

**STATE OF MICHIGAN
EMPLOYMENT RELATIONS COMMISSION
LABOR RELATIONS DIVISION**

In the Matter of:

ST. JOSEPH COUNTY INTERMEDIATE SCHOOL DISTRICT,
Public Employer-Respondent in MERC Case No. C15 L-157/Hearing Docket No. 15-062876,
Public Employer-Charging Party in MERC Case No. CU16 A-003/Hearing Docket No. 16-001868,
Public Employer in MERC Case No. UC15 L-021/Hearing Docket No. 16-002943,
Public Employer in MERC Case No. UC15 L-025/Hearing Docket No. 16-002945,

-and-

ST. JOSEPH COUNTY INTERMEDIATE EDUCATION ASSOCIATION,
Labor Organization-Charging Party in MERC Case No. C15 L-157/Hearing Docket No. 15-062876,
Labor Organization-Respondent in MERC Case No. CU16 A-003/Hearing Docket No. 16-001868,
Petitioner in MERC Case No. UC15 L-021/Hearing Docket No. 16-002943,

-and-

SOUTHWESTERN MICHIGAN EDUCATION ASSOCIATION/
MICHIGAN EDUCATION ASSISTANTS ASSOCIATION,
Petitioner in MERC Case No. UC15 L-025/Hearing Docket No. 16-002945.

APPEARANCES:

Thrun Law Firm, P.C., by Martha J. Marcero, for the Public Employer

White, Schneider, PC, by Erin M. Hopper and Colline DeVries-Burd, for the Associations

DECISION AND ORDER

On August 24, 2017, Administrative Law Judge Travis Calderwood issued his Decision and Recommended Order in the above matter finding that Respondents have not engaged in and were not engaging in certain unfair labor practices, and recommending that the Commission dismiss the charges and complaints. Further, the ALJ found that the position at issue in MERC Case No. UC15 L-021 should be included in the bargaining unit and recommended that the Commission grant the unit clarification petition. The ALJ found that the position at issue in MERC Case No. UC15 L-025 should be excluded from the bargaining unit and recommended that the Commission dismiss the unit clarification petition.

The Decision and Recommended Order of the Administrative Law Judge was served on the interested parties in accord with Section 16 of the Act.

The parties have had an opportunity to review the Decision and Recommended Order for a period of at least 20 days from the date of service, and no exceptions have been filed by any of the parties.

ORDER

Pursuant to Section 16 of the Act, the Commission adopts the recommended order of the Administrative Law Judge as its final order.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

_____/s/
Edward D. Callaghan, Commission Chair

_____/s/
Robert S. LaBrant, Commission Member

_____/s/
Natalie P. Yaw, Commission Member

Dated: November 2, 2017

**STATE OF MICHIGAN
MICHIGAN ADMINISTRATIVE HEARING SYSTEM
EMPLOYMENT RELATIONS COMMISSION**

In the Matter of:

ST. JOSEPH COUNTY INTERMEDIATE SCHOOL DISTRICT,
Respondent in Case No. C15 L-157; Docket No. 15-062876-MERC,
Charging Party in Case No. CU16 A-003; Docket No. 16-001868-MERC,
Public Employer in Case No. UC15 L-021; Docket No. 16-002943-MERC,
Case No. UC15 L-025; Docket No. 16-002945-MERC,

-and-

ST. JOSEPH COUNTY INTERMEDIATE EDUCATION ASSOCIATION,
Charging Party in Case No. C15 L-157; Docket No. 15-062876-MERC,
Respondent in Case No. CU16 A-003; Docket No. 16-001868-MERC,
Petitioner in Case No. UC15 L-021; Docket No. 16-002943-MERC,

-and-

SOUTHWESTERN MICHIGAN EDUCATION ASSOCIATION/
MICHIGAN EDUCATION ASSISTANTS ASSOCIATION,
Petitioner in Case No. UC15 L-025; Docket No. 16-002945-MERC.

APPEARANCES:

Thrun Law Firm, P.C. by Martha J. Marcero, for the Public Employer

White, Schneider, PC, by Erin M. Hopper and Colline DeVries-Burd, for the Associations

**DECISION AND RECOMMENDED ORDER
OF ADMINISTRATIVE LAW JUDGE ON CONSOLIDATED CASES**

Pursuant to the Public Employment Relations Act (PERA), 1965 PA 379, as amended, MCL 423.201 *et seq.*, these consolidated cases were assigned to Administrative Law Judge Travis Calderwood, of the Michigan Administrative Hearing System, acting on behalf of the Michigan Employment Relations Commission (Commission). The following findings are based upon the entire record, including exhibits and the transcript of hearings held on March 28, May 2, and May 9, 2016, as well as post-hearing briefs filed by the parties on or before August 22, 2016.

Unfair Labor Practice Charges, Unit Clarification Petitions and Procedural History:

On December 7, 2015, the St. Joseph County Intermediate Education Association (“IEA”) filed Case No. C15 L-157; Docket No. 15-062876-MERC, against the St. Joseph County Intermediate School District (“Employer” or “ISD”), alleging that the ISD violated Sections 10(1)(a) and (e) of PERA when it unilaterally removed Speech Therapist and Early Childhood Non-Classroom Special Education teacher positions from the IEA’s existing bargaining unit, and reclassified or retitled the positions as Early Childhood Speech/Language Therapist and Early Childhood Program Support Specialist, respectively, and when it posted said positions as vacancies outside of the unit at or near the end of the 2014-2015 school year. Coinciding with the filing of the unfair labor practice charge, the IEA, also on December 7, 2016, filed a petition for unit clarification, Case No. UC15 L-021; Docket No. 16-002943-MERC, seeking to clarify its bargaining unit to include the positions of Early Childhood Speech/Language Therapist and Early Childhood Program Support Specialist as well as the newly created position of Great Start Readiness Program (“GSRP”) Lead Teacher.¹

On December 28, 2015, the Southwestern Michigan Education Association (“SMEA”), in representation of the bargaining unit known as the Michigan Education Assistants Association (“MEAA”), filed a petition for unit clarification, Case No. UC15 L-025; Docket No. 16-002945-MERC, seeking to clarify the MEAA’s bargaining unit to include the GSRP Associate Teacher position, first posted by the ISD on or near the end of the 2014-2015 school year.

On January 26, 2016, the ISD filed an unfair labor practice charge, Case No. CU16 A-003; Docket No. 16-001868-MERC, against the IEA, alleging that the Union violated Section 10(2)(d) of PERA by demanding to arbitrate the Employer’s staffing decisions and actions concerning the Early Childhood Speech/Language Therapist and Early Childhood Program Support Specialist positions.

All four proceedings were eventually consolidated and set for hearing. On March 24, 2016, a pre-hearing conference was held with the parties. On March 28, 2016, and again on May 2, and 9, 2016, the parties appeared for an evidentiary hearing before the undersigned in Lansing, Michigan. Post hearing briefs were filed by the parties by August 22, 2016.

Facts:

The ISD, located in St. Joseph County, operates the special education services for its nine local K-12 constituent districts.

The IEA represents a bargaining unit that is comprised of the ISD’s state-approved special education certified personnel and along with the ISD is the signatory to a collective bargaining agreement effective July 1, 2015, through June 30, 2018. Article II, the Recognition Clause of that agreement, provides:

¹ At the onset of the hearing on March 28, 2016, the IEA withdrew its claim for the GSRP Lead Teacher.

The Board recognizes the St Joseph County Intermediate Education Association as the exclusive bargaining representative, as defined in Section II of Act 379 of the Michigan Public Acts of 1965, for all full-time and regularly employed part-time (half-time or more) state-approved special education certificated personnel such as; social workers, psychologists, speech therapists, occupational therapists, and physical therapists, and other professional staff servicing special education employed by the St. Joseph County ISD under annual contract. This excludes all supervisory (including directors, managers, coordinators, or supervisors), and administrative, clerical, custodial, maintenance personnel, assistant teachers, contracted services staff, staff employed to serve more than one (1) agency, staff employed under a contract of temporary employment for ninety (90) workdays or less, (substitutes), nurses, summer employees not otherwise in this bargaining unit, consultant for the gifted, career education consultant, computer specialists, co-op teacher, any staff employed in general education, and all other employees.

Article V of the IEA contract sets forth the agreed-upon grievance procedure and provides in the relevant part:

Section 1: Definition of a Grievance. A claim by a bargaining unit member or the Association that there has been a violation of this contract may be processed as a grievance. Grievance procedure shall not apply to: (1) dismissal or discipline of any certified teacher, (2) evaluation, (3) assignment of staff, (4) any provision so the Agreement which contain any express exclusion from this procedure, (5) any matter subject to the jurisdiction of the State Tenure Commission or other State or Federal administrative agency, (6) layoff or recall, and (7) prohibited subjects of bargaining.

E. Formal Level 4 - Either the Board of Education or the Association has the right to submit a grievance to arbitration if the resolution is not reached at Formal Level 3. Only the Association may request arbitration. The following procedures shall be followed:

5. Powers of the Arbitrator:

- a. Shall not alter nor modify the terms of this Agreement.
- b. Shall not render a decision nor rule on any provision expressly excluded from the grievance procedure.

The SMEA represented MEAA bargaining unit is comprised of the ISD's non-probationary special education teacher assistants, both full and part-time positions. The SMEA and the ISD are signatories to a collective bargaining agreement effective July 1, 2014, through June 30, 2017. Article 2, the Recognition Clause, of that contract provides:

The Southwestern Michigan Education Association (SMEA) has been certified by the Michigan Employment Relations Commission as the collective bargaining representative for the bargaining unit called the Michigan Education Assistants Association (MEAA). The SMEA has designated MEAA as its representative for the purpose of contract administration. The BOARD recognizes the Association as the sole and exclusive collective bargaining representative of all full time and part-time non-probationary Assistant Teachers, but excluding supervisors, professional, substitutes and/or other employees of the St. Joseph County ISO for the purpose of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment. "Employee" refers to a bargaining unit member.

GSRP and Head Start

The GSRP is a state-funded program for four-year old children at risk of school failure who are not yet in special education. The Michigan Department of Education ("MDE") through its Office of Great Start, administers the GSRP by way of the GSRP Implementation Manual ("Manual"). The GSRP is provided for under the State School Aid Act Public Act 94 of 1979, MCL 388.1601 *et seq.* Under Section 32d of that Act, only ISD's are eligible to receive grant funds and serve as fiduciary for the GSRP within its geographic area. Prior to January of 2016, the ISD did not operate its own GSRP classroom but rather provided services within the local districts' GSRP classrooms. As of the hearings in these matters, all but one of the local districts within the ISD operated GSRP classrooms.

A GSRP classroom has different physical requirements than a traditional special education classroom. The classroom, while physically structured for preschoolers, includes toys that are "intentional" and "realistic" and not for make believe play. According to testimony provided at the hearing, even lunch has a specific instructional focus required by the Manual with students and adults eating together "family style."

In GSRP the poorest child is admitted first. However, a child who has qualified for special education and has an Individualized Education Plan ("IEP") that includes an inclusive setting receives priority enrollment regardless of household income levels. GSRP classes are designed to operate on a four-day week with students while the fifth day, Friday, is reserved for professional development, planning and development amongst just the staff.

The Manual requires that GSRP classes maintain a 1:8 adult/child ratio at all times with a maximum number of three adults and eighteen children.² Pursuant to the Manual, a GSRP teaching team consists of a Lead Teacher and possibly an Associate Teacher depending on the number of students; a third adult must be consistently present where there are more than sixteen students enrolled in the class.

² The Respondent introduced a portion of the Classroom Requirements Section of the Implementation Manual, with a revision date of August 2015, at hearing.

The Manual also specifies that the teaching team must be supported actively by an Early Childhood (EC) Specialist; however the Lead Teacher and EC Specialist cannot be the same individual.

The Manual sets out specific credentialing for the Lead Teacher and Associate Teacher as well as the EC Specialist. Lead Teachers must hold either a valid Michigan teaching certificate with an Early Childhood Education or Early Childhood-General and Special Education endorsement. The Associate Teacher must have an associate's degree in early childhood education or child development or hold certification as a child development associate earned after completing 120 hours of instruction in certain content areas. It appears that within the local district ran GSRP classrooms the Lead Teachers and Associate Teachers were employed directly by that local district and not through the ISD.

With respect to the EC Specialist, the Manual, as was in effect August 2015, required that the ISD ensure that there was at least one EC Specialist for a maximum of fifteen GSRP teaching teams.³ Similar to the Lead Teacher and Associate Teacher positions, the EC Specialist can be employed either through the ISD or the locally operated districts. The Manual requires EC Specialist positions to have a graduate degree in early childhood education or child development, five or more years of relevant job experience and specific professional development. Since at least 2005, the ISD has employed staff members as EC Specialists; however, these positions are not part of any bargaining unit. According to Deana Strudwick, the ISD's Executive Director of Special Education and Early Childhood, the EC Specialist's purpose within the GSRP program is to assess the quality of the GSRP via a benchmark tool and provide support to the teaching team; the position does not provide direct instruction to enrolled students. Strudwick described the EC Specialist as a "teacher of teachers, not a teacher of children." This position's assessments of the GRSP teaching teams and programs are used for evaluation purposes of the individual teacher positions as well.

The Head Start program is a federally funded preschool program somewhat similar to GSRP in so far as it provides preschool services to lower income children. Like GSRP, the Head Start program operates on a four-day week with students, with the fifth day, Friday, reserved for professional development, planning and development amongst just the staff. Both Head Start and GSRP can be utilized at the same time to create a GSRP/Head Start "blended" classroom. The Manual requires that for these blended classrooms, all "Head Start and GSRP policies and regulations must be applied to the blended slots, with the highest standard from either program adhered to." According to Strudwick, at the time of these proceedings, there were four "blended" Head Start/GSRP classrooms and several Head Start only classrooms being operated throughout the ISD by its local districts. The record does not indicate that the ISD itself operates any Head Start classrooms, "blended" or otherwise.

³ Under Rule 172(2)(h) of the Commission's General Rules, R 423.172, 2002 AACCS; 2014 AACCS, I take notice of the Early Childhood Specialist Section of the Implementation Manual in effect August 2015 and available through the Michigan Department of Education's website.

Special Education

As stated herein, the ISD operates the special education programs for the nine constituent school districts within the County. Examples of those programs or services include speech therapy, physical therapy, occupational therapy, and evaluation of student eligibility for special education services, among others. The ISD also provides teacher consultants to support students within local districts that qualify for assistance because of hearing impairments or visual impairments as well as students that fall on the autism spectrum disorder. The ISD operates three classrooms for special education students in Mendon Community Schools and one classroom each in Three Rivers Community Schools and Sturgis Schools. Additionally, the ISD runs its own school called Pathfinder Education Center which is comprised of nine classrooms, attended by students with severe disabilities. Of the roughly 180 total individuals employed at the ISD, approximately 150 employees would be considered working in the area of special education.

The ISD has employed individuals in the Non-Classroom Early Childhood Special Education (“ECSE”) Teacher positions for some time. These positions are part of the IEA’s bargaining unit. According to Strudwick, the Non-Classroom ECSE Teacher position focuses on individual children with IEPs within Head Start. Former Non-Classroom ECSE Teacher Steffanie McConn indicated through her testimony however that she was not limited to providing services within the Head Start program but in fact provided services to students with IEP’s in several locally operated GSRP classrooms; it is not clear whether those classrooms were “blended” classrooms or GSRP only. Nonetheless, it is clear that the Non-Classroom ECSE, in whatever forum they work, are providing special education services to students who are on IEPs, and that the position’s focus is student centered and not on the program, whether GSRP, Head Start, or both.

The ISD’s job description for the Non-Classroom ECSE Teacher positions provides under the section entitled “Position Goal” the following:

To provide learning opportunities and experiences to students ages 3-5 from communities throughout St. Joseph County ISD. Varying disabilities include severe multiple impairment, severe mental impairment, trainable mental impairment, educable mental impairment and autism. The goal of the teacher is to help the students achieve the maximum level of functional independence possible within their capabilities, though development of a program that meets the students’ and families’ needs.

The job description requires that the Non-Classroom ECSE Teacher possess a current Michigan Teacher’s Certificate with Early Childhood Special Education Approval.

Also employed by the ISD and represented by the IEA is the position of Speech Therapist. The ISD’s Job Description for Speech Therapists provides as that position’s goal:

The speech and language therapist is the professional primarily responsible for the speech and language services for students with communication disorders between the ages of birth through 26. This includes evaluation of students with suspected or identified communication disorders, and the development, management, and coordination of speech and language services. The speech and language therapist has the expertise to make decisions regarding the student's communication services, but may not be the person to make all the decisions or provide all the services to eligible students with disabilities. Decisions regarding a student are based on the multidisciplinary team's evaluation.

Speech and language therapists are required to perform duties other than direct services that are essential to the appropriate management of each student.

The job description requires that the Speech Therapist position possess a Master's Degree in Speech/Language Pathology as well as a Certificate of Clinical Competency or eligibility for Clinical Fellowship Year. The ISD's Speech Therapists typically work in a "pull-out" therapy model where students on their caseload are removed from the classroom and receive speech therapy, either individually or in small groups, pursuant to their respective IEPs. These speech services are reimbursable under Medicaid and the Therapists are responsible for filling out the proper paperwork. Testimony provided at hearing indicated that Medicaid billing could take as little as an hour a week to several hours or more. The Speech Therapist's other duties include, but are not limited to, the identification and diagnoses of speech and language impairments, processing referrals, and making referrals. Speech Therapists work Monday through Friday and on occasion attend Professional Learning Committee (PLC) meetings with other Speech Therapists.

The ISD employs an Early On Speech Therapist, Lynn Shugars, who provides speech and language services from birth to three years old throughout the entire ISD. This position is also represented by the IEA. Services are provided exclusively within the child's home and the services are reimbursable through Medicaid. The Early On Speech Therapist is expected to work with the students on their caseload Monday through Friday. Prior to taking her current role, Shugars testified that during the 2013-2014 and 2014-2015 school years she was paired with Non-Classroom ECSE Teacher McConn, at GSRP, Head Start and special education classrooms in Sturgis School District. In that role, Shugars provided services to the Head Start and GSRP students by way of a "push-in" model, where she would interact with students in the classroom as a group, regardless of whether the individual students were covered by IEPs.⁴

The ISD's special education services also include the position of Level 5B Assistant Teacher represented by the SMEA. This position works directly with students with severe disabilities in segregated facilities. Their job is primarily to keep students safe and help with basic physical needs such as feeding, toileting, suctioning, tube feeding and adjustments in a wheelchair.

⁴ It is not clear whether Shugars was also providing services as an Early On Speech Therapist at this time or whether she was managing her own caseload of students with IEP's as well.

The position requires a high school diploma along with an associates degree or the completion sixty (60) college credits. This assistant follows the direction of the classroom teacher and does not operate independently.

Pre-School “Pilot Program”

The ISD’s pre-school “pilot program” as it existed at the time of the evidentiary hearings was multi-faceted and incorporated both an ISD run GSRP classroom as well as a shift in the way the ISD provided some services to certain locally run GSRP or Head Start classrooms.

Strudwick testified that the ISD first began to consider operating a GSRP at the ISD level in 2013-14. In November of 2014, three local district superintendents contacted Strudwick about moving locally run GSRP to ISD operated GSRP. Strudwick testified that around this time she spoke repeatedly on this issue with local district superintendents, local GSRP teachers and associate teachers, and other ISD staff, including Non-Classroom ECSE Teachers, special education teachers, and occupational and physical therapists. Between November of 2014 and April of 2015, Strudwick presented at or met with several local districts boards regarding GSRP. It is not clear from the testimony how many, if any, districts were preparing to have the ISD assume control of their GSRP programs.

On March 16, 2015, Strudwick gave a PowerPoint presentation before the ISD Board of Education which covered, among other things, the ISD’s plans for its pre-school “pilot program.” Strudwick testified that she intentionally referred to the program as a “pilot program” because:

[T]hat word choice was based on my experience in helping people make change, knowing that it's hard when we're comfortable doing things the way that we always do them. And so that was why it was called the preschool pilot. It was understandable and tended to produce less anxiety.

Also in April of 2015, bargaining between the IEA and the ISD began over a successor contract. During an April 28, 2015, bargaining session, ISD Superintendent Barbara Marshal informed the IEA that the ISD would not be bargaining over inclusion of the pre-school “pilot program” employees into the IEA. Present at that time for the IEA was Vice-President Christa Conroy, McConn, who was the IEA’s Secretary, and IEA member and Non-Classroom ECSE Teacher Sheryl Happel.

Sometime in May 2015, Strudwick worked with Lynn Shughars and others to draft the Early Childhood Speech Therapist job description and job posting for the ISD’s pre-school “pilot program.” Shughars produced at hearing an undated draft of the job description with a blank space for the “terms of employment.”

On or around May 11, 2015, job postings for the Early Childhood Speech Therapist, GSRP Lead Teacher, GSRP Associate Teacher and Early Childhood Program Support Specialist were sent to all ISD employees by email as well as posted on the ISD’s website.

Each of those postings clearly stated that the “Terms of Employment” were “To be determined based on the Non-union Conditions of Employment.” Each description also identified that the position would be part of the “Pilot Preschool Program.”

As explained above, the GSRP Associate Teacher is a position required by the Manual. The ISD’s Job Description for this position mirrors the Manual’s educational requirements. Like the EC Specialist, this position is general funded through the state’s GSRP grant. The Associate Teacher operates as a part of the GSRP teaching team and possesses instructional as well as planning responsibility, both of which it is expected to exercise independent of the Lead Teacher.

The EC Speech Therapist position, while working within the ISD’s pre-school “pilot program” and its related GSRP classrooms, is not a position required under the Manual. This position, according to Strudwick’s testimony, operates very differently from the traditional Speech Therapists the ISD employs as part of its special education services. On the onset, the funding sources for the two positions are different as the Speech Therapist is funded through special education dollars and also receives reimbursements through Medicaid while the EC Speech Therapist is funded through general education dollars received from the GSRP state grants. Additionally, the EC Speech Therapists follows the “push-in” model of providing services wherein they spend two hours a day in various GSRP classrooms part of the “pilot program” interacting with the entire class as opposed to individual therapy sessions. According to Strudwick, the EC Speech Therapists are there to support the GSRP teaching team to develop an environment and schedule for overall language development for all students, regardless of special education eligibility. The position requires the same education requirements as the Speech Therapist along with similar duties, including but not limited to the identification and diagnoses of speech and language impairments and processing referrals.

The EC Program Support Specialist is a position also operating within the ISD’s preschool “pilot program” and related GSRP classrooms that is not required under the Manual. Strudwick testified that these individuals spend two hours a day in the various classrooms in the “pilot program” and interact directly with children. The position’s responsibilities and roles include supporting the teaching team in implementing best practices of early childhood instruction as well as supporting individual students with IEPs and acting as the teacher of record for such students. Similar to the EC Specialist, this position does provide instruction to the GSRP Lead Teacher but does not directly participate in the program’s assessment or the teacher’s evaluation. This position, like the EC Specialist, is GSRP grant funded with general education funds. Strudwick, when comparing the EC Program Support Specialist to the Non-Classroom ECSE Teacher testified that the Specialists work at a “higher level” in so far as they are expected to possess the same program level knowledge as the GSRP teaching team while Non-Classroom ECSE Teachers are not.

IEA Secretary McConnell agreed as part of her testimony that all ISD employees, including her, would have received the May 11, 2015, email with the job postings. McConnell testified however that while she might have received the email she did not open it because “I wasn’t applying for these positions.”

IEA Vice President Conroy testified that she saw a draft of the EC Program Support Specialist position in April of 2015 but could not testify as to its contents as it related to “terms of employment. Conroy did not testify as to whether she received or looked at the job postings sent to all ISD staff on or around May 11, 2015.

On May 14, 2015, the IEA and ISD bargaining teams agreed to and executed a document entitled “Negotiations Ground Rules – 2015.” Paragraph 12 of that document listed several “Prohibited Subjects of Bargaining” that would “not be discussed and will not be part of any proposals.” Included within that list was “[u]se of experimental or pilot programs.”

During the months of May and June, the ISD began interviewing applicants for the pre-school “pilot program” positions. Shughars was offered the EC Speech Therapist position but declined to accept.

In the summer of 2015, the MDE awarded the ISD additional GSRP student slots, above and beyond what had been requested as part of its grant request originally submitted in February of that year. Strudwick stated that the additional student slots allowed the ISD to run its own GSRP classroom independent of whether any local districts chose to participate.

On June 8, 2015, Conroy spoke with Strudwick regarding the EC Speech Therapist and other pilot positions. More specifically, Conroy testified that she questioned Strudwick as to why the positions were posted as non-union. According to Conroy, she had only just learned that same day that the positions at issue were being posted as non-union positions. The following day, in an email to Strudwick, Conroy requested that the job descriptions be revised to reflect their inclusion in the IEA.

On June 21, 2015, IEA President Gary Marx emailed Strudwick requesting information regarding the ISD’s claims that its newly created pre-school program was a “pilot program.” That email provided in the relevant part:

We are writing to you in reference to the new program you have described as a “pilot program.” It is our understanding that, based on the provisions of PERA, you have determined that positions assigned to this program are not required to be subject to collective bargaining. It is our understanding that, as of now, four new positions are being listed and some current union staff have been transferred into this program.

* * *

At this point in time, we are asking that you provide our Association with any documentation of your proposed pilot, including the length of the pilot program, the experimental materials being used, government grants that subsidize the salaries and/or materials being used in the pilot and any proof that you have that this is indeed a pilot program.

In addition, we would like to know of any actions that have been taken to convert current union positions to non-union positions.

On June 26, 2015, the IEA and the ISD agreed to and executed a successor contract replacing the then expiring agreement. That contract made no changes to the Recognition Clause and did not address the “pilot program” positions.

On July 29, 2015, Strudwick responded by memo to Marx’s June 21, 2015, email, denying that any current “union staff” had been transferred to the new program. Strudwick also revealed that the length of the new program “cannot be determined at this time.” That memo concluded with Strudwick stating:

No action has taken place to convert current union positions into non-union positions. The four positions are new to the ISD. Job descriptions were created for the purposes of this unique work. ISD employees working in the preschool pilot will work a different number of days than union staff...

On August 3, 2015, the IEA filed a grievance claiming that the ISD’s filling of positions for the pre-school “pilot program” violated the Recognition Clause of the parties’ contract. The grievance also challenged the ISD’s claim that the ISD’s program was a “pilot program.” On August 14, 2015, Superintendent Marshal denied the grievance claiming that under Section 15(3)(h) of PERA “all aspects, including staffing, of the pilot program are within the district’s sole authority.”

On August 28, 2015, the IEA escalated the grievance to the ISD’s Board of Education. A hearing before the Board took place on September 21, 2015. The Board denied the Grievance on October 19, 2015.

On December 4, 2015, the IEA filed its unit clarification petition with the Commission. On December 18, 2015, the IEA filed its unfair labor practice charge against the ISD as well as a Demand for Arbitration pursuant to the parties’ contract and listed the alleged violation as “Including but not limited to hiring non-union employees into Association positions.” On December 24, 2015, the SMEA filed its own unit clarification petition with respect to the GSRP Lead Teacher and GSRP Associate Teacher positions. On January 20, 2016, the ISD, through its attorney, filed a written objection to the IEA’s arbitration demand. On January 22, 2016, the ISD filed its unfair labor practice charge against the IEA asserting that the Union was attempting to arbitrate a prohibited subject of bargaining.

Discussion and Conclusions of Law:

The ISD, with respect to the IEA’s unfair labor practice charge and unit clarification petition argues: (1) that the charge is barred by PERA’s strict six-month statute of limitations; (2) that because the charge and unit clarification petition were filed after contract ratification both actions are barred; and (3) that regardless of the foregoing the subject matter of these actions centers on a “prohibited subject” of bargaining under Section 15 of the Act and therefore not

only can it not be found to have committed an unfair labor practice but also that its decisions with respect to the pilot pre-school program cannot be challenged.

Regarding the SMEA's petition to add the GSRP Associate Teacher to the MEAA bargaining unit the ISD claims the position does not share a community of interest with the other positions within the bargaining unit and that accretion would be inappropriate.

Case No. C15 L-157

The IEA claims in Case No. Case No. C15 L-157; Docket No. 15-062876-MERC, that the ISD violated Section 10(1)(e) of PERA with its actions regarding the EC Speech Therapist and the EC Program Support Specialist. The IEA claims that two positions are in fact simply retitled and/or reclassified Speech Therapist and Non-Classroom EC Special Education Teacher positions. Central to the IEA's ability to pursue its unfair labor practice charge is that it is timely filed and for the reasons set forth below I find that it was not.

Charges under PERA must be filed within six months of the alleged unfair labor practice. MCL 423.216(a). The Commission has consistently held that the statute of limitations is jurisdictional and cannot be waived. *Walkerville Rural Comm Sch*, 1994 MERC Lab Op 582, 583. The limitations period commences when the charging party knows or should have known of the acts constituting the unfair labor practice and has good reason to believe the acts were improper or done in an improper manner. *Huntington Woods v Wines*, 122 Mich App 650, 652 (1983). The statute of limitations is not tolled by the attempts of an employee or a union to seek a remedy elsewhere, including the filing of a grievance, or while another proceeding involving the dispute is pending. See e.g. *Univ Of Michigan*, 23 MPER 6 (2010). In situations where a public employer's governing body adopts a resolution materially changing a term or condition of an employment, the statute of limitations begins to toll on the date that the body passes such resolution, announces the change, or takes other actions finalizing the change, rather than the date the unilateral change is actually implemented. *City of Alpena*, 1982 MERC Lab Op 1210. The statute of limitations can also begin to run from the date the employer announces the change in working conditions and communicates the same to the union. *City of Detroit, Dep't of Water and Sewerage*, 1990 MERC Lab Op 400.

Here, uncontested testimony by Strudwick clearly establishes that, on or around May 11, 2015, job postings inclusive of job descriptions for the EC Speech Therapist, EC Program Support Specialist, GSRP Lead Teacher, and GSRP Associate Teacher were emailed to all ISD staff as well as posted on the ISD's website. Furthermore, these job descriptions clearly indicated that the positions were to be unrepresented positions and that each position's terms of employment were "To be determined based on the Non-union Conditions of Employment." While the IEA, and more specifically Conroy, claims it was not aware of the positions' exclusion from the bargaining unit until June 8, 2015, such a premise fails as all members of the IEA, including its Secretary and Vice-President, were provided notice of such. The fact that McConn chose to not look at the notices because she was not going to apply for any of them does not cure the defect.

It is clear to the undersigned that the IEA knew, or should have known, on or around May 11, 2015, what position the ISD was taking with respect to the EC Speech Therapist and EC Program Support Specialist as to inclusion or exclusion with its bargaining unit. Furthermore, the IEA is precluded from arguing ignorance as to the duties or responsibilities of those positions as certain unit members were involved with discussions regarding and the actual drafting of some, if not all the position descriptions. Accordingly, it is my conclusion that the IEA's charge should be dismissed as untimely as it was not filed until December 7, 2015, almost seven months after the job postings that occurred on or around May 11, 2015.

The preceding notwithstanding, dismissal of the IEA's charge would still otherwise be warranted as the record clearly shows that the EC Speech Therapist and EC Program Support Specialist positions, while similar to the Speech Therapist and Non-Classroom ECES Teacher, nonetheless remain different positions.

It is long-settled under PERA that bargaining unit composition is neither a mandatory subject of bargaining nor a matter of managerial prerogative, but rather under Section 13 of the Act, is a matter exclusively reserved to the Commission. See e.g. *City of Warren*, 1994 MERC Lab Op 1019. A public employer may not alter bargaining unit placement unilaterally or after bargaining to impasse, but must either acquire the union's agreement to changes in bargaining unit composition or obtain an order from the Commission by filing an unfair labor practice charge, or if appropriate, a unit clarification petition. *Livonia Pub Schs*, 1996 MERC Lab Op 479. Accordingly, it follows that an employer violates its duty to bargain under Section 10(1)(e) of PERA if it reclassifies a position and unilaterally removes it from the bargaining unit simply by changing its title. *City of St Clair Shores*, 1988 MERC Lab Op 485.

Here however, the record clearly demonstrates that the positions of EC Speech Therapist and Speech Therapist, while sharing certain similarities, are nonetheless not the same position. While both positions require the same education and clinical training and are both tasked with the identical functions of identifying and diagnosing speech and/or language difficulties as well as processing referrals for such services, the fundamental method or application of speech/language services as well as the target and/or focus of those services is markedly different. The Speech Therapist follows a traditional special education model whereby it provides individual or small group therapy to students or children subject to their respective IEPs – there is no indication that the position works with other teachers on methods to improve overall classroom speech. These services are provided on a “pull-out” approach with the students or students removed from classroom to receive therapy. The EC Speech Therapist works within the classroom with children regardless of IEP or special education status. Additionally, the EC Speech Therapist is responsible for working with the GSRP teaching teams to develop an environment and schedule to overall language development for all kids, regardless of special education eligibility. I find that the EC Speech Therapist is not simply a retitling of the Speech Therapist position and therefore would hold that the ISD did not violate PERA by refusing to recognize it as a part of the IEA's bargaining unit.

Similarly, the record demonstrates that the EC Program Support Specialist is not the same position as a Non-Classroom ECSE Teacher.

EC Program Support Specialists, like the EC Speech Therapists, focus not on the student or child as an individual but rather the program or classroom as a whole. While the EC Program Support Specialist does act as the teacher of record for a child with an IEP, the position's focus still appears to remain on the classroom as a whole. This is supported by the expectation that the position has the same program level knowledge, GSRP, as the GSRP Teaching Team. Contrary to this, the Non-Classroom ECSE Teacher provides support and services to students pursuant to an individual IEP irrespective of the GSRP program. I find that the EC Program Support Specialist is not simply a retitling of the Non-Classroom ECSE Teacher position and therefore would hold that the ISD did not violate PERA by refusing to recognize it as a part of the IEA's bargaining unit.

As I have determined that the IEA's charge was untimely filed and nonetheless would fail on the merits it is unnecessary to address the ISD's argument that contract ratification precludes the IEA from pursuing its charge.

Case No. CU16 A-003

Under Section 15 of PERA, a public employer has a duty to bargain in good faith with respect to mandatory subjects of bargaining, i.e., wages, hours, and other conditions of employment. However, with Public Act 112 of 1994, the Legislature explicitly sought to exclude certain subjects from what public school employers could be required to bargain by listing those topics considered prohibited subjects in Section 15(3) of PERA.⁵ Section 15(3)(h) includes as prohibited the following:

Decisions concerning use and staffing of experimental or pilot programs and decisions concerning use of technology to deliver educational programs and services and staffing to provide that technology, or the impact of those decisions on individual employees or the bargaining unit.

While PERA does not define the term "prohibited subject", the Court of Appeals in *Michigan State AFL-CIO v MERC*, 212 Mich App 472 (1995), aff'd 453 Mich 262 (1996), concluded that the Legislature's intent was to foreclose the possibility that a school district could be found to have committed an unfair labor practice by refusing to bargain over a prohibited topic or that a prohibited topic could become part of a collective bargaining agreement. Furthermore, under *Pontiac Sch Dist*, 28 MPER 34 (2014), the processing of a grievance over a prohibited subject to the level of arbitration violates PERA's duty to bargain in good faith.

The ISD argues that its staffing decisions regarding its pre-school "pilot program" were a prohibited subject of bargaining under Section 15(3)(h) of PERA and that the IEA's demand to arbitrate the inclusion of the EC Program Support Specialist and EC Speech Therapy positions violated section 10(2)(d) of PERA.

The parties seem to be in lockstep insofar as each believes that a determination of whether the ISD's pre-school program is a "pilot program" is essential to adjudicate the ISD's

⁵ Intermediate School Districts are identified as public school employers under Section 1(h) of PERA.

charge against the IEA. However, whether the pre-school program is a “pilot program” for purposes of Section 15(3)(h) of PERA is immaterial, as the underlying issue the Union was seeking to have arbitrated, i.e., “staffing” cannot include the issue of bargaining unit placement. The plain language of Section 15(3)(h) as it relates to the present issue prohibits bargaining over a public school employer’s decisions “concerning use and staffing of experimental or pilot programs.” As one of the primary tenets of PERA is the protection of public employees’ right to be represented, or not represented, by the bargaining representative of their choosing, any premise or argument that the Legislature’s intent was to include bargaining unit placement within the realm of staffing as a “prohibited subject” logically fails. Rather, I would conclude that “staffing” for purposes of Section 15(3)(h) refers to who and how many employees should be placed in certain positions. For this reason I find that the IEA did not attempt to arbitrate a “prohibited subject” and therefore did not violate Section 10(2) of PERA.

The ISD, in its post-hearing brief, alluded to the claim that because the issue the IEA sought to arbitrate, unit placement, was an issue which the Commission has plenary authority, the Union had sought to arbitrate an issue which the grievance procedure explicitly excluded from the definition of grievance – any subject matter subject to the jurisdiction of a State agency. However, whether a grievance is arbitrable in so far as it depends on the interpretation of contract language is nonetheless a decision for an arbitrator and not properly before the Commission. As such I would not hold that the IEA’s actions herein could give rise to a repudiation claim.

Case No. UC15 L-021

The IEA in Case No. UC15 L-021; Docket No. 16-002943-MERC, petitions the Commission, if unsuccessful in its unfair labor practice charge, to find that the EC Speech Therapist and EC Program Support Specialist share a community of interest with its bargaining unit and to place those positions within it.⁶ The ISD argues, similar to its defense of the IEA’s unfair labor practice charge, that the petitions were not timely filed and/or that the ratification of the parties’ contract on June 26, 2015, should preclude the IEA from pursuing its petition.⁷ With respect to the parties’ contract, it appears the ISD is arguing that: (1) the plain language of the contract explicitly excludes these positions by nature of their inclusion in a general education program, and (2) that the ratification of the agreement amounts to an agreement that the positions remain excluded. The preceding aside, the ISD also argues that inclusion of the two positions into the IEA unit is inappropriate as there exists no community of interest between the two positions sought and the IEA’s unit and that nonetheless the inclusion of the EC Program Support Specialist within the unit would be further inappropriate as the position possesses evaluative duties with respect to the GSRP classroom.

⁶ As stated earlier the IEA originally sought the position of GSRP Lead Teacher but later abandoned that request.

⁷ To the extent the ISD’s timeliness objection is based on the length of time from when the IEA learned of that the positions at issue would not be included in its bargaining unit to when it filed the petition, I reject such an argument as having no merit as PERA does not provide a specific time limit for filing a unit clarification petition in the same manner as it does for an unfair labor practice charge. Furthermore, as I have determined that the IEA knew or should have known the positions’ non-placement in its unit on or around May 11, 2015, I find that the filing of the instant petition on December 7, 2015, was filed within a reasonable time and therefore is timely filed.

A primary objective of the Commission is to constitute the largest unit which, in the circumstances of the particular case, is most compatible with the effectuation of the purposes of the law, and which includes within a single unit all employees sharing a community of interest. *Hotel Olds v State Labor Mediation Bd*, 333 Mich 382 (1952). As adhered to by the Commission, a unit clarification petition is appropriate for resolving questions in unit placement caused by the creation of a new position or recent substantial changes in the job duties of existing classifications. *Tuscola Co Rd Comm*, 27 MPER 57 (2014). As indicated above, I have already found that the EC Speech Therapist position and EC Program Support Specialist positions are newly created positions and therefore properly part of this petition.

When newly-created positions share a community of interest with the unit that seeks to include them, it is appropriate to accrete them to the existing unit rather than permit them to remain with a residual group of excluded employees. *Chelsea Sch Dist*, 1994 MERC Lab Op 268, 276. Community of interest is determined by examining a number of factors, including similarities in duties, skills, and working conditions, similarities in wages and employee benefits, amount of interchange or transfer between groups of employees, centralization of the employer's administrative and managerial functions, degree of central control of labor relations, common promotion ladders and common supervision. *Delhi Charter Twp*, 27 MPER 28 (2013).

The Commission has long held that a presumptively appropriate unit in a public school district includes all teachers, certified and non-certified, K-12 and adult education. *Saginaw Twp Community Schs*, 1998 MERC Lab Op 479, 486; *Alma Pub Schs*, 1996 MERC Lab Op 72, 74; *Hesperia Community Schs*, 1994 MERC Lab Op 972, 976. Additionally, the Commission has determined that pre-kindergarten teachers share a community of interest with K-12 teachers. *Hastings Area School District*, 17 MPER 55 (2004); *Farmington Pub Schs*, 1982 MERC Lab Op 1519.

Regarding difference in funding sources, the Commission, while recognizing such can potentially be a bargaining problem, said differences do not prevent the placement of a position in the unit where a community of interest is apparent. See *Beecher Community Schools*, 1989 MERC Lab Op 311.

Addressing first the position of EC Speech Therapist, it is clear that the requirements of education and clinical certification are identical to that of the Speech Therapist. Furthermore, the high-level view of both positions is the same, i.e., provide speech and language services to students and children. However, past that level the two positions take markedly divergent paths as the EC Speech Therapists provides services on a class-wide basis irrespective of IEP status though the “push-in” approach, is general funded, and does not seek Medicaid reimbursement, while the Speech Therapist, funded through special education dollars and reimbursed through Medicaid provides its services on an individual or small group basis based on IEP and through a “pull-out” method. Additionally, the two positions work dissimilar schedules with the EC Speech Therapist interacting with students and children four days a week and spending the fifth with the GSRP teaching teams while the Speech Therapist is spending time with children every day of the week. Nonetheless, the high-level function of the two positions, providing of speech and language therapy, remains the position’s primary focus and characteristic.

Furthermore, as shown above, the fact the EC Speech Therapist is working with children in a pre-school does not destroy its community of interest with others that work in the K-12 environment. Lastly, the fact that one is general funded as opposed to special education funded should not preclude accretion. Based on the similarity in education, skills and duties between the EC Speech Therapist and Speech Therapist positions, I find that a community of interest does exist between the two positions and therefore the IEA bargaining unit as well.

Similarly the EC Program Support Specialist also shares a community of interest with positions within the IEA as it too provides direct instruction to ISD students while also holding the same special education certification as the Non-Classroom ECSE teacher. Additionally, this position similar to the Non-Classroom ECSE Teacher, serves as the teacher of record for Special Education students in the pre-school pilot program. While the ISD attempted to show similarities between the EC Program Support Specialist and the EC Specialist, the overall function of the two positions could not be more divergent in so far as the first, in addition to providing support to the GSRP teaching teams, also had direct instructional interaction with the students while the latter, in the words of Strudwick, was a “teacher of teachers, not a teacher of children.” Furthermore, while the EC Program Support Specialist does in fact provide instruction to the GSRP teaching team, it does not actively participate in the program’s assessment or teachers’ evaluation, while the EC Specialist does. Lastly, the fact that one is general funded as opposed to special education funded should not preclude accretion. For these reasons, I find that the EC Program Support Specialist shares a community of interest with the IEA bargaining unit and further that its minor evaluative function with respect to the GSRP Teaching team should not preclude its inclusion in the IEA unit.

Accepting that the two positions sought by the IEA indeed share a community of interest with the unit’s other positions, it remains whether the parties’ contract, or more specifically the recognition clause, shall serve as a bar to accretion. The Commission has long held that where a classification or classifications have been historically excluded from an established unit, a question of representation is raised which cannot be resolved through the mechanism of a unit clarification petition. *Genesee Co*, 1978 MERC Lab Op 552. There, the Commission stated at 556:

Clarification is not appropriate, however, for upsetting an agreement of a union and employer or an established practice of such parties concerning the unit placement of various individuals, even if the agreement was entered into by one of the parties for what it claims to be mistaken reasons or the practice has become established by acquiescence and not express consent.

However, the next year, the Commission in *North Dearborn Heights School Dist*, 1979 MERC Lab Op 894, held that *Genesee Co*’s “contract bar” to unit clarification petitions will not serve to prevent a petition covering a new position. There, the employer opposed the accretion of the newly created position of school psychologist because the contract’s recognition clause explicitly excluded the position of psychological consultants – said consultants were independent contractors. The Commission reasoned that, but for the “contractual restrictions” the new position would have been accreted to the bargaining unit. Considering the employer’s position, the Commission, at 898 held:

The parties cannot exclude a bargaining unit position in the recognition clause of the collective bargaining agreement which does not exist at the time the agreement was entered into. Thus, we conclude that the position of school psychologist is not excluded from the unit by reason of the recognition clause of the collective bargaining agreement and that the exclusion of the psychological consultant in the contract related to the independent contractor position that existed at the time the contract was reached in 1977.

Addressing next the employer's argument that, under *Genesee Co*, the petition should not be considered mid-contract term, the Commission stated at 898:

However, such a bar to the clarification of a bargaining unit cannot be applied to a true accretion situation where a new classification or employee is being added to the unit during the term of a contract. [internal citations omitted]. In the instant case the position of school psychologist did not exist as an employment position within the School District when the contract was entered into, nor does the addition of the position during the contract term modify in an essential way the existing professional bargaining unit represented by Petitioner. The school psychologist is, in effect, a new professional employee hired in mid-contract who would normally be included in the professional bargaining unit represented by Petitioner and who Petitioner timely requested be added to its unit.

While in the instant case it appears that the positions sought by the IEA existed at the time the contract was ratified by the parties, the record clearly indicates that the ISD took the position that it would not discuss and/or bargain over the placement of these positions within the IEA's bargaining unit during the negotiations for a new contract; thereby essentially foreclosing the possibility that the IEA could have attempted to bargain a revision to the recognition clause prior to the present contract's ratification. As such, it follows that, the positions sought by the IEA, being new positions, should not be barred from accretion by nature of the recognition clause.

Accordingly, for the reasons set forth above I find that, under the facts present herein, the EC Speech Therapist and the EC Program Support Specialist positions should be accreted to the IEA's bargaining unit.

Case No. UC15 L-025

The SMEA, in Case No. UC15 L-025 is seeking to clarify the MEAA bargaining unit to include the position of GSRP Associate Teacher. The record clearly reflects that the GSRP Associate Teacher position, while not necessarily new as it is required by the State with respect to GSRP classrooms, is nonetheless a new position with the ISD. As such, and in accordance with the general restatement of law concerning unit clarification petitions as set forth above, the question remains whether this position shares a community of interest with the petitioning bargaining unit. The ISD maintains that the GSRP Associate Teacher is an instructional position by nature and as such, accretion into the support staff bargaining unit would be inappropriate.

Since PERA's infancy the Commission has consistently held that in school districts separate units of teaching and non-teaching employees are presumptively appropriate. See *Pinconning Area Schools*, 1969 MERC Lab Op 472. Further, for non-teaching employees, the presumptively appropriate unit includes all nonsupervisory employees except clericals. See *Meridian Public Schools*, 1977 MERC Lab Op 82. To this point, the Commission has held that teaching aides will not be accreted to a unit comprised of instructional teachers. *Lansing School Dist*, 1972 MERC Lab Op 264.

Under the facts present in the record, it is clear that the GSRP Associate Teacher is a teaching position that engages in independent instruction of students within the ISD's GSRP classroom. See, for example, *Benton Harbor Area Schools*, 1984 MERC Lab Op 904 (the Commission held that the classification of in-house suspension monitor, despite not being a certificated teacher, was functionally and intrinsically intertwined with the duties of teachers and counselors and, therefore, should be included in the teaching unit); See also *Niles Community Schools*, 1984 MERC Lab Op 327 (the Commission held that a newly created behavior management specialist, despite not being a certificated teacher, was instructional by basis of the position's need to exercise "instructional and student-supervisory abilities usually associated with the teaching profession"). As such, despite the SMEA's claims, this position is not akin to the Level 5B Assistant Teacher represented by the SMEA in the MEAA bargaining unit, as the GSRP Associate Teacher actively participates in the curriculum and instructional planning for the classroom, while the Assistant Teacher's responsibilities focus on student safety and assisting with basic physical needs and activities. For these reasons, I conclude that the GSRP Associate Teacher does not share a community of interest with the SMEA bargaining unit.

Conclusion

I have carefully considered all other arguments asserted by the parties in this matter and have determined that they do not warrant a change in the result. For the reasons set forth above, I recommend that the Commission issue the following orders:

Recommended Order in Case No. C15 L-157

The unfair labor practice charge filed by the St. Joseph County Intermediate Education Association is hereby dismissed in its entirety.

Recommended Order in Case No. CU16 A-003

The unfair labor practice charge filed by the St. Joseph County Intermediate School District is hereby dismissed in its entirety.

Recommended Order in Case No. UC15 L-021

The petition filed by the St. Joseph County Intermediate Education Association to clarify its bargaining unit to include the positions of Early Childhood Speech Therapist and Early Childhood Program Support Specialist is granted.

Recommended Order in Case No. UC15 L-025

The petition filed by the Southwestern Michigan Education Association to clarify its bargaining unit to include the position of GSRP Associate Teacher is hereby dismissed in its entirety.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

Travis Calderwood
Administrative Law Judge
Michigan Administrative Hearing System

Dated: August 24, 2017