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IN INTEREST ARBITRATION BEFORE
MICHAEL E. CAVANAUGH, J.D.,
ARBITRATOR

2010 SEP -7 AM 8:30

PUBLIC EMPLOYMENT
RELATIONS COMMISSION

SEIU, LOCAL 925, (collective bargaining	:	
representative of Family Child Care	:	
Providers),	:	INTEREST ARBITRATOR'S
	:	DECISION AND AWARD
and	:	
	:	PERC NO. 23439-I-10-0554
	:	
STATE OF WASHINGTON, OFFICE OF	:	
FINANCIAL MANAGEMENT (on behalf of	:	
the Governor of the State of Washington).	:	

FAMILY CHILD CARE PROVIDERS INTEREST ARBITRATION
2011-2013 COLLECTIVE BARGAINING AGREEMENT

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I. INTRODUCTION

A. Bargaining Unit History

This is an interest arbitration proceeding concerning the terms and conditions of employment of independent child care providers serving families whose child care expenses are subsidized by the State, especially as part of the Working Connections Child Care program.¹ It arises under RCW 41.56.028, a section that adopts (with some modifications) the interest arbitration provisions applicable to uniformed employees in Washington such as law enforcement personnel and fire fighters. The child care bargaining statute, first enacted in 2006 and amended in 2007, establishes a state-wide bargaining unit² and designates the Governor as the “employer” of child care providers, solely for the purposes of collective bargaining with respect to authorized subjects of bargaining.³ The Union was certified as the bargaining representative of the providers in 2006 pursuant to an election, and the parties bargained an initial collective bargaining agreement that year covering the period July 1, 2007 through June 30, 2009, a period

¹ Working Connections (“WCCC”) is part of the system adopted as a result of federal welfare reform legislation enacted in 1996. It provides child care assistance to low income workers, or those looking for work or receiving training or education that will hopefully make them more employable. These workers are typically single parents, and approximately 80% are women. Without assistance, these workers might not be able to afford child care at the lower-wage jobs typically available to them, and thus they would have difficulty maintaining employment or preparing themselves for future employment without help from the government.

² The bargaining unit includes Licensed Family Homes and License-Exempt providers. The former are independent home businesses regulated and licensed by the State, while the latter, comprised of family, friends, and neighbors caring for subsidized children (hence, often termed ‘FFN’ providers), are not required to be licensed (although they must meet some minimal qualifications).

³ The authorized subjects are economic compensation, health and welfare benefits, professional development/training, labor-management committees, grievance procedures, and other economic matters. RCW 41.56.028(1)(c).

coextensive with the State's 2007-2009 biennium.⁴ In 2008, the parties bargained for a replacement Agreement to cover the 2009-2011 biennium, and although they were able to agree on most of the bargaining issues between them, they submitted several unresolved issues to me in an interest arbitration proceeding. I rendered an interest arbitration award on August 25, 2008, in which I awarded modest subsidy rate increases, i.e. increases in the amount the State pays to child care providers in addition to amounts paid by the child's family, and I also awarded an increase in the subsidy rates applicable during the first six months of the "toddler" classification, which the parties refer to as an "enhanced toddler rate." These awarded rate increases were "modest," but not because the child care providers did not deserve more. Rather, I was limited in what I could award because of a substantial revenue shortfall projected by the State's economists for 2009-2011.

Pursuant to the statutory procedures, my 2008 award was considered by the Governor, and she determined that none of the awarded increases would be included in her proposed budget which she issued in December 2008.⁵ Subsequently, at the Union's urging, the Legislature determined that the enhanced toddler rate should be funded for Licensed Family Homes despite the fact that the projected shortfalls in State revenues had increased substantially over the shortfalls that had been anticipated according to the data available at the time I awarded the increases.⁶ According to the evidence before me

⁴ Some compensation issues in the initial contract, however, were resolved in interest arbitration before Arbiter Timothy D. W. Williams. *See*, Exh. J-1, Interest Arbitration Award of Arbiter Williams dated November 10, 2006.

⁵ Similarly, the Governor declined to include increases awarded by interest arbitrators in other bargaining units, including the Home Care unit which operates under a very similar statutory procedure.

⁶ As an aside at this point (although it lays groundwork for a later discussion), during the 2008 interest arbitration proceeding, the State had argued that in applying the statutory "ability to pay" criterion in the context of the Union's proposal for an enhanced toddler rate, I should consider that as a matter of "parity," the State would in all likelihood need to extend the enhanced rate to Licensed Child Care Centers, too. The

in this matter, this toddler rate enhancement was the only increase obtained by any State bargaining unit for the 2009-2011 biennium.⁷

B. Issues in this Proceeding

It appears that the parties were even more cooperative than usual in bargaining during 2010, both because the Union took to heart the fact that the State faces today an even more perilous fiscal situation than was the case during the 2008 bargaining, and also because the State attempted to be responsive to the child care providers' noneconomic needs, recognizing that resources to improve the economic terms of the CBA would simply not be available. As a result, there are only two contract Articles at issue in this proceeding, and the issues posed by the parties' respective positions on those Articles are sufficiently interrelated that, in essence, there is only one core issue to be decided (although, to be sure, that issue has some subparts).

Specifically, the Union has attempted to address a serious problem which has arisen in the administration of the 2009-2011 CBA. Article 11.3 of the Agreement provides for a "Non-Standard Hours" bonus (sometimes hereafter abbreviated "NSHB") of \$50.00 per month per child for any month in which a licensed provider furnishes at least forty hours of care during "off hours," defined as care prior to 6:00 AM or after 6:00 PM, as well as on weekends and holidays. In their 2009-2011 CBA, the parties agreed to cap that bonus at a total of \$2 Million dollars during the life of the Agreement, \$1 Million in each year. The amount allocated for the first year of the contract, however, was

Centers are more formal child care businesses (as compared to the Licensed Homes that operate in a residence) and are not part of this bargaining unit. Although I considered those "parity" costs and awarded the enhanced toddler rate anyway, the Legislature funded the rate for Licensed Family Homes, but in the end the enhanced rate was not made available to Licensed Centers.

⁷ Thus, the Union argues that even in dire economic circumstances for the State, the Legislature has still been willing to fund "good ideas" that enhance the quality and availability of child care for lower wage working families.

exhausted by the end of February 2010, just eight months into the contract. Thus, payment of the bonus was suspended as of March 2010 with four months left in the first year of the biennium, and payments did not resume until the next fiscal year began in July 2010. The Union views the bonus as a significant incentive to Licensed Homes to provide off-hours care, or at least to be profitable in doing so, and notes that the service and retail jobs likely to be most available to WCCC recipients are the less desirable nighttime, evening, and weekend or holiday hours. Thus, a hiatus of four months or more in payments of the bonus presents a real danger of decreasing the availability of off-hours care for children of low income working parents.⁸

The Union has proposed several changes to the CBA to lessen the impact of suspensions in payment of the NSHB. First, the Union proposes that the total allocated amount of the bonus for 2011-2013 be raised to \$2.57 Million, i.e. an increase of \$570 Thousand. Second, the Union proposes that rather than being divided equally between the two contract years, the NSHB cap be \$1.4 Million in year one, and \$1.17 Million in year two.⁹ At \$1.4 Million in year one, the funds allocated for the bonus would be expected to last the entire year (or very close to it), at least if used at the same rate as in year one of the current CBA. Third, the Union proposes that any bonus money not used in year one

⁸ The State does not appear to disagree with the Union's analysis, but focuses instead on the lack of budget resources to increase the contractual cap on NSHB.

⁹ Originally, as I understand it, the idea to front-load the NSHB funds into year one was an attempt by the State to meet the Union's expressed concerns about the disruptive effect of having payment of the bonus interrupted twice during the life of the Agreement. The Union agrees with that approach, but only so long as the total amount for the life of the contract is increased as their proposal would provide. If the Arbitrator determines that the amount should stay the same, i.e. a total of \$2 Million, the Union prefers two separate hiatuses of shorter duration rather than one long hiatus at the end of the contract. The Union believes that providers might be able to survive two shorter suspensions in NSHB, but would be more likely to give up off-hours care altogether if the suspension lasted up to eight months or longer.

should carry over to the second year of the Agreement.¹⁰ Finally, the Union proposes that if the \$2.57 Million is exhausted during the life of the Agreement, moneys “allocated” to pay NSHB to Licensed Centers would be made available to Licensed Homes as well as a matter of parity. In order to fund the increase of \$570 Thousand over the dollars allocated for NSHB in the 2009-2011 Agreement, the Union proposes eliminating in-person training on the complicated billing procedures necessary for providers to receive payment from the State,¹¹ and instead offering that training solely online and by CD or DVD viewable in the providers’ homes or at the library. The amount allocated for in-person training during the 2009-2011 biennium was \$570 Thousand, and the Union proposes shifting that amount to NSHB instead.

The State notes that there is simply no money available for increases of any kind in this contract. In fact, the revenue projections are grim and getting worse, and the Governor has already directed agencies to identify every possible “nonessential” activity that might be cut, as well as to identify cuts of from 4% to 7% of their budgets for the remainder of the current biennium in order to balance the supplemental budget passed by the Legislature in April 2010. Thus, in its formal proposal with respect to the contractual cap on NNSB, the State proposes no increase, although it was willing to front-load the amount allocated to the bonus if the Union preferred that approach.¹² Similarly, the State

¹⁰ The State contends that the terms of Initiative 601, approved by the voters, requires that any unspent funds appropriated from the State’s General Fund (“GF-S”) be returned to the Fund at the end of the fiscal year. Although the funds necessary to comply with the terms of this CBA have historically been appropriated by the Legislature from the GF-S, some activities of the Department of Early Learning and DSHS are undertaken with federal funds, from which it is apparently possible to appropriate sums for an entire biennium.

¹¹ The parties have agreed that the State is required to provide such training. *See*, Article 14.3.

¹² As previously noted, the Union at the hearing made clear that it believed it would be a mistake to front-load the NSHB allocation if the total amount available would remain at its current level of \$2 Million. The

opposes the elimination of in-person billing training, and argues that even if there are savings available by emphasizing electronic training in its various forms, those savings will not be transferable to some other contractual benefit. Rather, any savings will be required to meet the State's need to cut overall expenses in order to balance the budget in these very difficult economic times.¹³

C. Procedural Status

At a hearing held August 26 and 27, 2010 in the offices of the Attorney General on Pacific Avenue in Tacoma, Washington, the parties had full opportunity to present testimonial and documentary evidence, including the opportunity to cross examine each other's witnesses. We reconvened on August 31, 2010 in the offices of Union counsel in Seattle where I received some additional documentary evidence with respect to the budget of the Department of Early Learning ("DEL"). Counsel then presented oral closing arguments, a process that helpfully allowed me to ask clarifying questions. Having now carefully considered the issues in light of the evidence, the statutory criteria, and the parties' arguments, I am prepared to render the following interest arbitration award.

State does not argue that its front-loading proposal should be adopted if the Union has decided that approach is unwise.

¹³ There is no dispute between the parties that mandatory subsidy billing training should be provided in multiple languages, a change to the Agreement that is part of each party's proposal. Currently, training in one form or another is provided in both English and Spanish, and the State intends to add training in Russian and Somali as well. Because the parties are in agreement on this issue, and because I concur that multi-lingual training is a good idea, that approach will be part of my final award in this matter.

II. STATUTORY FRAMEWORK

The statute succinctly sets forth the standards I am required to apply in resolving this contractual impasse. First, I must consider the general interest arbitration criteria set forth in RCW 41.56.456(1)(a) through (e):

- (a) The constitutional and statutory authority of the employer;
- (b) Stipulations of the parties;
- (c) The average consumer prices for goods and services, commonly known as the cost of living;
- (d) Changes in any of the circumstances under (a) through (c) of this subsection during the pendency of the proceedings; and
- (e) Such other factors, not confined to the factors under (a) through (d) of this subsection, that are normally or traditionally taken into consideration in the determination of wages, hours, and conditions of employment.

RCW 41.56.465(1). In addition, the statute provides the following guidance to arbitrators hearing interest arbitration proceedings involving the family child care providers:

- 4) For employees listed in RCW 41.56.028 [independent family child care providers]:
 - (a) The panel shall also consider:
 - (i) A comparison of child care provider subsidy rates and reimbursement programs by public entities, including counties and municipalities, along the west coast of the United States; and
 - (ii) The financial ability of the state to pay for the compensation and benefit provisions of a collective bargaining agreement; and
 - (b) The panel may consider:
 - (i) The public's interest in reducing turnover and increasing retention of child care providers;
 - (ii) The state's interest in promoting, through education and training, a stable child care workforce to provide quality and reliable child care from all providers throughout the state; and

(iii) In addition, for employees exempt from licensing under chapter 74.15 RCW, the state's fiscal interest in reducing reliance upon public benefit programs including but not limited to medical coupons, food stamps, subsidized housing, and emergency medical services.

RCW. 41.56.465(4). These additional specific considerations, particularly the “may consider” list in subsection (b), augment the stated purposes of the child care bargaining statute set forth in RCW 41.56.028, and thus, in deciding the issues before me, I believe they are important considerations, despite the fact that the statute does not make it mandatory that I utilize them in reaching my decision.

III. THE PARTIES' FORMAL PROPOSALS

There are two Articles of the CBA at issue in this proceeding, the portion of Article 11.2 governing the Non Standard Hours Bonus, and Article 14.3(A) concerning mandatory subsidy billing training for providers. I have set forth below redlined versions of the parties' formal proposals with respect to the two Articles.

A. Article 11.2

The Union proposes that the second paragraph of Article 11.2 be modified as follows (deletions from existing language marked with strikethroughs, new language underlined):¹⁴

The State will automatically authorize the non-standard hours payment option when it is clear to the authorizing worker, based on information regarding the approved activity received from an employer, a school, a WorkFirst case manager, or a Children's Administration social worker that a child will need forty (40) hours or more of non-standard care per month. Non-standard hours are defined as before 6:00 a.m., after 6:00 p.m. or any hours on Saturday, Sunday or holidays. Once a licensed provider has reached the forty (40) hour threshold, the State agrees to pay a non-standard hour bonus of fifty dollars (\$50) per child per month. The total cost of the non-standard hours bonus will not exceed two million five hundred seventy thousand dollars (~~\$2,000,000~~, 570,000) per biennium, one

¹⁴ In setting forth the parties' redlined proposals, I have not indicated some minor stylistic changes that are not in dispute

million four hundred thousand dollars (\$1,400,000) in year one and one million one hundred and seventy thousand (\$1,170,000) in year two of the Agreement. The State agrees to provide information to the Union on a monthly basis regarding the use of the non-standard hours bonus. Any of the bonus money not used in the first year would be carried over into the 2nd year of the agreement. If monies allocated to the non-standard hours bonus for family child care providers reaches the capped amount (\$2,570,000), monies allocated to the non standard hours bonus for licensed child care centers will be used for children to access care in both centers and family child care homes.

Exh. J-7. The State's proposal is as follows:

The State will automatically authorize the non-standard hours payment option when it is clear to the authorizing worker, based on information regarding the approved activity received from an employer, a school, a WorkFirst case manager, or a Children's Administration social worker that a child will need forty (40) hours or more of non-standard care per month. Non-standard hours are defined as before 6:00 a.m., after 6:00 p.m. or any hours on Saturday, Sunday or holidays. Once a licensed provider has reached the forty (40) hour threshold, the State agrees to pay a non-standard hour bonus of fifty dollars (\$50) per child per month. The total cost of the non-standard hours bonus will not exceed two million dollars (\$2,000,000) per biennium, one million four hundred thousand dollars (\$1,400,000) in year one and six hundred thousand dollars (\$600,000) in year two of the Agreement. The State agrees to provide information to the Union on a monthly basis regarding the use of the non-standard hours bonus.

Exh. J-6. As previously noted, if I determine that no increase in the NSHB total for the 2011-2013 is warranted, the Union requests (and the State agrees) that the present amount of \$2 Million should be divided equally between the two years of the Agreement, not frontloaded.

B. Article 14.3(A)

The Union's proposal:

All providers shall be required to take electronic (on-line, CD, or DVD) subsidy billing training at least once during the life of this Agreement. The State shall provide mandatory electronic (on-line, CD or DVD) subsidy billing training to providers in multiple languages. The State shall pay for the cost of delivering the training, but shall not pay for the cost of

licensed providers ~~attending~~ completing the training. The State will reimburse FFN providers ten dollars (\$10) per subsidized child in their care at the time they complete the training.

Exh. J-9. The State's proposal with respect to Article 14.3(A) is set forth below:

All providers shall be required to take subsidy billing training at least once during the life of this Agreement. The State shall provide mandatory subsidy billing training to providers in every geographic region, on-line ~~and or~~ at various times, days, evenings and weekends, and in multiple languages. The State shall pay for the cost of delivering the training, but shall not pay for the cost of licensed providers attending the training. The State will reimburse FFN providers ten dollars (\$10) per subsidized child in their care at the time they complete the training.

IV. INTEREST ARBITRATOR'S DECISION

A. Budgetary Context

Without belaboring the obvious, the State of Washington faces unprecedented revenue shortfalls with respect to expenditures in the official projections that must, by statute, guide the budgeting process (and that must result in a balanced budget). Although the official projection in June 2010 was somewhat optimistic in sensing that the economy had stabilized and had begun to recover, *see* Exh. S-4, subsequent assessments have not been as optimistic. *See, e.g.* Exh. S-7 (Preliminary September Economic Forecast, dated August 24, 2010). As a result, it is reasonable to expect that the current Six Year Outlook will be revised downward when a new forecast is issued in mid-September, and thus will project revenue shortfalls even worse than the currently projected \$3.053 Billion deficit in 2012-2013. Exh. S-6. Likewise, it is reasonable to assume that the projected shortfall of nearly \$9 Billion in the 2013-2015 biennium will be worse, as well. *Id.* Consequently, Gov. Gregoire has instructed agencies to pare all non-essential activities from their budgets (Exh. S-2) and to propose 4% to 7% reductions during the current biennium in

light of the revenue projections, as well as to prepare for additional reductions of up to 10% in the next biennium.

At the same time, the Governor has expressed six “values” that should guide the State’s budgeting in the remainder of the 2009-2011 biennium, one of which is “protect health and vulnerable people,” which is ranked a close second to “student achievement” among the Governor’s six budget values. Exh. S-3 at 2. In addition, the statute guiding this proceeding provides that expanding the quality and availability of child care options, especially for lower income parents, is a priority for the State, and in my view, those goals should exist as a priority even when the State faces difficult choices in determining which worthy activities to fund with scarce fiscal resources. As I noted in my award for the 2009-2011 Agreement:

[I]n light of the State’s commitment to early childhood education and quality child care, as well as the fact that many, if not most, of these child care providers are at the low end of the income scale in our state, I believe that the effort to find additional funds for this group is necessary and justified. That is, if improved child care and early learning are truly priorities of the State, they must be priorities in difficult economic times as well as when the economy is booming.

Exh. J-2 (Award of August 25, 2008) at 34.

Nevertheless, the State’s ability to pay is one of the primary criteria I am required to utilize in evaluating the parties’ economic proposals, and regrettably, that criterion takes on increasing importance at a time when the State’s finances are growing ever weaker. Thus, while I agree with the Union that “good ideas” may survive even in times of ballooning deficit projections—witness the enhanced toddler rate in the last contract—it would be an abdication of my responsibilities under the statute simply to ignore the

budgetary impact of my award, counting on the Governor or the Legislature to make the final decision.¹⁵

B. The Merits

1. Non-Standard Hours Bonus

a. Total Funds Allocated to NSHB

Turning, then, to the merits of the parties' respective proposals, I begin with the Union's proposal to transfer funds to the NSHB item line, in essence, by introducing efficiencies into the mandatory subsidy billing training process, a task for which the State had allocated \$570 Thousand in the 2009-2011 biennium. The Union contends that the vast majority of that amount can be saved, without impacting the effectiveness of the training, by providing the training exclusively through electronic means, i.e. online or by CD/DVD sent to the providers for use in their own homes, either on a computer or a television screen.

While I agree that the State can and should move to a preponderance of electronic training, the evidence convinces me that it would be unwise at this time to eliminate in-person training entirely. That is so because not every provider has access to the internet (or if he or she has access, is sufficiently knowledgeable and comfortable with the internet to complete the online training). Even if, as I think is reasonable, most providers

¹⁵ See, RCW 41.56.028(2)(d)(ii) (interest arbitration award is not binding on the Legislature, and if the Legislature does not appropriate funds necessary to implement the award, it is not binding on the State); see also, RCW 41.56.028(10) (if a significant shortfall occurs resulting in reduced appropriations following approval of the award by the Legislature, the parties shall immediately enter into collective bargaining for a mutually agreed modification of the Agreement); see also, *SEIU Healthcare 775NW v. Gregoire*, 168 Wn.2d 593 (2010) (despite terms of statute requiring that the Governor submit funding for interest arbitrator's award as part of her budget, mandamus will not issue to address Governor's failure to do so). These safety valves exist to preserve the discretion of primary actors in the budgeting process to reject the Arbitrator's decision, and for the parties to adjust the Agreement in the event of *unforeseen* budgetary shortfalls. They cannot and do not justify, however, the Arbitrator's failure to exercise his own sound judgment in the application of the statutory criteria, including the State's projected ability to pay.

will find the online training effective and convenient, especially once that training is available in the necessary non-English language versions, there will continue to be providers who live in rural areas with limited internet access, or who simply learn better in an in-person training format. Thus, I think it would be a mistake to preclude the State from providing in-person training where that form of instruction makes sense.¹⁶ The parties appear to be in agreement that in-person training is more expensive, however. Consequently, to the extent the Union's proposal is designed to save money that can then be allocated to NSHB, the available savings from changing to electronic training would be reduced if the State continued, as I think they should be allowed to do, to provide in-person training under appropriate circumstances.

Similarly, I share the State's concern that in-home training via CD/DVD currently lacks a reliable means of verifying that the training has actually taken place and that it has been effective.¹⁷ As I understand it, the online training has interactive features that provide a basis for making those judgments. It may well be possible, as the Union argues, to evaluate "effectiveness" by comparing the error rate in a provider's billing prior to DVD training and afterwards, but once again, development and implementation of that sort of analysis—or some other method—will entail costs that would reduce the projected savings of moving away from in-person training.

¹⁶ It is by no means clear that the Union intends to preclude the use of in-person training under any circumstances—Union counsel suggested during closing argument that it was unlikely the Union would protest "incidental" in-person training (my word, not his)—but the language of the Union's proposal could be read to make any in-person training a violation of the Agreement.

¹⁷ The State has an interest in verifying that the training has actually taken place and has been effective, both because the State pays FFN providers \$10.00 per subsidized child for completing the training, and because accuracy in the billing process relieves the State from the administrative burden of correcting errors and, in the case of overpayments, collecting reimbursements from the providers.

Despite these misgivings about the Union's proposal, I agree that subsidy billing training can and most likely will be accomplished in the 2011-2013 biennium for substantially less than the \$570 Thousand allocated for the current biennium. I am also, convinced, however, that whatever those savings might turn out to be, they will necessarily be applied to budget *reductions* required of the DEL and DSHS.¹⁸ Frankly, the mandatory subsidy billing training allocation seems to me to be "low hanging fruit" in that process, i.e. it is a budget reduction that can be accomplished by introducing efficiencies rather than by reducing benefits to recipients or compensation to providers. Thus, I cannot find that the \$570 Thousand formerly allocated to mandatory subsidy billing training can, in whole or in part, be made available to fund an increase in the cap on the payment of NSHB.¹⁹ Because that was the primary source of funds identified by the Union to support its proposal for an increase in NSHB, it necessarily follows that the "ability to pay" criterion requires me to reject the Union's proposal to increase the NSHB allocation to \$2.57 Million for 2011-2013. The State's inability to pay that increase in light of the current projections of massive deficits simply outweighs the undisputed merits of the proposed increase in terms of maintaining—and perhaps even increasing—the availability of high quality off-hours child care.²⁰

¹⁸ As noted earlier, Gov. Gregoire has instructed agencies to prepare for 4% to 7% across the board cuts in anticipation of possible allotment reductions starting October 1, 2010, as well as to identify reductions of \$500 Million statewide that can be incorporated into a supplemental 2011 budget, and to submit plans for 10% GF-S cuts in the 2011-2013 budget. *See*, Exh. S-9.

¹⁹ In addition, as the State has pointed out, the \$570 Million allocation in the current biennium is part of the DEL budget, whereas the Union is asking that it be transferred to payment of NSHB, an item in the DSHS budget, a different agency.

²⁰ In a later section of this Decision, however, I consider another potential source of increased NSHB payments, i.e. the Union's proposal that funds set aside for NSHB payments to Licensed Centers also be made available to Family Homes once the contractual cap has been exceeded.

In light of that conclusion, the parties are agreed that there should be no change in the current language of Article 11.2 in terms of the equal allocation of the \$2 Million dollars between the two contract years. Consequently, my award will be for an allocation of \$1 Million for each year of the contract.

b. Carryover of Unused NSHB Funds

The Union's proposal that unused NSHB funds from the first year of the contract carry over to the second year will not be awarded. The State's practice has been to appropriate funds for compliance with the terms of the Agreement, including payment of NSHB to Licensed Homes, from GF-S, and it is unlawful to carry over GF-S funds from one fiscal year to the next under Initiative 601. While the funds for the NSHB payments to the Licensed Centers are apparently appropriated from federal funds (or from a mixture of federal and GF-S funds), a source from which it seems to be possible to appropriate funds for the entire biennium, I do not view it as within my power as interest arbitrator to require the Legislature to change its historic appropriations practices, i.e. to fund NSHB under this Agreement from federal funds so as to enable a carryover of unused funds to year two.

In addition, it seems to me that the issue is somewhat academic in light of my decision that the total NSHB funds for the 2011-2013 contract will remain at \$2 Million as in the current Agreement. The \$1 Million allocated for the first year of the 2009-2011 contract lasted just eight months. Barring a significant decline in off-hours care provided by Licensed Family Homes in FY2011, which is possible but seems highly unlikely given the economic climate, the \$1 Million that will be allocated in this Agreement will not last the entire first year either, so there will likely be no funds to carry into year two.

c. Availability of the Centers' NSHB Allocation for Licensed Homes Once the Contractual Cap Has Been Exceeded

The final element of the Union's NSHB proposal is that once the contractual cap has been exceeded in any contract year, funds "allocated"²¹ for the payment of NSHB to the Licensed Centers should be made available for continued payment of NSHB to Family Homes as well. The Union notes that an overwhelming percentage of the off-hours care is provided in Family Homes,²² and thus, the Union argues, to the extent funds have been identified to pay for that kind of care, it makes sense to direct the dollars to the facilities where that care is predominantly being provided. The State opposes the idea as unfairly impacting the Centers, which are not part of this bargaining unit, and the State also objects that the proposal constitutes a modification of the concept of a cap on NSHB payments to Family Homes. The State also observes that judged by the period July 1, 2009 through February 2010, the average *monthly* payment of NSHB to Family Homes (\$143,125) exceeded the *total* NSHB paid to Centers for those *entire eight months* (\$107,550).²³ Thus, given that the State had planned to spend \$250 Thousand in NSHB payments to Centers during the 2009-2011 biennium, and assuming for the moment that a

²¹ The evidence established, however, that there is no separate line item in the DSHS budget for NSHB payments to Centers. Rather, those payments simply come out of the "TANF Box," i.e. federal funds and State matching funds available for necessary expenditures to provide appropriate services, of which child care assistance is only one. Thus, there are no funds "allocated" to pay NSHB to the Centers, and therefore if I determine that the Union's concept is feasible and otherwise worthy, some alteration in the Union's proposed contract language will be necessary.

²² For example, as of March 2010, 1,330 Family Homes had received NSHB payments during the first year of the 2009-2011 CBA, whereas only 78 Centers had received NSHB. Exh. U-7 at 1. In terms of dollar amounts, the Centers had received payments totaling \$107,550, whereas the Family Homes had received \$1,145,000 (slightly exceeding the cap). *Id.* at 2. Thus, approximately 95% of the facilities offering off-hours care were Family Homes, and the Homes received approximately 89% of the funds expended by the State to pay for such care (i.e. the \$1 Million capped amount paid to Family Homes under the CBA from GF-S funds, and an uncapped amount paid to Centers, chiefly out of federal funds such as TANF).

²³ Although the precise data is not before me, I understand that the State continued to pay NSHB to Centers after the cap on NSHB for Family Homes had been exceeded. Thus, the amount actually paid in NSHB to the Centers in FY 2009-2010 exceeded the \$107 Thousand noted.

similar amount will survive in plans for the 2011-2013 biennium, Family Homes could exhaust that entire biennial “allocation” in less than two months, leaving no NSHB funds for the Centers for the remainder of the biennium. Finally, the State notes that officials responsible for budgeting have already been eyeing the Centers’ NSHB funds as a source of savings required under the Governor’s budget cutting directives, both for the remainder of this biennium and into the next. Thus, the State argues, there is no guarantee that there will be *any* funds available for NSHB payments to Licensed Centers, let alone that there will be any left over to allocate to Family Homes once the annual cap under the CBA has been reached.

Despite the State’s objections, which I have carefully considered, I find that the Union’s proposal has merit. I do not understand the State to be contending that making funds available out of the TANF Box to supplement NSHB payments to Family Homes (once the contractual cap has been exceeded) is a non-mandatory subject of bargaining, e.g. because it potentially impacts Licensed Centers that are not part of the bargaining unit. Rather, the thrust of the State’s argument seems to be that it would be “unfair” to take money that had been identified as being available for Center NSHB payments and to make those funds available to the Family Homes as well, which likely would have the effect of exhausting the available funds in short order. But given that the vast majority of subsidized off-hours care is provided in the Family Homes, and given that the parties agree that such care is critical for the lower wage working families involved, I agree with the Union that the available dollars, *whatever their source*, should be directed to where the care is actually being provided.

Nor do I see it as fundamentally unfair that if TANF money currently designated for Center NSHB payments were also made available to Family Homes, the TANF funds for this purpose would be depleted after a month or two (at the most). In that case, it seems to me, each category of provider of off-hours care would still have received the bonus payments for precisely the same number of months.²⁴ The number of months in which bonus payments would have been made to *those providers offering the vast majority of subsidized off-hours care*, on the other hand, would have been extended slightly. Even that slight extension, however, might spell the difference in a provider's decision about whether to continue to provide off-hours care, i.e. the shorter the gap between the suspension of NSHB payments in year one and the resumption of those payments when year two begins, the more likely providers are to continue with off-hours care during the hiatus.

For the foregoing reasons, I will award a variation on the Union's proposal. That is, my award will provide that once the annual contractual NSHB cap has been exceeded, in any month in which the State pays NSHB to Licensed Centers, NSHB payments shall be made to Licensed Family Homes as well. To be clear, however, I cannot and do not require that the State appropriate any money for NSHB payments to Centers, whether out of the TANF Box or from any other source, nor do I have any authority to require that the State "identify" or "designate" or otherwise "set aside" any funds for such payments.

²⁴ To the extent the State continues to be concerned about parity between Centers and Family Homes, it seems to me that equality in the duration of the availability of NSHB goes a long way toward meeting that goal. I recognize, on the other hand, that the State has apparently taken into account that Centers did not receive the benefit of the enhanced toddler rate in the last contract, i.e. the Legislature funded it for the Family Homes, but the State has not been able to provide it for the Centers. Thus, continued payment of NSHB to Centers after the contractual cap for payments to Family Homes has been reached could be seen as helping to close a parity gap attributable to the enhanced toddler rate. Given the importance of off-hours care, however, and the fact that it is a service overwhelmingly provided in Family Homes, it seems to me that a potential lack of parity can be justified under these difficult economic circumstances.

Payments of NSHB to the Centers are simply beyond my authority. I do believe, however, that I have the authority to provide that to the extent, if any, the State pays NSHB to the Centers in a month in which the contractual NSHB cap has been exceeded, that the State also pay NSHB to the Family Homes notwithstanding the cap.

Given the projected budget deficits reflected in the current Six Year Outlook, however, which will in all probability get worse before they get better, it strikes me that the State is highly likely to suspend NSHB payments to the Centers, just as it suspended the NSHB in March of 2003 to licensed providers (prior to the creation of this bargaining unit) as a result of budgetary pressures significantly less onerous than those existing today. *See*, Exh. U-1 at 1. If that is the case, my award on this issue will be irrelevant, i.e. there will be no additional sources of NSHB payments beyond the contractual amount. Nevertheless, the contract language I have awarded will give the Union an opportunity to sell its “good idea” to the Legislature, the Governor, and/or to the Department, i.e. the idea that despite massive projected budget shortfalls, subsidized off-hours care should take priority over other worthy activities in the allocation of scarce State revenues.²⁵

2. Mandatory Subsidy Billing Training

I will award a combination of the two proposals before me. As previously noted, each party has proposed, and I will award, contract language in Article 14.3(A) providing that subsidy billing training will be provided in multiple languages. In addition, I will award language that recognizes that the training may be offered in various formats, including electronic, i.e. online or by CD/DVD, or in-person as the Department may deem appropriate within the limits of its budget and as necessary to meet the needs of

²⁵ Alternatively, if there is a miraculous turnaround in the State’s revenue projections, the language will provide sufficient flexibility to account for whatever level of increase in NSHB payments might be justified given a more positive budget outlook.

individual providers. It is my expectation that the State will move during the 2011-2013 contract to a training model that is predominantly electronic, but given the likely state of the budget, I believe that transformation will occur naturally, and therefore I find that specific contract language to that effect is unnecessary.

INTEREST ARBITRATION AWARD

Having carefully considered the evidence and argument of the parties, I hereby render the following INTEREST ARBITRATION AWARD:

1. With respect to Article 11.3 of the 2011-2013 Agreement, I award the following language:

[no change to first paragraph]

The State will automatically authorize the non-standard hours payment option when it is clear to the authorizing worker, based on information regarding the approved activity received from an employer, a school, a WorkFirst case manager, or a Children's Administration social worker that a child will need forty (40) hours or more of non-standard care per month. Non-standard hours are defined as before 6:00 a.m., after 6:00 p.m. or any hours on Saturday, Sunday or holidays. Once a licensed provider has reached the forty (40) hour threshold, the State agrees to pay a non-standard hour bonus of fifty dollars (\$50) per child per month. The total cost of the non-standard hours bonus will not exceed two million dollars (\$2,000,000) per biennium, one million dollars (\$1,000,000) in year one and one million dollars (\$1,000,000) in year two of the Agreement; provided, that if monies allocated to the non-standard hours bonus for family child care providers reaches the capped amount of one million dollars (\$1,000,000) in either year one or in year two of the Agreement, notwithstanding the capped amounts set forth above, the State will pay the non-standard hours bonus to family child care providers in any month that it pays the non-standard hours bonus to licensed child care centers. The State agrees to provide information to the Union on a monthly basis regarding the use of the non-standard hours bonus.

2. With respect to Article 14.3(A) of the 2011-2013 Agreement, I award the following language:

All providers shall be required to take subsidy billing training at least once during the life of this Agreement, either in-person or in an electronic format (on-line, CD, or DVD). The State shall provide mandatory subsidy billing training to providers in every geographic region, on-line, electronically, and or at various times, days, evenings, and weekends, and

in multiple languages. The State shall pay for the cost of delivering the training, but shall not pay for the cost of licensed providers ~~attending~~ completing the training. The State will reimburse FFN providers ten dollars (\$10) per subsidized child in their care at the time they complete the training.

3. Consistent with the terms of the statute, the parties shall bear the fees and expenses of the Interest Arbitrator in equal proportion.

Dated this 5th day of September, 2010



Michael E. Cavanaugh, J.D.
Interest Arbitrator