Background

This proceeding involves a successor agreement to the 2005 - 2008 agreement between the parties. The predecessor agreement was effective by its terms through July 31, 2008. During the course of extensive negotiations, the parties met and resolved some of the outstanding issues between them, but were unable to reach agreement on some 60 issues. The number of unresolved issues can be tallied as more or less than 60, but there is no need here to enumerate them: for current purposes it is enough to note that the areas of dispute were many and intractable. The parties themselves recognized that their negotiations had reached an impasse.

Accordingly, on September 30, 2010 the Federal Service Impasses Panel (FSIP) directed the parties as follows:

1. During the 60-day period following receipt of the Panel’s procedural determination letter, the parties shall resume bargaining in Puerto Rico, assisted by a private facilitator/factfinder of their choice, with the Employer to pay 75 percent of his or her related fees and expenses and the Union to pay 25 percent.
2. Should any issues remain unresolved at the conclusion of facilitated bargaining, the facilitator/factfinder shall submit a written report with recommendations for settling the issues, including supporting rationale, to the parties and the Panel no later than December 30, 2010.

3. In the event that a party does not accept the facilitator/factfinder’s recommendations for resolution of the issues it shall notify the Panel and the other party, in writing, and shall identify the unresolved provisions no later than January 24, 2011.

4. Thereafter, the Panel shall take whatever action it deems appropriate to resolve the issues.

5. If a voluntary settlement of the entire dispute occurs, the parties should immediately notify the Panel of any such agreement.

Thereafter, the parties selected me as the facilitator/factfinder from a list supplied to them by the Federal Mediation and Conciliation Service. I was notified of my selection on October 22, 2010.

During a conference call I conducted with counsel for both parties on November 3, 2010, there was general consensus that in view of the large number of outstanding issues, the FSIP’s directive that facilitated bargaining should take place in Puerto Rico, and our own locations (Atlanta, Georgia, Washington, D.C. and Pittsburgh, Pennsylvania), the best course would be to schedule a series of meetings on seven consecutive days in San Juan, Puerto Rico. Our schedules were such that the earliest we could begin was February 11, 2011. Over the course of seven consecutive days from February 11 through February 17, 2011, I met with the bargaining teams for both parties for mediated bargaining and hearings. I also met again with counsel for both parties in Washington, D.C. on March 3, 2011 to discuss some issues of drafting.

Having sketched the history of this long bargaining process, I would like to express a personal note of acknowledgment, admiration and thanks to the negotiating teams for both parties, and in particular to their legal counsel, Robert E. Sutemeier and Richard J. Hirn. Both teams worked long and conscientiously to try to resolve the very difficult issues confronting them. They worked with diligence, perseverance, tenacity, integrity and creativity. Despite the long hours and often emotional issues, they remained focused on addressing issues and not personalities.

Their respective constituencies cannot be expected to fully appreciate their efforts, but I was there and I am witness to how hard they worked to resolve the areas in dispute.

Thanks to their determined efforts, the parties were able to resolve most, although not all, of the outstanding issues during the course of our sessions. The parties are aware of the resolved items, and there is no need to recapitulate them here. Of course, I recommend that all agreements reached between the parties, whether before or after I became involved in the negotiations, be incorporated in the new collective bargaining agreement.

One “housekeeping” matter should be addressed. Some of the agreements referred to in the preceding paragraph use the term “Earned Hourly Rate” and others use the term “Wages Earned.” It is clear that the parties understood these terms to mean the same thing, but their interests are best served if any
confusion is avoided by the use of a single term consistently throughout. I recommend that the phrase “Earned Hourly Rate” be adopted, and that the agreements reached between the parties should substitute “Earned Hourly Rate” wherever “Wages Earned” appears.

I turn now to a discussion of the unresolved issues, my recommendations for their resolution, and my rationale for those recommendations.

Discussion and Recommendations

Article 7 Section 5 (h): Parties’ Positions, Recommendations and Rationale

Article 2 Section d (3) of the predecessor agreement reads as follows:

(3) The Parties further agree that the terms and conditions of employment in existence during School Year 2004-2005 (10 August 2004 - 7 June 2005) will be the basis on which to determine in the future if a change has occurred or is being proposed by the Agency. However, the Parties agree that normally a change in conditions of employment does not include the equitable and reasonable assignment of professional duties and responsibilities typically and customarily associated with the DDESS-Puerto Rico position to which assigned, or to the assignment of other duties in emergency situations (when such emergency is declared by the DDESS-PR Superintendent, Assistant Superintendent, or designee). Such duties may, for example, include: supervision of students (bus duty, pre-and post-instruction periods, cafeteria, playground, field day, and other out-of-class activities); tutoring and/or remedial assistance which does not require independent planning; committee meetings and associated work performed within the regular duty day; and other similar assignments. Assignments (other than those of an emergency nature) made in an inequitable and/or unreasonable manner may be grieved in accordance with Article 34. The Parties further recognize that changes to the manner in which duties are assigned may constitute a change in conditions of employment which would create an obligation for notice and subsequent I & I bargaining. Even if the manner in which duties are assigned does not constitute a change requiring formal notice and impact and implementation bargaining, the Agency is committed to a dialogue with and consideration of Association input.

The Employer proposes that the corresponding paragraph in the new collective bargaining agreement (Article 7 Section 5 (h)) be modified to read as follows.

h. The Parties further agree that the terms and conditions of employment in existence during School Year 2010-2011 will be the basis on which to determine in the future if a change has occurred or is being proposed by the Agency. However, the Parties agree that normally a change in conditions of employment does not include the equitable and reasonable assignment of duties and responsibilities typically and customarily associated with the position to which assigned, or to the assignment of other duties in situations when such change(s) are necessary to the continued functioning of the Agency. Such duties may, for example, include: supervision of students (bus duty; pre-and
post-instruction periods; cafeteria, playground, field day, and other out-of-class activities; tutoring and/or remedial assistance which does not require independent planning; committee meetings and associated work performed within the regular duty day; and other similar assignments. Assignments (other than those of an emergency nature) made in an inequitable and/or unreasonable manner may be grieved in accordance with Article 30. The Parties further recognize that changes to the manner in which duties are assigned may constitute a change in conditions of employment which would create an obligation for notice and subsequent I & I bargaining. Even if the manner in which duties are assigned does not constitute a change requiring formal notice and impact and implementation bargaining, the Agency is committed to a dialogue with and consideration of Association input.

Some of the proposed changes are “housekeeping” matters (change in date, two changes from commas to semicolons for consistency with the rest of the list of duties, and a change in the Article number of the grievance procedure). The substantive changes include the deletion of “professional” and “DDESS-Puerto Rico” in the second sentence, as well as deletion of the word “emergency” and the explanatory parenthetical in the same sentence. In place of the word “emergency” the Employer would substitute the phrase “situations when such change(s) are necessary to the continued functioning of the Agency.”

* * *

The Association proposes elimination of this provision in its entirety, as confusing and as a waiver of bargaining rights.

* * *

This Section relates to the parties’ obligations to bargain during the term of the collective bargaining agreement. Changes to the status quo may trigger a bargaining obligation, but parties to collective bargaining agreements often disagree over whether a change has occurred, and therefore whether an occasion for bargaining has arisen. Resolving such disputes can be uncomfortably lengthy and expensive for both parties.

Section 5(h) of the predecessor agreement was the parties’ own effort to define when a change would or would not be found, and thereby to reduce the number of debates about whether they needed to bargain. It thus serves a useful purpose, and I would not recommend that the parties take a step backward to the default and more murky legal standard of what triggers a bargaining obligation. I therefore do not agree with the Association’s position that this section ought to be removed from the agreement.

At the same time, I do not agree that the Employer’s proposed changes represent an improvement. The historical standard has been assignment of duties “typically and customarily” associated with the position does not amount to a change requiring bargaining. Presumably, such duties have heretofore always been “professional” duties, so that removal of the word “professional” likely brings no real change. But eliminating the word “professional” might mislead an administrator into an interpretation that he or she was free to assign any menial task to a teacher. It thus seems to me that deleting the word “professional” accomplishes no purpose, while inviting confusion.
This brings me to the second proposed change, removal of the words “DDESS-Puerto Rico” as a modifier to the word “position.” The apparent purpose is to mean that teachers in the District could be assigned (without bargaining) to perform duties typically and customarily associated with teachers anywhere in the United States. The problem is that this language must be applied by people at the local level. They know what duties teachers on the island have customarily performed, but unless they have also served in mainland schools, they do not know what is typical or customary elsewhere. I do not think teachers and administrators in Puerto Rico should need to consult representatives on the mainland for advice on whether a contemplated change is consistent with duties typically and customarily performed elsewhere.

Finally the Employer’s proposal to modify “emergency” assignments to “situations when such change(s) are necessary to the continued functioning of the Agency” in my view would reduce the clarity of the language. The word “emergency” is often used in collective bargaining agreements, and while disputes certainly arise over its application in specific situations, parties generally agree on what is or is not an emergency. The phrase “necessary to the continued functioning of the Agency” seems to me more vague, and more likely to inflict conflict over the degree of necessity, its relationship to the core functions of the Agency, and the availability or desirability of alternative courses of action.

Perhaps more to the point than anything I have said so far about this section is the lack of evidence that the existing language has caused significant problems for the parties. They have found life bearable under the current language, and the risks of creating new and unanticipated problems by tinkering with it outweigh any potential advantages of doing so.

I recommend that the language of Article 2 Section d (3) of the predecessor agreement be retained as Article 7 Section 5 (h) in the new agreement, with the exception of two minor housekeeping updates, namely that the words “School Year 2010-2011” should replace “School Year 2004-2005 (10 August 2004 - 7 June 2005)” and that the reference to the grievance procedure be changed from “Article 34” to “Article 30” to reflect revisions in the numbering of Articles elsewhere in the agreement.

The Remaining Issues - An Overview

The topics of Article 19 (hours), Article 26 (compensation) and Appendix H (definitions) relate to one another like the pants, coat and vest of a suit. None can be considered in a on its own, but only in the context of one another. It makes no sense to try to determine what a teacher should be paid unless one also addresses the amount of work (in terms of days and hours) that the teacher is expected to perform. It is natural for teachers to expect that greater effort calls for greater reward and conversely for the school system to expect that enhanced compensation should produce greater energy. This connection between hours and compensation is recognized in the Employer’s proposed contract language. See for example, Article 19, Sections 1 (b) and (d), and 3 (a). The relationship to Definitions is perhaps not as obvious, and a bit of explanation is in order. Articles 19 and 26 address the normal work day and work year, and the normal compensation. But circumstances may require an extended day, or extra days beyond the usual school year. How shall teachers be compensated for such extra effort? The parties agree in principle to the notion of compensation tied to the teacher’s average hourly earnings, but they disagree over the term to be applied to the concept (“Wages Earned” or “Earned Hourly Rate”), and more importantly how that hourly earning figure is to be calculated. As I said earlier, consistency calls for the use of a single term throughout the collective bargaining agreement, and clarity calls for a definition of what that term means.
So, the notions of work day and work year, annual compensation and extra compensation are inter-related and cannot be considered or discussed in isolation. Thus it seems desirable to address all these economic topics in one place, even though the implementing language appears in different places in the agreement. I shall first detail each party’s position on each of the Articles and the Appendix, and then set forth my recommendations on all of these areas, together with supporting rationale.

**Article 19 Sections 1, 2 and 3: Parties’ Positions**

The Employer proposes that the following three sections be included in Article 19. Article 19 would also include additional sections, but the inclusion of these is not in dispute. The corresponding provisions of the predecessor agreement are Article 15, and two of the memoranda of understanding listed in Appendix E.

The specific language proposed by the Employer is as follows:

**ARTICLE 19**

**HOURS OF WORK AND SCHEDULING**

Section 1. Workday.

a. The workday for full-time bargaining unit members shall consist of eight (8) hours. Unit members must be physically present at the work site for a seven and one-half (7½) hours duty day which includes a 30-minute non-paid duty-free lunch period.

b. Salaries in this contract were negotiated with the realization and expectation that bargaining unit members will perform one (1) hour per work day of preparation and professional tasks for completion of their assigned eight (8) hour work day. While this one (1) hour of preparation and professional tasks may typically be performed at or away from the work site at the election of the unit member, the Agency reserves the right to require that this eighth hour on a particular workday be accomplished at the school site for activities such as training, staff development, or faculty meetings. Not more than ten (10) general faculty meetings which extend the duty day should be scheduled during the school year. Such meetings may continue one hour beyond the regular duty day.

c. However, if the Agency requires a unit member to lose his/her duty-free lunch period by assigning substantial duties to the employee during this 30-minute lunch period, the employee will be compensated in accordance with section 3.d of this Article.

d. Additionally, the salary amounts specified in Article 26 and Appendix F were negotiated with the expectation that bargaining unit members will, within their assigned workday, perform professional duties and responsibilities typically and customarily associated with the position to which assigned, including student supervision, tutoring and attendance at meetings.
e. The workday for part-time bargaining unit employees shall be established as needed to meet the needs of the Agency. Typically, a part-time employee scheduled to work more than four (4) hours per day will receive the same non-paid, duty free lunch period as full-time employees.

f. In addition to the workday, bargaining unit members may be required to attend (4) evening meetings/events per school year without additional compensation.

g. Bargaining unit members are responsible for participation in necessary parent/student conferences and will remain at the work site to complete such conferences which commence prior to the end of the duty day. This requirement pertains to conferences mutually scheduled between a staff member(s) and parent(s)/guardian(s).

h. When the duty day for Summer School or Extended School Year (ESY) programs exceeds four (4) hours in length per day, the unit member will also receive a 30-minute duty-free lunch period with no compensation paid for the lunch period.

Section 2. Planning and Preparation.

a. In order to comply with requisite accreditation standards, the Agency has determined that each full-time bargaining unit member with instructional duties shall have (within the duty day) a minimum of 225 minutes per work week (5 days) for planning and preparation purposes. Part-time bargaining unit members shall receive a pro-rated portion (factor of 0.106 for each hour worked) of planning time.

b. Special education teachers will be provided additional preparation time within the duty day in accordance with Section 8 of Article 15.

c. The loss of a planning period as a result of a change in the instructional day such as assemblies, field days, special events, ceremonies, District-wide student assessment, field trips, early release for students, or emergencies (adverse weather, bomb threats, fire drills, installation-imposed threat conditions, and the like) will not be compensated.

d. In the case of management-directed loss of planning periods beyond the conditions described in section 3.c (bargaining unit member does not receive 225 minutes of planning time per work week), the bargaining unit member will receive compensatory time in accordance with Article 26, Section 6.

Section 3. Work Year.

a. The work year upon which the annual salaries were negotiated consists of 190 work days. The 190 work days are to be allocated as follows:

(1) 180 instructional days; and
(2) 10 non-instructional days to be used for orientation, staff development, record keeping, and/or parent teacher conferences or other similar purposes as determined by the Agency.

b. The Agency is free to assign additional workdays. When additional workdays are assigned, the bargaining unit member will be compensated at his/her earned hourly rate of pay. Additional workdays for full-time bargaining unit members will be eight (8) hours in length not including a 30-minute non-paid duty-free lunch period. Exceptions to this provision include: summer school or Extended School Year program, and reassignments per Section 2g or 2h of Article 28. In those instances pay will be based upon actual hours worked.

c. When a bargaining unit member is not in a work status on a scheduled additional work day or a portion thereof, he/she may request one of the following types of leave subject to management's approval:

   (1) Use of sick leave for the period of absence, if the absence is due to reasons that meet the requirements for use of sick leave as provided for in Section 2 of Article 27 of this Agreement;

   (2) Use of personal leave for the period of absence, if the absence is due to reasons that meet the requirements for use of personal leave as provided for in Section 3 of Article 27 of this Agreement; or

   (3) Use of leave without pay (LWOP) if the employee elects in lieu of sick or personal leave. Use of LWOP will result in placement in a non-pay status for actual hours absent from the work site less the normal 30-minutes for lunch when the bargaining unit member is in a duty status immediately prior to or after the scheduled lunch period.

d. The Agency is also free to assign additional work hours. When additional work hours are assigned, the bargaining unit member will be compensated by the Agency at either the employee's earned hourly rate or with compensatory time. Employees may elect, at the time additional work hours are assigned, to be compensated at their earned hourly rate or with compensatory time.

e. The Agency agrees to make reasonable efforts to provide bargaining unit members sufficient time to set up and close down their respective classrooms at the beginning and end of the school year. However, the Agency reserves the right to assign duties on any particular day of the work year.

f. If the Agency decides to extend the duty year of a unit employee by assigning work (exclusive of voluntarily accepted extracurricular duty assignments, summer school and/or Extended School Year program), the unit member shall be compensated at his/her earned hourly rate. If the Agency closes schools on days that are assigned as workdays as a part of the 190 day work year, due to inclement weather or
other emergency, the Agency may extend the work year for an equal number of days without additional compensation to employees.

g. In order for additional hours/days outside of the regular workday or year to be compensable, a management official must have assigned same in writing. Upon conclusion of the specified additional hours assigned, the unit employee may submit a written report of the work accomplished to the supervisor.

h. It is recognized that certain employees, i.e., counselors and media specialists, may be directed to perform work during the summer recess period that extends their duty year. In such instances, the employees shall be notified at least thirty (30) days in advance and will be paid at their wages-earned rate.

A detailed comparison of the proposed and existing language would be confusing, since the Employer’s proposal is for a substantial revamping of existing practice. Instead, I will highlight the proposed modifications.

The Employer would lengthen the workday from the current 7 hours and 15 minutes (including lunch) to 8 hours, which would consist of 7 hours and 30 minutes at the facility (including lunch, although the lunch period would be reduced from 40 to 30 minutes). In addition, teachers would normally be expected to work an additional hour either at or away from the facility, typically at home.

The effect of the expanded day on certain activities, such as faculty meetings, evening meetings, and summer school is specified.

In addition to lengthening the duty day and the workday, the Employer would lengthen the school year by three days, two of them teaching days. The proposal addresses other issues associated with the length of the school year such as rescheduled days (for example because of inclement weather), time for setting up and closing down classrooms at the beginning and end of the school year, and notice to counselors and media specialists who may be called upon to work beyond the normal school year.

* * *

The Association opposes the proposed changes, except that it would lengthen the duty day to 7 and a half hours (including a 40 minute lunch) in conjunction with its proposal quoted within under the heading Article 26 (although under the Association’s proposal the pertinent language would appear in Article 28, as under the predecessor agreement).

Specifically, the Association’s proposal for Article 19 (Article 15 under its numbering system) is as follows:
ARTICLE 15 (19)
DUTY DAY AND YEAR

Section 1

A. The rates of pay provided for in this agreement are based on a duty day of no longer than 7 and one-half hours, inclusive of a 40 minutes duty-free non-compensated lunch period, and a duty year of no longer than 190 days. Employees shall be entitled to additional compensation at the wages earned hourly rate (or, at their election, compensatory time) for any additional duty hours or for any extension of the duty year, except as otherwise provided for in this agreement. The wages earned hourly rate is calculated by dividing the annual salary by 1298, which is the total number of compensated duty hours in the school year (6 hours, 50 minutes a day x 190 days).

Otherwise, contrary to the Employer, the Association would retain existing contract language, with one exception. Article 19 Section 3 (g) of the Employer’s proposal follows Article 28 Section g of the predecessor agreement (although it revises the language somewhat) in requiring that in order to qualify for additional compensation assignments outside the work day or year must be in writing. The Association would eliminate the requirement of a written assignment, which appeared for the first time in the 2005 - 2008 agreement.

Article 26 Sections 1, 2, 3 and 4; Employer Appendix F and Association Salary Matrix: Parties’ Positions

Although they appear at different places in the collective bargaining agreement, the language implementing salaries, and the salary schedules are best treated as being a single issue.

The Employer would replace Article 28 (Salary) of the predecessor agreement with a new Article 26. While not opposing the renumbering, nor the Employer’s proposed Sections 5 through 9 (which are therefore not quoted below) the Association’s pay proposal is substantially different from the Employer’s.

The Employer’s proposal must be read together with its proposed Appendix F (see below), setting forth specific salaries for various levels of experience and educational attainment.

In essence, the Employer’s proposal would replace the current salary system with a new and much lower salary matrix, under which employees would not receive the top rate until their 30th year of service. The Employer would hold harmless the current employees against a reduction in compensation by retaining them at their current Earned Hourly Rate (sometimes called “grandfathering” or “red circling”). Since the Employer would increase the length of the workday and the school year, current employees would receive a commensurate increase in total compensation, although not in hourly wage.

The Employer’s salary proposal is set forth below, although as mentioned, it must be read in conjunction with the Employer’s proposed Appendix F.
ARTICLE 26  
PAY AND BENEFITS

Section 1.  Salary.

a.  School Year 2011 – 2012 salaries for bargaining unit members (annualized over 12 months) will initially be set in accordance with the schedules found at Appendix F effective July 25 following the effective date of this agreement. These schedules will be adjusted as appropriate for any increase in locality payment effective with the first pay period of the calendar year as mandated for Federal employees in Puerto Rico in accordance with P.L. 111-84 (Non-Foreign Area Retirement Equity Assurance Act) plus COLA as applicable.

b.  In addition to any mandated increase in locality pay as described in subsection a. above, the salary schedules for bargaining unit employees will be increased by any general increase effective with the first pay period of the calendar year as mandated for Federal employees in Puerto Rico.

Section 2.  Pay Year.

a.  The pay year for permanent bargaining unit members on set work schedules (Full-time or Part-time) will begin on the 25th day of July each year and end on the 24th day of July the following year.

b.  Temporary employees will be paid for hours they have actually worked.

c.  Steps 2 through 30 of the salary schedules are annual step increases payable upon completion of one (1) year of service in the prior step.

   (1)  For full-time employees a year of service is defined as no fewer than 120 work days.

   (2)  For part-time employees, a year of service is defined as a minimum of 900 hours in a pay status at the prior step. Hours in a pay status are cumulative and will be tracked from pay year to pay year until the bargaining unit member completes the 900 hours required for advancement to the next step. Once a bargaining unit member advances to the next step, he/she must be in a pay status a minimum of 900 hours at the new step prior to being eligible for advancement to the next step.

   (3)  Full-time and part-time bargaining unit employees whose pay is spread over the pay year will have step increases effective as follows:

      (a)  Full-time employees:  On the first day of the pay year.

      (b)  Part-time employees:  At the beginning of the pay period following completion of 900 hours in a pay status at the prior step.
(4) For bargaining unit employees outlined in section 2. b. above, step increases will be effective the first day of the school year following completion of one year of service.

(5) Under no circumstances will employees receive more than one step increase per pay year.

Section 3. Pay Setting for Current Bargaining Unit Members.

Current bargaining unit employees, on the effective date of this Agreement, will be transitioned to the salary schedules at Appendix F at the beginning of the first pay year (July 25) following the effective date of this agreement according to the following procedures:

a. Employees will be placed in the pay lane commensurate with degree, or degree plus semester hours (or equivalent quarter hours), earned from a regionally accredited college or university.

b. Bargaining unit members will be transitioned, using their current earned hourly rate, (i.e., current School Year salary divided by 1231 hours) to the appropriate academic salary lane and step on the salary schedules at Appendix F. Step placement on the pay schedule will be at the step that most closely matches the employee’s earned hourly rate of pay. If the employee’s earned hourly rate falls between two steps, the employee’s pay will be set on the higher step.

c. If the bargaining unit employee’s earned hourly rate exceeds the top step of the appropriate lane on the pay scale, he/she will be placed in a saved pay status (full-time employee’s School Year salary is computed by multiplying the Earned Hourly Rate x 1520 hours). While on saved pay, employees will receive one-half of the annual increase for the top step of their respective pay lane until such point as the top step in the employee’s pay lane equals or exceeds the employee’s earned rate of pay or until the employee is moved to a position or pay lane that will accommodate his/her retained hourly rate of pay.

Section 4. Pay Setting After Implementation of the Agreement.

a. Prior experience for pay setting purposes will be accorded for the life of the Agreement as reflected on the matrix at Appendix Q.

b. New bargaining unit employees hired after the effective date of this Agreement will have their pay set according to the following:

(1) Employees will be placed in the pay lane commensurate with degree, or degree plus semester hours (or equivalent quarter hours), earned from a regionally accredited college or university.
(2) Pay will then be set according to their years of experience as follows: Credit for all years of previous DoDEA (DODDS and DDESS) or other creditable Federal civilian teaching experience, plus credit for a maximum of nine (9) years of non-federal teaching experience. The initial step placement of temporary (NTE) bargaining unit employees will not exceed step 6.

c. All bargaining unit employees will receive pay lane adjustments as follows:

(1) Pay lane adjustments will be made upon receipt by the Agency of an official copy of a transcript indicating course work completion or award of an advanced degree from a regionally accredited college or university. If the college or university does not identify the date course work was completed, bargaining unit employees may provide official grade reports or other appropriate official documentation from the college or university in conjunction with the transcript to establish the date on which course hours were completed and grade/degree was awarded.

(2) Pay lane adjustments based upon completion of “degree plus hours” (e.g., BA+ 15) means graduate semester hours completed after the award of an academic degree. Quarter hours will be converted to semester hours on a 5 to 3 basis (i.e., 5 quarter hours equals 3 semester hours). In determining pay lane adjustments based upon completion of “degree plus hours,” the graduate credits acquired must be in an employee’s certified field(s) and/or general education.

(3) Pay lane changes will be retroactive for pay purposes to the beginning of the pay period following award of the degree or completion of coursework as reflected on the official transcript(s), provided the employee submits the request for pay lane change and supporting transcript(s) within this time period, the pay lane change shall be effective at the beginning of the pay period following submission.

The Employer’s proposed salary Schedule is attached to this Report as Exhibit A below.

*   *   *

The Association’s corresponding language proposal, numbered as Article 28 in keeping with the predecessor agreement, is set forth below:

ARTICLE 28
SALARY

Section 1:

a. Retroactive to 11 August 2008, the salary schedules applicable to educators in the District of Columbia Public Schools shall be applied to all non-intermittent unit employees
for the life of this agreement, and during the period of any renegotiation of this agreement. Employees whose salaries exceeded the corresponding step of the District of Columbia salary schedule in the 2008-09, 2009-10, and 2010-11 school years shall be entitled to retain the salary previously paid.

b. Bargaining unit employees currently receive non-foreign COLA in addition to existing negotiated pay rates, and are eligible to receive locality pay when COLA is phased out pursuant to the Non-Foreign Area Retirement Equity Assurance Act of 2009 (N-FAREA). Accordingly, all rates of pay provided for by this agreement shall be supplemented by the applicable COLA rates, plus the locality pay rates provided for by the N-FAREA.

c. The rates of pay provided for in this agreement are based on a duty day of no longer than 7 and one-half hours, inclusive of a 40 minutes duty-free non-compensated lunch period, and a duty day of no longer than 190 days. Employees shall be entitled to additional compensation at the wages earned hourly rate (or, at their election, compensatory time) for any additional duty hours or for any extension of the duty year, except as otherwise provided for in this agreement. The wages earned hourly rate is calculated by dividing the annual salary by 1298, which is the total number of compensated duty hours in the school year (6 hours, 50 minutes a day x 190 days).

The Association’s proposed salary schedule is attached to this Report as Exhibit B, below.

**Appendix H: Parties’ Positions**

The Employer would add a new Appendix H to the collective bargaining agreement, which would read as follows:

**APPENDIX H**

**DEFINITIONS**

Addendum to the Agreement: A written memorandum of agreement in which the parties agree to change, delete or add to the provisions of this agreement.

Bargaining Unit Employee: A DDESS employee assigned to a position within the Puerto Rico professional bargaining unit as described in the unit certification at Appendix A and any subsequent additions to the unit.

Days: Calendar day(s) unless otherwise indicated as workday(s).

Duty Day: The period of time bargaining unit employees are required to be physically present at the work site.

Earned Hourly Rate: The rate of pay an employee “earns” for one hour of work. Earned Hourly Rate is established as a fixed “rate” of pay by dividing the School Year Salary of
a Full-Time employee by the number of hours (1520) the Full-Time employee works in a School Year.

Spread Rate of Pay: For an employee working a Full-Time work schedule, the “Annualized/School Year Salary” divided by 2087 hours. For an employee working a Part-Time work schedule, the “Annualized/School Year Salary” divided by the number of hours the employee works per pay period multiplied by the number of pay periods the pay will be spread during the pay year.

Annualized/School Year Salary: The employee’s EHR multiplied by the number of hours an employee is scheduled to work during the school year.

Full-Time Employment: An employee who regularly works a basic workweek of 40 hours Monday through Friday.

Part-Time Employment: An employee who works a regularly scheduled tour of duty less than 40 hours per week.

Classroom Teacher: All professional employees whose primary duties are to provide instruction, i.e., teachers, media specialists, and special education teachers.

* * *

The Association is willing to accept the Employer’s proposed definitions of “Addendum to the Agreement,” Bargaining Unit Employee,” “Days,” “Duty Day,” “Spread Rate of Pay,” and “Classroom Teacher.” It does not accept the proposed definitions of “Earned Hourly Rate,” “Annualized/School Year Salary,” “Full-Time Employment,” and “Part-Time Employment.”

Its most strenuous objection is to the definition of Earned Hourly Rate. The Employer would derive an employee’s Earned Hourly Rate by dividing the employee’s annual salary by 1520. The 1520 is obtained by multiplying the number of days in the school year (190) by the 8 hour work day it proposes. The Association would instead divide the annual salary by 1330. The 1330 figure is obtained by multiplying the school year (190) by 7, obtained from the 7.5 hours an employee is required to be at the facility minus the half hour unpaid lunch.

Of course, the smaller the denominator, the larger the Earned Hourly Rate. Earned Hourly Rate applies to additional work for which an employee is compensated on an hourly basis. So, under the Employer’s definition, employees who perform such additional services would be compensated at a lower hourly rate than under the Association’s definition.

Recommendations on the Remaining Issues and Rationale

There seems to be a consensus that additional instructional time, both in the form of a longer instructional day, and more instructional days over the course of the year, leads to improved student results. Likewise, there is general agreement that increased preparation time outside the classroom enhances the quality of
the instruction inside the classroom. Thus the trend over the last decade or so has been to longer instructional days, longer school years, and increased time for preparation and other professional duties as well.

Both proposals contemplate increasing the length of the work year from 187 work days under the predecessor agreement to 190 work days. Both proposals also anticipate a longer work day, although they differ as to the specific length and the configuration of that enhanced work day.

Not surprisingly then, I shall recommend increases in the duration of the work day and the number of work days comprising the work year. Before discussing my specific recommendations in this regard however, I shall digress for a few moments.

It seems appropriate to posit that an increase in the length of the work day and work year should be accompanied by a concomitant increase in compensation.

It is of course impossible to implement an increase in the work day or work year retroactively. As a practical matter, these increases cannot occur until the beginning of the 2011 - 2012 school year. The predecessor agreement expired at the end of the 2007 - 2008 school year. Thus it seems appropriate to me to consider the new agreement in two phases, since the new agreement must look both backward and forward.

Nearly three years have passed since the expiration of the predecessor agreement, with the current year nearly over at the time of issuance of this report. When a longer day and year are implemented in 2011 - 2012, it will already be the fourth year of the “new” agreement.

The Employer would not increase the salary schedules for the three “backward” years to be covered by the new agreement. In so proposing, it notes the President’s recent announcement of a pay freeze for federal employees, currently expected to last for two years. But these are two future years, not years already past. The President has not asked federal employees to return increases they have received over the course of the past three years.

Unlike the situation in this case, labor organizations representing most federal employees are legally precluded from bargaining over wages. The government determines and then announces the salary increases, if any, for the forthcoming year. The current parties have a different system for determining salaries, and therefore a different history and expectations. Historically, these parties have not been able to conclude a new collective bargaining agreement before the expiration of the prior agreement, and usually a new agreement has not been achieved until several years into its term. Their agreements have always provided retroactive increases covering the period from the expiration of the prior agreement through the time the new agreement was reached. This history removes the urgency of a deadline by creating the expectation that the salary agreement, when ultimately reached, will be implemented retroactively.

Given this history and expectation, it seems to me unfair to pull the rug out from under these employees by telling them that although most other federal employees have received raises covering the last three years, although and their costs of living (including health care costs) have been increasing, their salaries will be frozen for the last three years.
Further, at the risk of tipping my hand, I will be recommending a future freeze as well as a radical restructuring of the salary structure for new employees. I could not possibly propose such measures while simultaneously recommending zero increases over the course of the last three years.

Both parties propose substantial changes in the structure of the salary matrix, and I shall return to this shortly. Any significant changes in the salary structure are best implemented prospectively, since for nearly three years employees have been paid under the salary schedule in the predecessor agreement. History, as well as administrative convenience, commend that any salary adjustments looking back over the current and two prior years should be simple percentage adjustments to what the employees have already received.

In this regard, the magic number seems to be 3.0 percent. This is in accord with the amount the parties have typically agreed to for retroactive increases in past agreements. (See, for example, Article 28 of the predecessor collective bargaining agreement, providing for increases of 3.0 percent in most cases.) Of particular significance, the 3.0 percent figure likewise matches the recent increases provided to other DDESS teachers. It is not out of line with increases in the cost of living, or increases received by other federal employees, over the course of the past three years.

Accordingly, I recommend a three percent annual increase in salary for current and recently retired employees, for school years 2008 - 2009, 2009 - 2010, and 2010 - 2011, to be paid retroactively. This recommendation is to be implemented through the language set forth below, to be numbered as Article 26 Section 1A of the new agreement:

A. Retroactive to 11 August 2008, the salary schedule for all unit employees shall be increased annually by three (3) percent above the previous year’s salary schedule. These retroactive salary increases shall be effective for the 2008-09, 2009-10, and 2010-11 school years. These salary increases do not apply to intermittent employees.

As I have already hinted, I am recommending a prospective salary freeze, in keeping with the President’s plan for most federal employees. But unlike most federal employees, whose work year will not change, under my recommendation bargaining unit employees will be working a significantly longer work day and work year beginning with the 2011 - 2012 school year. For them, the freeze I recommend is a freeze in hourly compensation rate. Since the number of hours they will work in 2011 - 2012 and thereafter will increase, their total compensation will increase in proportion to the increased number of hours to be worked. To do otherwise would in effect be telling employees to work overtime for free.

For current employees, this means a one-time adjustment in their total compensation in 2011 - 2012, proportional to the increase in hours, so that their effective hourly rate will remain constant. Thereafter, neither salaries nor hourly rate would increase.

As noted earlier, both parties propose increases in the work day and work year, but the Employer’s proposed increases are more substantial. My recommendation adopts the Employer’s proposal in this regard. I believe this proposal will be advantageous to the students. The Employer proposal has the additional advantage of acknowledging a fact of educational life. A teacher’s day does not end when the final bell rings. Most teachers take lesson plans, tests to grade, papers to read, or other work home with
them. The Employer’s proposal for Article 19 Sections 1, 2 and 3 incorporates the common expectation that teachers do homework too.

The Employer’s proposal also addresses administrative aspects of the enhanced workday, such as the effect on meetings. I recommend inclusion of these provisions as well as the Employer’s proposals for lengthening the work day and work year. In summary, I recommend inclusion of the Employer’s proposals for Article 19 Sections 1, 2 and 3.

One particular paragraph in Article 19 Section 3 deserves further comment. Section 3 (g) of the Employer’s proposal retains language from the predecessor agreement, which the Association vigorously urges should be deleted. The paragraph provides that in order for extra work to be compensable, there must be a written assignment. The Association asserts that administrators often orally suggest or request extra work in a way that sounds much like a directive, although not in writing. As I understand it, there is currently an arbitration case pending over this issue.

While I of course express no view about the proper outcome of a pending grievance, it may well be that an arbitration award (or a settlement by the parties) will clarify the meaning of this paragraph. In any case, it seems to me likely that issues about extra work will diminish in the coming school year, in view of the lengthened work day and work year included in my recommendations. Finally, the language at issue was included in the previous agreement at the Employer’s behest, perhaps in return for some other concession, and as part of the delicate overall accommodation that resulted in a collective bargaining agreement. I hesitate to impose myself in a way that could make achieving that delicate balance more difficult in future negotiations. For these reasons, my recommendations include the retention of this language from the prior collective bargaining agreement.

While I have recommended expansion of the work day and the work year, it is only fair that the teachers and other professionals be compensated for the additional hours they will be called upon to work, although the hourly rate for those hours will not increase. The Employer’s proposed definition of Earned Hourly Rate is in keeping with the recognition, discussed above, that a teacher’s day does not end when he or she drives home. For consistency, I recommend the adoption of the Employer’s proposed Definitions for Appendix H, and in particular its definition of Earned Hourly Rate, rather than the Association’s Wages Earned. Both Earned Hourly Rate and Wages Earned are computed by dividing the employee’s annual salary by the number of hours of work in a standard year. Since the Employer’s definition is based on a larger number of hours (that is, a larger denominator), the Employer’s computed Earned Hourly Rate is a lower number than the Association’s Wages Earned. For the 2011 - 2012 school year, salaries are to be adjusted in proportion to the increase in total hours of the work year, so that the Earned Hourly Rate remains constant, and is in effect frozen for that year and thereafter. The Earned Hourly Rate is also used to fix the rate a teacher is to receive for extra work beyond the normal work day or work year.

As already mentioned, in order to avoid confusion, I recommend that the term “Earned Hourly Rate” be used throughout the contract, and substituted for “Wages Earned” wherever that term appeared in the predecessor agreement.

This brings me to the final point in this discussion, the specific salary schedules for 2011 - 2012 and thereafter. The Association would adopt the salary schedule from the District of Columbia, while the Employer would adopt the schedule for DDESS schools in the continental U.S. (These employees are represented, but not by the same labor organization as the current employees.) It is not surprising that the
D.C. schedule is the higher of the two, by a substantial margin. For example in 2011-2012, the D.C. schedule calls for a starting (Step 1) rate for a teacher with a Master’s degree of $54,975 while the comparable DDESS rate (Step 0) is $46,370. Under the D.C. agreement the top of the scale for a teacher with a Master’s is $95,366 although there are three additional longevity steps that ultimately increase the Master’s salary to $100,839. Under the DDESS agreement, the maximum rate for a teacher with a Master’s degree, at Step 29, is $85,201. Furthermore, as the Step count indicates, it takes 15 more years to reach the top salary under the DDESS agreement than under the D.C. agreement.

In support of its position, the Association emphasizes history. Prompted by a 1950 statute suggesting comparability to the District of Columbia, the parties in their first collective bargaining agreement in 1976 adopted the D.C. salary schedule. In 1978 Congress mandated that DDESS salaries in Puerto Rico track those in the District of Columbia. Of course, this is no longer the case, and if it were, the issue of salaries would not be on the bargaining table. In 1994 Congress changed the statutory language to provide that the Secretary of Defense “may” provide for “incidents of employment” that are “similar” to those for comparable positions in the District of Columbia. The Employer argues that this provision applies to certain terms and conditions other than salaries. In any case, use of the permissive (“may”) indicates that the parties are not compelled to tie their salary schedule to that of the D.C. collective bargaining agreement. Indeed, the parties themselves have departed from the D.C. schedule in their most recent collective bargaining agreement.

Other than the historical connection, there is little to commend the District of Columbia as a point for comparison. Washington D.C. and San Juan are separated by about 1500 miles of ocean. The two locations are dissimilar in climate, culture, history and demographics. There is no compelling reason that salaries for DDESS employees in Puerto Rico should follow those of employees in the District of Columbia.

From the Employer’s standpoint, a salary schedule based on DDESS salaries elsewhere has two advantages: administrative convenience, and more importantly, substantial cost savings. In part, this is accomplished by the expansion of the schedule from the current 22 steps to 30 steps. (Although the top step is Step 29, the matrix begins with Step 0 rather than the current Step 1.)

I have decided to recommend adoption of the Employer’s proposed salary schedule, commencing with the 2011-2012 school year, with certain modifications.

Lately each day’s news report brings stories of budget deficits, and plans to curtail spending. The current operation is not immune. Adoption of the Employer’s proposed salary matrix will produce cost savings to the Employer for decades, particularly as senior teachers at the top of the salary schedule retire and are replaced by lower paid new hires at the bottom of a lower schedule. Such savings will more than offset the cost of the retroactive increases I have recommended for the first three years of the new contract’s term. Indeed, without those increases in the first years of the contract, I could not conscientiously recommend adoption of the Employer’s proposal for the remainder of the contract term.

Of course, no one suggests that the current teachers should suffer salary reductions when a new, lower salary schedule is implemented. It is therefore necessary to “grandfather” or “red circle” them, and I have included language for this purpose. As I have already indicated, these employees should have their 2011-2012 salaries adjusted in order to keep their Earned Hourly Rate constant as the work day and work year
are both extended. After the adjustment is calculated, they should be held harmless or “grandfathered.”

I recognize that this creates a two tiered wage structure, which can engender friction within the bargaining unit between senior and junior employees. This is a potential downside to my recommendation that I need to acknowledge.

Specifically, my recommendation is that the Employer’s salary proposals be implemented on a prospective basis. That is, the Employer salary schedule set forth in Exhibit A is to become effective for the forthcoming (2011 - 2012) school year. The Employer’s language proposals for Article 26, set forth above, are also to be incorporated in the new agreement. These are not to be applied retroactively, however, so that no current or recently retired employee is to have his or her compensation adversely affected by the changes. In addition current employees shall have their compensation adjusted for 2011 - 2012 so as to maintain their Earned Hourly Rate in conjunction with the increase in the school day and school year. Thereafter, they are to be held harmless, despite the implementation of a new salary schedule.

**Recapitulation**

I recommend no change in Article 7 Section 5 (h) other than minor housekeeping updates.

I recommend adoption of the Employer’s proposals for an expanded school day and school year, through inclusion of its proposed Article 19 Sections 1, 2 and 3.

I recommend annual three percent salary increases retroactively for school years 2008 - 2009, 2009 - 2010 and 2010 - 2011. Current teachers shall have their compensation adjusted for school year 2011 - 2012 by applying their Earned Hourly Rate to the increased number of annual hours. Thereafter these employees are to be held harmless, and the Employer’s proposed salary schedule (Appendix F) and language proposals for Article 26 Sections 1, 2, 3 and 4 are to be implemented prospectively.

I recommend adoption of the Employer’s proposed definitions as Appendix H.

Issued April 15, 2011

[Signature] Matthew H. Frankenburg