

**BEFORE THE INDIANA EDUCATION
EMPLOYMENT RELATIONS BOARD**

In the Matter of the Impasse)
 Between the) Case No. F-12-01-3060
)
Carmel Clay Schools)
) Factfinder: Sandra L. Jensen
 and the)
)
Carmel Clay Education Association)

FACTFINDER'S FINDINGS AND RECOMMENDED ORDER

BACKGROUND:

Pursuant to Indiana Code 20-29-8-7, on November 30, 2012 the IEERB appointed Sandra L. Jensen as factfinder in the negotiations impasse between the Carmel Clay Schools (CCS) and the exclusive representative Carmel Clay Education Association (CCEA) for a contract for the period from July 1, 2012 to June 30, 2013.

The Factfinding was stayed by an order of Patrick W. Mapes, Chairman of the Indiana Education Employment Relations Board (IEERB), on December 4, 2012. Factfinding was reinstated effective September 17, 2013 by an order of August 29, 2013 by John L. Krauss, Chairman Pro Tempore of the IEERB.

The factfinder scheduled and conducted a teleconference with the parties on September 17, 2013 to address scheduling and discuss additional information sought from both parties by the factfinder and the financial consultant. During the teleconference Eric Hylton (*Hylton*), counsel for the CCEA, inquired whether the factfinder would permit the presentation of actual financial data unavailable at the time the parties prepared their respective LBOs but which had developed over the course of the time Factfinding was suspended. The factfinder entered the following order:

It is the preliminary determination of the Factfinder that evidence unavailable at the time the parties prepared their LBOs will not be permitted to be presented at the Factfinding Hearing. This determination, which is subject to further objection and argument at the Factfinding Hearing, is based upon the determination that the spirit of the Factfinding process, as established at I.C. 20-29-6, I.C. 20-29-8 and 560 IAC 2, is served by limiting the parties' presentations to information known at the time the respective LBOs were prepared. The LBOs are required to be presented to opposing parties and submitted to the IEERB "within two (2) days after mediation has ended." 560 IAC 2-4-3.1(a). Furthermore, the

Factfinding process is to conclude within not more than fifteen (15) days after mediation has concluded. *I.C. 20-29-6-15.1(a)*. It is acknowledged that the Factfinding process, in this instance, was suspended on December 4, 2012 and reinstated effective September 17, 2013 and additional information, not known to the parties at the time they were required to submit their LBOs, likely developed during that period of time. However, the spirit of the Factfinding process requires a return to the time before the Factfinding process was suspended. To do otherwise would allow the parties to benefit from evidence that would not have been available but for the suspension and would potentially even allow a party to manipulate circumstances during the period of suspension for their own benefit in a later reinstated Factfinding.

See Report of Pre-Factfinding Teleconference and Pre-Factfinding Order, paragraph 6.

On September 19, 2013, Hudnall A. Pfeiffer (*Pfeiffer*), counsel for the Carmel Clay Schools, submitted by email a request to substitute a corrected copy of an exhibit previously included within its LBO. Hylton offered an objection to the substitution of the exhibit and after considering the objection Pfeiffer observed that the factfinder should, as she intended to do in any event, rule against allowing the substitution. Before the Factfinding Hearing commenced the factfinder issued an oral determination to deny the request to substitute the exhibit.

The Factfinding Hearing was commenced at approximately 5:00 p.m. on September 20, 2013 at the CCS Education Services, Public Meeting Room, 5201 East Main Street, Carmel, Indiana 46033. Representative for the CCS was Pfeiffer and representative for the CCEA was Hylton. Roger McMichael (*McMichael*), Assistant Superintendent for Business, gave testimony on behalf of CCS and Brian Lyday (*Lyday*), CCEA President, gave testimony on behalf of CCEA. Additionally, Steve Wise, Indiana State Teachers Association Uniserve Director, was present on behalf of CCEA and Ryan Newman, Human Resources Director, was present on behalf of CCS.

LAST BEST OFFER (LBO):

Provisions Necessary to the Formation of a Contract:

The LBOs of each of the parties contain language necessary to the formation of a contract. This includes the identification of the respective parties, the parties' respective affiliations along with recognitions of the CCEA as the exclusive representative of specified CCS's employees. Each of the LBOs also includes a grievance procedure which, although not specified in *I.C. 20-29-6-15.1* or *I.C. 20-29-6-4*, is authorized at *I.C. 20-29-6-5*. Both provisions are appropriate for inclusion in the LBOs. *In the Matter of the Impasse Between the Nettle Creek School Corporation and the Nettle Creek Classroom Teachers Association, Case No. F-11-02-8305.*

The grievance procedures set forth in the respective LBOs contain differences but these differences were not the basis for dispute between the parties. Having reviewed the grievance procedures set forth by each party it is concluded that, while distinctive, each grievance procedure allows for an appropriate and timely method of resolving an alleged

violation of the contract. Therefore, the grievance procedures set forth by the parties does not constitute a matter for consideration in accepting or rejecting either party's LBO.

Dissimilar Provisions Not Expressly Disputed:

A wide variety of provisions are contained within each party's LBOs relating to subject matter that the parties have addressed in differing manners. The divergence in the method of addressing these subject matters, was, in many instances not the subject of strenuous debate between the parties.

The Factfinder has reviewed these provisions of each party's LBO and has determined that they are appropriate for bargaining under I.C. 20-29-6-4 and have been addressed by each party in an acceptable manner. Therefore, the Factfinder identifies in this section the subject matter included within the parties' respective LBO that will not be considered further except as discussion becomes prudent in the context of subject matter that is expressly disputed by the parties.

1. Bargaining Unit Exclusions;
2. Alternative Contracts;
3. Job Sharing;
4. Special, Institutional & Home Instruction;
5. Summer School;
6. Personal Illness Leave;
7. Personal Business Leave;
8. Professional Business Leave;
9. Bereavement Leave;
10. Executor/Executrix Leave;
11. Adoption Leave;
12. Association Business Leave;
13. Legal Circumstances Leave;
14. Maternity Leave;
15. Personal Injury/Other Circumstances Leave;
16. Workers' Compensation Leave;
17. Tax-Deferred Annuity;
18. Group Insurance;
19. Retirement Programs;
20. Early Retirement Programs;
21. Long-Term Disability;
22. Extra-Curricular;

- 23. TRF Contribution;
- 24. 401(a);
- 25. VEBA Trust Account;
- 26. Life Insurance; and
- 27. Section 125

Provisions Expressly Disputed:

The remainder of the findings included herein will relate to those topics that are in dispute between the parties. Those topics can be divided into the following subject matter categories:

- 1. Compensation;
- 2. Paid Leave, including particularly:
 - a. Paternity Leave;
 - b. Child Rearing Leave;
 - c. Personal Care Leave;
 - d. Sabbatical Leave; and,
 - e. Elected Office Leave;
- 3. Daily Paid Leave; and
- 4. Catastrophic Leave Bank/Short Term Disability;

FINDINGS OF FACT AND CONCLUSIONS OF LAW:

- 1. A Factfinder is constrained to “select one (1) party’s last best offer as the contract terms.” In making the selection the factfinder’s “order must be restricted to only those items permitted to be bargained and included in the collective bargaining agreement under [IC 20-29-6-4] and must not put the employer in a position of deficit financing (as defined in IC 20-29-2-6). The factfinder’s order may not impose terms beyond those proposed by the parties in their last, best offers. *IC 20-29-2-15.1*.
- 2. Items permitted to be bargained under IC 20-29-6-4 include only salaries, wages, and “salary and wage related fringe benefits, including accident, sickness, health, dental, vision, life, disability, retirement benefits, and paid time off as permitted to be bargained under IC 20-28-9-11.
- 3. IC 20-28-9-9 requires that specified paid leave shall be authorized “on account of illness or quarantine” and “for death in the teacher’s immediate family”. Other paid leave is addressed at IC 20-28-9-11 as follows:

Absences that are not described in [IC 20-28-9-9 and IC 20-28-9-10¹] may be taken with pay when agreed on by the school employer and the exclusive representative under IC 20-29.

4. “‘Deficit financing’ for a budget year means actual expenditures exceeding the employer’s current year actual general fund revenue.” *IC 20-29-2-6.*

5. With respect to deficit financing:

Sec. 3. (a) It is unlawful for a school employer to enter into any agreement that would place the employer in a position of deficit financing due to a reduction in the employer's actual general fund revenue or an increase in the employer's expenditures when the expenditures exceed the employer's current year actual general fund revenue.

(b) A contract that provides for deficit financing is void to that extent, and an individual teacher's contract executed under the contract is void to that extent.

IC 20-29-6-3.

6. As relevant here, IC 20-29-8-7 states;

....

(c) The factfinder:

(1) may restrict the factfinder's findings to those issues that the factfinder determines significant;

(2) must restrict the findings to the items listed in IC 20-29-6-4; and

(3) may not impose terms beyond those proposed by the parties in their last, best offers.

(d) The factfinder may use evidence furnished to the factfinder by:

(1) the parties;

(2) the board;

(3) the board's staff; or

(4) any other state agency.

7. Furthermore, IC 20-29-8-8 requires the Factfinder to consider;

...(1) Past memoranda of agreements and contracts between the parties.

(2) Comparisons of wages and hours of the employees involved with wages of other employees working for other public agencies and private concerns doing comparable work, giving consideration to factors peculiar to the school corporation.

¹ IC 20-28-9-10 applies to the accumulation of sick days by a teacher who accumulates at least one sick day and is then employed in another school district. This statutory section is relevant to the issue presented here.

- (3) The public interest.
- (4) The financial impact on the school corporation and whether any settlement will cause the school corporation to engage in deficit financing as described in IC 20-29-6-3.

Paid Leave:

8. As previously identified, both the CCS and the CCEA provide for a variety of paid leave types for which there is no expressed dispute. *CCS LBO "Article 10: Paid Leave Days" & "Article 2: Leave for Association Business", CCEA LBO "Article X - Paid Leave"*.
9. However, the CCEA's LBO includes paid "paternity leave", "child rearing leave", "personal care leave", "sabbatical leave", and "elected office leave". Under the CCEA's LBO, a teacher taking these types of leave "shall be paid one dollar per contract day the teacher is on leave."
10. The types of leave that the CCEA has identified in its LBO to be paid at a the rate of one dollar per contract day of leave were identified in the July 1, 2008 to June 30, 2012 CONTRACT BETWEEN THE BOARD OF SCHOOL TRUSTEES OF CARMEL CLAY SCHOOLS AND THE CARMEL CLAY EDUCATION ASSOCIATION (*Hereinafter referred to as "the Previous Contract"*) as unpaid leave.
11. Under the Previous contract:
 - 1) All unpaid leaves may be taken without jeopardy to re-employment, retirement, salary and accrued fringe benefits, tenure, length of service or prior place on the salary schedule.
 - 2) While on any Corporation awarded unpaid leaves, the teacher shall be given the opportunity to continue insurance coverage in the school insurance programs at his/her own expense, paying one hundred percent (100%) of the cost, except those who qualify under FMLA....
 - 5) A teacher returning from leave shall, upon request, be given his/her original position if it exists or, if it does not exist, a position comparable to the one left for which the teacher holds a valid license....
12. Lyday explained that by having these types of leave identified in the previous contract the teachers had some assurance that the leave would be available and that these types of leave could only be eliminated through bargaining with CCS. Under the LBO presented by CCS, these previously identified and bargainable unpaid leaves are now identified only in an employee handbook that may be unilaterally amended.
13. Pursuant to IC 20-29-6-4 only "paid time off as permitted to be bargained under IC 20-28-9-11" may be the subject of collective bargaining.
14. Lyday observed that by paying even nominal compensation for the types of leave that were identified in the Previous Contract as unpaid leave, these types of leave would be maintained as subjects appropriate for collective bargaining as paid leaves thereby

preserving the teachers' ability to continue insurance coverage as well as ensure against unilateral loss of these types of leave.

15. IC 20-28-9-11 places no limitation on the type of absence that may be agreed upon by a school employer and an exclusive representative to be eligible as paid leave. Likewise, there is nothing with IC 20-28-9-11 dictating the amount of compensation that must be paid in order to have a particular type of absence qualify as paid leave.
16. Pfeiffer offered the observation that the identification of these types of leave as paid leave upon the payment of only one dollar (\$1.00) per contract day was violative of the spirit of the law. While Pfeiffer's observation may be worthy of merit, the clear and unambiguous language of IC 20-28-9-11 allows for broad based and nearly unrestricted negotiation of paid leave time beyond bereavement leave and illness and quarantine leave required by IC 20-28-9-9.

Daily Paid Leave:

17. The CCEA's LBO also specifies that a teacher will be provided a "daily paid leave" as follows:
 - 1) Teachers will be provided paid leave time during the school day in the amounts provided below. It is expressly understood that a teacher's Instructional Wages includes this paid leave time and a thirty minute paid lunch time.
 - 2) Each teacher at Carmel Clay High School shall have at least one (1) period of paid leave per day, consisting of ninety continuous minutes.
 - 3) Each teacher at a Middle or Junior High School shall have at least two (2) periods of paid leave per day, consisting of fifty-three continuous minutes each.
 - 4) Each teacher at an Elementary School shall have at least one (1) period of paid leave per day, consisting of fifty continuous minutes.
 - 5) Each teacher at an Elementary School shall have an additional two (2) periods of paid leave per day, consisting of at least 25 minutes.

CCEA's LBO, Article X, Sections N through S.

18. CCS noted and Lyday acknowledged on questioning by the Factfinder that, as written, the daily paid leave periods could be used by a teacher for any purpose, including personal business.
19. Lyday observed however, that the daily paid leave was intended for allow for teacher preparation.
20. Under the CCEA's LBO "instructional wage" is the compensation set for 7.5 hours of instruction. *CCEA LBO, Article IV – Compensation.*
21. Therefore, if a teacher used the daily paid leave as additional personal time, a high school teacher entitled to daily paid leave of ninety minutes under the CCEA LBO could earn his or her customary compensation at a rate applicable to a 7.5 hour day while only providing instruction for 6.0 hours.

22. Similarly, a middle school or junior high school teacher could use the 106 minutes of daily paid leave for personal business and thereby provided student instruction for only 5.73 hours while being paid wages for a 7.5 hour instructional day
23. Likewise, an elementary teacher would have the ability to use 100 minutes of daily paid leave for personal use and would be compensation for a 7.5 hour work day while instructing students for only 5.84 hours.
24. While ideally the purpose of the “daily paid leave” system is noble, the language of the CCEA’s LBO authorizes teachers to use this leave time selfishly. While many teachers would utilize the leave for the purposes intended by the CCEA, there are undoubtedly those who, at least on occasion, would not. The establishment of daily paid leave is fraught with the potential for abuse.
25. In the present environment of school finance the creation of a program that allows for the squandering of increasingly diminished educational funding is not in the best interest of the schools, the students or the taxpaying public.
26. While the concept of daily paid leave opens the door for abuse the Factfinder is convinced that this was not the intent of the CCEA.
27. To the contrary, it is apparent to the Factfinder from a review of “Article X – Teaching Assignments” as set forth in the Previous Contract that the intent of the CCEA in establishing the daily paid leave time was to creatively avoid the newly imposed prohibition on bargaining teaching assignments and in so doing to ensure the continuation of teachers’ preparation periods as formerly set out in the Previous Contract.
28. It is observed that coincidentally the Previous Contract expressly authorizes high school teachers to “have at least one (1) of these ninety-minute duty-free preparation periods per day.” Middle school and junior high school teachers “who are part of a team ...will have a maximum of five (5) teaching or supervisory periods, one (1) supervision period, one (1) preparation period, and one (1) team preparation period. Teachers who are not normally required to attend a team preparation period will have six (6) teaching periods and two (2) preparation periods.” *Previous Contract at “Article X – Teaching Assignments”, Sections A.1.b. and A.2.a.*
29. The correlation in the daily paid leave and preparation periods of elementary school teachers is not identical because the daily paid leave allows these teachers only 100 minutes total with two of those periods to be in 25 minute segments whereas elementary school teachers, under the Previous Contract, were afforded 200 minutes of preparation time with only those periods “in blocks of at least twenty-five (25) continuous minutes” counting as part of the 200 total allowed minutes. However, sufficient similarity exists upon which to base a conclusion that the CCEA’s intent was to maintain preparation periods for its represented teachers. *See Previous Contract at “Article X – Teaching Assignments”, Sections B.1. and B.3.*
30. Teacher assignments shall be discussed between the school and the exclusive representative pursuant to IC 20-29-6-7(4), but the inclusion of teacher assignments in the CCEA’s LBO is not appropriate for bargaining under IC 20-29-6-4.

Catastrophic Leave Bank/Short Term Disability:

31. The Previous Contract between the CCS and the CCEA included the continued existence of a Catastrophic Leave Bank (*CLB*) “to relieve teachers from undue financial burdens as a result of an absence from work due to illness, injury, or incapacitation sufficiently severe to make their presence in school inadvisable.” *Previous Contract, “Article XIX – Paid Leave Days” Section A.4.* The Previous Contract contained no provision for Short Term Disability.
32. In its LBO the CCEA maintains the existence of the CLB with some modifications. The CCEA’s modification of the CLB alters certain administrative provisions and effectively eliminates an appeals process established under the Previous Contract to address a situation in which a teacher disagreed with the initial decision regarding the use of leave days. Additionally, the CCEA modification removes a requirement existing in the Previous Contract that eligibility to apply for CLB coverage accrued only after “five (5) days without compensation” with the five (5) days being “cumulative from year to year until the teacher qualifies.” *See Section A.4.i.5-6.*
33. As a replacement for the CLB, the CCS’s LBO provides for the establishment of a short term disability program at no cost to the teachers as follows:
 - 1) After a five day elimination period, a teacher may apply for STD.
 - 2) The teacher will receive two-thirds base pay from STD for qualifying leaves up to a maximum benefit of \$45,000.00 on an annualized basis.
 - 3) A teacher who qualifies for STD may use one half of any available personal illness or personal business days for each day on STD to enable the teacher to supplement the STD benefit.
 - 4) CCS will continue to pay the employer’s contribution toward insured benefit premiums during the STD period.
34. Lyday, on behalf of the CCEA, offered the belief that while the STD policy would compensate a teacher two-thirds of that teacher’s base pay the compensation afforded that teacher through the use of personal illness or personal business days would be offset by a reduction in the compensation that teacher received from the STD. Contrary to Lyday’s belief, Pfeiffer, on behalf of the CCS, emphasized that a teacher’s use of personal illness or personal business days would result in compensation “supplemental to the STD benefit” such that the teacher could receive full base pay if that teacher chose to use a portion of an appropriate paid leave day.
35. Pfeiffer also noted that under the CCEA’s LBO maternity leave is not covered under the CLB and that the only paid leave applicable to maternity results from accrued personal illness leave. Under the CCS’s proposal to establish the STD policy maternity leave is covered at two thirds the teacher’s base pay and may be supplemented by the use of only a portion of the teacher’s accrued personal illness or personal business leave.
36. Pfeiffer also noted that every teacher is covered by the STD policy at no cost, whereas the CLB only covers those teachers who choose to become members at a cost of voluntarily relinquishing a personal illness day.

37. Lyday questioned the means by which personal illness leave days that were previously relinquished to the CLB by member teachers could simply evaporate, suggesting that the number of days existing within the CLB should be accounted for in some manner if the CLB was to be eliminated. Lyday raises a valid question.
38. While the factfinder might speculate that unexpended funds from personal illness days relinquished to the CLB may be intended for use as funding for the STD there was no evidence presented with respect to an accounting of or the proposed disposition of the personal illness leave days available presently in the CLB upon conversion to STD, if in fact the CCS's LBO is selected. While the factfinder believes the CCEA is entitled to a determination of this issue, it is the opinion of the factfinder that this determination is outside the scope of this Factfinding and unnecessary to a selection of one party's LBO.
39. Based upon the information provided by the parties it appears reasonable to conclude that the STD policy, which is free to all teachers, provides compensation during maternity leave, and may be supplemented to achieve full base pay is a better program than the CLB, which costs teachers the relinquishment of one (1) personal illness day to join, does not cover maternity leave and requires the repayment of days used at a rate of 2 days per year.
40. Overall it appears to the factfinder that either the CLB, proposed to be maintained by the CCEA, or the STD, proposed for creation by the CCS, provide a benefit to the teachers. Neither program is inappropriate for bargaining under IC 20-29-6-4. Therefore, it is the conclusion of the Factfinder that neither the maintenance of the CLB or the replacement of the CLB with the STD plan should be a conclusive factor in the acceptance or rejection of either party's LBO.

Compensation:

The CCS LBO:

41. The CCS LBO provides additional teacher compensation as follows:
 - 1) 2% increase to current salary (excluding all payments explicitly set forth in this Agreement, *e.g.*, ECA, Additional Approved Assignment stipend, National Board Certification stipend) retroactive to the beginning of the 2012-2103 school year. ...
 - 2) Teachers will be paid a stipend equal to ½% of their current salary (excluding all payments explicitly set forth in this Agreement, *e.g.*, ECA, Additional Approved Assignment stipend, National Board Certification stipend) in a lump sum payment, less applicable taxes. ... This payment will be made as soon as practicable after this Agreement becomes effective.
 - 3) Performance Bonus Pool – For the 2012 – 2013 school year, there will be a one time performance bonus pool of \$275,000.
 - a. Teachers who receive a Highly Effective or Effective rating in the Spring 2013 evaluation cycle are eligible to participate in the bonus pool.

- b. Each teacher who receives a Highly Effective rating will be awarded 2 points.
- c. Each teacher who receives an Effective rating will be awarded 1 point.
- d. The \$275,000 Performance Bonus will be divided by the total number of points and will be allocated to teachers on that basis. This means that a Highly Effective teacher will receive two times the bonus payment of an Effective teacher. Teachers who are not rated as either Effective or Highly Effective will not participate in the bonus pool.
- e. To the extent a second factor is needed to comply with the law, the School Corporation will use the academic needs of the students, weighted at 10% and give all teachers with an Effective or Highly Effective rating equal credit.

The same as in the Previous Contract the CCS's LBO provides that teachers achieving National Board Certification will continue to receive a \$1,500 stipend, and for the attainment of additional degrees "teachers will receive the same compensation adjustment as would have occurred under the July 1, 2008 – June 30, 2012 collective bargaining agreement for attaining additional degrees for which the teacher had started course work before July 1, 2011, and completed course work before September 2, 2014."

- 42. The CCS explains that the 2% salary increase is effectively a 1% salary increase for teachers participating in the 403(b) plan because a 1% matching contribution is being eliminated. The CCS observed that in this way, those teachers participating in the 403(b) plan are able to put the 1% into the plan on their own. However, under this plan the CCS believes parity is established between those teachers who participate in the 403(b) plan and those teachers who do not.
- 43. With the offset associated with the termination of the 1% contribution to the 403(b) plan, the CCS concluded that the total cost of the 2% salary increase will be \$750,000.
- 44. Also within the CCS's LBO is the Additional Approved Assignment Stipend which states:

Teachers selected by the District for additional approved paid assignments shall be compensated at a rate of \$35/hour. These additional assignments include, but are not limited to, summer assignments, homebound instruction, credit recovery, remediation, curriculum projects, translation services, testing for gifted/talented, remediation, kindergarten screening, preparation for leadership of professional development and other assignments.

The types of additional paid assignments included in the CCS's LBO at a rate of \$35 per hour were, in the Previous Contract, frequently paid at varying rates based upon a percentage of the base salary. It cannot be determined whether, as compared to the rate of pay established in the Previous Contract, \$35 per hour constitutes an increase

in compensation associated with these assignments; it is speculated that in some instances the \$35 per hour rate is an increase while in other situations that rate may constitute a decrease in compensation. CCS does not assign financial data to this Additional Approved Assignment Stipend.

45. The CCS's LBO maintains the Previous Contract terms related to Group Hospital, Dental and Vision Insurance at an increased cost of \$520,000.
46. CCS maintains and the CCEA did not dispute that the total additional cost of the CCS LBO is \$1,820,000 bringing the total cost of a contract based upon CCS's LBO to \$63,419,945.

The CCEA LBO:

47. The CCEA LBO provides:

Wages for the instruction of students (herein referred to as "Instructional Wages") shall be recompensed in a fixed amount as compensation of any time up to four hundred fifty (450) minutes per day for the first one hundred eighty-five days a teacher works.

- 1) Instructional Wages shall be paid to a teacher according to the amounts set forth in Schedule A that corresponds to a combination of the teacher's level of academic credit and his or her accumulated years of evaluative ratings of effective or highly effective.
- 2) A teacher's accumulated years of "effective" ratings for 2012 – 2013 will be equal to the accumulated years of earned experience credit as of June 30, 2012.

...

CCEA's LBO, "Article IV – Compensation" Section C.

48. The CCEA's LBO continues by providing that "wages for additional time (herein referred to as "Additional Wage(s)") shall be recompensed by ascertaining the amount of time a teacher works in excess of their four hundred fifty (450) daily minutes and/or in excess of their one hundred eighty-five days and multiplying the time by the teachers Additional Wages." The additional wages essentially equate to a "time and one-half" rate. *CCEA LBO, Article IV – Compensation, Section D.* For certain types of additional assignments, such as a Counselor Stipend and Curriculum Writing Stipend, the compensation rate differs. *See CCEA LBO, Article IV – Compensation, Sections E through M.*
49. Additionally, the CCEA included within its LBO, \$885,000 representing funds it determined appropriate for the settlement of an unfair labor practice. According to CCEA, and not disputed by the CCS the unfair labor practice action was settled with the parties agreeing to negotiate appropriate compensation for middle school teachers during the collective bargaining of the 2012 – 2013 contract.
50. The final resolution of the unfair labor practices action is not within the jurisdiction of the Factfinder. However, the Factfinder notes CCEA's acknowledgment that the

appropriate compensation for the unfair labor practices actions was to be *negotiated* by the CCEA and the CCS while realizing the CCEA included the \$885,000 in its LBO based upon what appears to be the CCEA's unilateral determination of the value of the added instructional time.

51. The cost of the CCEA's LBO, including the \$885,000 settlement of the unfair labor practice action, for the 2012 – 2013 contract period will be \$3,445,550 and the total cost of a contract based upon CCEA's LBO will be \$65,045,495².
52. The CCEA's LBO cost is \$1,625,550 more than the cost of the CCS's LBO.
53. The Indiana Department of Education (*DOE*) certified that CCS has \$80,521,762 in calendar year 2013 general funds.
54. The Indiana Department of Local Government Finance (*DLGF*) determined that for calendar year 2012 the CCS had a certified referendum levy of \$13,043,178.

Consideration of Deficit Financing:

55. Consideration of deficit financing is essentially a matter of first impression. The factfinder has been presented a challenge in interpreting the statutes applicable to an evaluation of the parties' LBOs with respect to deficit financing.
56. Rules of statutory construction prohibit the construction of clear and unambiguous statutes, but:

"mandate the court to interpret ambiguous statutes in order to ascertain and effectuate the general intent of the legislature." *Indiana Alcoholic Beverage Commission v. Osco Drug, Inc.*, 431 N.E.2d 823 (Ind. App. 1982) When a statute is open to multiple interpretations, the court may consider the implications of a particular construction. *Id.* Words and phrases are to be given their plain and customary meaning unless the intent of the legislature will be defeated by such meanings, *Board of School Trustees v. Indiana Education Employment Relations Board*, 497 N.E.2d 1084 (Ind.App. 2 Dist. 1986), and further requires that every word be given effect, and no part be held meaningless. *Union Township School Corporation v. State ex rel. Joyce*, 706 N.E.2d 183 (Ind. App. 1998). Where the plain and customary meaning of the words will defeat the intent of the legislature, the words may be afforded a particular or technical meaning. *Johnson County Farm Bureau Co-Op, Inc. v. Indiana Department of State Revenue*, 568 N.E.2d 578, affirmed 585 N.E.2D 1336 (Ind. 1992). Any such statutory construction requires that a determination be made through a consideration of the entire act, *Ernst and Ernst v. Underwriters National Assurance Company*, 381 N.E.2d 897 (Ind.App. 2 Dist. 1978), and multiple statutes on the same subject "should be construed together so as to produce a harmonious system." *Indiana Alcoholic Beverage Commission, supra*. There exists a strong presumption

² This total contract cost was calculated by reducing the CCS's total contract cost of \$63,419,945 by the increases afforded by CCS's LBO of \$1,820,000 to achieve an approximate current contract cost of \$61,599,945. The increases afforded by the CCEA's LBO were then added to the approximate current contract cost to determine an approximate total cost of a contract based upon the CCEA's LBO.

that the legislature did not enact meaningless statutory provisions and the rules of construction authorize the intent of the statute to take precedence over the literal language. *Althaus v. Evansville Courier Co.*, 615 N.E.2d 441 (Ind. App. 1 Dist, 1993).

F. D. McCrary Operator, Inc. v. DNR, 10 CADDNAR 73, (2005)

57. Deficit financing “for a budget year means actual expenditures exceeding the employer's current year actual general fund revenue.” *IC 20-29-2-6*.
58. For the General Assembly to have utilized both the term *budget year* and the term *current year* within this one sentence definition, it surely cannot be concluded that the two terms are intended to be synonymous.
59. A *budget* is “a statement of estimated revenues and expenses for a specified period of time, generally a year.” *Blacks Law Dictionary, Centennial Edition (1891 – 1991)*, West Publishing Co., 1990. A *budget year* is clearly the year to which the statement of estimated revenues and expenses applies and in the context of school financing a budget year could be a calendar year or a fiscal year.
60. In this instance CCS operates on a calendar year and for purposes of this proceeding the budget at issue is 2013.
61. A *current year* is “the year now running. Ordinarily, a calendar year in which the event under discussion took place...” although a current year may also be a fiscal year. *Id.*
62. In the context of this proceeding the parties were bound by statutory mandate to complete collective bargaining, including the impasse factfinding between August 1, 2012 and mid-November 2012. *IC 20-29-6-12 - IC 20-29-6-15.1*. Therefore, the event, the collective bargaining, occurred in 2012.
63. For our purposes then, the *current year* would be 2012.
64. Seemingly the intended meaning of deficit finance has clarity only when viewed prospectively. The definition, as written, clearly identifies deficit financing as occurring for the budget year 2013 if expenses had exceeded revenue in the current year, 2012, such that a deficit created in 2012 was required to be carried forward into the 2013 budget year.
65. For purposes of the first contracting cycle following the passage of P.L. 48-2011, the concept of deficit financing is anomalous because the same requirements applicable to the creation of the 2013 budget, the requirement to avoid deficit financing, did not apply to the development of the 2012 budget.
66. In any event it is certain from the information provided in this proceeding that CCS did not carry forward a financial shortfall from 2012 into 2013.
67. Going forward, *IC 20-29-6-3* and *IC 20-29-6-15.1* specify an additional need in developing a budget to consider whether that budget will result in deficit financing for the next future budget year.
68. By prohibiting a school employer from entering into “any agreement that would place the employer in a position of deficit financing...” during collective bargaining and

- specifying that during impasse proceedings the factfinder “may not put the employer in a position of deficit financing.” *IC 20-29-6-3 & IC 20-29-6-15.1*. These provisions illuminate the General Assembly’s emphasis on the avoidance of deficit finance, or the consequence of having expenses from a current year carried forward to a future budget year, through an affirmative determination during the collective bargaining process that an agreement reached will not create expenses greater than general fund revenues for the budget year at issue.
69. During the Factfinding Hearing, Hylton, on behalf of the CCEA argued that the General Assembly’s “poor choice of words” in defining “deficit financing” precluded there from ever being a determination that deficit financing had occurred. Hylton elaborated that because the definition considers only *actual* expenses and *actual* revenues it is impossible to ascertain, in advance, whether deficit financing will occur. Hylton’s contention is not persuasive.
70. Principles of statutory construction require that “statutes relating to the same subject matter must be construed in pari materia in order to give effect to every provision and so that no provision is rendered a nullity. *Lesch v. DNR and Town of Dune Acres*, 8 Caddnar 28 (1998) and *Collins v. State*, 415 N.E. 2d 46, 56, 275 Ind. 86, (Ind. 1981). *King v. Hamilton County Commissioners and DNR*, 9 CADDNAR 86 (2003). Statutes are also to be interpreted in such a manner that “no part be held meaningless.” *McCrary, supra citing, Union Township School Corporation v. State ex rel. Joyce*, 706 N.E.2d 183 (Ind. App. 1998)
71. Hylton focuses on the use of the word “actual” as an indicator that exact dollar figures would have to be known at present with respect to events that will occur in the future, which is impossible. Because interpretation of the word “actual” as denoting exact dollar figures would render the concept of deficit financing a nullity that was clearly not the intent of the General Assembly.
72. “Actual”, as defined, means “existing in act or fact; real”. *actual*. *Dictionary.com. Dictionary.com Unabridged. Random House, Inc.* <http://dictionary.reference.com/browse/actual> (accessed: September 25, 2013).
73. While use of the word “actual” could have meant exact dollar figures as Hylton argues, use of the word could, equally well, be interpreted as meaning identifiable revenue sources and expense types that in reality exist; that are not speculative. The latter gives the definition meaning as required.
74. Furthermore, Hylton’s position focuses solely upon the definition of “deficit financing” and fails to consider IC 20-29-6-3, which prohibits a school employer from entering “into any agreement that would place the employer in a position of deficit financing.” The language of this section reveals the intention for the collective bargaining to prospectively determine whether a contract would result in deficit financing. The same is true with respect to IC 20-29-8-15.1. This act requires the projection of costs and revenues. The language of the statutory sections taken as a whole reveals an intent to consider projected revenues and expenses.

75. The factfinder observes that it is not only the expenses that will be projected. The DOE certification of general fund revenue clearly states that it is a certification of estimation only. *See CCS LBO, Exhibit 1 & CCEA LBO, Tab 2.*
76. Through the application of IC 20-29-2-6 along with IC 20-29-6-3 & IC 20-29-6-15.1 school employers, employees and exclusive representatives are obligated to consider current year data projected in order to insure that deficit financing does not result in the budget year presently under consideration.
77. At first blush, there also appears to be a discrepancy between IC 20-29-6-12.5 which states that the “[DOE and DLGF] certifications must be the basis for determinations throughout impasse proceedings under this chapter” while it is also stated that the responsibility of a factfinder during impasse to consider expenses as compared to overall general fund revenue in insuring that the chosen LBO does “not put the employer in a position of deficit finance...”.
78. The apparent discrepancy results from the fact that a school’s actual estimated general fund revenue may be greater than the revenue certified by the DOE and DLGF. This occurs when a school employer earns miscellaneous revenue, which is distributed to all of the school’s adopted funds as a percentage that each fund represents to the entire school budget. Under these circumstances, the general funds will include the totals as certified by the DOE and DLGF plus a percentage, typically a large percentage, of the school’s miscellaneous revenue that has been directed to the general fund.
79. The fact that the total actual general fund revenue may exceed the amounts certified by the DOE and DLGF causes the factfinder to be faced with determining whether it is only the DOE and DLGF certified revenues or the total general fund revenues that may be considered during impasse proceedings.
80. A thorough review of the language at IC 20-29-6-12.5 reveals that the DOE and DLGF certifications must “form the basis” for impasse determinations while the factfinder is expressly mandated to insure that actual budget year expenses not exceed actual general fund revenue. It can be presumed that if the General Assembly had intended to limit consideration strictly to the amounts certified by the DOE and the DLGF it would have simply stated that those amounts shall not be exceeded. Instead, however, the General Assembly stated that the actual general fund revenue may not be exceeded. These requirements can be reconciled through a realization that the DOE and DLGF certified general fund revenue establish the percentage of a school’s budget attributable to the general fund. The total general fund revenue is then determined *based upon* the certifications by establishing the percentage of the school’s miscellaneous revenue to the general fund.
81. The factfinder is required to determine deficit financing using the total general fund revenue, not exclusively the DOE and DLGF certified general fund revenue.
82. One difficulty existing in this proceeding is that the factfinder was provided a DLGF certification of referendum levy for the calendar year 2012 with a DOE certification of general funds for calendar year 2013. The factfinder was not provided an appropriate 2013 DLGF certification of general fund operating referendum.

83. The Factfinder, understanding that budgeting for the future involves estimations and projections based upon the best available data, will evaluate the potential for deficit financing upon the information in the record. Therefore, although the total general fund revenue should reflect general fund revenue from 2013, in this instance the factfinder has no alternative but to consider the DLGF general fund operating referendum certification for 2012 with reasonable adjustments.
84. The CCS estimates that the 2013 general fund operating referendum funds will decrease to \$12,553,493 as a result of declines in assessed property values.
85. The CCEA, observing IC 20-29-6-12.5's requirement for the certifications to form the basis for the revenue to be considered during impasse insists that the total amount of the 2012 DLGF certification should be accepted for the year 2013 despite the knowledge that the certification is not applicable to 2013. To blindly apply IC 20-29-6-12.5 in such a strict and inflexible manner is unacceptable.
86. In support of its revised general fund operating referendum figure for 2013, the CCS offered that the 2013 referendum funds would be directly and negatively impacted by a 3% decline in property assessed value. The CCEA offered no data contrary to the CCS's calculation.
87. The factfinder accepts the CCS's estimated 2013 general fund operating referendum calculation.
88. Using the 2013 DOE certification of general fund revenue and the DLGF certification of referendum revenue the total certified general fund revenue available to the CCS is \$93,075,262.
89. According to CCS's estimations, the miscellaneous revenue that will be realized in 2013 is \$6,316,718 which constitutes less than .75% of the certified general fund revenue.
90. The CCS included all of its miscellaneous revenue as general fund revenue, which under the circumstances is not unreasonable.
91. During factfinding, the factfinder "must not put the employer in a position of deficit financing (as defined in IC 20-29-2-6)." *IC 20-29-6-15.1*. To avoid placing CCS in a position of deficit financing the CCS's total actual expenses for the budget year 2013 may not exceed the 2013 total general fund revenue of \$99,391,980.
92. By reviewing the CCS LBO Exhibit #9, the total 2013 projected expenses are \$99,376,160.
93. A deduction of the 2013 expenses of \$99,376,160 from the 2013 general fund revenue of \$99,391,980 the CCS's LBO results in estimated remaining balance of appropriation in the amount of \$15,820.
94. Because all of the CCEA budgetary projections allocate the expense of the LBO across 2012 and 2013 the factfinder must complete certain calculations to ascertain whether the total projected expenses under the CCEA's LBO would exceed the total projected income. The cost of the CCEA's LBO exceeds the cost of the CCS LBO by \$1,625,550. By adding that additional cost to the total projected expenses as set forth by the CCS the total expenses, including the CCEA's LBO will equal \$101,001,710.

95. The CCEA's LBO, with a cost \$101,001,710 (\$1,625,550 greater than the cost of the CCS's LBO) results in total expenses greater than the general fund revenue of \$99,391,980, which constitutes unlawful deficit financing.
96. Under the guidance of *Nettle Creek*, in which the IEERB recommended "a straightforward approach to the decision of whether an LBO would put the corporation into deficit financing: factfinders should be required to evaluate deficit financing by comparing the [DOE] Certification dollar amount and the [DLGF] referendum fund certification, if applicable, to the total cost of each proposal in relation to the overall general fund budget," the factfinder realizes that additional evaluation is not required.
97. However, in an effort to fully consider the positions and information provided by both parties the factfinder will indulge some additional assessment.
98. The CCEA disputes two items reflected on the CCS's budget³.
99. First the CCEA believes that the CCS over-estimated the power and light expense at \$792,600, when the CCEA estimates the amount should more appropriately be projected as \$209,728. This adjustment would reduce the total projected expenses by \$582,872.
100. Second, the CCEA believes that the CCS has under-estimated the facility rental revenue as \$153,500 when the CCEA believes the revenue more closely approximates \$331,979. This adjustment would increase the total projected revenue by \$178,479.
101. Decreasing the total projected expenses under the CCEA LBO of \$101,001,710 by \$582,872 the total expense becomes \$100,418,838.
102. Increasing the total projected revenue of \$99,391,980 by \$178,479 results in an increased total revenue of \$99,570,459.
103. Even with the budget projection adjustments proposed by the CCEA the total expense, including the cost of its LBO, exceeds the total projected revenue by \$848,379.
104. The CCEA consistently argued that the expenses associated with its LBO should be apportioned between two budget years with 41.6% of the expense allocated to the 2012 budget year and the remaining 58.4% being attributable to 2013 budget year.
105. The definition of "deficit financing" provides clearly that a determination of deficit financing is to be calculated for a budget year. This requirement, along with the IEERB's recommendation in *Nettle Creek* leads the factfinder to conclude that deficit financing is to be determined based upon, in this case, the annual general fund and referendum certifications reduced by the annual expenses associated with the LBO.
106. Additionally, IC 20-29-6-16 specifies that when "an agreement has not been reached on the items to be bargained collectively by November 1, as provided in IC

³ While the factfinder is considering the arguments presented by CCEA, the factfinder is skeptical as to whether an exclusive representative possesses the authority to question or amend an approved school corporation budget.

6-1.1-17-5, the parties shall continue the terms of the current contract that is in effect...”

107. For these reasons the factfinder is uncertain, and offers no determination here, as to the appropriateness of the allocation of expenses by the CCEA.
108. In any event, the CCEA provided information in accordance with the factfinder’s pre-factfinding order reflecting that the allocation of 41.6% applicable in 2012 would result in additional expenses of \$1,951,896, which includes the \$885,000 in settlement of the previous unfair labor practices dispute. The remaining 58.4% of the additional expense, that would be attributable to 2013, would equal \$1,493,654. *See CCEA’s submitted Financial Impact of Association’s LBO and Proposed Contract.* These figures combine to total \$3,445,550, which CCEA has consistently maintained is the total cost of its LBO, including the \$885,000 settlement of the unfair labor practice.
109. However, the projected expense data for 2012 and 2013, as presented by the CCEA at the Factfinding Hearing, which was intended to support the conclusion that the LBO would not result in deficit financing if the expenses were attributed to the years in which they would be incurred, is inconsistent with CCEA’s stated cost of its LBO.
110. At Tab 4 of the CCEA’s presentation material, the CCEA notes that salaries under its LBO will increase above the CCS’s November 26, 2012 Financial Update figure of \$54,787,118 to a total of \$56,519,811. This represents a total increase in expenses of \$1,732,693 for 2012. However, the CCEA projects that the cost of salaries associated with the implementation of LBO will result in 2013 increases of only an additional \$11,286. These figures represent only \$1,743,979 of what the CCEA acknowledges is an LBO with a total price tag of \$3,445,550.
111. It is important to note as well that the CCEA’s revenue is inflated by the CCEA’s use of the 2012 general fund operating referendum certification of \$13,043,178 instead of the reduced estimation of \$12,553,493. This correction reduces general fund revenue for 2013 by \$489,685.
112. Furthermore, the CCEA did not dispute the CCS contention that group medical, vision and dental costs would increase in the amount of \$520,000. However, the CCEA did not account for this increased expense in its financial calculations.
113. A simple comparison of the cost of the CCEA LBO to the general fund revenues available for consideration indicates that the CCEA LBO places the CCS into deficit financing. (discussed in findings 95 through 103, supra) The factfinder and the financial consultant have endeavored to give full weight and credit to the CCEA’s information, data and arguments. The CCEA has simply failed to provide adequate data to support its conclusions.
114. As the IEERB noted in *Nettle Creek*, a parties’ “deficit financing evaluation should focus on the verification and the (party-provided) cost of the proposal because such focus preserves the 15-day timeline while assuring the integrity of the process. Prescribing a deeper review of corporation finance would encourage the parties to use

factfinding as an audit or as a scapegoat for a bad or mismanaged budgetary situation.”

115. It is imperative that each party to factfinding present the financial consultant and the factfinder with clear and concise data to support its position.
116. It is concluded that the CCEA LBO will place the CCS in a position of deficit financing for the 2013 budget year.

Consideration of Compensation for Hours Worked Outside the Contracted Work Day and Work Year:

117. Both the CCS's and the CCEA's LBOs propose additional compensation for teachers for additional hours of work.
118. The CCS's LBO offers compensation at the rate of \$35 per hour for hours exceeding a teacher's usual eight (8) hour day (as prescribed under the CCS's LBO). These hours may be related to summer school, homebound instruction, translation services, curriculum projects, etc. *CCS's LBO, Article 6: Compensation, Section F*. The additional hours are for “teachers selected by the District...”, which infers that the teacher is voluntarily working the additional hours.
119. The CCEA's LBO assigns essentially a time and a half rate of pay for hours exceeding a customary workday, prescribed in the CCEA's LBO as being seven and one half (7.5) hours, for extra hours spent on certain tasks such as “translation services”, “testing for gifted and talented”, “kindergarten scening”, etc. *CCEA LBO, Article IV-Compensation, Section H*. These types of extra hours are only worked “upon authorization...”, which indicates that the worked hours are voluntary.
120. However, the CCEA's LBO also provides for additional compensation based upon certain other types of work. These additional compensation provisions are entitled “Counselor Stipend”, “Curriculum Writing Stipend”, “Counselor Coverage Stipend”, “Sixth Period Teaching Stipend for Teachers at the High School” and “Sixth Period Teaching Stipend for Teachers at the Middle School”. *CCEA LBO, Article IV-Compensation, Sections E, G, I–L*. There is no indication that these types of work are voluntarily engaged in by the teachers and in some cases these stipends relate to situations in which “the Administration deems it necessary...”, which is clearly an assignment.
121. The CCS and the CCEA are obligated to collectively bargain with respect to salary, wages and salary and wage related fringe benefits. *IC 20-29-6-4*. However, they are expressly prohibited from bargaining about “any subject not expressly listed in [IC 20-29-6-4]” and items that may not be bargained may also not be included in an agreement. *IC 20-29-6-4.5*. While the factfinder is required to select one party's LBO, following an impasse determination a factfinder's order must be restricted to only those items permitted to be bargained and included in the collective bargaining agreement under [IC 20-29-6-4]. *IC 20-29-6-15.1*.
122. The IEERB in *Nettle Creek* determined that language in the Nettle Creek Classroom Teacher's Association's LBO demanding extra pay “for required hours outside the contracted work day and work year” presented a matter prohibited to be bargained or included in a collective bargaining agreement.

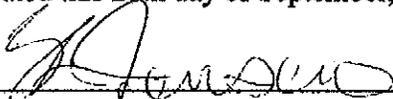
123. The IEERB determined in *Nettle Creek* that "IC 20-29 made hours of work a prohibited subject of bargaining" noting that it was an issue that "has been legislatively re-categorized as an item for the discussion process under IC 20-29-6-7."
124. Another topic that was "re-categorized" from a collective bargaining item to an item for discussion is teacher assignment. *IC 20-29-6-7(4)*.
125. During the Factfinding Hearing Lyday questioned the language contained within the the CCS's LBO referencing the potential for additional pay for "other assignments." The factfinder also observes that the Section Title is "Additional Approved Assignment Stipend."
126. Also during the Factfinding Hearing Pfeiffer questioned several of the CCEA's extra pay provisions as being violative of the prohibition on the inclusion of hours and assignments in a collective bargaining agreement.
127. The extra pay provisions in the CCEA's LBO Article IV-Compensation, Sections E, G, I – L clearly involve teacher assignments and as such are prohibited from inclusion in the LBO.
128. To avoid violation of IC 20-29-6-4, the extra pay provision contained in CCS's LBO, Article 6: Compensation, Section F and in the CCEA LBO, Article IV-Compensation, Section H should expressly state that the extra hours to be worked are voluntary.

Recommended Order:

Based upon the foregoing discussion and for the reasons identified therein:

129. The factfinder recommends that the Carmel Clay School's last best offer be adopted as the contract for the period from July 1, 2012 through June 30, 2013.
130. The factfinder is cognizant of the requirement that one of the party's last best offer must be accepted. However, the factfinder is also mindful of the prohibition on the inclusion of items beyond those specified in IC 20-29-6-4. For this reason, and in a manner consistent with the IEERB's action in *Nettle Creek*, the factfinder recommends that the title to Article 6: Compensation, Section F, of the CCS's LBO "Additional Approved Assignment Stipend" be amended to "Compensation for Additional Approved Hours of Work" and that the reference to "other assignments" be stricken.
131. Either party may appeal this Recommended Order to the IEERB within 30 days of receipt of the decision. IND. CODE § 20-29-6-18 (2011). For information on how to appeal, see 560 IAC 2. If no appeal is timely submitted to the IEERB, this Recommended Order, and any additional findings and recommendations made by the IEERB, will become the final contract pursuant to Indiana Code 20-29-8-5.

Dated this 27th day of September, 2013.



Sandra L. Jensen

Factfinder

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