The intent is not to affect existing benefits of SSLI Aides.

Paid holidays -- 4

Sick days -- 10 days with accumulation to 75 days (no payout)

Bereavement Leave -- Same as other bargaining units

Snow days -- Unpaid

This remaining recommendation concerns wages. The underscored language represents the Association's proposed Article 19 changes and the strikethrough the District's.

Article 19 --WAGES AND PAYROLL

A. WAGES AND PAYROLL

The payroll period shall be twice per month as designated by the Board.

B. HOURLY RATES

The hourly rate for all classifications in the bargaining unit for the years 2009-2010, 2010-2011 and 2011-2012 shall remain the same as they were upon certification of the bargaining unit. The parties will negotiate hourly rates for the 2012-2013 and 2013-3014 school years beginning no later than January 1, 2012 and in the absence of an agreement by June 2, 1012 as to new rates increase all hourly rates for 2012-2013 and 2013-2014 by no less than the April 2011 to April 2012 cost of living increase (CPI-U) for Detroit for 2012-2013 and again for the 2013-2014 and thereafter in each succeeding year in which no agreement is reached to modify such increase ~~shall remain at the rate paid to employees on June 2, 2011 throughout the life of this contract and during any extension of this contract.~~

The District calculates the Association proposal for all employees with three years of service (which is the vast majority of Association members) as ranging from $2.78 per hour (a 22.43%

increase) for the employees at the highest rate of $12.38 per hour, and as much as $6.08 per hour (for an increase of 66.9%) for each employee at the low end of the wage scale.

Two points are in order. The purpose of a collective bargaining agreement is to set forth the agreed-upon terms of employment for the duration of the contract. It is designed to bring bargaining to closure. This is not accomplished by the Association's wage proposal. Secondly, although the customary manner of calculation, expressing salary increases in percentages can give a misleading picture when lower wage workers are discussed. A one percent raise for a teacher making $60,000 annually is $600 but a one percent raise for someone making $13 per hour is 13 cents.

Any recommendation on a wage increase for members of this bargaining unit must take into account that other employees have experienced significant pay cuts. It is true that the reductions were taken from a higher salary but that recognition can go only so far in justifying a salary increase. Other employees have agreed to have wages frozen for the current and next school year. This would be a less complex negotiation if the salaries of other groups had merely stayed stagnant as is the case in this bargaining unit.

TABLE 2 -- EMPLOYEE SALARY REDUCTIONS SINCE 2009

Group	Reduction
Administrative Assistants	-5.0%
Central Office Admin.	-5.0%
Computer Lab Assistants	-1.6%
Operations & Maintenance	-6.0%
Food Service	-5.0%
Principals	-5.0%
Non-affiliated	-2.5%
Teachers	0%
Bus Drivers	-5.0%

The Association has described the present as not the best of all possible times to negotiate a first contract. That is at the same time true and an understatement. Considering the entire picture, the following wage increase is recommended for all bargaining unit members except SSLI Aides whose compensation package is determined by the Macomb Intermediate School District.

Date of ratification/approval to June 30, 2015 -- 75 cents per hour

July 1, 2015 to June 30, 2016 -- 75 cents per hour

This increase will also increase the District's FICA and MPERS payments.

SUMMARY OF RECOMMENDATIONS

1. I recommend that the list of job classifications in Article 5, Section J be the following:

   - Pre-School Aides (includes Day Care Providers, Pre-School and Caregivers)
   - Focus Four Aides/Associate Teacher and Lead Caregiver
   - SSLI Special Education (MISD) Aides
   - Special Education Aides (including Early Childhood Special Education (ESCE) Aides, Cognitively Impaired (CI) Aides, Autism Spectrum Disorder (ASD) Aides, and Least Restrictive Environment (LRE) Aides

2. I recommend that Article 6(F)(3) be revised to provide that in the event of layoffs an employee in the LRE classification shall not be bumped during the school year or beyond the school year if it is determined that not continuing the assignment to an individual student would be detrimental to the student's interests as established in the individualized education plan. Any person seeking to bump into the LRE shall have prior experience in dealing with disabled children and selection will be subject to input from the parents of the student and the teacher. The District's determination under this paragraph may be grieved through Step 3 of the grievance procedure.

   Other than the above provision I recommend adoption of the Association's proposed Article 6 language.

3. I recommend that the language proposed by the District in Article 7(C)(2) concerning training requirements be adopted.

4. I recommend that, except for Pre-School Aides, placement decisions be subject to arbitral review under the arbitrary and capricious standard. In challenging placement decisions the Association should be required to rebut by substantial evidence the presumption that the District has exercised sound discretion based on specialized knowledge concerning pupil needs. The preceding limitation on arbitral review will not pertain to placement of Pre-School Aides.

5. I recommend that the time period for filling of vacancies be 60 days except in extenuating circumstances.

6. I recommend adoption of the language proposed by the District for Article 8(A) regarding transfers out of the bargaining unit.

7. I recommend that the language proposed by the Association for Article 8(C) concerning criteria for determining a promotion outside the bargaining unit not be included in the agreement.

8. I recommend, subject to the previously discussed standards for arbitral review, that the District withdraw its proposal to limit arbitration to suspensions of three days or more and dismissals.

9. I recommend that language limiting back pay awards by an arbitrator not be included in the agreement.

10. I recommend that Article 13(C) concerning the Board's right to reduce hours include the requirement that the Association be notified of the proposed change as soon as possible and participate in discussions concerning available alternatives.

11. I recommend that the Board's determination of the need to reduce work hours because of the existence of an emergency crisis, financial crisis, or change in conditions concerning a student not be subject to arbitral review.

12. I recommend that the Association's proposed language to add preparation days before and after the first day of school not be adopted.

13. I recommend that the language in Article 13(D)(1) be changed to "no bargaining unit member will be permitted to work without being requested to work."

14. I recommend that the parties resolve the overtime authorization issue in accordance with recent discussions.

15. I recommend that the bargaining unit members not be paid on "Act of God" days.

16. I recommend that bargaining unit members receive four holidays with the designation of holidays to be determined by the Association.

17. I recommend that members of the bargaining unit receive 10 sick days with an accumulation to 75 days and that there be no payout of unused days upon separation.

18. I recommend that members of the bargaining unit receive the same bereavement leave as provided to other bargaining units.

19. I recommend that members of the bargaining unit be afforded "single only" medical insurance as delineated in the recommendation.

20. I recommend that members of the bargaining unit be allowed to purchase optical insurance at their own expense if permitted by the insurance carrier.

21. I recommend that members of the bargaining unit be allowed to purchase dental insurance at their own expense if permitted by the insurance carrier.

22. I recommend that members of the bargaining unit be allowed to purchase disability at their own expense if permitted by the insurance carrier.

23. I recommend that members of the bargaining unit be allowed to purchase life insurance at their own expense if permitted by the insurance carrier.

24. I recommend that members of the bargaining unit receive a salary increase of 75 cents per hour for the period from the ratification and approval of the agreement to June 30, 2014.

25. I recommend that members of the bargaining unit receive a salary increase of 75 cents per hour for the period of July 1, 2014 to June 30, 2015.

26. I recommend that the expiration of the collective bargaining agreement be June 30, 2015.

CONCLUSION

In closing, I would like to express my thanks for the professional and cordial manner in which the parties have advocated their positions. It is my hope that these recommendations will be of assistance.

Michael J. Falvo

MICHEAL J. FALVO

Dated: July 15, 2013