IN THE MATTER OF FACT FINDING BETWEEN

NATIONAL EDUCATION ASSOCIATION – SHAWNEE MISSION, KS
(NEA or NEA-SM or Association)

and

BOARD OF EDUCATION OF UNIFIED SCHOOL DISTRICT NO. 512
(USD 512, District or SMSD)

Kansas Department of Labor Case No. 72-I-6-2020 (Impasse)

Fact Finding Hearing, January 9, 2020

Overland Park, Kansas

FACT FINDING REPORT

Appearing for:

NEA-SM: Linda Sieck, Teacher and President NEA-SM; Jill Johnson, Teacher and Vice President NEA-SM; Jay Sharbutt, Teacher and NEA-SM Negotiation Team; Karen Meyers, Librarian and NEA-SM Negotiation Team; Lindsay Atchison, Special Education and NEA-SM Negotiation Team *(absent);* Kevin Scarrow, Representative, Ad Astra UniServ Director

USD 512: Mike Fulton, Superintendent USD 512; Gregory P. Goheen, McAnany, Van Cleave & Phillips, P.A.; Rachael Young, General Counsel, USD 512

KDOL Fact Finder: Henry R. Cox

Summary Background

The Shawnee Mission School District is in Johnson County, Kansas, with five high schools, five middle schools, 34 elementary schools, three student attendance facilities and three administrative offices or facilities. *(Referred to as, "SMSD", "District", or "USD 512").*

The District is a unified school district and governmental subdivision of the State of Kansas, duly organized and existing pursuant to Article 6, § 5 of the Constitution of the State of Kansas and K.S.A. § 72-1131, *et seq.*

The District serves approximately 27,500 students and has 3,800 employees.

The represented bargaining group includes 2,048 employees, including 1,772 teachers.

NEA-SM is the recognized bargaining representative for teachers and other non-administrative professional employees as defined by the bargaining agreement, such as, Registered Nurses, Therapists, Speech Pathologists, Occupational Therapists, Counselors, Librarians, Social Workers and Resource Teachers. *(Referred to as, "NEA-SM", "Association", "NEA", "Representative", or "bargaining representative").*

This Fact-Finding proceeding arises under the Kansas Professional Negotiations Act, (KPNA), KSA 72-2218 *et. seq.,*[1] KSA 72-2233, for the impasse between USD 512 and NEA-SM.

The negotiations utilize a "meet and confer" process.[2] The fact-finding is a non-binding process where the impartial, neutral fact-finder investigates the negotiation leading to impasse, and submits a "report" defining the disputed issues, sets out the factual elements involved, and provides non-binding "recommendations" for the parties to consider in a further attempt to negotiate an agreement.[3] If the parties remain unable to reach agreement, "the board of education shall take such action as it deems in the public interest, including the interest of the professional employees involved, and shall make such action public." *[KSA 72-2211 (f)].*

[1] The KPNA until recently was codified as KSA 72-5413 *et seq.,* and now is codified as, *KSA 72-2218 et seq*. The provisions regarding impasse and fact-finding were not substantively changed. Regarding 'mandatory' issues for bargaining, the definition of 'terms and conditions' remained unaltered, although various procedural aspects were changed, such as limiting a negotiation notice to only three mandatory issues in addition to compensation/hours of work, *i.e* KSA 72-2228, and *see* KSA 72-2218 (l).

[2] KSA 72-2218 (g) "Professional negotiation" means meeting, conferring, consulting and discussing in a good faith effort by both parties to reach agreement with respect to the terms and conditions of professional service.

[3] KSA 72-2218 (i), and 72-2233 (a) – (f).

Absent a 'bad faith' allegation, the fact-finding process does not involve 'claims' and meeting various 'burden of proof' standards seen in most legal proceedings. Each impasse situation involves its own, unique background and set of issues – and potential resolutions. The purpose of the fact-finding is to allow an objective, impartial fact-finder to investigate and explore issues to ultimately provide recommendations to facilitate the parties to move past impasse and fully negotiate the issues to agreement. Given the uniqueness of each fact-finding case, there purposefully is no set of particular standards to apply in attempting to resolve issues in a recommendation format.

In most instances, the prevailing focus is to objectively address the issues in terms of the various (and sometimes competing) "public interests" of relevant stakeholders, such as, the local community and the State.

There are also inherent, and sometimes legal, limits on the scope of the fact-finding process. For example, the fact-finder does not sit to substitute their own judgement for that of the District or the Association and the issues are limited to those at impasse within the parameters of the agreement at issue. These limits promote the value of objective focus on the 'public interests' involved and an understanding that there is a public interest in finding agreement.

Procedural Background

The last time USD 512 and NEA-SM reached a formal, negotiation ***impasse*** was approximately two decades ago. From a comparative standpoint, looking at school districts State-wide, or in relation to nearby, suburban school districts, the teachers in the SMSD, *on average*, have been the highest paid.

The last bargaining agreement (also referred to as the "PNA") between the parties expired on June 30, 2019. The parties have exchanged and negotiated various proposals to change certain economic and non-economic provisions in the 2018-19 PNA, and to change the terms of compensation. Both parties propose a "raise" in compensation.

NEA-SM and USD 512 timely exchanged Notices of Intent to Negotiate on March 29, 2019, in accordance with KSA 72-2228. The parties met in five negotiation sessions, May 20th, May 29-30th, June 24th, and July 16th, 2019.

During the course of negotiations, several changes to the PNA were mutually agreed to, subject to a final agreement, including some compensation issues. The issues already mutually agreed to are not part of the issues in the fact-finding case. The fact that those issues were successfully negotiated is relevant to this Report to provide context and background to the issues and to the extent that, overall, the parties met in good faith to negotiate the issues for the 2019-20 PNA.

NEA-SM requested to begin negotiation meetings in April and early May. The District did not want to begin negotiations until the 2019-20, State funding was known and a draft budget could be developed for both Non-operating funds and Operating funds. The initial budget planning was done in mid-May. By July 1, 2019, the Legislature had allocated funding and the funding was approved by the Kansas Supreme Court, (*Gannon VII*, June 14, 2019).

On August 12, 2019, pursuant to KSA 72-2232, the NEA-SM submitted its Petition for Impasse Declaration to the Kansas Department of Labor.

The KDOL assigned an FMCS mediator and the parties met in two mediation sessions on September 3rd and September 27th, 2019. The bargaining issues were not resolved in mediation.

On October 7, 2019, NEA-SM submitted a request for fact-finding to the KDOL. KSA 72-2233. On October 16, 2019, the parties submitted final negotiation proposals to the KDOL.

On October 28, 2019, through the KDOL, the parties agreed to appoint Henry R. Cox as the KDOL Fact Finder.

On November 11, 2019, an initial fact-finding conference was held by telephone, including representatives for NEA-SM, USD 512 and the Fact Finder. One purpose of the initial conference was to determine a schedule for conducting the fact-finding, which most often involves the mutual setting of a "hearing" along with the logistics for the exchange of exhibits/documents, pre-hearing statements, and the method and order for the hearing presentation. The parties, for different, but legitimate reasons, were not able to agree to a hearing date in November or December 2019. USD 512 proposed various hearing dates in December and NEA-SM indicated its inability to convene a hearing until January 9, 2020.

As a result of the hearing scheduling issue, USD 512, asked for a non-public, expedited hearing. Alternatively, USD 512 contended that the controlling statute contemplates that the find-finding process is to be completed within 10-days of the assignment of the fact-finder. *[KSA 72-2233 (d)].*

A second fact-finding conference call was held in the afternoon on November 11th. Parties submitted additional documents and arguments on the issues regarding a fact-finding hearing. On November 18, 2019, a third conference call was held where the parties remained in disagreement.

As a result, the Fact Finder determined that there was some technical merit to USD 512's position, especially concerning an expedited timeline for fact-finding, but using general

labor law standards, absent statutory specificity, that the "10-day" provisions were to accommodate limited, exigent circumstances, that absent exigent circumstances (*such as*, an unauthorized lockout or strike), as a practical matter, a comprehensive fact-finding process would be impracticable if not impossible, and that the vast majority KDOL fact findings do not occur within a 10-day window.

USD 512 presented a 1981 Kansas Attorney General's Opinion, concluding that a KDOL fact-finder is not required to conduct a "public" fact-finding hearing, but that it was in the province of the fact-finder's discretion to determine whether a hearing is public. An AG's opinion is not binding precedent, yet offers legally recognized guidance on issues. This Fact Finder would find room to debate the 1981 AG-Opinion, especially since it was formed in the relative infancy of cases involving the Kansas Open Meetings Act.

The Fact Finder determined that a 'hybrid' fact-finding process would be implemented to expedite the fact-finding process. The process would include a combination of the statutory, fact-finding tools available, including *ex parte* inquiry and investigative meetings, and a public hearing on January 9, 2010. Further, the Fact Finder determined that given the hybrid process, the hearing would be in a 'presentation' format (*such as*, Power Point® and explanation) as opposed to a trial-type format of calling individual witnesses to introduce testimony and exhibit evidence, but the parties would still have the opportunity to rebut or cross-examine opposing evidence or proposals.

Following this hybrid process, the parties were required to expedited exchanges of exhibits or other information, including optional pre-hearing briefs. Neither party submitted a formal objection to this hybrid process.[4]

The Fact Finder met with USD 512 on November 26 and December 11, 2019 for a fact-finding inquiry and with NEA-SM on December 5 and 19, 2019 for a fact-finding inquiry. The inquiry meetings allowed the parties to present and explain the exhibits exchanged between the parties. [5]

The Legislature is bound to a one-year, fiscal year budget, as is USD 512. Further, very different from private sector, collective bargaining, a school district is legally required to operate with a 'balanced-budget' under the 'cash-basis' laws– there are no private "profits" to redistribute or financial loans to obtain.[6] Further, the amount available to budget is determined by the Legislature and the State School Board equalization, allocation process and not the school district itself.

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[4] KSA 72-2233 (b): ". . . The fact-finding board *[fact-finder]* shall meet with the parties or their representatives, or both, either jointly or separately, and may make such inquiries and investigations and hold such hearing on the issues upon which the impasse exists, as the *[fact-finder]* may deem appropriate."

KSA 72-2228 (c): "Meetings, conferences, consultations and discussions held . . . and 72-2233, and amendments thereto, are specifically made exempt from the provisions of the Kansas open meetings law, and any amendments or supplements thereto."

[5] The reality in labor relations is that despite various deadline requirements for negotiation proposals, negotiations, potential ratification votes, and contract implementation, contract negotiations are fundamentally an on-going process. When parties reach impasse, it is logistically near the end of the negotiated agreement period, or even after the agreement has technically expired, and the parties are already in the process of providing notices for the next negotiation period. Thus, UDS 512 and NEA-SM are engaged the fact-finding process in mid-January, 2019, for the 2019-20 PNA, and negotiation notices for the 2020-21 PNA will be exchanged in about two months from the date of this Report. This is a reality of the negotiation process.

[6] In an overly simplistic analogy, it is like setting a family household budget, but without the ability to use a credit card, secure a loan, or a line of credit of any kind, and a mortgage debt on the family home is only allowed by a vote of the home owners association – there also is no option to borrow from a relative or friend.

Parties should never have a goal to negotiate to impasse. When parties are willing to negotiate to impasse, they do so with a certain amount of risk. The negotiations stop. A fact-finder neutral, despite a certain amount of labor expertise, is asked to review the facts. However, the fact-finder is never as close to the facts and inter-workings between the parties as the parties are themselves, nor is the fact-finder a part of the details and nuances arising throughout the negotiation process, and at least some of the benefits of self-determination provided through the negotiation process is lost.

Issues for Fact-finding

The parties have submitted a complex set of issues regarding "the issues" for fact-finding. There are disputes regarding what issues (or combination of issues) are mandatory compensation issues, what issues are potential mandatory subjects of negotiation under KSA 72-2218 (l)(1), and what issues are, "permissive topics" under KSA 72-2228 (b)(1).[7]

Pursuant to K.S.A. 72-2233 (d), ". . . the *[fact-finder]* shall determine the issues upon which the impasse exists, make findings of fact regarding the issues and shall make recommendations for resolution of the impasse." Thus, where there is disagreement or

[7] KSA 72-2228 (b)(1) either unartfully, or erroneously, uses the term, "permissive topics". The topic of distinguishing between "mandatory" and "permissive" subjects of bargaining is captured in an extremely large number of cases, Nationwide, for over 75 years. Simply stated, 'mandatory subjects' are those issues, that if raised by a party in negotiation, must be negotiated (not agreed to), and the failure to engage in negotiation can be considered bad faith bargaining. 'Permissive subjects' are those issues a party raises that the opposing party is not required to negotiate, and it is not 'bad faith' to refuse to negotiate. An example is a 'hiring' issue that is normally reserved as an issue of 'management rights', where management is not required to negotiate the issue, but a circumstance arises where management permissively agrees to negotiate the issue. The confusion in the Kansas statute is that the term, "permissive" topics, is specifically limited to "mandatory" topics stated in KSA 2218 (l)(1). What is clear from the statute, is that by mutual agreement, parties can negotiate as many mandatory subjects as they want to, without a limitation. The Fact Finder only presumes, parties can negotiate non-mandatory subjects, despite how the statute is phrased.

ambiguity regarding the issues for fact-finding, the fact-finder may exercise their discretion in determining the issues.

The amendments to the KPNA, at KSA 72-2228 (b)(1), limit the number of issues for a negotiation. First, the parties mandatorily negotiate, ***"compensation of professional employees and hours and amounts of work."*** Then, *". . . In addition, each party may select not more than three additional terms and conditions of professional service from the list described in KSA 72-2218 (l)(1) . . . for negotiation* – [mandatory subjects of negotiation][8] . . . *All other terms and conditions of professional service described in KSA 72-2218 (l)(1) . . . shall be deemed permissive topics for negotiation and shall only be negotiated upon the mutual agreement of the parties." [Emphasis added].*

For purposes of this Report, the Fact Finder will sometimes refer to the additional topics as, "elective topics."

While KSA 72-2218 (l)(1) separately lists the mandatory topics of, "salaries and wages, including pay for duties under supplemental contracts," and, "hours and amounts of work," KSA 72-2228 (b)(1), combines those two topics as 'the' required topic:

[8] The list of, "Terms and conditions," in KSA 72-2218 (l)(1) was effectively, unaltered from its predecessor statute, KSA 72-5413(l). Prior to 1977, there was no statutory list of negotiation topics. In what was called the, "Shawnee Mission", case, *NEA v. Board of Education*, 212 Kan. 741 (1973), the Court developed the, "impact test" to determine if a topic was a mandatory subject of negotiation. In 1977, the Legislature codified the Court's 'impact test.' In 1980, the Legislature replaced the 'impact test' with its list of mandatory topics, now KSA 72-2218 (l)(1). In 1984, the Court held that the, "Terms and conditions," statutory language (mandatory topics) shall use the, "topic approach," to determine if a topic is mandatory for negotiation. *USD 501 v. NEA*, 235 Kan. 968 (1984) - "Under this approach, a proposal does not have to be specifically listed *[under the statute]* to be mandatorily negotiable. . . . All that is required is that the subject matter of the specific proposal be within the purview of one of the categories listed *[under the statute]*." Thus, as held by the Court, "class size" or "teacher staff reductions" are not mandatory subjects of bargaining, nor is the development of a 'student teacher program'; however, the "mechanics" of selecting teachers to participate in a student teacher program, or the "mechanics" of a staff reduction, are mandatory topics of negotiation.

". . . the parties shall negotiate compensation of professional employees and hours and amounts of work."

The Fact Finder presumes the parties can agree to negotiate non-mandatory items. The statute is not helpful on this point and it only prohibits the negotiation of issues that would violate other statutory or Constitutional provisions. *KSA 2218 (l)(3).*[9]

Another complication becomes whether subtopics, under the banner of a mandatory topic, are appropriately combined to be a single-topic of negotiation under the statute.

For example, the required negotiation topic of 'compensation and hours of work,' can have one issue *(e.g. 0% vs. 1% increase to the step-schedule grid)*, or many issues and sub-issues falling under the banner of compensation and hours of work. The Fact Finder presumes there is no particular limit on sub-topics under 'compensation and hours of work,' and that in many, or most, negotiations there will be multiple subtopics under this banner. Still, any subtopic must appropriately fall within the ambit of a 'compensation and hours of work' issue.[10]

In the District's, March 29, 2019, Notice letter, it proposes two, elective topics in addition to compensation: (1) Amend, *Article V (H), Resignations*, <u>to delete</u> the provisions allowing a teacher to resign after the statutory date and pay a liquidated damage amount of $1,000, <u>and require</u> the teacher to continue teaching until a 'suitable replacement' is hired;

[9] An unanswered question is whether an existing contract provision, that is <u>not</u> clearly within the 'purview' of a mandatory subject, using KSA 72-2218 (l)(1), is a mandatory subject *ab initio,* because it is already a part of the bargaining agreement? The statutes and caselaw are silent on this issue. The Fact Finder, depending on the specific facts, would generally presume an existing contract provision, with a proposed change, is a mandatory subject. Presumably, this is one reason a school board will be reluctant to include non-mandatory issues in the agreement, even if the board agrees with the point of the provision.

[10] Whether multiple subtopics, under the banner of one, elective topic, is 'one' or more than one topic, is not clearly answered by the statute or applicable case law.

and, (2) Amend, *Article XII (B)(3), Staff Meetings*, to delete the exclusive, "Tuesday" designation and allow meetings to be scheduled on Tuesdays, Wednesdays and Thursdays.

The District's Notice letter, ***broadly*** defines the required 'compensation and hours of work' topic stating:

> "... under which category ***the Board may discuss any part of the contract touching on these issues***, including, but not limited to: (a) Pay freeze, step freeze or column freeze; (b) Salary schedule; (c) Supplemental pay schedule; and/or (d) Modification of the Professional Employee Work Schedule under Article XI (E) and Article XII including, but not limited to: (1) ***increased hours in the work day***, (2) increased days in the work year, and (3) increased number of night meetings. *[Emphasis added].*

NEA-SM's, March 29, 2019, Notice letter, proposes to negotiate the required 'compensation and hours of work' issues and three, elective topics:

(1) Increase the employer's contribution to the professional employee's health insurance premium;

(2) Add language to define the role and responsibilities of the Building Leadership Team (BLT) and how members are selected; and

(3) Add language to the contract regarding consistent discipline reporting.

NEA-SM defined the proposed, "compensation and hours of work," issue(s) as:

(1) Compensation: increase the dollar amount in all cells of the salary schedule, and make changes to the supplemental salary schedule.

(2) Hours and amount of work:

(a) adjust the current conference schedule,

(b) define the length of night meetings,

(c) modify the current plan time language to ensure all teachers have a plan time every day,

(d) ***modify the current contract language regarding teacher work days***,

(e) define the purpose and length of PLC meetings, and

(f) adjust the date of the second semester PD flex day.

[Emphasis added, also the breakdown designation of (a)-(f) is done by the Fact Finder].

The 'compensation' proposals, from both parties, are mutually absent "specific" proposals. Presumably, this is because, in March, there was no assurance of what funding would be available to the District for negotiation. Also, historically, or through past practices, broad or generalized proposals may be the norm. Neither party presented evidence regarding the past practices on the "form" used in the exchange of initial compensation proposals.

KSA 72-2228 (a) provides:

> "Notices to negotiate on new items or to amend an existing contract must be filed on or before March 31 in any school year by either party, such notices shall be in writing and delivered to the chief administrative officer of the board of education or to the representative of the bargaining unit ***and shall contain in reasonable and understandable detail the purpose of the new or amended items desired***." *[Emphasis added]*.

This provision addresses providing "detail" of "the purpose" of the proposal, and not providing any specific proposal itself.[11]

Following the mediation in September, the proposals designated for impasse were:

Compensation:

(1) NEA-SM proposed a three-year contract with a "base" increase for all steps at 2% for 2019-20, 1.5% for 2020-21, and 1.5% for 2021-22.

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[11] *Cf. USD 252 v. South Lyons Cty. Teachers Association*, 22 Kan. App. 2d 295 (1986), where the court opines that with a unilateral notice proposal, some level of "particularity" is required (not "specificity"). The Fact Finder believes that the bilateral notice proposals, neither with 'specific' proposals, but with specific reference to the provisions involving the 5:7 work schedule, provides sufficient particularity under the statute.

KSA 72-2228 (a) also provides: "Nothing in this act, or the act of which this section is amendatory, shall be construed to change or affect any right or duty conferred or imposed by law upon any board of education . . ." This provision, in part, codifies the concept of 'management rights' held by the District.

(2) USD 512 proposed a two-year contract with a "base" increase for all steps at 1% for 2019-20, and 1.25% for 2020-21.

(3) NEA-SM proposed that Articles XI (E) and XII be amended so that in 2020, High School teachers would only be required to teach 5 classes per day, with a stipend for teaching a 6th class (similar change for Middle School in 2021-22). ***[Referred to as the "5:7" issue].***

(4) Regarding the 5:7 issue, the District asserts: (a) the 5:7 issue is not a mandatory subject of negotiation; (b) NEA-SM did not raise the issue in its initial notice of negotiation; (c) it would be a practical impossibility at this point in the fiscal year to logistically determine the hiring needs, adjust schedules, and hire teachers (especially in certain subjects); (d) the current budget, especially with a base-increase for teachers, would not economically allow for an added expenditure of several million dollars for the additional hiring; and, (e) the District has an active, strategic planning process in place where one of the specific issues being reviewed is the feasibility of a 5:7 schedule -noting the feasibility study is expected to be completed in June 2020.

NEA-SM asserts: (a) the 5:7 issue is a mandatory subject related to both compensation and hours of work; (b) the 'strategic planning' process does not replace the bilateral, negotiation process; (c) contract language does currently exist, because the District previously implemented a 5:7 schedule prior to 2014 without a need to negotiate specific language in the PNA, and NEA-SM informally agreed to a 6:7 schedule at the District's request, on an interim basis, because of the State funding issues, and; (d) the District can appropriate funds for the anticipated change for the High Schools - hiring approximately 40 teachers at a cost of $2.9 million.

It is clear to the Fact Finder that the 5:7 issue is both a compensation and hours

of work issue, and subject to mandatory negotiation. The number of required classes during the work day is, *prima facie,* an 'hours of work' issue. The request to negotiate a stipend for teaching a sixth class is a compensation issue.

The District's Notice letter, specifically included: "(d) Modification of the Professional Employee Work Schedule under Article XI (E) and Article XII including, but not limited to: (1) increased hours in the work day . . . . " The NEA-SM Notice stated, "Hours and amount of work . . . modify the current contract language regarding teacher work days." While the notices did not state specific proposals, the District specifically referenced the contract provisions and topic that would include the 5:7 issue, and the Association stated, "regarding teacher work days." This language, especially since both parties raised it, appears to comply with the notice requirements of, "reasonable and understandable detail of the purpose . . ." The fact that the District did not subsequently make a 'specific' proposal on the work schedule under Article XII does not alter the issue on the adequacy of the "notice."

The existence of the 5:7 issue as a specific topic in the District's Strategic Plan shows that this was an on-going, known topic of negotiation. Further, the District, on this and other issues, must remain mindful that without undermining the value of a Strategic Plan, a strategic plan concept, unilaterally developed by the District outside the negotiation process, does not replace or supersede the <u>obligation to negotiate</u> mandatory issues with NEA-SM in a good faith, bilateral process. The 5:7 issue is addressed further in this Report, regarding compensation and hours of work issues.[12]

[12] As noted in *fn 11*, the Fact Finder has carefully reviewed, *USD No. 252 v. South Lyons County Teachers Association*, 11 Kan. App.2d 295 (1986), and believes that the facts and circumstances surrounding this case are highly distinguishable. In that case, the parties were not confronted with the complex and annual-vagaries of the existing school finance issues. Here, both parties presented notices on compensation issues and because of the unknowns on available funding in March, neither party provided specific proposals. Using only the District's

Health Insurance

As a practical matter, increasing the health insurance contribution, is a bit of a red-herring issue. It did not appear to be an actual issue of "impasse"- the issue had simply not been resolved prior to impasse. There was a limited 'window' for the health insurance policy to be renewed and the matter was resolved in November 2019, for all District employees.

Having been resolved, health insurance is not an issue for this fact-finding.

NEA-SM is placed in a 'Catch-22' with the health insurance issue. Arguably, health insurance premium contributions are *de facto* part of compensation terms, but the statute lists "insurance benefits" as a free-standing issue. The District negotiates health insurance coverage as a 'package deal' for all employees – the District knows it is going to provide health insurance to all full-time employees. There are aspects of health insurance coverage that go beyond premiums and compensation issues. KSA 72-2218 (l)(1) specifically lists, generically, "insurance benefits" as a negotiation topic. Certain insurance benefits, such as unemployment and workers' compensation are mandated by statute and not topics for negotiation.

The dilemma for NEA-SM is that it must decide whether to list "health insurance" as one of its elective topics for negotiation, or somehow risk having insurance coverage different from other employees with lower contributions or coverage, or potentially no coverage.

notice, had the financing issues not been resolved through the Court and Legislature, and the District was wanting, or needing, to propose a freeze in the step-schedule, using the District's own logic on being more specific, it possibly would have been prohibited from doing so. Further, because of the active, on-going issues regarding the 5:7 issue, the parties were aware this was a point of contention pending the resolve of State funding allocations.

The issue relevant to this fact-finding is whether "health insurance" is one of NEA-SM's, elective topics for negotiation, or whether it is a "mutually agreed, permissive topic," under KSA 72-2228 (b)(1). Given the unique circumstances surrounding health insurance, and the facts surrounding the negotiations, the Fact Finder believes this was treated as a "permissive topic" by the parties and does not necessarily fall within the limitation of the elective topics.

Additional Issues by NEA-SM

(1) Building Leadership Team (BLT).

Having a BLT in each school is a Kansas Education System Accreditation (KESA) requirement administered by the Kansas State Department of Education, (KSDE):

> The BLT leads/facilitates the building needs assessment, establishes the building's goals for the five-year cycle, develops an action plan for each goal, oversees the implementation of the action plans, and analyzes the effectiveness of the action plans.

The KSDE contemplates that each school is "unique" and that the depth, number of members, and jobs represented for an individual school's BLT will look different from another's. A key element is that the BLT, "represents the building's employees."

There are two fundamental issues at impasse regarding the BLTs: (1) is it a topic of mandatory negotiation and; (2), if terms are negotiated, do they belong in the PNA, or the District's, administrative policies manual.

The answer lies in the nature of the negotiation proposal.

An issue or topic may have component parts – some negotiable and some not. Whether to have a BLT, or to define the purpose of a BLT, are not negotiable topics. However, some aspects of teacher participation could potentially fall within the 'purview' of a mandatory negotiation topic, even though the overarching topic of BLTs does not.

NEA-SM proposes that, "each group represented on the BLT shall select its representative(s) on an annual basis," and select the chair by election.

An underlying purpose of the NEA-SM proposal is that the BLT become, "employee led." The BLT, in any configuration or selection process, (administrative employees, represented professional services employees, or other facility employees), is inherently "employee led." The practical meaning of, "employee led", by the NEA-SM proposal, is that the BLT is led by represented employees and not administrative employees. The concept of "leading" also involves defining the agenda of topics and controlling the process for outcomes.

There is no provision in the current bargaining agreement dealing with BLT's. And, there is no requirement or mandate for any teacher or represented employee to serve on a BLT.

While, in most schools, the majority of BLT members will be NEA-SM represented employees, the impact of BLT processes and recommendations impact all levels of employees, students, and the school system itself. Determining the composite of the BLT, the agenda of issues and the implementation process to fulfill the purpose of the BLT, directly impacts the administrative responsibilities for accreditation. As a practical matter, the administration needs to have a reasonable level of control, or oversight, for the process to assure that the composite of members and agenda of issues are appropriately addressing accreditation compliance issues - and that the process works through that goal.

Ultimately, this is an accreditation standard. It is the type of issue that is clearly assigned to the category of 'management rights.' Generally, the Fact Finder also believes this is the type of issue that falls under the actual or intended umbrella of KSA 72-2218 (l)(3). At

the end of the day, the District, not the NEA-SM or its represented employees, is responsible for administering and satisfying accreditation standards.

The nature of the NEA-SM proposal does not cast it into the 'purview' of a mandatory topic. For example, a teacher who serves on the BLT will experience an impact on their hours of work. Hours of work would fall within the purview of a mandatory topic. However, there is nothing about the proposal that goes to this issue. Whether a proposal dealing with an 'hours of work' issue makes it a component, or mechanical, part that is subject to mandatory negotiation, has not been raised as an issue in this case.

In determining whether a proposal falls within the ambit of a mandatory topic, the title or header of the proposal does not control the outcome. The issue is whether the "subject matter" of the proposal falls within the "purview" of a 'term or condition' listed in the statute.

This does not appear to fall within the ambit of the, "mechanics", of an issue by simply contending that it is a selection process and has some mechanics to it. (*See, USD 501 v. NEA-Topeka*, 235 Kan. 968 (1984)). The composite of the BLT appears to require selective diversity within the administration and operations of the facility. This type of a process traditionally would be an administrative/management function. The Fact Finder believes the mere fact that a teacher serving on the BLT has an impact their hours of work is too far of a stretch to automatically envelop it in the 'hours of work' purview. Again, the NEA-SM proposal was specifically about the selection process and allocating control over the process. – not hours of work. Those are not mandatory subjects of negotiation.

Whether or not accreditation standards strictly fall within the ambit of KSA 72-2218 (l) (3), the wording of that statute should be a guide on negotiations:

> Except as otherwise expressly provided in this subsection (l), the fact that any matter may be the subject of a statute or the constitution of this state does not preclude negotiation thereon so long as the negotiation proposal would not prevent the fulfillment of the statutory or constitutional objective.

Thus, this is an appropriate issue to be raised during the negotiation process, even if it deals with a "policy" objective and not language in the PNA. The effectiveness of the BLT, for both planning and implementation goals would be better served by having the represented stakeholders (*i.e.* teachers and other represented professionals) **participate** in the selection process to some degree and to have represented employees participate in how the BLT policy is implemented.

It is the Fact Finder's understanding that the Strategic Plan contemplates this type of participation and involvement and the District, in negotiations, in response to the NEA-SM proposal, provided proposed amendments to the 'policy' language.

RECOMMENDATION: While this does not appear to be a mandatory subject for negotiation, **the Fact Finder recommends** that the District continues to negotiate with NEA-SM on the policy language, and, remain vigilant in monitoring, listening and taking action, to develop a policy that involves Association members in the BLT selection process, and certainly a policy that can hear concerns and take *timely action* if and when an individual administrator goes too far in not recognizing the need to create effective representation diversity to meet the intended goals of the BLT process.

(2) Professional Learning Communities, (PLC)

PLC's serve a different function than BLT's, but are often used in tandem to achieve better educational outcomes. Similar to BLT's, there is a PLC at each school. The PLC will primarily be made up of represented employees.

Different from the BLT, a PLC process is developed at the District level and is not a statutory or regulatory requirement.

PLC's are not currently addressed in the PNA. A represented employee is not required to serve on a PLC.

The analysis regarding whether the topic of PLC's is a mandatory subject of negotiation is the same as discussed above regarding BLT's, and that analysis is adopted for PLC's, but not repeated in this section of the Report.

The decision to have a PLC and the development of the purposes, objectives, and process for a PLC is a topic reserved to the District's administration.

A PLC, as defined by the NEA-SM, is a group of grade level or content area educators that meet weekly, share expertise, and work collaboratively to improve instructional practice and the academic performance of students.

In relation to the District's Strategic Plan, a PLC: develops grading practices, assessment methods for student proficiency; looks at diversity, equity and inclusivity in designing lessons, writing and administering common assessment and dealing with student behavior; analyzes teacher workload and feasibility for a 5:7 class schedule; and, assess student proficiency and mastery of competencies.

The NEA-SM proposal is that each PLC become, "teacher directed," - teachers set the agenda of the PLC and fundamentally control its operation.

Additionally, the proposal includes: "Elementary PLCs will meet for at least 20 minutes as determined by the team during one plan time a week." The proposal is for the language to be in the PNA, at Article XII (D) Professional Day, (3) Professional Employee School Schedules (a) Plan Time.

There is no debate that PLC's are primarily made up of teachers and the issues dealt with are teacher-student oriented. The existence, design and implementation of the PLC lies within the ambit of administrative discretion and is not a mandatory subject of negotiation within the purview of terms and conditions stated in KSA 72-2218 (l)(1).

NEA-SM conducted a district-wide survey to determine if PLC's were teacher directed. The results were: *Yes* 36.1% of the time; *Sometimes* 38.9%; and, *No* 25%. Thus, 75% of the time PLC's had some relevant level of being teacher directed. The concern, of course, is that it was believed that 25% of time it was not teacher directed, and that 'sometimes' it should be more teacher directed than it is.

There was no evidence submitted to show what the particular problems were or might be. Generically, the NEA-SM contends the process simply needs to be completely teacher directed. The District contends that a "high functioning" PLC tends to be teacher directed, but when a PLC shows signs of 'dysfunction', such as internal disagreement or a failure to focus on the needed goals, it is critical to insert various administrative strategies. Human nature would predict that the problems experienced are sometimes administration driven, sometimes teacher driven, and sometimes a combination of both, depending on the school, the principal and the composition of the PLC.

The Fact Finder believes that the existence, design, implementation and oversight of a PLC is an administrative function and not subject to mandatory negotiation. This includes whether the PLC is teacher directed.

However, a component issue regarding "plan time" at the Elementary level, does arguably fall within the ambit of 'hours of work' as a mandatory subject of negotiation.

Neither party presented any specific facts or evidence dealing directly with the issue of plan time at the elementary level for teachers serving on a PLC. Thus, the Fact Finder is left without any facts to further explore specific recommendations.

The Fact Finder is aware that the 230 minutes per week of plan time for elementary teachers is a common level, but remains an extremely "tight" or a limited amount of time, especially when taking into consideration the practical realities of daily circumstances placing pressure on that plan time, such as other non-teaching assignments, illness/absences of teachers, student illness and individual family issues . . . and the list goes on.

Assuring there are logistical parameters for planning time for Elementary teachers on PLC's to function is an appropriate, mandatory, topic of negotiation.

The legal caveat should also be kept in mind that when a proposal, from either party, is subject to mandatory negotiation, it does not mean that the opposite party must agree to the proposal – it means that it must be negotiated in good faith.

RECOMMENDATION: The Fact Finder recommends that the parties negotiate the issue on whether to include language in the PNA, or at least the 'policy,' to adequately accommodate or designate the parameters of plan time as it relates to elementary teachers serving on a PLC.

This is a sub-topic that falls within the purview of 'hours of work' as a required topic of negotiation, and not one of the three elective topics under KSA 72-2228 (b)(1).[13]

(3) Student Management

[13] The Fact Finder understands that the District believes the PLC issue was not raised by NEA-SM with sufficient 'particularity' of 'detail' in the negotiation notice. The Fact Finder also believes that the parties have fully put this issue on the negotiation table and it would be bad labor relations to ignore the issue on such a technicality. The District, of course, does not have to agree to any proposal; however, with the limited issue on elementary teacher plan time, it would not surprise the Fact Finder if the parties can agree to some language in the PLC "policy."

The 'student management' topic fundamentally deals with student discipline and the District's student discipline policy. Student discipline is a complex area involving a variety of Federal, State, and Local law (or regulation) issues and has required oversight of school district policies by the State Board of Education.[14]

The development, execution and any changes to the student discipline policies are not a mandatory subject of negotiation. Likewise, NEA-SM is not asserting that the policy is subject to negotiation. The Association is proposing that a 'new article' be inserted into the PNA, stating:

> *Student behavior will be entered into student management software by the teacher who witnesses said behavior. Administrators will document assigned consequences via student management software and the teacher will receive written notification of the assigned consequences in a timely fashion.*

The focus of the proposal is to create an obligation for the school administrator to assure that once a teacher has reported a discipline incident, the teacher will be timely informed of the action taken.

For the most part, this proposal is one of the objectives of the policy. Through a teacher survey, and reports of specific incidents, (1) not all schools are effectively entering data into the "Skyward" discipline tracking program – and in some schools, inadequate training is provided to teachers to use the program; (2) school administrators are not adequately (or timely) documenting the discipline taken – "assigned consequence," and; (3)

[14] More comprehensive information on the various laws and regulations can be found in, Kansas Compilation of School Discipline Laws and Regulations, https://safesupportivelearning.ed.gov

teachers referring a student for discipline are not adequately (or timely) receiving "notification" of the action taken.[15]

The Association appears to recognize that there are complicated, unique situations where, for a variety of reasons (including legal compliance), a timely entry of the assigned consequence might not take place. However, in the majority of situations, is it more a matter of assuring that teachers are adequately trained to use Skyward, that administrators timely insert discipline referrals into Skyward, and, then, timely insert notification into Skyward on the resulting consequence. Again, understanding exceptions, in its simplest form, without the appropriate and timely follow through by school administrators, it directly impacts the teacher's ability to deal with the student if returned to the classroom and also denies or delays teacher and classroom strategies that can be used to assist the student on an individual basis.

Based upon the evidence and statements, it is also clear that the District wants school administrators to effectively use the Skyward system, including communications with teachers.

RECOMMENDATION: Given the importance of classroom and administrator communications in disciplinary issues, this is certainly the type of issue that either party should bring to the negotiating table to discuss by mutual agreement and attempt to develop resolutions for policy consideration, if not in the PNA.

[15] While the survey may be informal, what stands out is that the perceived problems are likely occurring at specific schools. Working together to identify, verify and take appropriate steps to correct is recommended, regardless of the issue of negotiability.

For purposes of this fact-finding, however, the topic and the subject matter of the proposal does not fall within the purview of a mandatory subject for negotiation within KSA 72-2218 (l)(1).

Additional Issues by USD 512

(1) Staff Meetings

The District proposes to amend the existing, PNA language in Article XII, Professional Employee Work Schedule, Section (B), Staff Meetings, subsection (3). The purpose of the change is to eliminate the provision that "Tuesday" is the 'exclusive' day of the week for staff meetings, (except in an emergency), and have greater flexibility to allow staff meetings on Tuesday, Wednesday or Thursday.[16]

The current, relevant language of subsection (3), states:

> *Except for emergencies, school staff meetings will be scheduled on Tuesdays.*

The proposed change is:

> *Except for emergencies, school staff meetings will be scheduled on Tuesdays, Wednesdays, or Thursdays as determined by the building administrator with input from the building leadership team.*

At the time of filing for impasse, NEA-SM had a 'contingent' counter-proposal:

> *Beginning with the 2020-2021 school year, except for emergencies, school staff meetings may be scheduled on Tuesdays, Wednesdays, or Thursdays, as*

[16] As a technical matter, the Staff Meeting topic would be a mandatory subject of negotiation, under KSA 72-2218 (l) (1), within the 'purview' of "hours and amounts of work." As discussed previously in this Report, using the Kansas Supreme Court's analysis, if the 'subject matter' of the proposal is within the "purview" of a mandatory subject, it must be negotiated, and pursuant to KSA 72-2228 (b)(1), a topic under "hours and amounts of work" is a 'required' subject of negotiation, and not one of the three, potential, elective topics.

determined by the building leadership team. [Dependent [contingent] upon the Building Leadership Team language being added to the negotiated agreement.]

During the fact-finding phase, further evidence, compiled by the Association, demonstrated that the number of 'District Scheduled Meetings' along with other school or teacher-specific meetings and activities, would make the District's proposal extremely 'disruptive' to other schedules. There are also other disruptions, such as, teachers with class and course work obligations working on post-graduate curriculums through third-party, college and university schedules.

NEA-SM asserts that the current District Scheduled Meetings is:

- NEA meetings: Mondays
- Mathletics: Wednesdays
- PDC: Thursday
- Vertical Team meetings: Monday, Wednesday, Thursday
- Curriculum meetings: Monday, Wednesday, Thursday
- After School tutoring: Monday – Thursday

This, standing-schedule, demonstrates that it is not by coincidence that staff meetings were exclusively scheduled for Tuesday.

The Fact Finder believes that the evidence shows a need to negotiate the comprehensive schedule and it is not realistic to isolate the Tuesday staff meeting.

The District has indicated a compromise position to allow a school to set a standard day (Tuesday, Wednesday or Thursday) for staff meetings at that school.

The benefit to the District is that there is more flexibility to allow a timely presentation from a District facilitator or coordinator on a current topic – *i.e.* only

using Tuesday, it might take three-weeks to make a presentation to all schools, where the presentations could be completed in one week using Tuesday, Wednesday and Thursday.

The problem is that with a unilateral focus on the time efficiency of a District presentation, the comprehensive schedule of meetings and activities is seriously disrupted.

This problem is not resolved by various schools establishing a standard, staff meeting on Wednesday or Thursday, because the conflicts of the other meetings and activities still exist. A number of these meetings and activities require teachers to travel outside their own school and involve teachers from multiple schools.

Likewise, it is unclear how the NEA-SM counter-proposal would avoid this same issue, regardless of whether the BLT determined the day of the staff meeting. Presumably, and it may be true, that if the BLT determined the day of the staff meeting, there might be more subjective insight for teachers' actual schedules. However, such a presumption if not a fact, in evidence.

Also, missing from the fact-finding record are facts and evidence demonstrating how much of a problem this is. For example, NEA-SM would postulate that an underlying reason for the proposal is that the District wants to change the PNA for teachers, to benefit administrative employees working on their doctoral programs. That may or may not be true – there are no actual facts in evidence on that point.

Further, it remains unclear whether there are more, potential conflicts at one school level compared to another. For example, if the greater number of disruptions occur at the high school level, and significantly fewer at the elementary level, leave Tuesdays for high schools and look at Wednesday and Thursday for elementary schools.

The negotiating parties best understand the relevant, factual realities regarding how frequent there is a disruption in allowing a more flexible schedule. Goals that are organizationally-selfish, such as, freeing time for administrators to work on doctoral programs, or the Association wanting to use this issue to establish more control within the BLT, are position-driven and not fact-driven.

RECOMMENDATION: The Fact Finder recommends the following options (or combinations):

(1) leave the exclusive day at Tuesday;

(2) leave the exclusive day as Tuesday, with a 'number' or 'frequency' limitation on flexibly using Wednesday and Thursday, *(e.g. no more that one-time in a two-month period),* with adequate notice, *(e.g. one-week, one-month – whatever would be adequate to reasonably adjust other meeting obligations),* including broader language for use of other days – *i.e "Except with an emergency, exigent or unique circumstance, where the District will provide a brief, written explanation of the circumstance for the exception"*;

(3) the parties bring the facts to the negotiating table to look at the amount or frequency of disruptions, and determine what changes, if any, may also be needed to the broader, comprehensive meeting schedule, including whether changing the day is less disruptive at one school level compared to another;

(4) negotiate a procedural mechanism, in scheduling staff meetings, that allows significant, if not primary, input from the teachers, subject to, *"emergency, exigent or unique circumstances, with a written explanation"*; or, some combination of the above recommendations.

(2) Late Resignation[17]

Pursuant to KSA 72-2251 (a), ". . . A teacher **shall** give written notice to a board that the teacher does not desire continuation of a contract on or before the 14th calendar day following the third Friday in May . . . ." *[Emphasis added].*

As a practical matter, if a teacher submits a resignation after this statutory date, (a late resignation), and the school board does not approve the tendered resignation, releasing the teacher from their contract, the teacher risks having the school board petition the State Board of Education to have the teacher's teaching certificate suspended – unless the teacher continues teaching until a "suitable replacement" is hired.

Pursuant to KSA 72-2216: *Contracts bind both teachers and board of education; suspension of license, when; insufficient budget, effect***:**

> All contracts shall be binding on both the teacher and board of education of the school district until the teacher has been legally discharged from such teacher's teaching position or until released by the board of education from such contract. **Until such teacher has been discharged or released, such teacher shall not have authority to enter into a contract with the board of education of any school district for any period of time covered in the original contract.** If upon written complaint, signed by ⅔ of the members of the board of education of the school district, any teacher who is reported to have entered into a contract with another school or board of education without having been released from such former contract, or for other reasons fails to fulfill the provisions of such contract, such teacher, **upon being found guilty of such charge at a hearing held before the state board of education, shall have such teacher's license suspended for the remainder of the term for which such contract was made.** The hearing before the state board shall be conducted in accordance with the provisions of the Kansas administrative procedure act. Notwithstanding the foregoing provisions of this section, any contract of employment made by the board of education of any school district prior to the public hearing on the budget of such school district shall be voidable in case adequate funds are not available in such budget for the compensation provided for in such contracts. *[Emphasis added].*

[17] Late resignation, is a topic that specifically falls within the mandatory subjects of KSA 72-2218 (l)(1), "resignations," "termination and nonrenewal of contracts," and potentially, "terms and form of the individual professional employee contract." Neither party submitted an 'actual' teacher's contract. It is unclear whether the 'liquidated damage' option is stated in the teacher's contract, or implemented by policy through the PNA provision.

Pursuant to KSA 72-2155. *Cancellation of teachers' licenses; grounds*:

> **Any license issued by the state board of education or institutions under the state board of regents may be canceled by the state board of education** in the manner provided by law, **on the grounds** of immorality, gross neglect of duty, **annulling of written contracts with boards of education without the consent of the board which is a party to the contract,** or for any cause that would have justified the withholding thereof when the same was granted. *[Emphasis added].*

Liquidated damage provisions are permitted to allow a teacher to be released from their contract with a late resignation, K.A.R. 91-22-7, *Violation of continuing contract laws*:

> A complaint filed directly with the state board pursuant to K.S.A. 72-1383 or K.S.A. 72-5412, and amendments thereto, alleging that a license holder is in breach of the license holder's employment contract with a local board shall be referred to the commission for investigation, hearing, and the entry of an initial order regarding licensure. **If the investigation reveals a settlement provision or liquidated damages clause in local board policy or in the contract of the employee, so that the employee could make a financial settlement to a local district governing authority or be relieved of contractual commitment by other agreed means, the case shall be dismissed by the commission.** *[Emphasis added].*

The statutes do not mention a 'liquidated damages option' for withdrawing from a teacher contract. Neither party presented information regarding the genesis of a liquidated damages option, or when 'liquidated damages' was negotiated into the PNA. The District did submit a Kansas Association of School Board (KASB), 2018 Policy Update, *(Ex. 6C)*, that includes suggested "options" for the language in bargaining agreements. Option one, proposes:

> . . . A licensed employee . . . who has not resigned by the continuing contract notice deadline shall not be released from the contract to accept another position until a **suitable replacement** has been employed.
>
> If the employee terminates employment in the district without complying with board policy, the board may petition the State Board of Education to have the teacher's license suspended.

Option two states:

> The board shall consider any licensed employee's resignation which is submitted to the board in writing. The board may accept resignations from employees under contract when the resignation will be in the best interests of the district and when such resignations are accompanied by full payment for **any applicable liquidated damages** due to the board for release from contract pursuant to the negotiated agreement.
>
> If the licensed employee terminates employment in the district without complying with board policy and the negotiated agreement on liquidated damages, the board may petition the State Board of Education to have the teacher's license suspended.

[Emphasis added – the "suitable replacement" option, and the "liquidated damages" option].

Under the current PNA, at Article V, General Employment Provisions, section (H), Resignations, subsection (2), ". . . Resignations tendered after the date designated in *[K.S.A. 72-2251 (a)]* will be accepted subject to payment of liquidated damages in the sum of $1,000 to the District . . . Unless waived by the Board of Education, no resignations will be accepted after the date designated in *[K.S.A. 72-2251 (a)]* unless this condition has been met."

The District proposes to amend the subsection to state:

> ***Request for Release from Contract - no financial damages.***
> Professional employees requesting a release from a contract shall provide a letter to the Department of Human Resources to be considered by the Board of Education. Professional employees who request a release from contract after the statutory notice period set forth in Kansas Statutes Annotated [K.S.A. 72-2251] shall not be released from that contract until a suitable replacement has been secured to assume the position they wish to vacate. Ultimately, the Board of Education reserves the right to decline any such request that does not include at least one of the criteria listed below and as such will require the professional employee to fulfill his/her contract."
>
> Criteria for post statutory notice contract release:
> 1. Bona fide move of fifty miles or more outside of district boundaries
> 2. Extreme illness of self or immediate family member
> 3. Professional promotion"

This proposal eliminates the current option for the teacher to pay a $1,000 liquidated damage payment, and obligates the teacher to remain teaching until a "suitable replacement"

is hired, unless one of the three exceptions applies. Basically, the District's proposal is a 'hybrid' from the KASB options, implementing a, 'suitable replacement,' requirement, but allowing specific exceptions for the release of the agreement.

The District's rationale for the change is that depending on the timing of the late resignation, and the nature of the teaching position, it can be logistically difficult to fill the position in a timely manner. Some subjects, such as science and math, can be more difficult to timely replace than others. Further, not having a full-time teacher in place when classes begin, directly impacts the students, parents and educational community, relying on a quality educational opportunity for students.

NEA-SM opposes the District's proposal and wants to leave the provision as it is. Also, NEA-SM made a counter-proposal to increase the amount of the liquidated damage payment.

The Association contends: (1) there is no evidence of any significant problem that would justify the amendment, and many of the actual, late resignation situations involve misconduct or mutual reasons to end the contract; (2) there are many, individual circumstances that can arise causing a late resignation – the District's list of exceptions is too limited, and regardless of whether a teacher stated a legitimate reason for the resignation, the board could subjectively decide not to approve the release, without meaningful recourse; (3) for a teacher wanting to resign, there are obvious timing issues with the required, May resignation date, where teaching, hiring, or other decisions, do not necessarily fit within that window; (4) there are concerns that an underlying reason for the proposal is to significantly inhibit a teacher from moving to another district in the area, where the District can intentionally or unintentionally delay finding a 'suitable replacement' to effectively prohibit

a teacher from being hired in another district – and in making hiring offers, other districts would be aware of this dilemma creating a strong deterrent to hiring a SMSD teacher.

This concern regarding the creation of a potential interference with a teacher accepting a position at another area school is at least indirectly tied to the 5:7 issue, where both the Blue Valley and Olathe Districts have a 5:7 schedule with an enhanced stipend for teachers teaching a sixth class. NEA-SM points out that it is reasonable to assume a teacher might agree to a slightly lower salary to be able to teach five classes a day, or to receive an enhanced stipend to teach a sixth hour.

The opposing positions and rationale on this proposal is a classic example of an issue ripe for concessionary bargaining – *e.g.,* provide a 5:7 schedule and eliminate the liquidated damages. However, that is a decision for the parties.

Neither party submitted evidence regarding comparative provisions in bargaining agreements with other school districts regarding late resignations.

Restrictive employment agreements are generally not favored under Kansas law. The late resignation issue is effectively a non-competition provision – similar to those found in various private sector employment agreements. Generally stated, under Kansas common law, an employment, non-competition provision is not enforceable, unless it specifically includes: a reasonable geographic area of restriction; a reasonable time frame for the restriction, and; there is a legitimate business reason for the restriction beyond normal competition in the industry.

The fact that the restriction for licensed school employees is specifically contained in the Kansas statutes may completely supersede any common law contract principle – end of analysis. That is an issue beyond the province of the fact-finder.

Interestingly, KSA 72-2216, appears to attempt to deal with the elements of an enforceable non-compete provision, at least indirectly. The statute applies when a teacher seeks a position, ". . . of any school district," "for any period of time covered in the original contract." The reason for the restriction, at least implicitly, is to prevent a teacher from resigning to go teach in another school district, (without any geographic limit, or even a limit of - within the State of Kansas). The "hammer" is that presumably a teacher will need their Kansas education license, in good standing, to teach elsewhere. The statute, also, does not provide for 'hardship' exemptions.

The District's proposal has closed some of those gaps, favorably to the teachers. One, the proposal provides for only a 50-mile geographic restriction, if the teacher is moving. Two, the restriction on time is the recruiting and hiring of a 'suitable replacement,' and not the end of the teaching contract that would be permissible under the statute. While not guaranteed, there would be a logical desire to find a replacement as soon as possible. Three, the outside limit would be the end of the current school year where the teacher can submit a resignation prior to May. Four, the proposal provides several 'exceptions' that would, if applicable, generally allow the teacher to resign without consequence.

The 'legitimate reason' for the restriction is to protect the very strong public interests to avoid teachers from simply picking-up and leaving during the school year (or the period immediately preceding the beginning of the school year).

From a labor negotiating standpoint, once a provision is in the bargaining agreement, a heightened, or a mutual, rationale is needed before a change should occur based upon merely a unilateral desire. The District has not presented any evidence that there is a particular problem or 'need' for the change. The NEA-SM has presented evidence, (with

limited resources on access to human resource information), that most late resignation situations involve mutual acceptance, or as options to disciplinary outcomes.

The District's proposal has unilaterally addressed some concerns. However, the District should remain cognizant of the potential impact on individual teachers. Likewise, NEA-SM understandably raises concerns regarding a significant change to the provision and the taking-away of the individual's option to agree to a liquidated damage payment, but must be mindful of the applicable statutes that are intended to avoid late resignations.

If the driving concern is actual a fear that teachers want to leave for employment with adjacent school districts, it was not openly put on the negotiating table.

It is clear that a statutory purpose for the restrictions on resignations is not only to serve the public interests of educational continuity, but also to prevent teachers from 'jumping-ship' to another district, or, for a district's ability to 'pirate' teachers from another district. It is not the role of the fact-finder to interfere with statutory objectives.

RECOMMENDATION: Based upon the competing facts and issues raised, the **Fact Finder recommends** that the parties look at one (or a combination) of the following options:

(1) Withdraw the proposal. At the next "notice" in March, the District re-asserts the proposal, and NEA-SM asserts the 5:7 issue, where, in part, the late resignation may apply concessionary negotiations on late resignation issue. The District's interests in the Strategic Plan report should be complete by June for the 5:7 issue, and subject to negotiation without further delay.

(2) Negotiate tiered-periods for liquidated damages (keeping certain exceptions in place). For example, if the resignation is submitted prior to June 15th, the

liquidated damage remains $1,000, June 16 – July 15, $5,000, and 'suitable replacement' after July 16th. Acknowledge that the District may pay a hiring-bonus for a replacement teacher.

(3) Negotiate a broader scope of exceptions. For example, language that would include other, reasonable life situations, such as, avoidance of violence via an ex-spouse or other person, changes in a joint-custody order moving the custodial children, or, deployment orders for a member of the U.S. Armed Forces. A carefully worded, "catch-all" provision might cover these types of situations.

While legally the District can eventually, unilaterally push its proposal to the end, there no evidence of an actual need for the change and no evidence that the parties have engaged in adequate concessionary bargaining on the issue.

Discussion and Recommendations on Compensation and Hours of Work

Overview

The District's total budget for the 2019-2020 fiscal year is $385 million. The Operating Fund has $243 million. The Capital Fund has $47 million.

The State increased the SMSD operating budget by $9,633,849 for fiscal year 2019-20, allowing for a one-time, 'inflationary increase' to make up for past funding deficiencies. This creates a 4.1% increase in the total operating revenue. Under the Court approved plan, there is an 'anticipated' increase of $2,940,000 for the 2020-21 fiscal year, $5,673,057, a 1.2% increase in the operating revenue for 2021-22, and $6,466,380, a 2.3% increase in the total operating revenue for 2022-23.[18]

[18] For the benefit of the interests for various stakeholders, *a very brief history* on the evolution of Kansas school financing issues may be helpful, relying on the various Kansas Supreme Court cases. Various details are omitted for the sake of brevity. Since 1889, the Kansas Constitution, at Article 6, provided language for **the State** to support financing a school system. For almost a century, the primary method for financing remained at the local level. However, the underlying premise of various financing laws and court rulings, was that school districts have always been a creation of the State and the State has autonomous control over the districts and methods for school financing.

In 1966, Article 6 of the Kansas Constitution was substantially amended. The underpinning concept was a centralized, state control over the education system and the creation of a State School Board, and then development of the Unified School District system. Article 6, Section 6(b) was added: *"The legislature shall make suitable provisions for finance of the educational interests of the state."* In 1965, the legislature enacted the State School Foundation Finance Act. This placed certain restrictions on local districts to fund budgets by limiting *ad valorem* (mill levies) taxes to 104% of operating expenses per pupil. This process still allowed districts that generated more tax-wealth, because of certain businesses or real estate property values, to operate at higher budget levels. In 1970, the legislature enacted further limitations, generally called, "School Tax Lids."

With some irony, given the current school financing formulas, in 1972, a judge in the Johnson County District Court ruled that the various school financing statutes were 'unconstitutional,' because using local tax-bases, the tax-wealth of the district still controlled the quality of education provided – at least in terms of financial resources. *Caldwell v. State of Kansas*. At that time, Johnson County had more rural or semi-rural school districts and significantly less business and residential development outside the SMSD area.

In response to the *Caldwel*l case, in 1973, the legislature replaced the financing statutes with the School District Equalization Act. This law created an 'economic scale' for the distribution of State funds. Thus, the "State fund" attempted to finance schools based on an economic need basis. Local districts could still increase budgets subject to certain 'voter approval' provisions, and there were various amendments allowing for local funding options.

In 1990, a Shawnee County District Court judge held that districts with more wealthy tax bases created an unequal education system on a State-wide basis. The court set forth a series of questions, or guidelines, directing the redistribution of tax funds. Eventually (through a designated planning board) the Base State Aid Per Pupil (BSAPP) formula was created, based on school district economic 'needs' and a 'weighting' system. *Mock v. State of Kansas*.

In response, the legislature enacted the School District Finance and Quality Performance Act. The SDFQPA required mandatory levying of *ad valorem* taxes at a consistent rate, varying by year (*i.e*. 30 mills). Then, the revenue generated by each local district, after paying off existing principal/interest bond obligations, goes to a State General Fund for 'equalized' distribution. In essence, more wealthy tax districts fund less wealthy districts, with more limits on methods for raising funds at the local level.

In 1994, as the tax-base throughout Johnson County significantly increased (since the 1972 *Caldwell* case), several school districts, including those in Johnson County, challenged the constitutionality of the SDFQPA on the basis of, interference with local control, and an unconstitutional 'taking of property' (local taxes) to support other districts. However, the Kansas Supreme Court firmly held that a centralized financing and equalized distribution method was constitutional, and necessary, for the State to adequately fund a statewide, equalized education system. *USD 229 et al. v. State*, 236 Kan. 232.

School financing issues were not unique to Kansas. In effect, Kansas courts and the legislature were following national trends, and cases from other jurisdictions were commonly relied upon. Regardless of party politics, many legislators were glad to enact legislation to comport with the trend of court opinions when their local school districts benefited from "statewide" funding formulas and redistribution of tax revenues to their districts.

The next evolution of these trends was not the ability to redistribute tax-wealth, but to challenge the constitutionality of the actual, funding levels provided by the Legislature. Thus, from 2003 through 2005, the Kansas Supreme Court, in a series of cases, *Montoy* I, II, II and IV, held that the Kansas Legislature was unconstitutionally underfunding school districts pursuant to Article 6, Section 6(b). Now, the issue was not the constitutionality of redistributing tax funds through a 'general fund' allocation process – the issue was that the

These funding allocations are based on the BASE/per pupil allocation – for 2019-20 the BASE is $271 per pupil and in 2020-21 the BASE lowers to $133 per pupil. However, the anticipated funding is, in part, speculative, subject to the actual funding allocations, changes in the State General Fund allocation process (*i.e.* the BASE allocation), and any changes in student population. There is, however, more certainty on future allocations under the legislative/court plan, even though there is not an 'absolute' certainty.

Legislature was being judicially ordered to substantially increase the general fund itself, (*e.g.* reallocation of the general budget funds and/or increased taxes to generate added revenue). This created a type of on-going *feud* between the Kansas Supreme Court and the Kansas Legislature regarding separation of powers and the court's ability to demand specific levels of funding for education.

Funding was increased, new allocation formulas were developed, and the *Montoy* case was dismissed. However, in 2014, a new case (with mostly the same parties) challenged whether the legislature was complying with the "adequacy" of funding and the "equity" goals of funding distribution as previously directed by the Court in the *Montoy* decisions. *Gannon v. State (Gannon I, 2014)*.

From 2014 through 2017, the Kansas Supreme Court issued five rulings in *Gannon I, Gannon II, Gannon III, Gannon IV and Gannon V*. The Court held that the Court mandated goals of adequacy and equity in the *Montoy* decisions had not been met. In *Gannon VI* (2018), the Court determined, once more, that proposed, legislative funding levels were not adequate. In *Gannon VII* (2019), the Court determined that the Legislature's 2019 funding bill, including a three-year funding plan, meets the goals set forth by the Court; however, the Court leaves the case open for further review to determine if the proposed funding levels by the Legislature are implemented.

The practical impact of the *Montoy* and *Gannon* decisions, is that the Court can demand specific funding levels, but only the Legislature can pass laws to generate the added revenue, redistribute budget priorities, and then allocate the funds.

Thus, every year, the amount of funds a school district receives to operate and to pay its employees, remains in a state of flux and uncertainty, (there are various funds and parameters for how each fund can be spent). Allocations to each districts' "general fund" or "operating fund", is the only fund that can be used to pay teachers and non-administrative professionals. A district can develop an 'anticipated' budget for planning purposes, but the actual budget cannot be developed until the State actually pays the determined allocation. At that point, (typically in July), modifying the allocations to an 'actual' budget becomes a type of an 'accountancy crunch time' – the funds are being received after the fiscal-year has already begun. As a further practical matter, on a State-wide basis, while the Shawnee Mission School District, comparatively, generates a larger amount of revenue, that revenue goes to the State's 'general fund', and only a portion comes back to SMSD pursuant to the various distribution formulas. Districts can obtain voter approved, *ad valorem* taxes, subject to certain statutory limits. Despite an *historical* willingness of the District's taxpayers to fund higher teacher and employee compensation (and other spending), and the Board's desire to increase compensation, that funding is limited by the State's equalization formulas – in other words, the State determines the amount of money *available* to the SMSD to pay its employees, to raise compensation levels and to operate the District.

The 2019 funding bill has a bit more predictability for advanced-budgeting with the three-year extension funding formula.

Step-Schedule Increases

Using current budgeting, 48% (or roughly one-half) of the District's Operating Budget is used to pay salaries and benefits for teachers and the represented unit employees.

Although past expenditures and allocations, along with future, anticipated funding, can be relevant to this fact-finding, it must be kept in mind that the impasse issues before the Fact Finder are limited to the 2019-2020 fiscal year.

KSDE Data Central compiles statewide information on teacher salaries. The 'Average Salary Comparisons,' compiled through School Finance Reports 2013-2019, use a calculation that includes teacher salaries, supplemental salaries and benefits. Based on this data, USD 512 has maintained the highest "average salary" rate for teachers in Kansas, in comparison to 'large' school districts and the school districts adjacent to Shawnee Mission, such as Blue Valley, Olathe and DeSoto. (In 2018, Shawnee Mission shows a #2 ranking).

State-wide, on average, the Shawnee Mission district maintains a KSDE Average Salary Comparison, roughly 30% higher than the median average of all districts. In 2019, the local, comparative averages were: Shawnee Mission, $71,382; Olathe, $68,876; Blue Valley, $68,820, and; DeSoto, $60,265.

For the 2018-2019 fiscal year, State-wide, teacher compensation ranged roughly from – 10% to + 14%, although most changes were roughly 1% to 4%. Locally, SMSD 2.7%, Blue Valley 3.5%, Olathe 1.1%, and DeSoto 3.0%.

It is understood that an "average" is only one type of statistical comparator, (*cf.* a 'median' or medians within smaller groups, such as teachers 1-5 years, and teachers with masters' degrees), and the method is based upon a district-wide aggregation of salaries, including benefits.

NEA-SM has submitted data showing that USD 512 is comparatively declining in State ranking on 'starting salary.'

The District contends the source of the NEA-SM data is unknown, and that there is no issue regarding USD 512 recruiting new hires and the starting salary levels are highly competitive. The District also points out that USD 512 does not experience the same issues that other districts may encounter in the State, where higher starting salaries are necessary to attract new teachers. Further, the USD 512 step-schedule provides for more rapid salary advancement as teachers pursue added, post-graduate and masters' degree achievement, even compared to adjoining, competitive districts.

NEA-SM contends that additional money to pay teachers can be created by freezing additional hiring of administrative staff. While this may be true, administrative hiring is a decision within the discretion of the District, and there is no evidence that the administrative salary levels or hiring practices are somehow improper or excessive. Fundamentally, without some type of clear and convincing evidence of hiring or salary practices that go against the public interests, the issue is beyond the scope of this fact-finding process.

The District holds out that the 2018-19 teacher average of total compensation is $69,409, with an average *salary-only* component of $63,389. This is consistent with the Association's exhibit showing that 1,404 teachers have a salary of less than $65,000 and 634 teachers have a salary of less than $70,000.

The reality is that most teacher compensation disputes arise out of comparative data showing that teachers in the district are making comparatively less than teachers in

the comparative districts – and there is an overriding public interest in assuring that teachers are paid competitive salaries for quality recruitment and retention.

Teachers in USD 512, being paid at or near the highest levels in the State, do not have the benefit of that contention. To some extent, it can be expected, and confirmed by the KNEA, that teachers in other districts use the higher USD 512 pay scale to contend the teachers in that district, comparatively, should be paid more.

Thus, the issue in this fact-finding is whether USD 512 has used its operational funding revenue to adequately allow for a reasonable increase in the base salary-schedule.

A step-schedule is commonly used to create a salary scale for a larger, common group of skilled or licensed professional employees where the nature of the job classification does not lend itself to income increases by promotion. For example, a licensed teacher will begin teaching high school math and twenty years later the person is still teaching high school math. In other workplaces, increased pay may be based on expanding job classifications. Applied to teaching, this would be something like, Teacher I, Teacher II and Teacher III, based primarily on seniority or merit, and not self-determined education levels. The teaching profession, by its nature, does not lend itself to promotion, except those desiring to enter the ranks of administration. Thus, a step-schedule is a common method for pay scales in the teaching profession.

A teacher can self-promote by obtaining advanced educational hours and degrees (horizontal movement). By virtue of length of service and experience, the teacher advances on an annual service basis (vertical movement). Salary adjustments are made by increasing or decreasing the base rate and there are an indefinite number of calculation methods to insert changes into the base rate.

The step schedule anticipates vertical and horizontal progression. This anticipated progression is particularly important for the type of licensed professionals to which they often apply.

A first-year teacher and a 20-year veteran may be performing the identical job duties, teaching third-grade, or Algebra I. Different from most industries or business models in labor relations, the 20-year veteran teacher will make a higher salary for performing the same job duties by virtue of vertical, step movement, and likely additional horizontal movement. Then, based on self-promotion, a 10-year teacher might 'leap frog' a 20-year teacher, using horizontal movement to earn more.

The step-schedule arises out of a bargaining process. It provides a number of "known" factors regarding current and future compensation levels to both the teacher and the school district. It represents an obligation to an anticipated progression of salaries. The teacher commits the use their education and license to serve the District where there is effectively no promotional opportunity for upward financial mobility or merit increase and the District commits the budget to a step-schedule where the teacher can self-promote through individual education and continue to serve the District from year-to-year to receive a higher salary. For a variety of reasons, the step-schedule provides certain advantages and disadvantages to both the individual teacher and the District.

Various, "known" issues arise with a step-schedule. Salaries can become compressed over time, especially when more experienced teachers reach the maximum in the vertical scale and a base rate gradually increases to attract new teachers or to promote high levels of self-education. For a variety of reasons, a more experienced teacher may not continue to pursue self-promotion through horizontal movement. It is known that eventually a teacher

will reach a maximum, or flat, "longevity step" and that each column of horizontal progression also has a maximum "career salary." Again, the benefit to the teacher with the step-schedule is the opportunity to self-promote, or to know the salary in opting not to pursue added education hours or degree. Teachers reaching a 'career' level, then, receive increases when the base salary for that 'cell' in the schedule is increased, or a stipend is negotiated to compensate for an increase in base salary for other cells.

The USD 512 step-schedule has been negotiated by the parties, over many years, to develop a schedule that encourages horizontal movement, and allows teachers to reach a career salary earlier – basically a type of 'front-loading.' The benefit to the teacher is that the teacher reaches a higher salary sooner and over their career, earns more, than if the increases were spread out in smaller increments based upon vertical movement. The evidence in this fact-finding shows that SMSD teachers, over a 20-year period, on average, earn more that teachers in adjacent districts.

The step-schedule is inherently important information when looking at compensation for non-bargaining unit employees. However, it is not a tool that mandates some sort of parity for all employees.

If the District wants to exercise its discretion to give an individual administrator or maintenance worker a raise, it can. The same is not true for the represented unit. Pay increases must be made part of the bargaining unit step-schedule, typically with an increase in specific base rates. As understandable it may be in terms of a desire for parity, there is no requirement that if the teachers' base rate is increased 1% that all district employees must receive a 1% increase. The inverse is also true – the District can increase non-represented salaries without increasing the salaries of represented employees.

Because of the various uncertainties involving the Kansas Supreme Court school finance rulings and Kansas Legislature allocations of school financing funds, it has become perhaps too common for school districts to either freeze teacher salary schedules, or provide minimal adjustments, and to provide lump-sum, "stipends" at or near the end of the fiscal year, based on available funds.

The SMSD has not been immune from this compensation strategy, and in 2016-2017 SMSD provided stipends ranging from $1,025 to $1,375.

The term, "frozen" in relation to compensation, step-schedules, is used by some to mean different things. Generally, 'frozen' means the teacher is at a 'cell' on the step-schedule, *vertically* based on number of years, and *horizontally* based on education level. If frozen, the teacher will remain in that cell for the next compensation year, with no schedule increase vertically or horizontally. (Stipends can be used to provide an increase in income, but a stipend does not change where a teacher is in the step-schedule).

Variations, other than a 'frozen' schedule can occur, that result in actual, budget expenditures for salary increases, without an increase to the step-schedule. Thus, in years where there is 'no change' to the step-schedule, but a teacher advances, either or both, vertically and horizontally, a teacher will obtain a pay increase. Teachers with horizontal, educational advancements will obtain a greater increase.

From a district-wide, budget viewpoint, those increases are actual budget increases that have to be accounted for. If those teacher compensation increases result in a deficit, that deficit must be paid for out of an appropriate reserve fund, which is the carryover, Operational Fund balance.

SMSD encountered this situation in the 2018-2019 fiscal year, where there was no increase to the 'base' salary schedule, but there was an average salary increase of 2.66%, because of step-movement. Thus, leaving the step-schedule as status-quo ('as is') is not a 'frozen' schedule, and the actual budget expenditure goes up. In 2018-19, it created a deficit of $1,126,314, that later-on had to be paid out of the Operational Fund balance.

Notwithstanding the overall increases in total compensation, the NEA-SM raises concerns that the percentage of the fund spent of salaries has, "dwindled." In 2017 the salary expenditure was 54.56%, in 2018 is was 53.66% and in 2019 it further declined to 52.07%. From a 'raw data' standpoint, this decline is potentially concerning. Additional information would be needed to determine if the decline represents a failure to adequately fund increased compensation levels for teachers. It is beyond the province of the Fact Finder to make recommendations on the general budget and its allocations. Regarding the "new money" increases to the Operational Fund, the District's two-year proposal allocates 72.6% to increased teachers' compensation and approximately 66% from all revenue sources.

While many districts negotiated frozen schedules, because of the on-going funding issues, USD 512 avoided this (except in 2011-12) by using 'deficit spending' budgeting, which benefited teachers and professional service employees.

Using the District's uncontested calculations, the District proposal to increase base compensation by 1% for the 2019-20 school year equates to an overall budget increase, per teacher, of 3.22% (rounded), broken down as follows: 1% base salary increase; step movement on the salary schedule (1.31% increase); column movement on the salary schedule for professional growth (.43% increase); and an additional $45/month

contribution to health insurance premiums (.47% increase - bringing the monthly total District-paid health insurance contribution to $694).

This would account for 45.5% of the increased State funding ($9,633,849) that includes a one-time, interest adjustment, going to compensation for teachers and professional service employees.

The District also proposed a two-year agreement with NEA-SM whereby compensation is increased by 6.87% over the combined, two-year period. For year-one, the increase in compensation would be as described above. For year-two, (the 2020-21 school year), the District would provide: 1.25% base salary increase; step movement on the salary schedule (1.31% increase); column movement on the salary schedule for professional growth (.43% increase); and an additional amount per month equal to the premium increase of the highest cost individual health plan premium (.65% increase bringing the estimated total District-paid health insurance contribution to $734).

The total cost of the District's one-year proposal is $3,916,613. The combined, total cost of the District's two-year proposal is $8,352,836, (1% base 2019-20, and 1.25% 2020-21). This would account for 72.6% of the combined State fund increases going to compensation for teachers and professional services employees.

The Association did not provide a specific cost calculation for total compensation for its three-year proposal. Using the same method of calculation for the District's two-year proposal, the District contends that the NEA-SM proposed three-year compensation creates a total compensation increase of 12.05%. The successive base increases of 2%, 1.5% and 1.5% would calculate to total compensation of approximately $14,708,000. This amount is

in excess of the reasonably available funds, including the proposed increases from the State for the District's Operational Fund, to allow for an adequate Operational Fund balance.

Using mandated, government "cash-basis" budgeting and spending on an annual basis, makes long-range budget predictions risky. This is especially true when the State is in control of the funding allocations and not the school district itself. A significant number of unknown variables come into play. Additionally, base increases to the salary-schedule have recurring costs in all future years, especially with on-going vertical and horizontal movement, even if the base is not further increased.

One-time, Operational Fund increases (such as 2019-20) cannot be used to pay for permanent compensation increases.

It is important to realize that a critical issue in fact-finding for a public school district is the strong public interest in assuring not only a fiscally sound financial process, but also using available funds to create a competitive school district – especially in terms of hiring and retention of quality educators. This is why comparative school district information is extremely important.

Again, in many, or most, school district cases, the contention is that, comparatively, teachers are underpaid, based upon the 'median' of comparative districts (not the highest paid) and the SMSD is used by other districts to show the highest pay levels. While the District, nor anyone in the hearing process, contends that SMSD teachers are paid too much, from a legal review process and comparative data, underpayment is not an issue in this case. Without the restraints of the State funding formulas and local option funding, more funding may well have been available, however, that is not the situation given the *Montoy* and *Gannon* cases. At the same time, the District maintains a duty to the public

interests, and teachers, to maintain its compensation levels. In fact, the Fact Finder has not been shy to assert strong recommendations for salary increases when the facts in evidence support such recommendations.

The parties have reached agreement on all components of compensation for the 2019-20 and 2020-21 school years, except for the base salary increase, at a total annual cost ***increase*** in excess of $2.7 million. Specifically, the parties agreed to step movement at a cost of $1,626,744, column movement at a cost of $500,000, additional health insurance contribution at a cost of $545,616, reimbursement for college credit to be qualified to teach College Now at a cost of $17,000 to $20,000, a stipend to Advanced Placement and International Baccalaureate teachers at a cost of $10,000 to $15,000, increases to supplemental pay for high school counseling department coordinators at a cost of $865 and increase to supplemental base pay at a cost of $32,000.

For the 2019-20 fiscal year, the District anticipates the following additional expenditures:

- Classified staff compensation increases: $961,076
- Teacher compensation: professional growth column movement at $500,000;
- Teacher compensation: additional employees purchasing health insurance with a district match expense of $675,154;
- Buses: contractually obligated additional increases to transportation of $346,576;
- Electricity: contractually obligated utility rate increases of $1,209,674;
- Resources: increased expenditures for supplies and services of $1,484,519; and
- Teacher workload: 28.44 additional full-time employee positions at $1,673,450.

(USD 512, Ex.# 1-O).

These expenditures are also paid out of the Operating Fund and are not part of the fact-finding process, except to review the accountancy of monies in the budget. After the budget was approved in August 2019, $4,693,957 remained unallocated. This amount was available for compensation increases for all pay groups, including teachers and professional service employees:

- The District's proposal for a one-year contract with NEA-SM, representing a total compensation package of $3,916,613 [19]
- Increased health insurance contribution for non-teachers, totalling $363,745
- Compensation increases for school psychologists, parents as teachers, and administrators

Also, the District tentatively agreed to additional cost items proposed by NEA-SM:

- To reimburse teachers up to 18 credit hours of expenses for tuition to a college or university for a teacher to be qualified to teach College Now courses at the high school. Projected Cost: $17,000-$20,000
- To provide a stipend of $100.00 per day to Advanced Placement (AP) and International Baccalaureate (IB) teachers who attend required summer training. Projected Cost: $10,000-$15,000
- To increase the supplemental pay for the five, high school Counseling Department coordinators ($2,637 to $3,610) is $4,865
- Raising the base for 'supplemental pay' by the same percent will be an estimated $32,000.

[19] This calculation by the District includes an increase of $1,650,733 from last school year.

If these increases are approved, there will be approximately $341,734 available to address other, anticipated compensation issues - compensation increases for school psychologists, parents as teachers, and administrators. That will leave less than $340,000 available to address any predictable overages, such as, increased substitute teacher costs and inclement weather expenditures.

Given the reformulation of the school finance issues over the last 15 years through the *Montoy* and *Gannon* cases, Kansas school districts have, to some extent, needed to re-invent their budgeting practices, and there has been more scrutiny or oversight of districts by the State. There have been 'shortfalls' and limitations in allocations for Operational Funds (used to pay teachers), and the timing of actual fund payments by the State versus the actual timing of expenditures by districts, (*e.g.* funding lags after the fiscal year has begun, and 'anticipated' versus 'actual' funding), plus limits on methods for local districts to cover costs. This is further complicated by annual, 'cash-basis' laws.

In a simple explanation, because of these concerns, districts are required to create a 'reserve' by using the Operational Fund "balance." The expectation is that to be able to open the doors for school in August, when funds have not yet been paid (or even allocated), the district is allowed to carryover the 'balance' to cover costs. In some years, this dynamic created almost crisis situations for some districts – there was no money to pay the bills and cuts from anticipated spending were required to avoid a type of public bankruptcy for various districts. Thus, recommendations, audits and oversight were implemented. Recommendations, generally, were that a district to attain a carryover balance of approximately 10%, even though this was improbable for many districts. Further, the changes in school financing impacted the 'bond rating' system. To preserve a lower

interest bond rating, a district would need to show a history of maintaining appropriate reserves and balances.

Objectively, USD 512 has maintained a financial strategy that is stronger than many districts, because of its focus on both its short-term and long-term practices. Also, as mentioned, USD 512, has been able to avoid implementing a 'frozen' salary schedule for teachers, where many or most districts have not, (except for 2011-12). To accomplish these goals, USD 512 engaged in 'deficit spending.'

"Deficit spending" means that operating expenditures exceed operating revenues for the fiscal year. Under cash-basis laws, there is no credit card or line of credit that can be used to cover a deficit. The only source of revenue to cover the deficit is the carryover, Operational Fund balance. The generation of revenues for the operational fund are not within the control of the District, as it would be for a private company with profit allocations, or even public financing options available prior to 2004.

Thus, to avoid a frozen schedule, salary reductions, or crisis budget cuts, in 2016-17 the District created a deficit of $408,415, in 2017-18 a deficit of $1,242,155 and 2018-19 a deficit of $1,126,314. The deficit was then captured in carryover fund balance to cover costs to open the schools for the next fiscal year. In doing this, the fund balance was progressively reduced from 10.09% in 2015-16, to 7.89% in 2018-19. As with any budget, deficit spending has an endpoint – money runs out.

The District's goal is to progressively reverse course, reduce deficit spending and return to a more financially solid surplus spending budget. Thus, agreeing to expend the lion's share portion of the Operational Fund increase in 2019-20 to teacher's salaries, the

fund balance will go from about 9.71% to 7.93%. This still involves deficit spending, but with an attempt to progressively reverse course.

As discussed above, the 2019-20 Operational Fund increase results in approximately a $5,448,334 surplus, other non-compensation obligations reduced that amount to $4,693,957 in the approved budget in August. The District's 1% base increase and other increases to total compensation for teachers uses $3,916,613 of that available amount, or 83.4%, leaving only $340,000 for anticipated contingency costs, (substitutes and weather issues).

The budget numbers in evidence, at first glance, looking in isolation at individual funds, or "buckets," may give the appearance of surplus funds that can be used for higher salaries – just put the money in the Operational Fund and have more money for compensation – however, the pieces of the puzzle have to be fit together.

For example, the Contingency Reserve fund, has a consistent balance of $5,638,052. This amount is determined using calculations on potential, "emergency" needs. It cannot be transferred to the Operational Fund or used to supplement salaries. Optimistically, the Contingent Reserve is never used, meaning that there has not been any emergency. The fund does not accumulate, rather is remains a constant in the budget process.

The Capital Outlay fund is restricted for expenditures to build and maintain facilities. The money cannot be transferred to the Operational Fund. NEA-SM aptly points out that given changes in the authorized uses of the Capital Outlay fund, the District may be able to transfer maintenance employee salaries to the Capital Outlay fund, freeing up money to increase teacher compensation. The facts in the record show that this may be possible, however, it is unclear if, and to what extent, the District is already doing this, the

amount of potential money it would free-up, and whether there are restrictions or logistical reasons for not doing this. It appears that "transportation" maintenance employees have been transferred to the Capital Outlay fund. This option is worth exploring in negotiations, but insufficient information is in the fact-finding record to make any specific recommendations. As a simple accountancy matter, shifting employees to the Capital Outlay budget does not meant the money is appropriately there to pay for the transfer, and that the Operational Fund would not be impacted or allow for additional money for teacher compensation.

The Operating Fund is made up of several sub-funds, such as, General Vocational, Supplemental General, At-risk, Bi-lingual, and Special Education. Budget documents show what appears to be a generous surplus, or "unencumbered" amount, in the Special Education fund. Since the Special Education fund is already in the Operational Fund it cannot be transferred. The Special Education fund is also where the Operational Fund "balance" is 'parked' for accounting purposes. Thus, the Special Education fund surplus "is" the carryover balance fund and not additional money to put into the Operational Fund to use for increased compensation.

The District is currently below its operating fund balance target of 8.3% (approximately one month) of expenditures.

The District's two-year proposal would end the 2020-21 year with a deficit of $1,292,272, and the District's fund balances would decrease to $17,976,652, keeping in mind that a balance of $17million is needed to pay for only one-month of salaries. The District contends that the two-year proposal, would not further the District's goal of ceasing to deficit spend; however, a two-year proposal would provide the District with

additional time and flexibility to make budgetary changes with the intent of balancing the budget.

Comparatively, the District calculates that the NEA-SM three-year proposal would create a deficit of $1,215,577 in the first year, $3,433,702 in the second year, and $3,700,860 in the third year, leaving an ending operating fund balance of $10,421,220 at the end of three years. This operating fund balance would present financial risk to the District, and would leave SMSD with significantly less than one-month of payroll expenditures in its operating fund balance.

The 'in between' negotiation options were not calculated by either party. The NEA-SM did not present any cost calculations on either their three-year proposal or the District's alternative one-year or two-year proposal to challenge the District's calculations.

Part of the fact-finding report and recommendation process to attempt to 'set the table' for a continued negotiation of the relevant issues. This is not a "high-low" arbitration. [20]

Using the District's calculations, the one-year, 1% proposal avoids deficit spending with a $497,567 surplus and an Operational Fund balance of $19,268,925. The District's two-year, 1% and 1.25%, proposal creates a deficit of $1,292,272 in year-two. (Ex. #1-U). It appears that the $497,567 surplus remains in year-one of the two-year proposal.

The NEA-SM three-year proposal is 2% year-one, 1.5% year-two and 1.5% year-three. (Let's forget about the third-year for discussion purposes). The 2% increase creates

[20] Commonly used in Major League Baseball arbitration where the arbitrator is presented with the 'high' proposal from the player and the 'low' proposal from the team, and the arbitrator must pick the 'high' or 'low' offer, based on the record – and nothing in between.

a deficit of $1,215,577 in year-one, with a fund balance of $17,555,781. Extended out with an added 1.5% in year-two creates a deficit of $3,433,702 and a fund balance of $14,122,080 – which is below the "one month" operational level. (Ex. 1-V).

The Fact Finder agrees with the District that the NEA-SM proposal is overly aggressive to meet reasonable budget objectives of the District, including deficit spending and the creation of a sub-standard fund balance - and contrary to the overall public interests.

The 2% year-one increase appears to be in the "reasonable" range, but for the compounded effect with step movement in year-two and on into the future, even without added base increases. Yet, the District's combined 2.25% proposal is acceptable over two-years. The increased State funding in year-one is $9,633,849, but drops to $2,940,000 in year-two. However, the anticipated increased State funding for year-three bumps to $5,673,057.

Putting these calculations together, (admittedly without all of the information to calculate the exact deficit or fund balance), the Fact Finder believes it is reasonable for the parties to look at a two-year proposal with a base increase of 1.25% in each year, or, 1% in year-one and 1.5% in year two. This may not allow the District to escape deficit spending as quickly as desired, yet it would appear to fall within the tolerable budget parameters.

The anticipated funding bump in year-three (and year-four) should allow the parties ample opportunities to calculate the impact of the two-year increase for potential negotiations for the year-three, step-schedule, or how to potentially facilitate a 5:7 schedule. Also, in computing budget figures, it appears there is some amount of discretion with attributing the added expenditure to the deficit amount or the fund balance amount.

The Fact Finder encourages the District to balance out those two numbers, within reason, and not overload the deficit number and underload the balance.

No one has a crystal ball to determine exactly what the State school financing picture will bring in 2023. At the same time, the Fact Finder believes the combined dynamics of *Gannon VI and VII* and the Legislative action with a four-year funding proposal was intended, as a matter of public interest, to maximize teacher compensation within reasonable limits.

RECOMMENDATION: The Fact Finder recommends that the parties attempt to negotiate a two-year proposal substantially less than what the Association proposed and relatively, slightly more than the District left on the negotiating table at impasse.

The 5:7 Issue

The Fact Finder will not repeat the points of discussion above in this Report on the 5:7 issue. The Fact Finder opines that although awkwardly, the Association did raise the 5:7 issue in this negotiation and it is a mandatory, compensation and hours of work issue. Given that the adjacent school districts maintain 5:7 provisions in their agreements, it is unlikely that the District will escape the issue. The Strategic Plan is a potentially valuable tool for both parties, yet it does not replace the bilateral negotiation process.

The Fact Finder only has province over the negotiations for the 2019-20 negotiation. The substance of the 5:7 proposal was raised late in the game. Budget issues aside, as a practical matter, to implement a 5:7 proposal, it is not logistically possible to determine the specific hiring needs, hire the needed number of teachers, and rearrange class schedules within this fiscal year.

Thus, it is unrealistic to recommend negotiation of that issue in this negotiation period.

The NEA-SM will need to decide on whether it will attempt to notice that issue for future negotiations. Also, the parties will have the benefit of the Strategic Plan report to work with or contend against.

SUMMARY

Given the number of issues, some with more discussion complexity than others, the Fact Finder has used, **"RECOMMENDATION,"** to label the Report recommendations without restating them in a summary or conclusion section.

The goal is to take into account both parties' concerns in the negotiation process, objectively focus on the public interest issues involved, and to allow the parties to continue to have a meaningful negotiation opportunity in the 10-day or optional 17-day post-report process.

/s/ Henry R. Cox Date: January 15, 2020

Henry R. Cox, KDOL Fact Finder