

BEFORE THE ARBITRATOR

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In the Matter of the Arbitration of a Dispute Between

**POYNETTE SCHOOL DISTRICT**

and

**POYNETTE EDUCATION ASSOCIATION**

Case 18  
No. 68793  
MA-14345

(Preparation Time Grievance)

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**Appearances:**

**Shana R. Lewis**, Attorney at Law, Lathrop & Clark, LLP, 740 Regent Street, Suite 400, P.O. Box 1507, Madison, WI 53701-1507, appeared on behalf of the Poynette School District.

**John D. Horn**, UniServ Director, Three Rivers United Educators, 33 Nob Hill Road, P.O. Box 8003, Madison, WI 53708-8003, appeared on behalf of the Poynette Education Association.

**ARBITRATION AWARD**

The Poynette School District, herein the District, and the Poynette Education Association, herein the Association, are parties to a collective bargaining agreement which was in effect at all times relevant to this proceeding and which provides for the final and binding arbitration of certain disputes. The Association filed a Request to Initiate Grievance Arbitration with the Wisconsin Employment Relations Commission to resolve a grievance filed on behalf of an Association member concerning preparation time. From a panel the parties selected Paul Gordon, Commissioner, to serve as arbitrator. Hearing on the matter was held in Poynette, Wisconsin on June 23, 2009. A transcript was prepared and made available to the parties. The parties filed written briefs and reply briefs and the record was closed on August 26, 2009.

**ISSUES**

The parties did not stipulate to a statement of the issues. The Association states the issues as:

Did the District violate Article II-Negotiation Procedures, E,1 and/or Article VIII-Other Miscellaneous Provisions, E-Teacher Assignment and Prep

Time of the Collective Bargaining Agreement during the 2008-2009 school year when it assigned Jean Hofmann duties during her preparation period and failed to pay her any additional compensation”

If so, what is the appropriate remedy?

The District states the issues as:

Did the District violate Article VIII(E) of the Master Agreement when it did not pay Ms. Hofmann any additional compensation related to her prep time during the 2008-2009 school year?

If so, what is the appropriate remedy?

The Association’s statement of the issues is selected because the Association raises arguments under two Articles in the collective bargaining agreement as contained in its statement, while the District’s statement refers to only one Article.

### **RELEVANT CONTRACT LANGUAGE**

#### **ARTICLE 11 – NEGOTIATION PROCEDURES**

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E. While it is agreed that the P.E.A. has the exclusive right to negotiate for teachers in the School District of Poynette, as provided for by law on questions of wages, hours and working conditions and that the Board of Education may discuss with the P.E.A. matters of educational policy, it is also expressly recognized and agreed that:

1. The Board of Education and its agents have and shall retain the exclusive right and responsibility in accordance with applicable laws, rules and regulations, to select and establish the framework of education policy and projects.

2. This written agreement between the P.E.A. and the Board of Education constitutes the entire agreement between said parties on all matters pertaining to wages, hours and working conditions. All matters not specifically covered in this written agreement are and shall remain management prerogative to the Board of Education and electors of the school district for the term of this agreement.

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ARTICLE VIII – OTHER MISCELLANEOUS PROVISIONS

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E. Teacher Assignment and Prep Time

Teachers at the elementary and middle schools will receive 300 minutes of prep time per week. Teachers in the elementary school will receive at least 270 minutes of that prep time in 30 minute blocks. Art, music and physical education teachers may have one 15 minute prep period per day as a part of the 300 minutes of required prep time. Teachers in the middle school will receive at least 225 minutes of that prep time in 45 minute blocks. Preparation time is allowed for the purpose of classroom preparation and student evaluation. This time will be given during the student day and will be void of administrative meetings, student supervision, and/or IEP meetings. The administration may assign any duties to a teacher during that teacher's prep time. The teacher would be paid at an hourly percentage of the base salary for all prep time under 300 minutes per week.

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**BACKGROUND AND FACTS**

The issue in the case is about whether or not Jean Hoffman, herein the Grievant, is contractually entitled to additional payment for time within a school period having to do with preparation (prep) time.

The State of Wisconsin through the State Department of Public Instruction has adopted the following provisions in the Administrative Code:

PI 34.01(4)

(4) "Aide" means a school employee who works under the direct supervision of a licensed teacher in a school or district whose responsibilities include, but are not limited to, supporting the lesson plan of the licensed teacher, providing technical assistance to the teacher, helping with classroom control or management, and other duties as assigned. Aides may not serve as substitute teachers.

PI 34.01(58) (58) "Teacher" has the meaning defined under s.40.02(55), Stats. For the purposes of licensing under this chapter, "teacher" also means a person who demonstrates the knowledge, skills and dispositions outlined in s. PI 34.02 to improve pupil learning through the exercise of any educational function, including instructing pupils or administering, directing, or supervising any educational activity.

PI 34.01(59)

(59) "Teaching" means improving pupil learning by planning instruction, diagnosing learning needs, prescribing content delivery through classroom activities, assessing student learning, reporting outcomes to administrators and parents and evaluating the effects of instruction.

Special education students in the District have Individual Education Plans (IEPs). The District implements Department of Instruction rules concerning IEPs through the District's local rules and policies. Pursuant to those, District special education teachers evaluate, prescribe or tell the educational assistants (aides) what must be done for instruction of the student. The teacher also must have some time to frequently communicate with the educational aides as far as how the students are doing and what the aide needs to do, as well as face-to-face time with the students.

At all times relevant herein Grievant was an experienced special education teacher at the middle school in the District. The school day at the middle school is divided into 8 periods plus a period 0. One of the periods is 30 minutes for lunch. Academic and applied academic class periods last either 50 or 55 minutes, and period 0 lasts for 20 minutes. The District sets tentative teacher schedules at the beginning of the school year and changes or modifies teacher schedules from time to time, more so towards the beginning of the school year. The base BA salary for a teacher in the District is \$31,284.00 for 180 teaching days of 7.5 hours per day.

At the start of the 2008-2009 school year Grievant was assigned a schedule of one supervision period, five instruction periods, a duty free lunch period, and a prep period. Period 4 was her assigned prep period. She was also assigned 20 minutes of prep time for period 0 for four days each week. This is a schedule that includes 330 minutes of prep time and met or exceeded the contractual 300 total minutes per week of prep and the 225 minutes thereof in 45 minute blocks.

Period 1 was an 8<sup>th</sup> grade special education math class and was also a 7th grade resource time. An educational aide was assigned to the class.

On September 12<sup>th</sup> of the school year the District, in order to fulfill certain student IEP requirements and considering its available personnel, changed Grievant's schedule in several respects. Effective September 17<sup>th</sup>, the District re-assigned her 4th period from prep time to have Grievant support 8<sup>th</sup> grade science. This is an instructional period. The District also informed Grievant that her 1<sup>st</sup> period would become prep time, and that there would be a second educational aide added to the class for instruction. One educational aide would work the first 30 minutes and the second work the second 30 minutes, with some overlap. Grievant need not stay in her classroom during the prep time part of the 1<sup>st</sup> period. According to the District, Grievant would have 45 minutes of prep time 1<sup>st</sup> period except on Fridays, when the entire period would be instructional for her. She would also meet with the two educational aides daily in 1<sup>st</sup> period for 5 to 10 minutes each day except Thursday was not so specified. This new schedule purported to provide 300 hours per week of prep time, but only 200 of those hours was in 45 minute blocks.

Grievant promptly complained to her supervisors about the schedule change and about the amount of prep time. Following the grievance process, she contended that because she had to supervise the students and do other instructional duties during 1<sup>st</sup> period that the period was not prep time. She pointed out in an email of September 15<sup>th</sup> among other things, that

First period involves two 8<sup>th</sup> grade students in different math levels, along with resource time with 7<sup>th</sup> grade students. This would not be a time that I would be able to have prep time. I would not find it appropriate to have one or two aides instructing two students in two different math courses in which they have no familiarity and also deal with support for resource students. I need to be the instructor and work with/and or direct the students in math and resource.

(emphasis supplied)

Grievant followed up that email with another on September 16<sup>th</sup> in which she stated, among other things that:

I do not care which period I have prep time as long as my classes are adequately covered and I get prep as stated in the contract “. . . time void of student supervision. . . .”

The District responded with a letter that 1<sup>st</sup> hour prep and support in 6<sup>th</sup> grade science 4<sup>th</sup> hour is a directive.

Grievant followed up on this with the next step in the grievance process. The District again reviewed her schedule and concerns. The District then, in its view, realized that it was not providing the 45 minute blocks of prep time as in the collective bargaining agreement. The District did not agree with Grievant's contention that the entire 1<sup>st</sup> period was not prep time. As to the 45 minute blocks, it made some revisions to the schedule. On or about October 13<sup>th</sup> the District modified Grievant's schedule. To correct what it viewed as the 45 minute block deficiency it assigned Grievant prep time for 50 minutes in 4<sup>th</sup> hour on Thursdays. It modified the 1<sup>st</sup> period so Grievant's scheduled instructional time was moved from Friday to Thursday with Friday then being prep time. Conference time with the educational aides was for 5 to 10 minutes daily, except for Thursdays. The District viewed this schedule as now providing 310 minutes of pep time with 225 minutes in 45 minute blocks. It did not make any monetary payment relating to the 45 minute block deficiency that had existed between September 17<sup>th</sup> and October 10<sup>th</sup> because, in its view, there had been at least 300 minutes of prep time weekly between those dates.

At the same time the District told Grievant that for 1<sup>st</sup> period, after her 5 or 10 minute meeting with the educational aides, while there would be students in the classroom she would not be teaching them as she could either stay in her classroom or leave the room and spend the next 45 minutes for her prep time preparing for math and other classes, and she could check out a laptop computer to use for that. She could go to the library or anywhere else for this if she wanted. The District also provided her with a separate office which was close to her

special education room. It had a telephone for parent calls and the desk in that office was raised to accommodate Grievant's use of it. The educational aide(s) would remain in the classroom during the 45 minute blocks.<sup>1</sup>

Grievant then did sometimes leave the classroom 1<sup>st</sup> period, but not for extended times and not for 45 minutes at a time. While remaining in the classroom she saw and heard what was going on and could hear student response, know when there were difficulties with the curriculum and when changes or modifications needed to be made, as well as intercede if there were behavioral problems and work with the resource study hall students.

Grievant continued to maintain that she was still the 1<sup>st</sup> period instructor during that entire 1<sup>st</sup> period. Her schedule remained the same for the rest of the year. No other teachers were assigned to that 1<sup>st</sup> period 8<sup>th</sup> grade math class. For 1<sup>st</sup> period math class she wrote the lesson plans, oversaw the curriculum, modified the curriculum for the students if necessary, generated progress reports, contacted parents about the student's 1<sup>st</sup> period, was responsible for a paraprofessional, and assigned the quarter grades.

Another special education teacher in her second year with the District has prep time while students are sometimes in the classroom at the same time, and an educational aide is working with them on the curriculum. That teacher has prepared the lesson plans, does the grading and interacts with the aide a few minutes at the beginning of the day to give direction. During the prep time that students are there, the teacher is able to leave the room to prep somewhere else, such as the library, and check out a laptop to work someplace else.

Pursuant to a conversation in mid November which included one of the educational aides in Grievant's 1<sup>st</sup> period class and the District Director of student services, the aide sent an email to the Director to respond to a question about Grievant working with kids on the Thursdays she was scheduled to teach 1<sup>st</sup> period. The email stated in relevant part:

I really don't see any difference in Thursday than any other day. If there is suppose to be a difference she is not making it clear to us. This last Thursday she spent about 10 minutes with me, Mary and the kids, and then worked at her desk. Mary T did math with M\_\_\_ till 7:50, and Mary asked a couple questions to her. I did math with G. until my break at 8:05 and Terri took over. A\_\_\_ was absent. I really don't want to sound negative about her. She doesn't treat me poorly and I think she cares for the kids. That is very important to me.

(redacted added)

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<sup>1</sup> On the occasional need to call in a substitute aide Grievant would remain in her classroom until the substitute arrived and as more fully set out below.

The Grievant pursued the matter through the grievance process contending that, because she was teaching and instructing during 1st period she was not being provided the prep time required under the collective bargaining agreement. She contended that she was teaching and instructing the entire 1<sup>st</sup> period and her 4<sup>th</sup> period prep time had been filled with teaching and instructional duties, and that her prep time was not void of student supervision. Therefore, she did not have the requisite prep time. The District denied the grievance, leading to this arbitration. Further facts appear as are in the discussion.

### **POSITIONS OF THE PARTIES**

#### **The Association**

In summary, the Association argues that it is undisputed that Grievant was scheduled 4<sup>th</sup> hour for her preparation period at the beginning of the 2008-2009 school year and that the administration assigned her duties during 4<sup>th</sup> period most of the school year almost every day. Her initial schedule was consistent with the master agreement because she had over 300 minutes of prep time per week and 250 minutes in 45 minute blocks. On September 12<sup>th</sup> she was notified she would be assigned to work 4<sup>th</sup> period science class and she began that September 17<sup>th</sup>. Assigning duties during a preparation period is allowed under the master agreement, but the teacher so assigned must be given additional compensation. Grievant was not compensated for the additional duties assigned during daily 4<sup>th</sup> periods, as prep time went below the required 300 minutes per week. Nothing else changed in her schedule. She continued to have fine instructional period, a duty-free lunch, resource, and the assignment in science class. On October 13<sup>th</sup> the District reestablished a 4<sup>th</sup> period prep on Thursdays. Every other day of the week her preparation period – 4<sup>th</sup> period - has been lost because she was given an assignment during that class period.

The Association argues that calculation of the remedy for the assignment during the preparation time reducing Grievant's weekly minutes below the required 300 minutes per week. It is clear Grievant was given an assignment during her prep period and she must be compensated for the loss of that time under Article VIII, E. There is no express remedy in the master agreement if the District had only failed to provide the requisite blocks of prep time. The agreement does provide a remedy when the weekly minutes fall below 300, which happened in this case. The remedy's calculation might be argued in more than one way. The appropriate remedy for adding duties to 4<sup>th</sup> hour prep period is a per-minute calculation. Base salary divided by teaching days divided by hours per day equals an hourly rate divided by 60 minutes for a per-minute rate. ( $\$31,284 \div 180 \div 7.5 \div 60 = \$.39$ ) Then, from September 17<sup>th</sup> to October 10<sup>th</sup> is 80 minutes of prep time per week. The only prep time is 0 period for 80 minutes per week. For four weeks she is 220 minutes below the 300 required total for each week. Multiplied by \$.39 per minute is \$343.20 for this period. ( $220 \times 4 \times .39 = \$343.20$ ) Factoring in the 4<sup>th</sup> period for Thursdays for the 33 weeks from October 13<sup>th</sup> through June 12<sup>th</sup> yields \$2,187.90. ( $(300 - (80 + 50)) \times .39 \times 33 = \$2,187.90$ ) The two amounts added together to remedy the grievance is to pay Grievant \$2,531.10.

The Association also argues that 1<sup>st</sup> hour 8<sup>th</sup> grade math was not "void of student supervision" for Grievant. This does not satisfy the contractual requirement that perpetration

time must be void of student supervision as in Article VIII, E of the agreement. The 1<sup>st</sup> hour cannot be considered preparation time. First, Grievant was responsible for grading, progress reports, instructional content and parent contacts about 1st hour students. And it is impossible for her to use the 1<sup>st</sup> period as a prep period void of student supervision. Secondly, if she does not spend time with the students she cannot provide information to parents about their students. Third, she can't plan instruction if unaware of students' thought processes, areas of difficulty, reason for difficulty, and make judgments required of a professional educator. Merely telling her she can leave the room to make private phone calls or grade papers does not provide prep time as defined in the contract. Even if she were able to fully delegate instructional responsibilities, she was still responsible for supervising the students' learning during that period. The District recognizes the 0 period on Friday cannot be considered prep time because Grievant is available to students. The District's grievance response required Grievant to be available for students, to work with students and pull them from classes. The District did not count this time as preparation time, but would limit the arbitrator to find that the time a class is being held, to which the teacher is assigned the students, is not prep time. The only way to harmonize this is to sustain the grievance.

The Association argues that the dictionary definitions of void and supervision are instructive. The key words in the provision, void and supervision, have a clear meaning. Citing dictionary definitions of void and supervision, Grievant's time was filled with obligations to oversee the work of students and educational assistants. First hour 8<sup>th</sup> grade math class was not void of student supervision.

The Association further argues that the other special education teacher's preparation time situation is not similar to Grievant's. That probationary elementary special education teacher's situation is distinguishable from Grievant's. Sometimes there were no students in her classroom during her prep time, and no indication of students there on a regular basis. Students were in Grievant's class every day. There is no evidence a class was held in the other teacher's room during the preparation period for which she was a teacher. She only testified affirmative to a question about work she would ultimately be grading students on. Her schedule was not entered into evidence to substantiate real similarities. The District failed to substantiate comparable situations to that of Grievant.

The Association argues that Grievant was the teacher for 1<sup>st</sup> hour 8<sup>th</sup> grade math the entire 2008-2009 school year. She was the teacher every day of the week. She did exactly what the Administrative code defines as teaching, writing lesson plans, overseeing the curriculum, modifying the curriculum, generating progress reports and assigning quarter grades. She understood she could not actually engage in teaching and leave the classroom on a consistent basis, and explained that she sees and hears what is going on in the classroom, hears student responses, knows difficulties with the curriculum and changes that are needed, intercedes if behavioral problems and works with resource study hall students. No other teacher was assigned 1<sup>st</sup> hour. She was the 8<sup>th</sup> grade math teacher and the instructor for 1<sup>st</sup> period. The educational aide recognized Grievant was the teacher every day of the week. He told the District that Thursdays were no different than any other day. Grievant worked with students for a portion of the class period and was in the classroom the entire period. The



District wants it both ways. It claims to comply with contractual prep time while requiring a teacher to be responsible for the learning of an entire class of students. The District gets a class taught by the teacher while calling it prep time, void of student supervision, based on allowing the teacher to leave the room now and then. This violates the language and intent of the prep time provision. No students were moved from 1<sup>st</sup> period. The teacher is put in the position of deciding if they will follow a directive that does not allow them to do the work they are responsible to complete or to actually function as the teacher. Grievant chose the latter. The District would have the educational aides be teachers doing work for which they are neither trained nor paid to do.

The Association also argues that State law and the DPI Administrative Code, as well as the federal IDEA provide support for the grievance. PI34.01(4) says, among other things, that aides may not serve as substitute teachers. In this case the special education aide was directed to substitute for the special education teacher four days a week. If Grievant would not have continued as the teacher the District's actions would have been counter to PI34. PI34 and federal and state education law requires educational assistants be under the direct supervision of a teacher while working with students. The teacher can't do this while outside the room. Citing a 2008 DPI case involving the Jefferson School District, if Grievant hadn't been the teacher during 1<sup>st</sup> hour, the District would clearly be vulnerable to an IDEA complaint because she may not have had sufficient contact with the students or the educational assistants during that period of time. Because Grievant was able to diagnose educational needs, prescribe teaching and learning procedures and evaluate the effects of teaching, this time was clearly not void of student supervision and cannot be considered prep time.

In reply to the District's arguments, the Association contends that the District relies on an unexpressed reserved right, while the Association relies on clear and ambiguous contract language that prep time must be void of student supervision. The District established that Grievant had 8<sup>th</sup> grade math assigned to her all year during 1<sup>st</sup> hour. This was scheduled at the beginning of the year. From October 13<sup>th</sup>, 8<sup>th</sup> grade math continued to be assigned to Grievant 1<sup>st</sup> hour, and was scheduled every day the entire year 1<sup>st</sup> hour. Joint exhibits 3 and 4 show 1<sup>st</sup> period is 8<sup>th</sup> grade math and that class was assigned to Grievant. The District tried to make 1<sup>st</sup> period look like a prep period. But it did not make it void of student supervision. It never assigned another teacher or moved the students. The time cannot be considered prep time. The District has a contract right to assign duties during prep time, and was within its right to assign 4<sup>th</sup> period science support to Grievant. It is clear the District must pay Grievant for the lost prep time because of this assignment. And the most egregious distortion of the facts is the District wants to make 1<sup>st</sup> period prep period by creating a fiction that this is simply a resource period. Despite the District argument that this was for her a resource period, there was in fact a resource at that time, in addition to 8<sup>th</sup> grade math. First period was 8<sup>th</sup> grade math. Grievant was the only 8<sup>th</sup> grade math teacher 1<sup>st</sup> hour. The District invents a story that 1<sup>st</sup> hour was a resource period so that it is void of student supervision and not in violation of a policy that assistants cannot be teachers. Only teachers can evaluate and prescribe, which is what Grievant did. First hour cannot be considered a preparation period for any day of the week. It seems the District policy is to allow paraprofessionals to be teachers at least once a week, which is an inappropriate interpretation of its policy.

The Association argues the District is attempting to make a clear and simple violation of the agreement into an overly complex issue, using the collaborative relationship between special education teachers and their assistants against Grievant. In this case it is clear Grievant was the teacher 1<sup>st</sup> hour. Because she had a teaching assignment the time then is not void of student supervision. The Principal established Grievant's teaching schedule at the beginning of the school year and the Director assigned science support during the 4<sup>th</sup> hour preparation period, and they did not change any other part of Grievant's schedule. The District must pay Grievant for being assigned science support during her 4<sup>th</sup> hour preparation period. The Association has met its burden to show the District violated the agreement, and it must make Grievant whole by paying her \$2,531.10 or refer the remedy to the parties to agree on an appropriate remedy.

### **The District**

In summary, the District argues that the Association has the burden of proof, which it has not sustained. It argues Article II, Section E, paragraph 2 of the master agreement reserves to management all matters not specifically covered in the agreement, citing arbitral authority. The reservation of rights article contains the right to set and modify schedules which is an inherent management right, citing arbitral authority. While this right to schedule was limited to a degree by Article VIII, E, it was not nullified and the District acted consistent with its right to modify Grievant's schedule when in changed her prep time period to 1st period due to the need to meet the demands of student IEPs.

The District argues the Association has failed to establish by a preponderance of the evidence that the District violated Article VIII, E when it changed the Grievant's schedule to give her prep time during 1<sup>st</sup> period rather than 4<sup>th</sup> period as originally contemplated and as preferred by Grievant. It boils down to Grievant's insistence that she could not follow the directive to take prep time because she was required to be present to work with the students in the classroom during 1<sup>st</sup> period. She claims she was responsible for their learning, but failed to articulate the basis for this supposed requirement other than her own opinion. She was told by the Director that she did not have to be responsible for student supervision during 1<sup>st</sup> period and two educational aides would have that responsibility. She was told she was not required to engage in student supervision but was free to leave the room while the aides were present so that she could use 1<sup>st</sup> period for prep time. Grievant refused to acknowledge the fact that 1<sup>st</sup> period was designated her prep time. The Association failed to prove the District violated the agreement by not providing the required number of minutes of prep time. Grievant was not required to attend any administrative meetings or IEP meetings during 1<sup>st</sup> period. Her argument is that 1<sup>st</sup> period was not void of student supervision so it cannot be prep time. However, 1<sup>st</sup> period was void of student supervision four days per week. Special education teachers often have to deal with schedule changes like the one here. IEPs have to be met and there were IEPs and student/family concerns to meet here. This required 6<sup>th</sup> grade science changes for Grievant to provide support during 4<sup>th</sup> period. Being aware that Grievant was entitled to prep time, the Director informed her that her new prep time was Monday through Thursdays 1st period instead of 4<sup>th</sup> period. She needed to be available to students on Friday to meet DPI guidelines. Two aides were assigned to 1<sup>st</sup> period to accommodate breaks. The

District was aware of the need to have sufficient contact time between special education teachers and the students during the week to diagnose needs, prescribe teaching and learning procedures, and evaluate effects of teaching. The District followed its guidelines for special education procedures, and made sure it scheduled Grievant for prep time 1<sup>st</sup> period leaving Fridays for meeting with students. The schedule was later revised when the District switched Thursdays and Fridays to accommodate blocks of prep time. Federal and State law govern special education and IEPs, which can involve a resource or guided study hall. The special education teacher is responsible for making sure the IEP is implemented. That teacher, however, is not always the one who provides the instruction or support to the student. Under DPI and District provisions the teachers evaluate, prescribe, and essentially tell the educational assistants what must be done for instruction for the children. Teachers must have some time to frequently communicate with the assistants as to how the kids are doing and what the assistant needs to do, and also have some face-to-face time with the kids as well. Grievant tried to make a case why she could not do 4<sup>th</sup> hour science. The District, as of September 16<sup>th</sup>, directed her to provide 4<sup>th</sup> period science support and take her prep time 1<sup>st</sup> period. She was not required to provide instruction to students during 1<sup>st</sup> period math because that was scheduled as a resource period and the educational assistants had been assigned to work with the special education students who needed the math resource support between 7:40 and 8:25 the entire year. Grievant did not have to be in the classroom providing instruction during 1<sup>st</sup> period, but was able to use that time for her prep time. She was specifically told she could leave the classroom, discussed where to relocate for preparation, had an office made available and desk raised to meet her specifications. The District made a computer and laptop available to her, and a telephone in the separate office. She had these things to do all of what is encompassed in prep time. She knew she could leave her classroom during 1<sup>st</sup> period, but she insisted she had to remain in the classroom and that she could not use 1<sup>st</sup> period for prep time. She explained why, because she was the teacher. The District admittedly made an error in the first schedule change, and later corrected that for 45 minute blocks of time.

The District argues that Grievant, according to her assistant, did not do anything differently on Thursdays than the rest of the week. She did not work with the kids on the Thursdays she was scheduled to teach 1<sup>st</sup> period. There was no difference between Thursdays and the rest of the week. The assistants continued to teach the two math students even though Grievant was in the room. That is how it was suppose to be. ET K- special education teacher takes her prep time in the classroom and sometimes there are students there. I students are there then, the educational assistants work with them on the curriculum based on lessons plans she provided. That work is ultimately graded by the teacher, who takes a few minutes at the beginning of the day with the assistant to go over what should be done. She can leave her classroom, check out a laptop and work someplace else while students are in her classroom.

The District argues that it was not Grievant's prerogative to decide she was simply unable to use 1<sup>st</sup> period as her prep time. She failed to articulate any basis in law or regulation supporting her opinion that the directive to use 1st period as prep time, rather than engaging in student supervision or instruction is erroneous. The District did everything it could to make it so she was free to leave the room when students were working under the supervision of the

assistants. It is difficult to see this as anything other than Grievant seeking to get her way because she did not like the fact that her schedule had been changed. Her disclaimer is unconvincing. She had attempted to create a contract violation where there is none.

In reply to the Association's arguments, the District criticizes the Association's initial brief for not including fact matters concerning Grievant's involvement in the decision that a special education student would be helped by an educational assistant 4<sup>th</sup> period, and how that then resulted in Grievant providing support 4<sup>th</sup> period rather than have that as prep time. Similarly, notes the District, the Association brief does not mention that Grievant had time built into 1<sup>st</sup> period to meet with educational assistants before her scheduled prep time of 7:40 a.m., and student personal contact on Thursdays. The District also contends the Association has failed to establish by a preponderance of the evidence that the District violated Article VIII(E) when it changed the Grievant's schedule to give her prep time during 1<sup>st</sup> period rather than 4<sup>th</sup> period as originally contemplated and as preferred by Grievant. The dispute is whether or not Grievant was able to use 1<sup>st</sup> period for prep time as directed, or whether she was responsible for student supervision then and unable to use that time as prep time. The Association's position, that requiring her to use 1<sup>st</sup> period as prep time was in violation of administrative regulations concerning educational assistants and inviting a complaint from parents under IDEA, is without merit. The Association argues that Grievant was still responsible for supervising the students' learning during that period because she had to be present in the classroom to perform her teaching responsibilities. But this mistakenly assumes her constant physical presence in the classroom was necessary for teaching responsibilities. That is not the case. Constant physical presence is not required. Her schedule has sufficient personal contact with educational assistants and students to carry out her responsibilities.

The District argues that as to the use of educational assistants, the Association incorrectly equates professional teaching responsibilities with direct pupil instruction. The Administrative code does not equate the two. Teaching is planning, diagnosing, prescribing, assessing, reporting and evaluating. Direct pupil instruction is not the definition of teaching. Nothing of record shows the assistants were to teach as that term is defined in the administrative code. They were to work under the supervision of Grievant by supporting her lesson plan. The fact they provided direct instruction during 1<sup>st</sup> period does not mean they were performing like substitute teachers. The Jefferson School District DPI decision was satisfied here by time to meet with the assistants daily before 1<sup>st</sup> period prep, and on Thursday work personally with students. Absent a clear and undisputed DPI violation, which is not the case here, Grievant was responsible to follow the directives of her supervisors, not second-guess them. Assistants are to work under the direct supervision of the teacher. Direct supervision does not mean under Grievant's constant supervision. They met daily at the start of 1<sup>st</sup> period for Grievant to give the assistants lesson plans, prescribe teaching and learning procedure to implement the plan. That is what a teacher does. Citing a learned treatise, the assistants did not improperly extend their role.

The District argues the Association is mistaken when it argues a teacher cannot comply with the administrative code to directly supervise the assistants if the teacher is outside of the

room to make phone calls or grade papers. Analogous to a lawyer and paralegal, Grievant had personal supervisor authority and the assistants worked under her direct supervisory authority even though Grievant was not required to be physically in the classroom.

The District requests that the grievance be denied.

### DISCUSSION

The issues in the case concern whether Grievant is contractually entitled to additional payment for having less than the contractually required prep time after her schedule was changed by the District on two occasions. The Association's arguments concern the 4<sup>th</sup> and 1<sup>st</sup> periods in the school day. There is no issue that at the beginning of the 2008-2009 school-year Grievant's schedule was in compliance with the parties' collective bargaining agreement. Besides the period 0, her then assigned prep time was 4<sup>th</sup> period. Due to special education student and parent considerations, as well as available personnel in the District, Grievant's duties and schedule during 4<sup>th</sup> and 1<sup>st</sup> period were changed by the District effectively on September 17, 2008. The ramifications of those changes resulted in Grievant starting the grievance process over the issue of prep time. The District thereafter again modified her duties and schedule as of October 13, 2008. That did not resolve the grievance, leading to this arbitration.

The collective bargaining agreement has provisions in Article II, E.1 and 2 which contain reservation of rights language in favor of the District:

1. The Board of Education and its agents have and shall retain the exclusive right and responsibility in accordance with applicable laws, rules and regulations, to select and establish the framework of education policy and projects.
2. This written agreement between the P.E.A. and the Board of Education constitutes the entire agreement between said parties on all matters pertaining to wages, hours and working conditions. All matters not specifically covered in this written agreement are and shall remain management prerogative to the Board of Education and electors of the school district for the term of this agreement.

As the District notes, these provisions would normally leave to the District the right to schedule the duties of employees such as Grievant, unless otherwise limited by the agreement. The District also acknowledges that this right to schedule is limited by Article VIII, E, which states:

E. Teacher Assignment and Prep Time

Teachers at the elementary and middle schools will receive 300 minutes of prep time per week. Teachers in the elementary school will receive at least 270 minutes of that prep time in 30 minutes blocks. Art, music and physical education teachers may have one 15 minute prep period per day as a part of the 300 minutes of required prep time. Teachers in the middle school will receive at least 225 minutes of that prep time in 45 minute blocks. Preparation time is allowed for the purpose of classroom preparation and student evaluation. This time will be given during the student day and will be void of administrative meetings, student supervision, and/or IEP meetings. The administration may assign any duties to a teacher during that teacher's prep time. The teacher would be paid at an hourly percentage of the base salary for all prep time under 300 minutes per week.

Pursuant to Article VIII, E, Grievant is to have 300 minutes of prep time per week, with at least 225 minutes of that in 45 minute blocks.

The Association makes two arguments why Grievant did not get all the prep time she was supposed to get and, thus needs to be compensated as required by Article VIII, E. First, when 6<sup>th</sup> grade support duties were added to her 4<sup>th</sup> period, this time was no longer prep time so she should be compensated for that lost prep time. Secondly, the prep time lost in 4<sup>th</sup> period was not made up to her in 1<sup>st</sup> period because she was still assigned as the 8<sup>th</sup> grade math teacher then and actually was teaching the entirety of that period, which was not void of student supervision by her. The District maintains that when support duties were added to Grievant's 4<sup>th</sup> period, it made up the prep time lost there by rescheduling her duties in 1<sup>st</sup> period so that she had 45 minutes of prep time on four days per week, the balance of 1<sup>st</sup> period being student and educational assistant contact time, which portion is instructional and teaching time. The District admits that between September 17<sup>th</sup> and October 13<sup>th</sup> Grievant was short one 45 minute block of prep time per week, but notes she did have more than 300 minutes of total prep time per week, which it argues negates any need to compensate her. The undersigned is persuaded that, as the District Director of student services testified, the District was aware that when it assigned student support to Grievant for 4<sup>th</sup> period she no longer had prep time during that period, so it needed to, and wanted to, make up that prep time. As the District correctly observes, the crux of the issue is whether Grievant was properly scheduled with prep time during 1<sup>st</sup> period or if that time was teaching time that was not void of student supervision. There is no contention that any part of Grievant's 1<sup>st</sup> period contained administrative meetings or IEP meetings.

As of October 13<sup>th</sup>, Grievant's schedule is reflected in Joint Exhibit 4. That exhibit is consistent with the District's directive to Grievant that for 1<sup>st</sup> period she was to meet with the two educational assistants from 7:35 a.m. to 7:40 a.m. on Monday, Tuesday Wednesday and Friday. The document also is consistent with the District directive to Grievant that during 1<sup>st</sup> period she was assigned prep time from 7:40 a.m. to 8:25 a.m., a block of 45 minutes, on

Monday, Tuesday, Wednesday and Friday. The document also shows, consistent with the testimony of the District Administrator, that Grievant was scheduled with a 50 minute block of prep time in 4<sup>th</sup> period on Thursdays. There is no question that Grievant had four 20 minute periods of prep time in period 0 Monday through Thursday. Grievant does not agree that the 1<sup>st</sup> period prep time in the document is accurate because she contends this really was not prep time. This schedule, as drafted, on its face supplied Grievant with more than 300 hours of prep time per week with at least 225 minutes of that prep time in 45 minute blocks. The question remains if the 1<sup>st</sup> period 45 minute blocks were prep time, void of student supervision as the District maintains, or teaching /instructional as the Association maintains.

The undersigned is persuaded by the credible testimony of the Distinct Director of student services, supported by the credible testimony and actions of the District Administrator, that Grievant was told that her prep time, after September 17<sup>th</sup>, would be in 1<sup>st</sup> period after first meeting for 10 minutes with the educational assistants. This is consistent with the emails from the Director to Grievant of September 12<sup>th</sup> and September 15<sup>th</sup>. There is no doubt that Grievant did not agree with the way the District proposed to provide 8<sup>th</sup> grade math instruction 1<sup>st</sup> period. She emailed the Director and Principal on September 15, stating in pertinent part:

First period involves two 8<sup>th</sup> grade students in different math levels, along with resource time with 7<sup>th</sup> grade students. This would not be a time that Would be able to have prep time. I would not find it appropriate to have one or two aides instructing two students in two different math courses in which they have no familiarity and also deal with support for resource students. I need to be the instructor and work with/and or direct the students in math and resource.  
(emphasis supplied)

The District responded by a follow up letter to Grievant from the Director of September 16, which states: "Please understand that 1<sup>st</sup> hour prep and support in 6<sup>th</sup> grade science 4<sup>th</sup> hour is a directive." It is also demonstrated by the record that Grievant was not required or directed to remain in her classroom 1<sup>st</sup> period during the directed 45 minute blocks of prep time. Rather, she was free to leave the classroom to do prep time work where she wanted to, and was provided with an office, telephone and computer to facilitate that. She was not required to stay in her classroom during the time the District had designated as her prep time in 1<sup>st</sup> period. While she did leave the classroom from time to time for varying lengths of time under 45 minutes during 1<sup>st</sup> period, the undersigned is persuaded that Grievant made the choice herself to otherwise remain in her classroom during time designated as her prep time.

While this is not a Department of Public Instruction proceeding where the enforcement and interpretation of the DPI Administrative code provisions is made, but rather a matter of interpreting a collective bargaining agreement, the undersigned is persuaded that the District was acting in what it considered, and what is within its management rights, the proper application of the administrative code as to the teaching and use of educational assistants in 1<sup>st</sup> period. The District has the management and contract right to select and establish the framework of education policy and projects. The District must comply with DPI requirements,

such as that expressed in the Jefferson School District DPI, IDEA Complaint Decision 08-004 that;

A district must ensure the student's program complies with state requirements including the requirement that professional teaching responsibilities be carried out by or directly supervised by, a special education teacher who is licensed by the department. Direct supervision means regular, continuing interaction between the special education teacher and teacher aide which includes time to evaluate the services provided. There must be sufficient contact between the special education teacher and the teacher aide, and between the teacher and the student, to enable the teacher to diagnose educational needs, prescribe teaching and learning procedures, and evaluate the effects of teaching.

As is its right, the District in this case determined that the five minute meetings between Grievant and the educational assistants in 1<sup>st</sup> period four days per week, and the full 1<sup>st</sup> period contact between Grievant and the students one day per week was in compliance with the above DPI decision and the DPI administrative code that the decision applies. This is how the District determined that 8<sup>th</sup> grade math would be taught by Grievant. It limited the time she had to do this to only part of 1<sup>st</sup> period four days per week, and required the use of the two instructional assistants. Grievant might disagree with the way the District decided to meet its obligations, but that is a decision for the District to make. Similarly, whether the educational assistants were improperly teaching in violation of DPI regulations is not a matter of interpretation of a collective bargaining agreement, although the record does not show that they planned instruction, diagnosed learning needs, prescribed content delivery, assessed student learning, reported outcomes to administrators and parents, or evaluated the effects of instruction, all as contained in the PI34.01(59) definition of "teaching".

The District had made available what it considered the proper educational setting for the students through the limited use of Grievant and adding a second educational assistant, while affording Grievant four 45 minute blocks of prep time per week during 1<sup>st</sup> period. Grievant chose not to avail herself regularly of the opportunity to use that prep time outside of the classroom. It is very understandable that as she chose to remain in the classroom she would be able to hear and observe the educational aides carry out their duties and also observe how the students reacted. It is reasonable to understand that invariably she would be asked some questions or have some involvement with the students given her choice to remain in the room. As a matter of contract interpretation, the question becomes, was this time void of student supervision. The prep time directive, the provision of two educational assistants, the scheduling of daily five minute meetings with the assistants, and making available work space and equipment outside the classroom was the District's effort to meet its obligation under the collective bargaining agreement to provide prep time void of student supervision. It fulfilled that responsibility. At least one other special education teacher had a similar prep time arrangement. The District cannot be faulted because Grievant, as an experienced, motivated teacher, choose to remain in her classroom where she would inevitably see, hear, and observe student instruction. If her prep time was not void of student supervision it was because



Grievant chose to be in the classroom and around the students and educational assistants while she was suppose to be using her prep time. The Association's argument admits that Grievant made this choice. While there is some contention between the parties as to exactly how much teaching, instruction and student supervision Grievant engaged in during the 45 minute blocks of prep time scheduled in 1<sup>st</sup> period, ultimately that is not dispositive. The record supports the fact that Grievant chose to remain in the classroom and observe the class, rather than her being directed to as a duty by the District.

The modified schedule which proved for prep time during 1<sup>st</sup> period replaced to 4<sup>th</sup> period prep time that had been modified to have Grievant support 6<sup>th</sup> grade science. Because the District provided Grievant with at least 300 minutes of prep time per week void of student supervisions and at least 225 minuets of that was in 45 minute blocks, the District did not violate the collective bargaining agreement after October 13, 2008.

### DISCUSSION

The issues in the case concern whether Grievant is contractually entitled to additional payment for having less than the contractually required prep time after her schedule was changed by the District on two occasions. The Association's arguments concern the 4<sup>th</sup> and 1<sup>st</sup> periods in the school day. There is no issue that at the beginning of the 2008-2009 school-year Grievant's schedule was in compliance with the parties' collective bargaining agreement. Besides the period 0, her then assigned prep time was 4<sup>th</sup> period. Due to special education student and parent considerations, as well as available personnel in the District, Grievant's duties and schedule during 4<sup>th</sup> and 1<sup>st</sup> period were changed by the District effectively on September 17, 2008. The ramifications of those changes resulted in Grievant starting the grievance process over the issue of prep time. The District thereafter again modified her duties and schedule as of October 13, 2008. That did not resolve the grievance, leading to this arbitration.

The collective bargaining agreement has provisions in Article II, E.1 and 2 which contain reservation of rights language in favor of the District:

The District acknowledges that between September 17<sup>th</sup> and October 10<sup>th</sup> Grievant did not have at least 225 minuets of prep time in 45 minutes blocks. It declined to compensate her because it had scheduled her for at least 300 total minutes of prep time. This included the 45 minute blocks four days per week in 1st period. The District did recognize that by changing the 4<sup>th</sup> hour prep time to instructional during that time there was a shortage of 45 minutes blocks. It made up that time by adding back a 50 minute 4<sup>th</sup> period prep time on Thursdays, starting October 13<sup>th</sup>. The Association argues that by failing to comply with the 45 minute block component of prep time Article VIII,E requires Grievant be compensated for the difference. The Association counts the entire 225 minute requirement in its loss, as it has contended the 1<sup>st</sup> period prep time was not really prep time for any of the 4 minutes scheduled four days per week during 1<sup>st</sup> period.

At all relevant times Grievant had 20 minutes of prep time in period 0 four days per week. As set out above, for the time after October 13, 2008, she also had 1<sup>st</sup> period prep time in 45 minute blocks four days per week. This is the same arrangement she had 1<sup>st</sup> period from September 17<sup>th</sup> through October 10<sup>th</sup>. For the same reasons as set out above, Grievant had scheduled prep time in 45 minute blocks 1<sup>st</sup> period four days per week from September 17<sup>th</sup> through October 10<sup>th</sup>. The District, in responding to the Grievance by letter of October 17, 2008, had calculated that Grievant had received 200 hours of prep time in at least 45 minute blocks. This was before prep time of 50 minutes was again added back to 4<sup>th</sup> period. For the time frame at issue the District's calculations can only add up to 200 if the full 50 minute 1<sup>st</sup> period is counted as prep time. It did initially tell Grievant that 1<sup>st</sup> period was her prep time. But it did later clarify that when it added the specific duty to meet with the educational aides 1<sup>st</sup> period. It is clear that Grievant was directed to meet with the two educational assistants during the first five minutes of each of the four days scheduled as prep time. This was memorialized on the schedule marked as Joint exhibit 4. That clearly designates 45 minute blocks as prep. It does not designate 50 minutes as prep, as in 4<sup>th</sup> period on Thursday. It is more specific than only referring to the period. The District's argument recognized that there was time included in Grievant's schedule at the beginning of 1<sup>st</sup> period to meet with the assistants each day before Grievant's 1<sup>st</sup> period prep time. (Reply Brief, p. 5) This leads to the conclusion, as set out in the exhibit, that she was scheduled for 45 minutes of prep time four days per week 1<sup>st</sup> period from September 17<sup>th</sup> through October 10<sup>th</sup> as well as thereafter. This is a total of 180 minutes per week in at least 45 minute blocks. It is 45 minutes per week short of 225. Adding in the 80 minutes per week from 0 period, the total prep time per week was 260, or 40 short of 300. Grievant was not scheduled to have prep time 300 minutes per week and at least 225 of those minutes were not in 45 minute blocks between the relevant dates as required by the collective bargaining agreement.

The collective bargaining agreement provides that out of the 300 minutes of prep time per week, teachers in middle school will receive at least 225 minutes of that prep time in 45 minutes blocks. It also provides that the teacher would be paid at an hourly percentage of the base salary for all prep time under 300 minutes per week. As the Association argues, the agreement does provide a remedy when the weekly minutes fall below 300. That is what happened in this case from September 17<sup>th</sup> through October 10<sup>th</sup>, a period of four weeks. The Association has argued the application of a formula to calculate that amount, starting with the base salary. The Association then applies that formula, using its figure of 220 minutes below the required 300, to arrive at a dollar amount it feels Grievant should be compensated for that time period. The District does not argue a different remedy or a different calculation, contending it did not breach the agreement. The Association's formula accounts for the factors in Article VIII, E. However, the number of hours short of 300 to put into that formula is 40 as set out above, not the 220 as argued for by the Association.

Applying that formula:

Base salary divided by teaching days divided by hours per day equals an hourly rate divided by 60 minutes for a per-minute rate. ( $\$31,284 \div 180 \div 7.5 \div 60 = \$.39$ ) Then, from September 17<sup>th</sup> to October 10<sup>th</sup> is

80 minutes of prep time per week in 0 period plus 180 minutes of prep time per week in 1<sup>st</sup> period, for a total of 260 per week. For four weeks she is 40 minutes below the 300 required total for each week. Multiplied by \$.39 per minute is \$62.40 for this period. ( $40 \times 4 \times .39 = \$62.40$ )

\$62.40 is the amount of compensation for a remedy for Grievant not having had at least 300 hours of scheduled prep time each week.

The agreement does not provide a specific remedy for a middle school teacher not being provided at least 225 minutes of prep time in 45 minute blocks. However, the Association has not argued for or requested that Grievant be compensated for that. It only seeks compensation for those minutes less than 300 per week and made a very specific calculation based on 300 total minutes and not on 45 minute blocks. Accordingly, it is not necessary to decide if the District breached that agreement by not scheduling at least 225 minutes of prep time in at least 45 minute blocks, or what compensation, if any, would be appropriate.

The District breached the agreement when it did not schedule Grievant with at least 300 minutes of prep time per week between September 17th and October 10<sup>th</sup>. Accordingly, based on the evidence and arguments presented in this case I make the following

**AWARD**

1. The grievance is sustained in part and denied in part.
2. As and for a remedy, the District will compensate Grievant in the amount of \$62.40.

Dated at Madison, Wisconsin, this 23<sup>rd</sup> day of November, 2009.

Paul Gordon /s/

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Paul Gordon, Arbitrator

