

BEFORE THE ARBITRATOR

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In the Matter of the Arbitration of a Dispute Between

**OAK CREEK EDUCATION ASSOCIATION**

and

**OAK CREEK-FRANKLIN SCHOOL DISTRICT**

Case 68  
No. 64270  
MA-12856

(Resource Room Assignment)

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**Appearances:**

**Mr. Jason Mathes**, UniServ Director, Council 10, 13805 West Burleigh Road, Brookfield, Wisconsin 53005, appearing on behalf of the Association.

**Mr. Mark Olson** and **Mr. Geoffrey Trotier**, Davis & Kuelthau, S.C., 111 East Kilbourn Avenue, Suite 1400, Milwaukee, Wisconsin 53202, appearing on behalf of the District

**ARBITRATION AWARD**

The Oak Creek-Franklin School District (hereinafter referred to as the District or the Employer) and the Oak Creek Education Association (hereinafter referred to as either the OCEA or the Association) requested that the Wisconsin Employment Relations Commission designate Daniel Nielsen as arbitrator of a dispute over a grievance concerning the assignment of Middle School teachers to the Resource Room. The undersigned was so designated. Hearings were held on March 2, March 24 and May 9, 2005 at the District offices in Oak Creek, Wisconsin, at which time the parties were afforded full opportunity to present such testimony, exhibits, other evidence and arguments as were relevant. A stenographic record was made of the hearing, transcripts of which were received on May 17, 2005. The parties submitted post hearing briefs, and reply briefs, the last of which was received by the undersigned on August 5, 2005, whereupon the record was closed.

Now, having considered the evidence, the arguments of the parties, the relevant provisions of the contract and the record as a whole, the Arbitrator makes the following Award.

**ISSUE**

The parties stipulated that the arbitrator should frame the issue in his Award. The issue may be fairly stated as:

Did the District violate the collective bargaining agreement when the Middle School teachers performed Resource Room duties without receiving sixth class compensation?

If so, what is the appropriate remedy?

**RELEVANT CONTRACT LANGUAGE**

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**ARTICLE II – REPLACEMENT TEACHERS**

Section 2.1. Qualifying Period. The District recognizes replacement teachers as part of the bargaining unit following twenty (20) consecutive work days of replacing a regular teacher in the same assignment. In the event a replacement teacher is absent no more than three (3) days during his/her twenty (20) day qualifying period, s/he will not have to begin a new qualifying period. At the expiration of the twenty (20) day qualifying period, the replacement teacher will be paid in accordance with the contractual salary schedule if the replacement teacher continues working in the same assignment. Payment at such rate shall then be retroactive to the first work day. Fringe benefits shall be applied prospectively after the twentieth day. The twenty (20) day qualifying period continues from one year to the next.

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**ARTICLE IX - TEACHING CONDITIONS**

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Section 9.5 Flexible Work Hours. With the approval of the building administrator, a teacher may alter his/her work schedule in response to having participated in work beyond the normal work day such as - Team meetings, exceptional parent conferences (other than those scheduled on the calendar), committee meetings, etc. Denials shall not be based solely on the time of day (see Memorandum of Understanding on page 76).

Section 9.6. Prep Time After 3:00 p.m. - Elementary. The time between 3:00 p.m. and 3:30 p.m. during the elementary teacher work day shall be guaranteed as preparation time.

Section 9.7. Prep Time Between 7:00 a.m. and 7:30 a.m. - Elementary. The time between 7:00 a.m. and 7:30 a.m. during the elementary teacher work day shall be guaranteed as preparation time if the teacher's work day is 7:00 a.m. to 3:00 p.m.

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### **ARTICLE XXVII - EXTRA CURRICULAR PAYMENT SCHEDULE**

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#### Section 27.8. Hourly Rates.

Activity	2001-03 Rate
A. Substitution per class period or prorated portion thereof in grades 6-12	\$16.99
Substitution per class period or prorated portion thereof in grades K-5	\$10.20
...	
C. Special assignments (Article XXX)	\$22.00
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### **ARTICLE XXX - ADDITIONAL PROFESSIONAL ASSIGNMENTS**

Section 30.1. Additional Professional Assignments. When the Board of Education finds it in the interest of the school to employ teachers for additional time in professional capacities such as summer school teaching, homebound teaching, curriculum work, PEP advisory assignments, or participating on the Staff Development Committee, they may do so at the rate specified in Section 27.8.C or at a percentage of the teacher's scheduled salary as mutually agreed to between the OCEA and the District.

Section 30.2 District After School Workshops. Teachers shall receive the hourly rate identified in Section 27.8, Sub. C. for time spent in the successful participation of District sponsored "after school day" workshops.

Section 30.3. Sixth Assignments.

- A. Effective August 1, 2002 a teacher who is assigned a sixth assignment will receive an additional 1/5<sup>th</sup> (20%) per diem compensation for the duration of the sixth assignment. Sixth Assignments will be recognized as an additional class which is assigned to a teacher who has a 100% FTE and the assignment is for greater than twenty (20) consecutive work days.
- B. Sixth assignments will be posted in their respective buildings and the District web page for five (5) work days in order to receive expressions of interest.
- C. The District will make a reasonable attempt not to assign probationary teachers to sixth assignments.

Section 30.4. Appointments in Writing. Appointment to these positions shall be made in writing at the earliest possible date.

Section 30.5. Appointments by Qualifications. Appointments shall be based on qualifications with employees of the district receiving first consideration when qualifications are equal. Previous experience will be a factor.

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**MEMORANDUM OF UNDERSTANDING**  
**between the Oak Creek School District and**  
**the Oak Creek Education Association**

**Flexible Work Hours**

Section 9.5 Flexible Work Hours: The OCEA and the Administration agree that this is how flextime will be administered.

**ASSUMPTIONS:**

- 1. Teachers are scheduled for an 8-hour workday.
- 2. Teachers often work before and after their scheduled workday.
- 3. Principals should have at their discretion the ability to adjust a teacher's scheduled workday to address a teacher's compelling personal need.
- 4. From time to time teachers may experience a compelling personal need that requires an adjustment in their scheduled workday.

**TIME UNDER CONSIDERATION:**

1. When a teacher needs to arrive at work after the scheduled starting time, but before the students arrive ... flextime procedures apply.
2. When a teacher needs to leave work before the scheduled ending time, but after the students leave ... flextime procedures apply.
3. When a teacher needs to leave work during the times the students are in the building, but not during an assigned duty time ... flextime procedures apply. It is understood the teacher must return prior to the beginning of the next assigned duty time.
4. When a teacher needs to leave or be absent at times other than those times listed above, sick leave or personal leave will be deducted only for the time during which the teacher was assigned duties.

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**BACKGROUND**

There is relatively little dispute over the facts underlying this grievance. The District provides educational services to the students in Oak Creek and portions of Franklin, in southeastern Wisconsin. The Association is the exclusive bargaining representative for the District's teachers.

Among the educational facilities of the District are two Middle Schools, East and West, attended by the 6<sup>th</sup>, 7<sup>th</sup> and 8<sup>th</sup> grade students. The Middle Schools are organized into "houses", with each grade split into two houses, and each house having five teachers assigned – one each in the core areas of social studies, science, language arts, and math, and one "encore" teacher. There are also specialists and special education teachers assigned to the schools, though they are not assigned to specific houses. House teachers meet daily to plan and coordinate instruction for the week, and discuss whatever issues may come up.

**A. Background of the Resource Room**

At issue in this case is the assignment of teachers to the Resource Room. Resource Rooms have been employed at the Middle School since 1997. At risk students are assigned to the Resource Room for an hour each day, where a teacher reviews and re-teaches the substantive content of the classes for the week, helps students prepare for tests, reviews the students' work, and provides other assistance to improve the students' performance. Prior to the 2003-2004 school year, the Resource Room was staffed by a single teacher, and was treated as part of that teacher's normal class load. Beginning in the second semester of 2003-2004, the District altered the staffing pattern. Rather than a single teacher, the Resource Room for each house at the Middle School is staffed by the five teachers assigned to the house, each one covering one day per week during what would otherwise be one of his or her two

daily preparation periods. The rotation is determined by the teachers themselves.<sup>1</sup> The Resource Room assignment is in addition to the normal five classes per day workload for a Middle School Teacher. It generally involves about 5 to 10 students, compared to 27 for a normal Middle School class.

The teacher assigned to the Resource Room does not prepare a lesson plan as such. Instead, the teacher confers with the other teachers in the house to determine what topics are being covered in their classes, what tests are coming up, and what specific items they believe should be addressed in the Resource Room. These discussions typically take place during the group preparation periods. Teachers will also speak with the students once they arrive at the Resource Room, and will adjust their plans to meet the needs identified through these discussions. In some houses, the teacher focuses only on his or her own core subject, while in others, the entire range of subjects may be open for review in a single session. A teacher may also devote portions of the hour to tutoring one or more students in a particular subject, while the others complete assignments or work on projects. There is no assigned curriculum for the Resource Room. The content is driven by the needs of the individual students and the materials covered in their core classes. No grades are assigned for the Resource Room,<sup>2</sup> although teachers and administrators confer and make judgments about whether a student continues to need the extra help, as they do in initially assigning the students to the Resource Room. The final determination about assigning a student to the Resource Room, or removing the student, is made by the principal.

## **B. Background on Pay for Additional Duties and Sixth Assignments**

Prior to August 2002, teachers at the Middle and High School levels who were assigned an additional class, beyond the normal five, were paid an hourly special assignment rate, in addition to their salary. The special assignment rate provided in Section 26.9C of the contract – \$22 per hour in the 2000-2001 school year – was considerably less than the teacher’s pro rated salary for the other five classes. This payment was mandated by what was then Article XXIX, Section 29.1:<sup>3</sup>

Section 29.1. Additional Professional Assignments. When the Board of Education finds it in the interest of the school to employ teachers for additional time in professional capacities such as summer school teaching, homebound teaching, curriculum work, *teaching a sixth class (grades 6-12)*, PEP advisory assignments, or participating on the Staff Development Committee, they may do

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<sup>1</sup> The majority of the houses follow a set rotation, but some vary the day each teacher is responsible for on a weekly basis, and teachers in the house have the ability to vary the rotation, if they consider it desirable.

<sup>2</sup> In its original incarnation, prior to 2003, grades were assigned for the Resource Room, on a “satisfactory/unsatisfactory” basis.

<sup>3</sup> These Article numbers were changed in the 2001-2003 collective bargaining agreement.

so at the rate specified in Section 26.9.C or at a percentage of the teacher's scheduled salary as mutually agreed to between the OCEA and the District.

This same language was in issue in a grievance filed in 2003 claiming pay for a teacher assigned to do curriculum development work during his preparation period. The District denied that grievance on the grounds that "additional time" did not include prep periods, which were part of the normal paid day. The grievance was withdrawn.

The Association proposed to change the system for sixth assignments in the collaborative bargaining process leading to the 2001-2003 contract. Jeffrey Olson was the President and chief spokesperson for the Association in that process, and Human Resources Director Paul Vance spoke for the District. The collaborative bargaining process employed by the parties involves an identification of issues, a statement of each party's interests, a listing of options to address the issue, and the formulation of criteria by which a decision will be made. The joint minutes of the discussions about the Association's proposal to add sixth assignment language to the contract showed the parties' interests/root causes to be:

Association:

- Fair compensation.
- Protecting inexperience (new) teachers from excessive workload.
- Equal opportunity to be assigned.
- Consistent application.
- Need continuity of programs.

District:

- Need to offer courses.
- Maintain (limit) fiscal impact.
- Maximize economic resources.
- Deal with teacher shortage and maintain flexibility to assign (attractability).
- Need to minimize 6<sup>th</sup> assignments.
- Limit staff turnover.
- Opportunity for additional compensation is needed to attract and hire.
- Need continuity of programs

This listing of interests was followed by thirteen options for addressing sixth assignments, ranging from paying an additional 20% of salary and compensation for prep time, to simply maintaining the status quo. The agreed upon criteria for making a decision were:

- Fair or equal treatment for all teachers.
- Efficient.
- Easily implemented.
- Acceptable to broad constituency on both sides of the table.
- Cost effective.
- Within control of the negotiating team to implement.

While the issues, options and criteria were all identified early in the negotiating process, the issue of sixth assignment pay was one of the final issues settled. The ultimate language addressed the Association's interests in increasing the pay, avoiding the assignment of probationary teachers and posting sixth assignment opportunities. At the same time, the parties agreed to limit the fiscal impact by requiring that pay be limited to teachers assigned a class in addition to five already assigned classes, where the assignment was for greater than 20 consecutive work days:

Section 30.3. Sixth Assignments.

- A. Effective August 1, 2002 a teacher who is assigned a sixth assignment will receive an additional 1/5<sup>th</sup> (20%) per diem compensation for the duration of the sixth assignment. Sixth Assignments will be recognized as an additional class which is assigned to a teacher who has a 100% FTE and the assignment is for greater than twenty (20) consecutive work days.
- B. Sixth assignments will be posted in their respective buildings and the District web page for five (5) work days in order to receive expressions of interest.
- C. The District will make a reasonable attempt not to assign probationary teachers to sixth assignments.

The limitation of 20 consecutive days was at least in part a response to the District's concern that unanticipated enrollments could create the need for an extra class at the beginning of the semester, a class that would need to be staffed by a current teacher until a permanent staffing decision could be made. The 20 consecutive work day duration was drawn from the contract's limitation on the time that replacement teachers could be employed without becoming part of the unit and being paid on the negotiated salary schedule. The parties also discussed compensation for teaching a sixth assignment for fewer than 20 consecutive days, and agreed that it would be treated as a special assignment. There was no discussion of the status of the Resource Room at the time of the negotiations.

Additional facts, as necessary, will be set forth below.

**POSITIONS OF THE PARTIES**

**The Position of the Association**

The Union takes the position that the Resource Room is clearly a sixth assignment for the teachers involved, and that it should be paid in accordance with contract. The contract requires that a sixth assignment Per the contract, a sixth assignment is "an additional class which is assigned to a teacher who has 100% FTE and the assignment is for greater than twenty (20) consecutive work days."



Notwithstanding the District's efforts to portray this as a glorified study hall, the work performed in the Resource Room is teaching, as defined by the Department of Public Instruction. The DPI has ruled that "teaching" means improving pupil learning by (1) planning instruction, (2) diagnosing learning needs, (3) prescribing content delivery through classroom activities, (4) assessing student learning, (5) reporting outcomes to administrators and parents and (6) evaluating the effects of instruction. This distinguishes teaching from purely supervisory activities such as study halls.

Applying this definition to the facts of this case, the Resource Room teachers are engaged in teaching. They pre-teach, teach and re-teach material to at-risk students. That is what the District expects of them, and it cannot be done unless the teacher teaches. In so doing, they must confer with the other house teachers, and plan the topics and methods of instruction for the day. If, as is often the case, the teacher is covering subjects other than those he or she normally teaches, the teacher must become familiar with the materials. Further, the teacher must diagnose the learning needs of these at-risk students, who have not grasped the material in the past. That cannot be accomplished unless the teacher prepares a strategy to present the material in a different and more effective way. That in turn requires a diagnosis of the problems that keep the student from learning in the normal course of instruction. As to the third criterion, the Resource Room teachers clearly provide classroom instruction on content to the students. That is the whole point of the Resource Room.

As to the final three criteria, while it is true that the Resource Room teachers do not assign grades as such, they do assess performance, report on outcomes and evaluate the effects of instruction. Assessing performance is necessary as the teachers proceed with instruction, so that he or she can decide whether the student has made sufficient progress on one subject to permit a shift to other subjects. There can be no flow of instruction without assessment of the students' performance. Resource Room teachers also report on outcomes. Again, they do not assign grades, but reporting outcomes may be done in several different ways. Here, the teachers participate in PST teams to discuss student performance, and make recommendations on whether the student may be reassigned from the Resource Room to his or her regular class schedule. That recommendation is made to the administration, which makes the final decision. Finally, Resource Room teachers do evaluate the effects of their instruction. They evaluate the effectiveness of their teaching strategies and make changes in the schedule of lessons in the Resource Room based on that evaluation. The work performed by teachers in the Resource Room is teaching, and the Resource Room is, perforce, a class to which these teachers have been assigned.

The Association points out that before the Resource Room became a shared responsibility of the house teachers, it was treated as a class assignment for the individual teachers assigned to the job. Indeed, teacher John Eglsaer is currently assigned to a Resource Room as part of his normal workload, and it constitutes – and is paid as – his fifth teaching assignment.

The contract also requires that a sixth assignment be assigned for twenty consecutive work days. The District asserts that Resource Room teachers do the work, on average, for only one day per week, and thus do not meet this threshold. That ignores the distinction between days and work days. The teachers are required to work one fifth of the week, every week, in the Resource Room. For purposes of the calculation under Article 30, the days they are not assigned to the Resource Room are not work days. The Association analogizes to the teachers who work alternating day schedules, known as “A/B” schedules. The District’s principals admit that teachers working such schedules are working consecutive work days in their assignments, because they work on each day they are scheduled to work, even though the schedule does not call for the class to meet every day of the week. Three such teachers – one art and two physical education - were paid for a sixth assignment in the 2004-2005 school year, each receiving an additional 10%. This demonstrates that it is the working of each scheduled day, for twenty scheduled days, that constitutes twenty consecutive days under the sixth assignment language.

The District attempts to portray these teachers as not meeting the 20 day threshold by claiming that it is the teachers who determine the actual schedule of days for teaching in the Resource Room, and thus no teacher is assigned to a particular day. This is mere wordplay, and ignores the fact that each teacher has a responsibility for his or her pro-rata share of the teaching, and regardless of the specific day, each teacher is responsible for one day per week. Teachers do not have the option of refusing this assignment, and the fact that management leaves it to the faculty to determine the exact day on which the teacher performs this duty does not make it something other than a work assignment.

The District also tries to distinguish the Resource Room from a sixth assignment, because sixth assignments are supposed to be posted and the Resource Room is not posted. They also point out that probationary teachers should not normally have sixth assignments, but are routinely assigned to the Resource Room. These arguments confuse the definition of a sixth assignment with the procedures for filling sixth assignments. According to subsection A of Section 30.3, a sixth assignment exists when the teacher has five classes, is assigned to another class, and work 20 consecutive work days in that assignment. Someone is entitled to pay for that assignment. Subsection B requires posting that opportunity. Subsection C contains the promise to avoid using probationary teachers. The fact that the District did not follow the contract in filling these jobs is a separate violation of the agreement, not a substantive factor in determining whether the assignment exists.

Even if the arbitrator were to somehow determine that the Resource Room is not a sixth assignment within the meaning of Section 30.3, it would still, at a minimum, constitute an additional professional duty under Section 30.1 of that same Article. Section 30.1 provides for compensation for additional time spent in professional capacities:

“When the Board of Education finds it in the interest of the school to employ teachers for additional time in professional capacities such as summer school teaching homebound teaching curriculum work or participating on the Staff

Development Committee, they may do so at the rate specified in Section 27.8.C or at a percentage of the teacher's scheduled salary as mutually agreed to between the OCEA and the District.”

Teachers assigned to the Resource Room are required to sacrifice their preparation periods, both to prepare for the Resource Room and to teach in it. This is additional time required of the teacher in a professional capacity, and it requires compensation at the hourly rate.

In summary, the teachers assigned to the Resource Room are expected to teach those children one day each week. They are expected to perform this duty in addition to their other five classes, and they are expected to do so throughout the school year, a period of more than 20 consecutive work days. There can be no serious argument that this does not constitute a sixth assignment within the meaning of the contract. Even if it falls short of the technical definition of a sixth assignment, it must then be considered an additional professional duty. In either case, the District has clearly violated the agreement by refusing to compensate these teachers for their work in the Resource Room.

### **The Position of the District**

The District takes the position that there has been no contract violation, and that the grievance seeking additional pay for the Resource Room teachers for work during their prep periods must be denied. The District has not traditionally paid additional compensation for any professional work assigned to teachers unless it falls outside of the normal work day, or unless the contract specifically provides for such compensation. The normal work day has always been considered to include prep periods, and the District has never compensated teachers for additional work performed during prep periods. Thus, in order to prevail, the Association must prove that compensation for the Resource Room is specifically required by the terms of the collective bargaining agreement. It has failed to do so.

Section 30.3 of the contract provides an additional 20% pay for teachers having a sixth assignment. The contract is clear as to what constitutes a sixth assignment, and the Resource Room plainly does not meet that definition. A sixth assignment must be an additional class, it must require more than 20 consecutive days of work, and it must be posted. The sixth assignment language also requires the District to avoid using probationary teachers for sixth assignments. The structure and staffing of the Resource Room is completely inconsistent with all of these features.

The Resource Room is not a class, in that it does not require the normal preparation and follow-up of a class, nor are teachers expected to teach new content. It is essentially a study hall and a tutoring session to review materials that have already been taught and help students catch up on their homework. There is no established curriculum for the Resource Room. No lesson plans are required, there is no grading, and there is no reporting of outcomes to parents or administrators. No student earns credit towards graduation from attendance at the Resource Room, and no specialty certification is required of a teacher

assigned to the Resource Room. The class size policies of the District are not applied to the Resource Room. In all of these ways, the Resource Room is completely distinct from a “class” and the activity undertaken by the teachers who work there is distinct from “teaching” as that term is normally understood.

Nor has any teacher ever been assigned to work, and none has ever worked, more than 20 consecutive days in the Resource Room. A sixth assignment must be “assigned” to the teacher. No administrator “assigns” a teacher to work a particular day in the Resource Room. The staffing of the Resource Room is left up to the house teachers, who decide for themselves who will work and when, without any administration involvement. In addition, no teacher claims to have ever worked 20 consecutive school days in the Resource Room, nor could they. Consecutive days mean the days on which a class is scheduled to meet. The Resource Room meets every day of the week. Given that the average house teacher is in the Resource Room once a week, they plainly do not work 20 consecutive days. Even if the arbitrator accepted the Association’s unusual interpretation of consecutive days as meaning days the teacher is expected to be there, rather than days on which the class meets, these teachers could not meet the 20 consecutive days threshold in the course of any semester. There would not be more than 20 consecutive weeks in any semester during which they would work the Resource Room. Thus there is no interpretation of this provision that allows these teachers to qualify for sixth assignment pay.

Moreover, no Resource Room assignment has ever been posted, as sixth assignments must be, and probationary teachers are routinely assigned to the Resource Room as part of their normal house responsibilities. No grievance has ever been filed protesting the lack of posting or the use of probationary teachers. If the parties had considered Resource Room to be a sixth assignment, one would expect the assignment to be posted, and only veteran teachers to be eligible. The fact that this has not occurred, and that there has been no protest by the Association, clearly demonstrates the parties’ mutual understanding that the Resource Room is not a sixth assignment.

The clear language of Section 30.3 does not allow the Resource Room to be treated as a sixth assignment. Neither can it be considered an additional duty under Section 30.1. Section 30.1 contains a specific listing of extra duties, and nothing resembling the Resource Room is listed. Had the parties intended the Resource Room to generate additional income for teachers, they would have negotiated language allowing for that result. They did not do so, in either Section 30.1 or Section 30.3.

The District points to the history of negotiations over Article 30 to buttress its position. Both the former teacher negotiator and the District’s chief spokesperson agreed that the sixth assignment language was not added until the 2001-2003 collective bargaining agreement. They explored the possibilities of per diem pay for sixth assignments and of additional pay for the necessary additional preparation time. In the end, they reach agreement on per diem pay at 20%, but made no provision for additional prep time pay. As a means of limiting financial liability for sixth assignments, they agreed to the 20 consecutive work days threshold. At no

time did either party make reference to the Resource Room as a sixth assignment. Inasmuch as the structure of the Resource Room is inconsistent with the language negotiated by the parties, and since the Association, as the moving party on this issue, never once raised the Resource Room as an example of a sixth assignment, the most reasonable interpretation of the bargaining history is that no agreement to pay per diem for the Resource Room can be inferred in the contract language.

### DISCUSSION

The issue in this case is whether the Middle School Resource Room is a sixth assignment for which per diem rates must be paid under Article XXX. A sixth assignment is defined as “an additional class which is assigned to a teacher who has a 100% FTE and the assignment is for greater than twenty (20) consecutive work days.” The District argues that a sixth assignment must also involve posting and must not be something routinely assigned to probationary teachers. With respect to these additional elements, the District’s argument misconstrues the language and structure of the contract. Subsection A of Section 30.3 sets forth what “will be recognized” as a sixth assignment, and it is this provision that contains the substantive definition of the term:

- A. Effective August 1, 2002 a teacher who is assigned a sixth assignment will receive an additional 1/5<sup>th</sup> (20%) per diem compensation for the duration of the sixth assignment. Sixth Assignments will be recognized as an additional class which is assigned to a teacher who has a 100% FTE and the assignment is for greater than twenty (20) consecutive work days.

The posting requirement and promise to avoid using probationary teachers are set forth in Subsections B and C:

- B. Sixth assignments will be posted in their respective buildings and the District web page for five (5) work days in order to receive expressions of interest.
- C. The District will make a reasonable attempt not to assign probationary teachers to sixth assignments.

While these would reasonably be viewed as attributes indicative of a sixth assignment, they are not integral parts of the definition. The District controls the assignment process, and it did not regard the new configuration of the Middle School Resource Room to be a sixth assignment. The decision to use the house teachers to staff the Resource Room effectively eliminated any option of using posting or giving special consideration to probationary status, and the District’s position on what constitutes a sixth assignment led them to believe they had no such obligations. The new configuration was promptly grieved, and while the Association focused on the compensation aspect of the Resource Room assignments, it cannot be said to

have thereby agreed that posting was not required or that probationary teachers were appropriate candidates.<sup>4</sup> Whether the grievance focused on compensation, posting or use of probationary teachers, the basic underlying question -- whether this is a sixth assignment -- would still need to be resolved.

The components of a sixth assignment are (1) an additional class; (2) assigned to a teacher; (3) where the teacher already has five assigned classes; and (4) the assignment lasts more than 20 consecutive work days. Of these four elements, the principal arguments are over the first and fourth - whether this is a class, and whether it extends for more than twenty consecutive work days. There is no dispute that most of the teachers assigned to the Resource Room already have five assigned classes.<sup>5</sup> The District does argue that the Resource Room is not “assigned” to the teachers, since the members of the house have flexibility on which days to cover the Resource Room and could theoretically agree to let a member of the house forego this work. The District reasons from this that the teachers are assigning themselves, but the fact is that the District dictates that the Resource Room will be held every day. It assigns the responsibility for staffing the Room to the house, and the great weight of the record evidence is that each teacher in the house is expected, both by the principals and the other teachers, to carry his or her pro-rata share of this duty. There is no evidence of a house teacher being exempted from this work, and no basis for finding that a teacher has the right to simply declare that he or she will not provide Resource Room coverage. The conclusion is inescapable that these teachers are working in the Resource Room at regular intervals because their employer has assigned them to perform that duty.<sup>6</sup>

### **Is the Resource Room a Class Assignment?**

The District distinguishes the Resource Room from a “class” on the grounds that the work of the Resource Room teacher does not meet the DPI definition of teaching. The District instead characterizes the activity as tutoring or re-teaching. These terms, though, focus on the student rather than the teacher. The distinction between tutoring and teaching goes to the number of students the teacher is dealing with, not the content or purpose of the presentation. The distinction between teaching and re-teaching goes more to the student’s comprehension of the material than to the teacher’s activity in presenting it. The purpose of the Resource Room is to have students learn content that they have not learned the first time around, by having a

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<sup>4</sup> Indeed, absent the dispute over compensation, the Association could reasonably have concluded that the District’s interest in the continuity of using house teachers, and the commitment of only one day per week, would sufficiently answer the concerns about inconsistency in offering sixth assignments and overloading new teachers that led to the inclusion of items “B” and “C”.

<sup>5</sup> There is one teacher, John Eglsaer, who had a Resource Room as part of his normal five classes in the 2004-2005 school year. However, I would agree with the District that using the assignment to fill out a teacher’s schedule and maintain his 100% FTE does not necessarily say much about the nature of the task assigned.

<sup>6</sup> See the testimony of Principal Sigler, transcript of May 9, 2005, at page 257, folios 4-17.

teacher present it in a different way.<sup>7</sup> If one student was absent when the material was covered in his or her core class, and another was present but failed to grasp the material, the teacher making a presentation to the Resource Room will be teaching for the former, and re-teaching for the latter, even though the actions of the teacher are the same.

Aside from assigning different terminology to the activity, the District points to specific areas in which providing instruction to a Resource Room student differs from teaching a core class. The Department of Public Instruction defines teaching as (1) planning instruction, (2) diagnosing learning needs, (3) prescribing content delivery through classroom activities, (4) assessing student learning, (5) reporting outcomes to administrators and parents and (6) evaluating the effects of instruction. The District argues that in the Resource Room there is no formal lesson plan, no set curriculum, and no testing or grading. With respect to the lack of lesson plans, the record shows that, although weekly lesson plans are not submitted to the administration, teachers do plan for the week's activities in the Resource Room, jointly in consultation with their house colleagues. To some extent, the need for advance planning is greater in the Resource Room, since the teacher must become familiar with subjects other than those he or she normally teaches. Those advance plans, however, are necessarily subject to the learning problems presented by the students in the room when the teacher arrives, and may need to be adjusted. The fact that the plan is driven by the content being presented in the entire house and the testing schedules in other classes, and may need to be adjusted when it encounters the students, does not mean that no plan is made. No one in this proceeding contends that the Resource Room teachers walk into the room without some form of instructional plan prepared for the day.

The lack of a Resource Room curriculum reflects the derivative nature of the instruction undertaken there. The Resource Room is not a credit class, devoted to a single subject. Its content is derived from the curricula of the other classes, and from the ability of the students to academically advance in keeping with those curricula. As with the necessarily flexible lesson planning, the lack of a Resource Room curriculum that is defined in advance does not reflect on whether a plan of instruction is being made or followed by the teachers.

As to the second criterion, the diagnosing of learning needs is clearly undertaken in the Resource Room. The Resource Room, by its very nature, is designed to determine what it is that causes these students to be at risk, and to find ways to deliver materials that will respond to those needs. Some of that assessment is done by the house teachers as a group, in discussing each child, while some is done in the course of instruction and judging the reaction to that instruction, but diagnosing and responding to learning needs is a basic function of the structure.

The third criterion, prescribing content delivery through classroom activities, is the subject of the District's distinction between teaching, re-teaching and tutoring, discussed

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<sup>7</sup> See the testimony of Principal Sigler, transcript of May 9, 2005, at pages 258-260, and Principal Kreuser, at pages 275-276, 278, 281, and 305.

above. The delivery of content, albeit content that has been presented once before, is a duty of the Resource Room teacher. Otherwise, there is little rationale for assigning the house teachers to this task. That having been said, it is also the case that some time in the Resource Room is devoted to traditional study hall types of activities, with students catching up on assignments. It appears from the record that that is not a primary activity, and that while some students are working on their own, the teacher is typically presenting instruction to others. Again, in assessing whether this is a class, it is the activity of the teacher, rather than the activity of some students, that is the principal focus.

The final three criteria - assessing student learning; reporting outcomes to administrators and parents; and evaluating the effects of instruction - go to the teacher's measurement and reporting of the learning in the Resource Room. As the Resource Room is designed as an adjunct to the other courses, and the teaching done there is for the purpose of improving performance in those courses, the visible measurement of improvement in learning is done through these same teachers' testing and grading of these same students in their other classes. Some assessment of learning is performed within the Resource Room, by the teachers as they judge whether to change subjects in the course of a session, but there is no formal testing to validate that judgment. Assessment of progress in learning, as well as reporting such progress to the administration, is also undertaken when recommendations are made to transfer a student from the Resource Room back to his or her normal class schedule,<sup>8</sup> although that determination is largely driven by whether the student has eliminated the "D", "F" and "Incomplete" grades that led to his or her assignment to the Resource Room in the first place.

The activities of a teacher assigned to the Resource Room parallel those of a teacher in other classes, with some variation attributable to the derivative nature of the Resource Room teaching. Teachers in the Resource Room devote more time to individualized instruction, and the day-to-day content varies more from session to session than would be expected in the standard classroom. The formal assessment and reporting of progress is done at a remove, through grading in the other classes, though some is performed directly in the Resource Room itself. In concluding that the Resource Room is a class, and that the activity undertaken by Resource Room teachers is teaching, I am influenced by the fact that it has been treated as such in the past in this District. The configuration of the Middle School Resource Room as a shared duty for house teachers was new in 2004, but the activity itself has been assigned for some seven years prior to that and had always been treated as a teaching assignment for whichever faculty member was assigned. The teachers who were assigned to the Resource Room in the previous daily format testified that the difference between the two formats was limited to the

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<sup>8</sup> Making an assessment of learning and report of outcomes does not necessarily involve the assignment of letter grades. I note the testimony of teacher Gail Wiziarde to the effect that her normal Reading class does not use assigned grades to measure and report student learning outcomes, and of teacher Trent Lower that, when he taught Resource Room as a daily class before the 2004 change in format, he assigned grades based on effort, on a "satisfactory/unsatisfactory" basis.



dispersion of responsibility among all teachers in the house rather than a single teacher, and the lack of any formal grading system in the new format.<sup>9</sup>

### **Are Teachers Assigned to the Resource Room for More than 20 Consecutive Work Days?**

Having determined that the Resource Room assignment qualifies as a “class”, the question becomes whether the Resource Room teachers meet the contract’s threshold of being assigned for more than twenty consecutive work days. There is some lack of clarity in the record, owing to some houses having more than 5 teachers,<sup>10</sup> but in the main, each teacher is assigned to the Resource Room one day per week and unless there is an absence or some special arrangement, no teacher works two days in a row in the Resource Room. The District argues that the teachers are not assigned for more than 20 consecutive days, because they work only one day per week while the class meets every day, and because their assignment to a given day is determined by the members of the house and not by the administration. This latter argument is answered at the beginning of this Discussion section – the District assigns the duty and expects each teacher to perform his or her pro-rata share of the duty on a regular basis. The more substantial question is whether the teacher so assigned works 20 consecutive work days.

The simple answer to the question, on the facts as they existed when this grievance was filed, is “no”. The sharing of Resource Room duties among members of the Middle School house faculty began in the second semester of 2003-2004. The third and fourth quarters of that year contained only 19 weeks. Thus, even under the Association’s definition of what constitutes consecutive work days, there were not 20 consecutive work days for a teacher working one day per week in the Resource Room during the remainder of the school year, and the assignment could not satisfy the contract’s threshold. That does not necessarily answer the full question.

The shared assignment of the Resource Room continued past the second half of the 2003-2004 school year, and house teachers split the duty again on the same basis in 2004-2005. Each teacher worked one day per week, and no teacher was assigned consecutive calendar days. The record is silent as to whether Middle School teaching assignments are made on a semester or a school year basis. If they are made on a semester basis, the teachers would encounter the same mathematical problem as they encountered in 2003-2004 – there would not be 20 weeks worth of classes in the semester.<sup>11</sup> However, if the assignments are

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<sup>9</sup> See the testimony of teacher Jack Holzman, to the effect that he had taught Resource Room as a sixth assignment before Section 30.3 was added to the contract, and was paid at the hourly rate for an additional class. Transcript, May 9, 2005, pages 120-137.

<sup>10</sup> See Principal Sigler’s testimony at page 233 to the effect that some houses have more than five teachers and thus may average less than one day per week in the Resource Room, and his subsequent testimony at pages 240-241, that teachers may double up during the week in the Resource Room if more than five share the duty.

<sup>11</sup> I note that Article 2 of the collective bargaining agreement provides that the 20 consecutive work day limit on the use of temporary teachers carries over from year to year. No such provision appears in Article 30.

made on a school year basis, there would be more than twenty weeks of work in the Resource Room across the school year.

In arguing that the days spent in the Resource Room are “consecutive” the Association points to the fact that these are the only days on which teachers are expected to teach, and thus are the “work” days for that assignment. The Association analogizes to teachers working an A/B schedule as a sixth assignment, who receive pro-rated sixth assignment pay even though their classes meet on an every other day basis. The District responds by pointing out that those teachers teach on every day the class is in session, while the Resource Room teachers teach at most 1/5<sup>th</sup> of the days the class is in session. The A/B schedule sheds little light on the question. The Resource Room scenario was not in the minds of either set of bargainers when Section 30.3 was negotiated.<sup>12</sup> The Association’s Chief Spokesperson testified credibly that the discussion of the 20 consecutive work days centered on how classes would be staffed at the beginning of the year, if enrollments were heavier than anticipated and additional sections were required.<sup>13</sup> Either daily classes or A/B schedule classes might be added, and either might need temporary staffing. At the time of negotiations, under both schedules, there was no difference between days on which the class was scheduled to meet and days on which the teacher was expected to teach the class. A teacher working an A/B schedule could qualify for sixth assignment pay under either definition.

The contract provides per diem payment for sixth classes where “the assignment is for greater than twenty (20) consecutive work days.” The Association’s argument is that a teacher works consecutively so long as he or she works each day he or she is expected to work. That is not an irrational interpretation, but it centers on the term “work days” and ignores the word “consecutive.” If “consecutive work days” means each day a teacher is assigned to work, all assignments are for consecutive days and there could not be an assignment that did not involve consecutive work days.<sup>14</sup> An assignment to work five days at a class in the first quarter, seven days in the second quarter, seven days in the third quarter, and two days at the end of the year, would be an assignment for twenty-one consecutive work days, since those were days the

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<sup>12</sup> The District suggests that the Association should have raised the issue, but that argument has little force. At the time of the negotiations, the Resource Room was not structured as a shared assignment, and had been either part of the teachers’ normal class load or paid at an hourly rate if it was a sixth assignment for an individual teacher. The twenty day issue was not relevant to the Resource Room at that time.

<sup>13</sup> This testimony is not inconsistent with Human Resource Director Vance’s testimony that the 20 consecutive work days were meant to limit the District’s financial exposure to paying per diem rather than hourly for sixth assignments. Plainly it would also have that effect. Former Association President Olson testified without contradiction that teachers teaching a sixth assignment for fewer than 20 consecutive work days would receive the hourly special assignment rate paid in the past, rather than the newly bargained per diem rate.

<sup>14</sup> Even if the teacher failed to appear on assigned days, it is the duration of the “assignment” and not the presence of the individual teacher, that the language uses as a measurement. This is distinct from the 20 work day threshold for temporary replacements under Article II, where an individual’s absences can interrupt and restart the qualifying period.

teacher was expected to work, and the teacher would qualify for the per diem rate. In short, the word “consecutive” has no meaning at all in this clause under the Association’s interpretation. Yet it is fundamental to contract interpretation that words are used for a purpose, and that as between an interpretation which renders a word meaningful and an interpretation which renders it meaningless, the former is to be strongly favored.

The Association’s interpretation has a certain amount of equitable appeal, but it cannot be reconciled with the language actually used in Section 30.3 of the contract. Nor is the arguable inequity particularly pronounced. Any time qualifying conditions are set for a higher rate or some other benefit under a contract, equitable arguments can be made for those who fall short of the threshold. The change in the language on sixth assignments was intended to produce a very substantial increase in compensation for this work where the assignment met the specified conditions. The twenty consecutive work day requirement was intended as a limitation on the District’s exposure to paying the per diem rate for this work, rather than the lower hourly rate. While the bargainers did not specifically contemplate the shared assignment format for the Resource Room when they negotiated this language, they did expressly provide that even a significant level of responsibility for a sixth class might not qualify for the higher rate.<sup>15</sup> Inasmuch as the teachers assigned to the Middle School Resource Room do not meet the contract’s requirement of having an assignment “for greater than twenty (20) consecutive work days” I conclude that they are not entitled to per diem pay for the duty.

### **Are Teachers Assigned to the Resource Room Entitled to Additional Compensation?**

The Middle School Resource Room is an additional teaching assignment, but teachers performing it do not work in the assignment for twenty consecutive days. It does not, therefore, qualify as a ‘sixth assignment’ as that term is used in Section 30.3 of the contract, and the teachers do not qualify for per diem pay.” The Association argues that they should then qualify for hourly pay for a special assignment under Section 30.1:

Section 30.1. Additional Professional Assignments. When the Board of Education finds it in the interest of the school to employ teachers for additional time in professional capacities such as summer school teaching, homebound teaching, curriculum work, PEP advisory assignments, or participating on the Staff Development Committee, they may do so at the rate specified in Section 27.8.C or at a percentage of the teacher's scheduled salary as mutually agreed to between the OCEA and the District.

The District objects, noting that pay for a sixth assignment is not specified in that provision, and asserting that the District has only made payment for the work listed in that provision where it is performed outside of normal work hours, and never pays for work of any type performed during a prep period.

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<sup>15</sup> Twenty work days equates to 12% of the teaching days in the school year.

The District's claim that pay for additional professional assignments under Section 30.1 is only for "additional time" beyond the work day, and has never included pay for work performed during prep periods, ignores the fact that this is the provision under which hourly payment for sixth assignments was made before the per diem language was added to the contract. At that time, the provision included "teaching a sixth class (grades 6-12)" among the examples of professional assignments requiring additional time. Thus the specification of "additional time" does not itself exclude payment for additional classroom teaching duties performed during a prep period within the normal day.<sup>16</sup>

When the new language providing for per diem pay for sixth assignment was incorporated to the contract, the reference to teaching a sixth class was removed from the Additional Professional Assignments provision. The new language is not all encompassing, and this leaves the contract without a specific provision for payment for teachers who have a sixth class, but do not qualify for per diem pay because the work is not assigned for more than 20 consecutive work days. There are two possible interpretations to the current state of the contract. The first is that the parties intended to completely eliminate compensation for any additional class assignment that failed to meet the 20 consecutive day threshold. The second is that the new language was intended to specify the conditions under which a teacher in a sixth assignment would be entitled to step up in pay to the higher per diem rate, leaving teachers who did not qualify for the step up to receive the lower hourly rate as they had in the past.

The status of the Resource Room teachers presents a conflict in the principles of interpretation. The principle of *Ejusdem Generis* holds that where general language is followed by a listing of examples, the general language includes items not listed that are of the same general nature or class as those that are listed. Teaching an additional class is a professional assignment, and would be akin to homebound teaching or summer school teaching, which are items listed in Section 30.1. However, bargaining history is another important tool in contract interpretation, and changes in language are presumed to have been made for a reason. Where parties once included an item in a general listing, and then removed it, the logical implication is that they intended that the provision no longer apply to that specific item. Thus the fact that teaching a sixth class was removed from the specific listing of examples in Section 30.1 would tend to counter the notion that it could still be compensated as a special duty.

In resolving this conflict of principles, I am persuaded by another item of bargaining history. In testifying about the change to a per diem basis for compensating sixth assignments, former Association President and Chief Spokesperson Jeff Olson stated that the parties specifically discussed how a teacher who had a sixth assignment but did not satisfy the 20 consecutive days threshold would be paid. Olson said that the parties agreed that the payment would be made as it had in the past, as an additional professional assignment. While District

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<sup>16</sup> This observation is not intended to interpret the language with respect to non-classroom teaching duties.

negotiator Paul Vance stressed in his testimony that the 20 consecutive days requirement was a safeguard against increased costs for sixth assignments, he did not deny the exchange described by Olson. An interpretation that treats sixth assignments below the 20 consecutive day level as additional professional assignments is consistent with Vance's testimony, since there is no increase in cost – the District is merely paying the same rate it had paid before.

The contract does not specify how additional teaching assignments will be paid if they do not qualify for per diem pay. Either party's interpretation is plausible – the teachers are performing additional professional duties of the type listed in Section 30.1, but the removal of the reference to sixth assignments from that list in the 2001-2003 negotiations allows the inference that the bargainers intended to exempt that duty from pay under that provision. However, the removal of the language is equally explained by the fact that the parties established a separate provision that would apply to most instances of sixth assignments. These are all inferences. The most direct evidence of what the parties intended is the uncontroverted testimony of Olson that there was a specific discussion of how to pay teachers who did not qualify for per diem pay, and an agreement that they would continue to receive hourly pay. The preponderance of the evidence therefore establishes that a teacher assigned to a sixth assignment, but not meeting the test for per diem pay, is entitled to hourly pay for that assignment as a special duty.<sup>17</sup>

On the basis of the foregoing, and the record as a whole, I have made the following

### AWARD

The District did not violate the collective bargaining agreement when the Middle School teachers performed Resource Room duties without receiving per diem compensation for a sixth assignment.

The District violated the collective bargaining agreement when the Middle School teachers performed Resource Room duties without receiving compensation for the work as an additional professional assignment.

The appropriate remedy is to make the Middle School teachers assigned to the Resource Room whole by compensating them in accordance with Section 30.1 of the collective bargaining agreement.

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<sup>17</sup> This is consistent with the scheme for paying for additional teaching under the remainder of the contract. Teachers are paid for time spent substituting for absent colleagues (Sec. 27.8 and 28.1), homebound instruction (Sec. 30.1) and summer school teaching (Sec. 30.1). It is not impossible that the contract would provide pay for 36 minutes of substituting, but not for 36 days of Resource Room work, but it would be an unusual result.

The arbitrator will retain jurisdiction over this dispute for a period of thirty days following the issuance of this Award for the sole purpose of clarifying or resolving disputes over the remedy ordered herein.

Dated at Racine, Wisconsin, this 31st day of January, 2006.

Daniel J. Nielsen /s/

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Daniel J. Nielsen, Arbitrator

