

I. INTRODUCTION

This is an interest arbitration proceeding concerning the terms and conditions of employment of independent child care providers serving families whose child care expenses are subsidized by the State. It arises under RCW 41.56.028, a section that adopts (with some modifications) the interest arbitration provisions applicable to uniformed employees in Washington such as law enforcement personnel and fire fighters. The child care bargaining statute, first enacted in 2006 and amended in 2007, establishes a state-wide bargaining unit¹ and designates the Governor as the “employer” of child care providers, solely for the purposes of collective bargaining with respect to authorized subjects of bargaining.² The Union was certified as the bargaining representative of the providers in 2006 pursuant to an election, and the parties bargained an initial collective bargaining agreement that year covering the period July 1, 2007 through June 30, 2009, a period coextensive with the State’s 2007-2009 biennium.³

In negotiations during the first half of 2008 for a successor Agreement to cover July 1, 2009 through June 30, 2011, the parties were able to resolve many of the issues between them without outside assistance. *See*, Exh. E-3 (collection of Articles and an

¹ The bargaining unit includes Licensed Family Homes and License-Exempt providers. The former are independent home businesses regulated and licensed by the State, while the latter, comprised of family, friends, and neighbors caring for subsidized children, are not required to be licensed (although they must meet some minimal qualifications).

² The authorized subjects are economic compensation, health and welfare benefits, professional development/training, labor-management committees, grievance procedures, and other economic matters. RCW 41.56.028(1)(c).

³ Some compensation issues in the initial contract, however, were resolved in interest arbitration before Arbiter Timothy D. W. Williams. *See*, Exh. E-1, Interest Arbitration Award of Arbiter Williams dated November 10, 2006.

Appendix “TA’d” by the parties in April and July of 2008). They could not agree on some matters, however, and as the statute requires, the parties engaged in mediation with a PERC staff member. At the conclusion of that mediation process, seven Articles still remained unresolved. *See*, Exh. E-4, also in the record as Exh. U-1 (July 28, 2008 letter from PERC Executive Director Cathleen Callahan certifying seven issues for interest arbitration). The parties continued to discuss the issues following the formal mediation sessions, however, and reached agreement on five of the seven Articles that remained in dispute, including Article 13 which substantially increases the State’s contributions to the SEIU 775 Multi-Employer Health Benefits Trust on behalf of covered employees within the bargaining unit. Exh. E-5.

Thus, this proceeding involves only the two Articles on which the parties have been unable to agree, comprising three distinct disputed contract issues. Specifically, the parties differ over the appropriate size of an across-the-board increase in subsidy rates for both the Licensed Family Home and License-Exempt providers,⁴ as well as over the Union’s proposal to increase the differential between the subsidy rates for “infants” (comprised of children from birth through 11 months) to 119% of the rate for “toddlers” (children 12 through 29 months). In addition, the Union has proposed that the subsidy rate for toddlers in months 12 through 17 be paid at the same rate applicable to infants.⁵

⁴ The State proposes to increase subsidy rates by 1.6% in FY-2010 and by 1.7% in FY-2011. As of June 2008, the State forecasts a revenue shortfall of approximately \$2.7 Billion in the 2009-11 biennium, and not surprisingly, the State limits its proposed subsidy increases to the forecast of inflation in 2010 and 2011 as measured by the implicit price deflator (IPD). *See*, Exh. E-11 at 2. The Union, on the other hand, proposes across-the-board increases of 7.8% in each contract year, although the testimony made clear that the Union had additional room to move had the State raised its offer.

⁵ During the course of the hearing, this proposal was occasionally described as “altering” the definition of “infant” within the child care subsidy structure. Testimony, however, as well as an extensive discussion during closing argument and during a subsequent telephone conference with counsel for both parties, made

At a hearing held August 4 through August 8, 2008 in Tacoma and Seattle, Washington (August 4, 6, and 7 in Tacoma and August 5 and 8 in Seattle), the parties had full opportunity to present evidence and argument, including the opportunity to examine each other's witnesses. The proceedings were marked by a high level of civility and cooperation, an approach not always found in disputed proceedings, and I commend all the participants, witnesses as well as counsel, for their constructive approach to creating a record designed to provide the Arbitrator with all of the information necessary to faithfully apply the statutory criteria. At the close of the formal evidentiary process on August 8, counsel argued the issues orally, clarifying their proposals and arguments, and they also agreed to provide specific pieces of additional information requested by the Arbitrator.⁶

Although the statute provides a deadline of October 1, 2008 for submitting the financial aspects of the Award to the Director of the Office of Financial Management for inclusion in budget requests for the 2009-11 biennium, RCW 41.56.028(6)(a), the parties requested an early decision in order to present the Arbitrator's findings to the Union membership and to State officials in advance of the statutory deadline. I have been able to meet the parties' timetable due in no small part to the efforts of the court reporters to turn

clear that the Union is simply suggesting an increased rate for "toddlers," applicable during the first six months of the "toddler" age range, equivalent to the rate for "infants." The State has argued against this proposal, both because of the projected cost and because of potential "confusion" of consumers.

⁶ While some of the information I requested could be provided with little difficulty, at least one issue ultimately required significant research and the preparation of additional spreadsheets with supporting declarations. I appreciate the parties' efforts in responding to my requests.

around the transcripts,⁷ as well as the parties' prompt responses to my requests for additional information.⁸

Having carefully considered all the evidence in light of the parties' arguments and the statutory criteria, I am now prepared to issue the following Decision and Award.

II. BACKGROUND

In 2006, the Legislature created the Department of Early Learning ("DEL") in recognition of a body of research demonstrating that "the early years of a child's life are critical to the child's healthy brain development and that the quality of caregiving during the early years can significantly impact the child's intellectual, social, and emotional development." *See*, RCW 43.215.005(2). Governor Christine Gregoire enthusiastically supported the implementation of a more cohesive and integrated system of early learning and has made it one of the cornerstones of her administration. The proposal also had strong bipartisan support. One aspect of that integrated system was the creation of a state-wide bargaining unit of Licensed and Exempt providers. Any Licensed Home or Exempt provider caring for at least one subsidized child during the course of a year is included in the bargaining unit, RCW 41.56.030(12), with the Governor acting as the putative "employer" for bargaining purposes.⁹ The designation of the Governor as the statutory

⁷ I prepared my initial draft of the Award utilizing uncertified rough drafts of the transcripts, but where I have cited to the record in the Award, I have also reviewed the certified electronic transcripts I received via e-mail beginning on August 17, 2008.

⁸ On the other hand, the compressed time frame has made it impossible for me to discuss all the evidence and argument in complete detail. While I have carefully considered everything that the parties presented during the hearing (and in subsequent responses to my requests for additional information), in this Interest Arbitration Decision and Award, I expressly set forth only the most important considerations that have influenced my decision.

⁹ In addition to Licensed Family Homes and Exempt Homes, child care services in Washington are provided by Licensed Child Care Centers ("Centers") which are not part of the bargaining unit. The

“employer” reflects an economic reality, i.e. although subsidized families are entitled to choose the care setting in which to enroll their children, the bulk of the compensation for that care comes from the State, not the parents.

Interest arbitration is an integral component of the bargaining relationship created by RCW 41.56.028, as it is for other strike-prohibited units. Initially, the statute simply referred to the interest arbitration provisions covering uniformed personnel. RCW 41.56.030(7). Those provisions enumerate mandatory considerations for an interest arbitrator (the employer’s statutory and constitutional authority, stipulations of the parties, the cost of living, and a catch-all “such other factors . . . that are normally or traditionally taken into consideration in the determination of wages, hours, and conditions of employment”). RCW 41.56.465(1)(a) through (e). The uniformed personnel statute then goes on to set forth the universe of “comparable jurisdictions” an arbitrator must consider in evaluating compensation for law enforcement and fire fighters, a universe not well suited to nontraditional bargaining units such as the Independent Home Care or Child Care Provider units. In 2007, the Legislature amended the statute to provide more specific guidance on the selection of comparables in the child care unit, a matter I will discuss in detail later in this Decision and Award. For now, it suffices to note that the 2007 amendments, in addition to providing additional guidance on the selection of appropriate comparables, also set forth specific policy judgments that an arbitrator *may* take into account in determining terms and conditions of employment for child care

Centers, which provide roughly half of the total child care capacity in the State, *see* Exh. U-9, are operated in commercial, nonresidential facilities, with employees who may be entitled to organize and select an appropriate representative to bargain with their employer. The Licensed and Exempt Homes, by contrast, are operated by independent small business owners who, in the absence of the statutes involved here, would not be entitled to bargain collectively with the State.

providers. Those legislative judgments include recognition of the public's interest in reducing turnover and increasing retention in the industry, the State's interest in promoting a stable child care workforce providing high quality services, and the State's interest in reducing reliance upon public benefits. *See*, RCW. 41.56.465(4).

As to the last policy judgment, it is important to provide a bit of history. A central tenet of welfare reform, as enacted at the federal level in 1996, was the establishment of a policy goal that those receiving public assistance should be encouraged to enter the workforce and eventually become self-sufficient. Reaching the goal of sustained employment, however, requires that low income parents have access to affordable child care, otherwise they would find it difficult, if not impossible, to remain in the workforce. Consequently, the federal government provides funds to individual states for use in meeting low income families' child care needs, including grants under the Temporary Assistance to Needy Families Program (TANF) and under the Child Care Development Fund (CCDF). The states are required to provide additional dollars from their general funds at the level they were being provided prior to the creation of these federal programs. The State offers subsidies for child care through the Working Connections Child Care program, a program that provides benefits to low-wage working families; through the WorkFirst program, for families on public assistance; through a program for seasonal workers (largely agricultural); and, at least until recently, to children under the protection of Child Protective Services. Unlike the Medicaid program, however, the federal government does not match increased funds a state may choose to allocate beyond the State's required participation amount.

III. STATUTORY CRITERIA

The current statute succinctly sets forth the standards I am required to apply in resolving this contractual impasse. First, I must consider the general provisions of RCW 41.56.456(1)(a) through (e):

- (a) The constitutional and statutory authority of the employer;
- (b) Stipulations of the parties;
- (c) The average consumer prices for goods and services, commonly known as the cost of living;
- (d) Changes in any of the circumstances under (a) through (c) of this subsection during the pendency of the proceedings; and
- (e) Such other factors, not confined to the factors under (a) through (d) of this subsection, that are normally or traditionally taken into consideration in the determination of wages, hours, and conditions of employment.

RCW 41.56.465(1). In addition, following the 2007 amendments, the statute provides the following additional guidance to arbitrators:

- 4) For employees listed in RCW [41.56.028](#) [independent child care providers]:
 - (a) The panel shall also consider:
 - (i) A comparison of child care provider subsidy rates and reimbursement programs by public entities, including counties and municipalities, along the west coast of the United States; and
 - (ii) The financial ability of the state to pay for the compensation and benefit provisions of a collective bargaining agreement; and
 - (b) The panel may consider:
 - (i) The public's interest in reducing turnover and increasing retention of child care providers;
 - (ii) The state's interest in promoting, through education and training, a stable child care workforce to provide quality and reliable child care from all providers throughout the state; and
 - (iii) In addition, for employees exempt from licensing under chapter [74.15](#) RCW, the state's fiscal interest in reducing reliance upon public benefit programs

including but not limited to medical coupons, food stamps, subsidized housing, and emergency medical services.

RCW 41.56.465(4). These additional specific considerations, particularly the “may consider” list in subsection (b), augment the stated purposes of the child care bargaining statute set forth in RCW 41.56.028, and thus, in deciding the issues before me, I believe they are important considerations, despite the fact that the statute does not make it mandatory that I utilize them in reaching my decision.

V. ISSUES

As noted previously, only two Articles are still in dispute. In Article 11.2, the Union proposes as follows:

11.2 Infant Pay Differential and Age

Infants shall be at least ~~fifteen~~ nineteen percent (159%) above the Toddler/~~Pre-school~~ rate; no rate shall be lowered as a result of this agreement.

For Licensed Family Child Care Providers the infant rate shall be paid through age 18 months to move closer to aligning the rates with the state’s infant and toddler licensing ratios ~~age required for the infant subsidy shall be birth to 18 months.~~

The Union’s proposal includes two separate components. First, that the differential for infants—a differential supported by the fact that infants require more hands-on care from the provider—should be raised from 15% above the toddler rate to a 19% differential.¹⁰

Second, the Union proposes that an enhanced rate, equal to the infant rate, continue for

¹⁰ The fifteen percent differential became part of the subsidy structure as a result of bargaining in 2006. One group of providers, in Spokane, retained its prior 16% differential because of the “no rate shall be lowered” language of the CBA.

the first six months of the toddler rate, i.e. months 12 through 17.¹¹ The State proposes no change in either respect.

Second, each party proposes an across-the-board subsidy rate increase in Article 12.1 for both Licensed and Exempt Providers. The State proposes that each category of provider receive an increase in rates of 1.6% effective July 1, 2009 and 1.7% effective July 1, 2010. Exh. E-7, also in the record as Exh. U-5. The Union proposes increases of 7.8% for each category in each year of the contract. Exh. U-3, also in the record as part of Exh. E-7.

V. SUMMARY OF ARGUMENTS OF THE PARTIES

A. Summary of the Union's Arguments

The Union notes that the State has expressly recognized the critical importance of reliable and stable child care in promoting early childhood development, especially for low-income working families. Consequently, the Governor and the Legislature have made support for early childhood development a priority for the State. In 2007, approximately 30,000 children were cared for in Licensed Homes or License-Exempt Homes, operated overwhelmingly by females and with median gross revenue (before expenses) for Licensed providers of approximately \$30,000. Thus, argues the Union, this is a low-wage, largely female workforce, many of whom are people of color. In addition, Family Homes operated by these minority providers serve larger percentages of the

¹¹ The Union's formal proposal, set forth in the text, actually would result in an increased toddler rate for the first *seven* months, i.e. months 12 *through* 18. The testimony at the hearing, however, as well as discussion during closing argument and in a post-hearing telephone conference with counsel, confirms that the Union intended to propose an enhanced toddler rate for only six months.

subsidized children.¹² Thus, the statutory goal of increasing stability and retention in the child care industry is of particular importance to those who serve disadvantaged communities, many of whom may choose providers, at least in part, based on cultural and/or linguistic considerations.

In addition, notes the Union, this home-based child care industry has historically been under-compensated, and in fact, a Union expert witness testified that a provider with the median gross revenue of \$30,000 per year, adjusted to account for expenses, would likely qualify for at least some public assistance programs, e.g. help with health care and telephone service expenses.¹³ Tr. Vol. I at 75 (Watkins Test.). Even with increases in recent years, e.g. 10% for Licensed and 7% for Exempt in the 2007-09 Agreement, providers remain underpaid, particularly given the spike in inflation caused by fuel and food prices. Recent CPI-U data for Seattle show that the local rise in the cost of living far exceeds the national average. *See*, Exh. U-20. One reason the Legislature made child care workers eligible for interest arbitration, according to the Union, is to help address these longstanding deficits in compensation that interfere with retention and stability in the Licensed and Exempt child care market.¹⁴

¹² The State's bi-annual Market Rate Survey published in 2006, for example, showed that Caucasian Licensed providers (approximately two-thirds of the total Licensed Homes) had 24% subsidized kids in their care, whereas Hispanic providers (75%), Native American (52%), Asian (53%), and African American providers (73%) each served much higher percentages. *See*, Exh. U-13, Table 34.

¹³ The State offered census-based data that suggested a higher level of income for self-employed, home-based child care providers, but because the data reflects *household* income, it is difficult for me to determine how much of the income derives from child care as compared to other sources. Moreover, the data is not necessarily limited to members of the bargaining unit here, i.e. some of the households in the State's data may not take subsidized children.

¹⁴ In fact, the Union points to a precipitous decline in the number of providers between 1996 and 2004 (33%), with a 16% decline from 2004 to 2006. Exh. U-42. The Union attributes a more recent slowing of the attrition rate to improved compensation as a result of collective bargaining with the State and the interest arbitration process inherent in that statutory scheme.

In addition, one of the key concepts of the federal program is “equal access” to child care for subsidized families. Prior to 1996, federal regulations defined “equal access” as subsidy rates at the 75th percentile of the private market, i.e. three-quarters of the providers charge that rate or less for private pay clients. Following 1996, the 75th percentile standard became “aspirational” or a “guideline” rather than mandatory, but still it represents, according to the Union, a “best practices” standard.¹⁵ Nevertheless, recent subsidy increases in Washington have been percentage increases across-the-board, i.e. flat percentages applied to the different rates for categories of children (e.g. infant, toddler, etc.) and in the six different regions of the State, each of which has its own rate structure dating from the days when rates were set according to the 75th percentile in each region. As a result, in the State of Washington, percentile subsidy rates have dipped into the 20’s,¹⁶ and even with recent substantial increases, are estimated by a Union expert witness to be currently at approximately the 35th percentile.¹⁷ Moreover, the State has a policy of providing any subsidy increases granted to the Licensed and Exempt Homes to the Licensed Child Care Centers as well. The Centers, to reiterate, are not part of the bargaining unit, and they have always had higher subsidy rates than Licensed and Exempt

¹⁵ On the other hand, testimony on behalf of the State established that “equal access” can be demonstrated in other ways, e.g. by examining the percentage of providers who serve subsidized families and/or who are willing to do so.

¹⁶ See, e.g. Exh. U-25 from the 2006 Market Rate Survey calculating the overall access rate for subsidized families at the 28th percentile.

¹⁷ See, Exh. U-30, calculations by Union expert Hannah Lidman of the Economic Opportunity Institute. The State has critiqued Lidman’s methodology, but the important point—a point that I do not believe is in dispute—is that Washington subsidy rates (unlike the rates in Oregon and California) are substantially below the former 75th percentile standard. At the same time, it is true that Washington covers families at 200% of the federal poverty level (Oregon and California cut off eligibility at 185%) and that Washington (unlike California) serves all eligible families without a waiting list for benefits. I discuss these issues in more detail later.

Homes. The effect of applying flat rate increases both inside and outside the bargaining unit, given the preexisting rate differential between Homes and Centers, is to widen the gap between bargaining unit providers and the Centers.¹⁸ The Union argues that the gap should be closed somewhat by larger increases in compensation for Licensed and Exempt Homes. These increases are supported, contends the Union, by comparison to the statutory comparables, i.e. a comparison of the subsidy rates provided by public agencies, including counties and municipalities, along the west coast of the United States.¹⁹

B. Summary of the State's Arguments

The State agrees with the Union's assessment of the importance of quality child care to the Governor and to the State as a whole. On the other hand, the current forecasts of State revenue in the FY 09-11 biennium are for a shortfall of roughly \$2.7 Billion, which, if the Legislature and Governor choose to make a withdrawal from the "Rainy Day Fund," could be reduced to just under \$2 Billion Exh. E-12. Thus, argues the State, there is an extremely limited "ability to pay" which is a mandatory criterion the Arbitrator must apply. Under the circumstances, the State argues that its proposed subsidy increase of 1.6%/1.7% is evidence of the importance the State attaches to quality child care.

The State also notes that, during the very week the parties were presenting evidence in this matter, the Governor instituted a hiring freeze and limits on purchases of

¹⁸ That is so because an increase of the same percentage for Homes and Centers, while it maintains the percentage relationship between the two, results in a widening dollar amount difference given that the Centers' percentage increase is applied to a higher pre-existing rate, resulting in a greater absolute increase.

¹⁹ See, RCW 41.56.465(4)(a)(i). I will discuss the application of the comparables analysis, as well as the other statutory factors, in conjunction with my evaluation of the parties' specific proposals.

equipment and on out-of-state travel.²⁰ The projected problem is serious and stems from the nature of the State's tax structure, i.e. the sales tax applies mostly to purchases of discretionary goods (it does not apply to food purchases, for example). On the other hand, the current inflationary pressure arises mostly from increases in food and fuel prices. The former is not taxed, even though we might surmise that a higher percentage of income might be directed toward purchases of food because of the rising prices, and the latter is taxed by the gallon, not as a percentage of the price. Thus, a decrease in purchases of motor fuel because of higher prices results in reduced revenue.²¹ Similarly, declining business transactions as a result of a slowing economy reduce Business & Occupation Tax receipts which are calculated on the basis of gross revenue.²²

Moreover, as a policy matter, the State grants any subsidy increases throughout the entire subsidy program, i.e. to Centers as well as to Licensed and Exempt Homes. Thus, the State argues, when considering the cost of any increases granted in this proceeding, I should include the cost of extending those increases to the Centers.²³ The State regards the subsidy program as a unified whole, and as a policy matter, does not

²⁰ According to news reports, the Governor believes these restrictions might result in savings of \$90 Million dollars in the current fiscal year. Thus, even if it is true, as the Union argues, that these annual savings could be continued into the next biennium, the savings would make only a minor dent in the projected revenue deficit of \$2.7 Billion.

²¹ Even then, of course, the gas tax revenues are set aside for transportation, and absent a change in the law, would not be available to fund wages and benefits under this collective bargaining agreement.

²² Although there was little discussion concerning real estate excise taxes at the hearing, my understanding is that it represents a significant component of the State's General Fund revenues, but with the current problems in the housing market, receipts have no doubt slowed down. Exh. E-9 at 5.

²³ The Union, of course, vehemently opposes any consideration of the cost of extending subsidy increases beyond the bargaining unit in determining a fair increase for Licensed and Exempt Homes.

want to disrupt the market by an increase that favors one segment over another, fearing that approach might reduce access to child care for families outside the subsidy program.

With respect to the Union's argument about the 75th percentile guideline, the State contends that the benchmark is inappropriate as a hard and fast rule because states conduct their market rate surveys differently. Therefore, in the real world, the 75th percentile in one state may or may not provide the same level of child care access as in another state. The State also argues that consideration of comparable jurisdictions must take into account geographical variations in the cost of living, an issue I will consider in some detail later. Finally, the State notes the substantial subsidy increases granted two years ago when the economic outlook was brighter, but contends that the current outlook will require the State to make some very difficult choices among many worthy programs. Nevertheless, the State points out, it is offering an increase in subsidy rates and has also committed to increased health insurance contributions (on behalf of approximately 660 eligible providers) totaling \$5.45 Million over the course of the contract. The cumulative incremental cost of the State's proposals, therefore, is projected at \$13.752 Million over the biennium,²⁴ whereas the Union's proposals are projected to cost \$47.376 Million.²⁵ The bottom line, argues the State, is that it cannot afford increases at this time at the level demanded by the Union, despite the important work that child care workers do and the

²⁴ If the State continues its policy of extending the same increases to Licensed Centers, the total incremental cost of the State's proposals rises to \$23.737 Million and the Union's to \$98.009 Million. Exh. E-34.

²⁵ In a supplemental declaration provided after the hearing, the State notes that neither party's costing data reflects any consideration of projected caseload changes. *See*, Declaration of Carole Holland, WorkFirst Coordinator for OFM, ¶ 4. Holland asserts that because neither party accounted for caseload changes, the costing models of the Union and the State underestimate the number of children to be served (and thus the cost to the State). While that may be true, there is nothing in the record to assist me in determining precisely how the cost of the parties' proposals would be affected. Consequently, I have no choice but to do the best I can with the costing data in the record.

priority the State has placed on improving the quality of child care and early childhood learning.

VI. ARBITRATOR’S ANALYSIS AND DECISION

A. General Comparables Analysis

During the hearing, the State offered evidence concerning the subsidy rates and other terms and conditions of employment of child care workers in Illinois and Arizona. The Union objected that the statute limits comparable jurisdictions to those “along the west coast of the United States,” and I sustained the objection.²⁶ Although I gave a capsule explanation of my reasoning on the record, I supplement that explanation here, hopefully describing my rationale with greater coherence and precision.

The State acknowledges that the statute provides that the Arbitrator “shall” consider “subsidy rates and reimbursement programs by public entities, including counties and municipalities, along the west coast of the United States,” RCW 41.56.465(4)(a)(i). The State contends, however, that while the statute *requires* the Arbitrator to consider West Coast jurisdictions, nothing in the statute prohibits the Arbitrator from considering *other* “comparable” jurisdictions elsewhere under the catch-all clause, i.e. “such other factors . . . that are normally or traditionally taken into consideration in the determination of wages, hours, and conditions of employment.” RCW 41.56.465(1)(e).

At the outset, I note that the State offered the Arizona/Illinois evidence under a section that is mandatory—that is, the statute provides that if a factor is “normally or

²⁶ I did not preclude, however, receipt of evidence about practices in other states to the extent it might be offered for purposes other than the comparables analysis, e.g. to illuminate the policy considerations a state might take into account in setting subsidy rates.

traditionally taken into account,” the Arbitrator *shall* consider it. Thus, it is not exactly accurate to say that I have “discretion” to consider Arizona and Illinois. Terms and conditions of child care workers in those states either represent “factors that are normally or traditionally taken into account” or they do not. As an aside, I doubt whether conditions of employment in Arizona or Illinois are “normally or traditionally taken into account” in setting wages and working conditions in Washington, at least with respect to workers who provide a local service in a local labor market. But be that as it may, it seems to me that the direction that the Arbitrator *shall* consider comparable jurisdictions “along the west coast of the United States” carries a negative implication that he or she *may not* consider other jurisdictions, i.e. that the statute defines the universe of jurisdictions that the Arbitrator may treat as “comparable.”

I certainly read the statute that way before the 2007 Amendments, and apparently Arbiter Williams did as well. *See, e.g.* Exh. E-1, 2006 Williams Interest Arbitration Award at 34 (“Whether one restricts comparability to the west coast *as provided by statute*, or whether data from Arizona and Illinois are included, the sibling differential is absolutely unique, etc.”) (emphasis supplied); *see also*, Award at 28 (“While the statute clearly limits the Arbitrator to looking at Oregon and California, etc.”). Similarly, in my 2006 Award in the Independent Home Care Provider Interest Arbitration between the State and a sister local of the Union, addressing the parallel issue under the statute as it existed at that time, I held that the former statute limited my consideration to West Coast jurisdictions. *State of Washington OFM and SEIU, Local 775 (Independent Home Care Providers)* at 8 (Cavanaugh, 2006) (“The clear language of the statute, however, requires that comparables be located ‘on the west coast of the United States’”).

In sum, at least two interest arbitrators, hearing cases in 2006 under relatively new state-wide bargaining relationships featuring a “quasi-employment” status for independent providers compensated (at least in part) by the State, interpreted the former statute as precluding consideration of jurisdictions not on the West Coast. The question, then, is whether the 2007 amendments changed the analysis. I find that they did not. While the 2007 amendments added some clarity about whether counties and municipalities could be considered comparable under appropriate circumstances, they did not address the issue of whether *jurisdictions* beyond the West Coast, whether states or otherwise, could or should be considered. Had the Legislature intended that interest arbitrators should have the option of considering jurisdictions located in other parts of the country, I must assume they would have said so given that at least two of those arbitrators had just held that such considerations fell outside the terms of the statute. Thus, I find that my analysis of comparability is restricted to jurisdictions “along the west coast of the United States.”

I turn, then, to the specific issues between the parties, dealing with the specific comparability data relevant to each proposal (as well as the State’s ability to pay and the other statutory factors) in context.

B. Article 11.2 Issues

1. Increase in Infant Differential

The Union proposes that the infant differential be increased to 119% of the toddler rate in recognition of the increased workload involved in caring for infants. The State counters that the 15% differential only went into effect with the present contract, and that it is too soon for such a substantial additional increase, especially in lean times.

If the experts were predicting solid economic growth and growth in State revenues, the Union's proposal might be worth serious consideration. In light of the forecast of a \$2.7 Billion revenue shortfall during FY 2009-11, however, and in light of the fact that the current differential has only been part of the compensation scheme for a little over a year, it seems prudent to me to delay further increases in the differential. For reasons that follow, I believe an investment in an increase of the subsidy rate during the first six months of the toddler category is a better use of the State's limited financial resources. If the choice is between one proposal or the other—and I believe that it is—I strongly prefer an increase in the toddler rate in months 12 through 17 for reasons that are set forth in the following section. Therefore, I decline to award the Union's proposal to increase the infant differential to 119% of the toddler rate.

2. Enhanced Toddler Rate for First Six Months

The Union argues for an increase in the subsidy during the first six months of the toddler category²⁷ and suggests that the rate should be equivalent to the rate applicable to infants. Such an increase, argues the Union, would provide a partial remedy for a “misalignment” between the subsidy rates and the allowable number of children less than two years of age in a Licensed Home. Specifically, the infant rate applies from birth through 11 months, but drops to a lower toddler rate on the child's first birthday. On the other hand, the regulations limit the number of children less than 24 months in a Licensed Home to two (but the number in some cases can increase to four with another caregiver

²⁷ I will call this increase during the first six months the “Enhanced Toddler Rate,” but the parties are free to call it whatever makes sense to them if they agree on different nomenclature, e.g. Toddler I and Toddler II.

on staff).²⁸ As a result of this “misalignment,” Licensed providers believe they suffer a loss of income because once an infant reaches 12 months, the provider cannot replace that lost income by adding another infant at the higher rate—at least, not without the increased expense of hiring an assistant—until the child already in care reaches the age of 24 months. Two providers testified at the hearing about the financial loss involved, and they provided anecdotal testimony about long waiting lists for infant slots, as well as their sense that a number of providers have decided not to take infants because of the loss of income from that slot between 12 and 30 months.²⁹ They believe that increasing the toddler rate for the first six months, i.e. for months 12 through 17, would provide additional incentive to take infants as well as assist providers in covering the expense of hiring an assistant should they find that it makes business sense to do so. Thus, the providers contend, infant slots could be preserved and probably even increased with a higher rate during the early part of the toddler range.³⁰

I believe the Union’s proposal to provide increased compensation to Licensed providers in the first six months of the toddler category has merit. Obviously, children develop individually, some faster than others, but common sense (as well as the

²⁸ See, WAC 170-296-1350(3).

²⁹ While the data from DEL does not appear to demonstrate a shortage of infant slots available system wide, see Exh. E-30 at 15, it is certainly possible that in particular local market areas, the demand for high quality and conveniently accessible infant care exceeds the available infant slots meeting those criteria.

³⁰ Although the providers testified that this is “a 12 month problem,” i.e. the reduced income caused by the licensing ratio lasts for an entire year, they testified that it would help if the State “met them halfway.” In addition, there are apparently discussions underway in the “negotiated rulemaking” context (a “meet and confer” process in which the Union and Licensed Centers discuss the content of regulations with the State) about changing the staff-to-child-ratios to provide a maximum of two children under the age of *18 months* without an assistant. Tr. Vol. I at 44; Vol. II at 261-62. If that rule were adopted by the State, the Union’s current proposal would align precisely with the ratio regulations.

testimony of the providers Ms. Hall and Ms. Smiley), tells us that a child 365 days old is not 15% easier to care for than a child 364 days old.³¹ It thus makes sense to me that there should be an additional rate between infant and pre-school to account for the continuing difficulties of providing hands-on care for children between the ages of 12 months and 18 months, especially given the fact that the ratios prevent providers from caring for more than two children under 24 months in a Licensed Home. On the other hand, as the providers testified, additional compensation in the first six months of the toddler category would assist in covering the cost of an assistant (which consists not only of wages, but also payroll taxes, etc.). Moreover, if a provider found that it made economic sense to hire an assistant, two additional slots for children under two years old could be created (if justified by the provider's local market).³² In difficult economic times for the State—and with scarce funds to achieve the State's childcare policy goals—it makes sense to carefully target areas in which the State's assets can produce a multiplier effect by addressing several problems at once—e.g., in this case, increased provider compensation that could improve retention, a potential to preserve or perhaps even add available slots for infants and early toddlers, additional employment opportunities for child care workers

³¹ Although Oregon utilizes the same definition of “infant” as Washington for subsidy purposes, i.e. birth to 12 months, I note that California applies its initial rate from birth to 24 months. Thus, the concept that a child ceases to be an infant at 12 months is not universally accepted. In fact, experts in the field appear to agree that the concepts of “infant” and “toddler” are overlapping. *See*, “Caring for Our Children: National Health and Safety Performance Standards: Guidelines for Out-of-Home Child Care,” Exh. U-37 (“infant” defined as a child between birth and ambulation, “usually” between the ages of birth to 18 months, whereas “toddler” is defined as between the age ambulation and toilet training, “usually” a child aged 13 to 35 months.

³² I also agree that it is possible the additional compensation could prevent the *loss* of infant slots that already exist by addressing concerns that have caused some providers to stop providing infant care. Tr. Vol. II at 312-13. Thus, the Union's proposal addresses the issues of stability and retention in the child care provider network, as well as fostering parent choice—important components of both federal and State child care policy.

(to the extent providers decide to hire assistants), and added choices for parents in terms of high quality and convenient facilities to care for their young children.³³

I will award a form of the Union’s proposal, providing for an “Enhanced Toddler Rate” in months 12 through 17 computed as follows: the percentage across-the-board increase awarded below shall be applied to the old toddler rates in order to determine the new “Regular Toddler Rates.” In months 12 through 17, however, an “Enhanced Toddler Rate,” equal to 115% of the “Regular Toddler Rates,” shall be applicable.³⁴ The State estimated the cost of the Union’s proposal at \$353,000 for the biennium plus an additional \$619,000 for Licensed Center parity (i.e. the cost of extending the increased rate to Licensed Centers),³⁵ for a total of \$972,000. Exh. E-34. On the other hand, the State calculated this cost assuming the Union’s proposed 7.8%/7.8% subsidy increase as

³³ To the extent the State argues that the data shows no shortage of available infant slots, Exh. E-30 at 15, I note that the DEL data in the record is region-wide and does not necessarily establish that there are conveniently located vacancies close to any particular family. The data also does not factor in issues of quality, i.e. some of those vacancies could exist because families are reluctant to commit their children to those particular facilities. In any event, the cost of the Union’s proposal is relatively modest, even in this lean budgetary climate, and the potential benefits of the change are worth the cost, even if there is no technical shortage of infant slots judged on a region-wide basis.

³⁴ While this “Enhanced Toddler Rate” happens to equal the current “Infant Rate,” in my mind the two are independent. In other words, the rates appropriate for the infant category may or may not continue to be appropriate for early toddlers, and therefore I believe that it promotes clarity for the parties to de-link the two rates. In other words, in future negotiations, the parties should be free to adjust the rates as experience demonstrates. It is possible, for example, that the parties might wish to raise the infant differential in the future without necessarily increasing the Enhanced Toddler Rate. Keeping the rates independent of each other provides maximum flexibility for the parties to respond to evolving conditions. It also avoids adding to the families’ confusion in a regulatory scheme that is already complex enough.

³⁵ As previously noted, the Union argues that the State’s policy of extending Licensed Home subsidy rate increases to Licensed Centers as well—even though the Centers are not part of the bargaining unit—should not be considered by the Arbitrator in determining the incremental cost to the State of the Union’s proposals. I cannot say that the State’s parity policy is irrational, however, and thus while the cost of Center parity may not be controlling, I find that it fits logically within the criterion of “ability to pay” and thus should be given some appropriate weight.

well as the increase in the infant differential to 119% of the toddler rate.³⁶ Because I have not awarded the Union's proposed increase in the infant differential, however, and because (for reasons that follow) I have determined that the State cannot afford an across-the-board subsidy rate increase of 15.6% in the next biennium, the actual cost of this proposal will be far less than if it were added on top of these other substantial increases. In addition, the State's cost estimate is based on the maximum rates, but as set forth more fully below in connection with the subsidy rate increase proposals, historically the actual rate paid by the State has been less than the maximum. That fact also will likely reduce the cost below the State's estimate reflected in Exhs. E-34 and E-38. Therefore, I find that the State can afford the estimated cost of this "alignment" proposal, even under these difficult economic conditions, given the priority afforded early childhood education in State policies, and in light of the fact that the proposal advances several important statutory interests at once.³⁷

B. Article 12.1 Issues – Increased Subsidy Rates

Each party suggests an across-the-board increase in subsidy rates, but they differ markedly on what the increase should be. In resolving these questions, I have carefully

³⁶ I do not believe that the basis of the State's calculation is necessarily clear from the testimony or from Exh. 38 itself, but it is apparent from the formulae in the State's electronic costing spreadsheet provided to me following the hearing at my request.

³⁷ In discussions between the parties and the Arbitrator following the formal hearing itself, the State argued that there would be an additional cost to implement this proposal, namely that the proposal would add another occasion on which a case worker would be required to manually approve the transfer from one category to another. The State estimates that process would take approximately fifteen minutes for each of the 10,000 or so children affected, or the equivalent of slightly more than one-half FTE per year during the course of the biennium (one-quarter hour times 10,000 children equals 2500 hours). During a time in which the Governor has instituted a hiring freeze, the State argues, the proposal would place a heavy burden on a reduced staff. While I am sympathetic to those concerns, I do not believe they alter the analysis sufficiently to justify denying the Union's proposal.

considered all the statutory factors, but I expressly discuss here only the most important in my analysis—the appropriate comparables suggested by the parties, the cost of living, and the State’s ability to pay—each of which is a mandatory consideration—as well as the State’s enacted policies with respect to the importance of early childhood development and support of low income families and their children. The latter is a very important consideration in my analysis, even though it is technically discretionary.

1. Analysis of the Parties’ Proposed Comparables

For Licensed Homes, the Union has offered a chart of the leading and lowest subsidy rates broken out by each category of child (infant, toddler, etc.) for current Washington rates, as well as the rates that would apply under each party’s subsidy increase proposal, and then comparing those rates to the current “leading” and “lowest” subsidy rates for Oregon, California, and City of Seattle. Exh. U-27. The chart, unadjusted for differences in the cost of living, shows that the State’s proposed subsidy rates would generally put bargaining unit providers ahead of the group the Union considers their peers in Oregon (certified providers), but behind current California rates.³⁸ *Id.* Another set of charts provides more detailed California comparisons of potential comparables with a comparison of the rates applicable in the various Washington DSHS regions with those applicable in California counties of similar population (2003), median income (2005), and numbers of licensed providers (2006). Exh. U-28.³⁹ Again, the charts

³⁸ With respect to Exempt Homes, the Union has presented a similar chart, also unadjusted for cost of living, which shows Washington providers behind California by a substantial amount, while ahead of Oregon in “lowest rates,” but lagging Oregon in “leading rates.” Exh. U-33.

³⁹ While the data used to determine “comparability” is somewhat dated, Kurstan Holabird of the Union, who created the chart, explained that in each case the data was the most recent available.

show that providers in the Washington regions are generally behind their California counterparts in the counties selected, but the data is not adjusted for differences in the cost of living. The Union also notes that Oregon provides subsidies equal to the 75th percentile, as compared to Washington's estimated 35th percentile, and that California sets its subsidy rates even higher, at the 85th percentile. Exh. U-29.⁴⁰

The State, by contrast, provided state-wide average data for Washington, comparing that data to rates for registered providers in Oregon, for certified providers in Oregon, and for providers in selected California counties that were utilized by the State in the 2006 interest arbitration—namely, Alameda, Fresno, Los Angeles, Sacramento, San Bernardino, and San Diego counties. The rates are adjusted for the cost of living using data from 2008 Runzheimer Reports, a private firm that collects cost of living data.⁴¹ When adjusted for the cost of living, Washington's current average state-wide subsidy rates compare favorably with the average state-wide rates in Oregon (but not the average state-wide California rates). Washington rates compare more favorably to the cost-

⁴⁰ On the other hand, as the State points out, Oregon caps eligibility at not more than 185% of the federal poverty level as compared to Washington's eligibility cap of not more than 200% of the poverty level, i.e. Washington families with greater incomes are eligible to receive benefits. Similarly, California limits eligibility to families at or below 185% of the poverty level, and although subsidies are pegged at the 85th percentile (higher than Washington's estimated 35th percentile), at that level, California cannot provide benefits to all eligible families. The evidence establishes that as of September 2007, there were more than 135,000 eligible families with more than 204,000 children on waiting lists to receive benefits for which they have been authorized. Exh. E-24A. It appears that California, at least, has achieved higher percentile subsidies at the expense of providing benefits to all eligible families. I must keep this difference in philosophy in mind in evaluating the "comparability" of Washington and California subsidy rates.

⁴¹ According to Dr. Irv Lefberg, the State's main witness on cost of living comparisons, the Department of Defense uses Runzheimer data in calculating "cost of living" payment differentials for personnel stationed in different parts of the country.

adjusted California county rates,⁴² although they lag some of the California counties (e.g. Sacramento and Fresno) by relatively substantial margins in some categories. Exh. E-19. On the other hand, the State notes that it contributes toward health insurance premiums for Licensed providers, which California does not. In addition, Washington Licensed providers receive some paid time off (e.g. compensation for a limited number of days even if a child is absent, as well as paid training days and paid holidays if the Licensed Home is closed) that are unavailable to California providers. Oregon providers, while they are eligible to be paid for some absent days, do not receive paid training days or holiday pay. Exh. E-19.

As previously noted, in comparing these subsidy rates, I must also take into account the differing subsidy policies of the various states, e.g. both Oregon and California have lower income caps for eligibility than Washington, and California also has a substantial waiting list for benefits—at least in part, no doubt, as a result of providing subsidies at the 85th percentile. Oregon, on the other hand, does not have a waiting list despite providing subsidies at the 75th percentile. Nevertheless, the record establishes that Washington has chosen to provide benefits to a larger universe of families (in terms of income) than either Oregon or California, and that fact means that I must consider more than just the subsidy rates in determining the extent to which Oregon or California (or California counties) are truly “comparable.”

In sorting through the information provided, I find the parties’ comparability data less useful than I would have hoped. Because the Union omitted any comprehensive

⁴² The Union notes that the rates for California providers may change in March 2009, and while that is no doubt true, I take arbitral notice of the current budget crisis in California which has been much in the news in recent weeks.

consideration of variations in the cost of living between jurisdictions, it is difficult to compare apples to apples with the various subsidy rates.⁴³ On the other hand, the State used what seemed to me to be questionable methodologies in calculating its cost of living data. For example, the State calculated the state-wide California cost of living quotient by using a weighted average of just six cities—Oakland, Fresno, Los Angeles, Sacramento, San Bernardino, and San Diego. There is no showing, however, that a weighted average of these cities⁴⁴ accurately reflects a weighted cost of living quotient for the entire state of California.⁴⁵ The same is true of the Oregon data which relies on a weighted average of Portland and two of its suburbs (Gresham and Beaverton), in addition to Salem and Eugene, to represent the cost of living in the entire state.

As a result, it is difficult for me to form reliable conclusions about the relative subsidy rates across categories for the various jurisdictions. The most I can say is that there may well be significant variances between the cost-adjusted average subsidy rates in California as a whole as compared to Washington (the State's own data would suggest

⁴³ I recognize, however, that detailed cost of living data may not be readily accessible to the Union.

⁴⁴ The record is also somewhat confusing about whether "cities" or "counties" are being offered as cost of living comparators. Dr. Lefberg described the data as applying to the "cities" listed, and testified that the "aggregate of CA Cities" data represented a weighted average of the "cities" contained on the list. *See*, Exh. E-13 *and* Tr., Vol. III at 453-54. I understood that the corresponding Oregon data was derived in the same fashion. On the other hand, Exh. E-19 lists the "counties" in which those California cities are located and uses those "counties" as comparators for Washington as a whole. In other words, Exh. E-19 treats the cost of living in the cities listed as proxies for the cost of living for each county in which those cities are located. That data could be accurate, of course, or at least close enough to be useful. The state of the record, however, does not enable me to determine the extent to which the cost of living data for these cities accurately reflects the cost of living for the county as a whole, just as the weighted average of the various cities may or may not accurately reflect the cost of living in California as a whole. These discrepancies leave me unsure of the precision of the data.

⁴⁵ Nor is it clear to me from the record why the individual California jurisdictions selected by the State are truly "comparable" to the State of Washington, although I understand the State used these same jurisdictions in the last round of bargaining and in interest arbitration in 2006.

that), but it is difficult to tell how great the variance is when adjusted for the relative cost of living.⁴⁶ In better economic times, accuracy in these data sets would be more important, and might even be critical. On the other hand, the current economic climate means that the State is facing a massive revenue shortfall in FY 2009-11, and thus the mandatory consideration of the State's ability to pay is more likely to shape the outcome here than computations of the precise cost-adjusted subsidy differentials.

2. State's Ability to Pay

Turning to ability to pay, then, I must take into account the projected financial condition of the State, the level of incremental cost already part of the biennial cost of the Agreement because of TA'd items (specifically, additional contributions toward health insurance of \$5.45 Million for the 2009-11 biennium), and the cost of the increase in the subsidy rate for the first six months in the toddler category already awarded above. At the same time, I must also keep in mind the priority the State has placed on early childhood care and learning, while not forgetting that many other worthy programs and workers will be clamoring for their "fair share" of a pot of revenue that will very likely turn out to be much smaller than might have been anticipated a year or so ago.

I begin with the State's revenue forecast. It is true, as the Union notes, that economic forecasts, particularly forecasts of revenue several years into the future, can be far off the mark. On the other hand, it would be foolish of the State (and of an interest arbitrator) to award expensive contract improvements based on little more than a hope that actual future revenue will, in fact, turn out to be substantially greater than forecast.

⁴⁶ As noted above, however, I would have to consider other factors, such as paid time off and health care contributions, not just the bare subsidy rates, in comparing child care provider compensation.

Moreover, the Governor and the Legislature are required by law to present a budget in balance with a forecast of revenues that will be produced later in the year, and while it is possible that economic conditions will change sufficiently between now and then to reduce the current projection of a \$2.7 Billion shortfall, Exh. E-12, the forecast in June 2008 was lower than the forecast in February 2008, Exh. E-11 at p. 4, and recent monthly collections of revenue seem to confirm a trend that is worsening, not yet getting better.⁴⁷

Based on these considerations, the State offers increases for both Licensed and Exempt providers of 1.6% in FY-2009-10 and 1.7% in FY-2010-11. The cost of these subsidy increases for Licensed providers, as calculated by the State, would be approximately \$5.68 Million for the biennium as compared to a cost of \$27.68 Million associated with the Union's 7.8%/7.8% proposal. Exh. E-32. The Union costs its proposal for Licensed providers at \$26.86 Million. Exh. U-36. The State projects that its proposal would cost \$2.785 Million for the Exempt providers, whereas the Union's proposal would cost \$12.78 Million. Exh. E-33. The Union calculates that its proposal for the Exempt group would cost the State \$8.964 Million during the life of the Agreement. Exh. U-36.⁴⁸

⁴⁷ Thus, even though it is true, as the Union has noted, that it is up to the Legislature to allocate scarce funds among the State programs, a projected severe shortfall in collected revenue severely limits the Legislature's options in that regard. Moreover, I am required—both by the law and by the ethics of my profession—to apply the statutory criteria to the best of my ability, and it would be improper for me to fail to do so simply because the Legislature and the Governor have the ultimate responsibility to craft a balanced budget for the next biennium.

⁴⁸ The State's estimate of costs includes the "employer costs" of making FICA, FUTA, and SUTA contributions on behalf of Exempt providers that are technically the responsibility of the families receiving services, but which the State pays on their behalf. It is not clear to me whether the Union's calculation includes those amounts or not, but it seems unlikely to me that the difference between the two estimates could be explained on that basis. In any event, with or without those added costs, it is clear to me that the State cannot afford the Union's proposed subsidy increases.

Facing a revenue shortfall approaching \$3 Billion during the next biennium, the State simply cannot afford the increased subsidy rates proposed by the Union. I note, however, that when Arbiter Williams granted substantial increases in Year I of the current Agreement followed by smaller increases in Year II, he observed that the first year should be regarded as “catch-up” for past deficits in fair compensation, and that the second year should be viewed as maintaining the ground gained. Exh. E-1 at 28, Williams 2006 Award. Demonstrating the difficulty of projecting future revenue and expenses accurately, however, inflation has been and continues to be higher than originally anticipated for 2008. The State’s economists are now predicting an inflation rate of 3.8% for the year,⁴⁹ as measured by the implicit price deflator (IPD), lowering to 2.4% in 2009. Exh. E-11 at 2. In other words, for the last half of 2008, during which the 3% raise will be in effect, inflation is likely to exceed the subsidy increase and to erode real income for the providers, contrary to Arbiter Williams’ intentions. Some of that lost ground may be regained in the first half of 2009, when IPD inflation is forecast to be 2.4%, but it might be lost again in the second half of 2009 under the State’s 1.6% offer which is pegged to predicted inflation in 2010.⁵⁰ As previously noted, CPI data, measured

⁴⁹ That projection is consistent with the running “annualized” inflation rate (as measured by the IPD) published in July 2008 on the website of the Municipal Research and Services Center of Washington (“MRSC”). During the first four months of 2008, the annualized rate of inflation exceeded 3%, and was as high as 3.509% in January. These figures, moreover, do not include May and June, two months of high energy prices. The CPI numbers are no doubt higher. *See, e.g.* Exh. U-20 (year-over-year inflation of 5.8% for June 2007 to June 2008 in the Seattle-Tacoma-Bremerton statistical area, with food, motor fuel, and housing costs rising at substantially higher rates).

⁵⁰ These forecasts of inflation appear to be based on calendar years, not State fiscal years. Consequently, the data do not exactly match with the time periods during which the increases in subsidy rates will be in effect. I have assumed a constant inflation rate in this discussion throughout the calendar years involved because that is the best I can do with the data I have, even though I recognize that it may result in less than completely accurate projections of the impact of inflation on the providers.

by a fixed “basket” of goods and services that does not take immediate account of changes in consumer purchasing patterns, may well be higher.⁵¹ *See*, Exh. U-20.

In sum, although Arbiter Williams, using data then available, thought that a 3% increase in the second year of the current contract would enable providers to “maintain” their income levels, unexpectedly high overall inflation in the second half of 2008 threatens to erode subsidy rate gains achieved in the first year of the current Agreement. On the other hand, in addition to subsidy rate increases in both years, the State has agreed to increase health insurance contributions by \$5.45 Million during the life of the new Agreement, an amount that is roughly equal to the cost of the State’s offered subsidy rate increase for Licensed providers (\$5.68 Million) as reflected in Exh. E-32.⁵² Also, I have awarded above a form of the Union’s “alignment” proposal that raises subsidy levels in the first six months of the toddler classification.

Taking all these factors into account, I find that the State’s total package for 2009-11, including the additional health care contributions and the “Enhanced Toddler Rate” awarded above, may well keep pace with inflation (at least as measured by the IPD) at a time when projected budgetary shortfalls will no doubt create great pressure to cap increases at the cost of living. As I have previously noted, the State cannot afford the

⁵¹ The Union argues that the statutory criteria—“the average cost of goods and services”—better fits the CPI measurement than the IPD. I agree with the State, however, that the statute does not prescribe one measure or the other, and both indices measure (albeit, in different ways) “the average cost of goods and services.” Thus, I consider both measures.

⁵² Apparently, the increase in State health insurance contributions will benefit only about 20% of Licensed providers, just 660 out of a total of roughly 3400. *See*, Exh. U-10. Nevertheless, the State’s agreement to contribute toward health insurance constitutes a significant incremental cost to the State on a matter of great importance to the Union and to the members of the bargaining unit as a whole, because it potentially sets the stage for broader benefits and/or broader participation in the future. For both of these reasons, I cannot discount the importance of the changes to Article 13 (*see*, Exh. E-5) in calculating whether the bargaining unit, as a group, is “maintaining” compensation and benefit levels.

Union's proposed subsidy rate increase of 7.8% in each year for Licensed providers.⁵³

The Exempt providers, however, face the prospect of effectively giving back some of the subsidy increases awarded by Arbiter Williams because of greater than anticipated inflation, and they will not share directly in the improvements in health care contributions and in the Enhanced Toddler Rate that hopefully will enable the Licensed providers to keep pace with the cost of living. Moreover, I note that Arbiter Williams in the last interest arbitration granted higher increases to the Licensed provider group than to the Exempt Family Homes.⁵⁴ As a result, the Exempt group has less to "give back," especially without the benefit of the other major improvements in this contract. At the same time, I agree with the Union that the Exempt Homes provide an important child care resource, where children can be cared for by a trusted relative, neighbor or friend, and in a setting (often in the child's own home) that may be more sensitive to cultural and linguistic values important to parents.

Considering all these factors, including the stated policy of the State of Washington to preserve parental choice and to foster stability, quality, and retention in the child care industry, I find that the State's proposed subsidy increases are insufficient

⁵³ I recognize that the Union's proposal was designed to result, through bargaining, in a rate increase of something less than 7.8% in each year of the Agreement. Whatever rates the Union had in mind, however, given the current economic conditions and the other terms of the Agreement—both those agreed by the parties and those awarded by the Arbitrator—I find that subsidy rate increases above projected inflation are unwarranted, no matter how well deserved. That is, even taking into account the public policies expressed by the Governor and the Legislature, the focus in this year should be attempting to keep pace with inflation and to maintain prior increases during a projected budgetary crisis.

⁵⁴ It is also true that because of the low hourly rates applicable to the Exempt providers, i.e. a little over \$2.00 per hour per child, even a 4%/3% raise, such as that awarded by Arbiter Williams, results in a very small absolute increase, smaller than an equivalent percentage applied to the Licensed Home full-day and half-day rates. Thus, in absolute dollars, the Exempt providers effectively fell even farther behind the Licensed group than a simple comparison of the percentage increases might suggest. It therefore seems all the more important to me that the Exempt providers keep pace with inflation if at all possible.

for the Exempt providers. I will award, instead, a 1.6% hourly rate increase effective July 1, 2009, as the State has proposed, but an additional increase of 2.0% effective July 1, 2010 instead of the State's proposed 1.7% increase.⁵⁵ While these increases are not a great amount in absolute terms, they are hopefully sufficient to allow the Exempt providers to maintain ground while the State weathers the current economic downturn. Moreover, by placing the larger increase in the second year of the biennium, even though higher inflation is expected in the first year, the overall cost to the State is significantly less.⁵⁶ In addition, the State's economic forecast predicts higher growth in 2010 and 2011, Exh. E-11 at 2, which should help the State absorb the modest increase in Exempt provider compensation during that time.

I will award the same 1.6%/2.0 % increases to the Licensed Homes. Although Arbiter Williams in the 2006 interest arbitration proceeding awarded different rate increases to the two groups, neither party has suggested here that I should continue that trend. In fact, the State's concerns about parity of subsidy rates for Licensed Centers and Licensed Homes, as well as a general reluctance to distort the market by favoring one group of providers over another, would seem to argue in favor of granting the same level of increases to Licensed providers as to the License-Exempt group. The cost of doing so is again relatively modest—\$6.034 Million for Licensed as compared to \$5.68 Million under the State's proposal—and even parity for the Centers is not beyond the State's ability to pay (\$10.6 Million as compared to \$9.985 Million under the State's proposal).

⁵⁵ Using the Excel spreadsheet produced by the State, it appears that the projected cost to the State of these increases will be approximately \$3.32 Million, as compared to a cost of approximately \$2.62 Million for the State's proposal.

⁵⁶ At the same time, the larger increase in Year II provides a base on which future increases will build.

Exh. E-34 at 2.⁵⁷ Even though these are small increases for the providers, I recognize that they will require the State to make some difficult choices regarding allocation of its scarce financial resources in a time of significant revenue shortages. Nevertheless, in light of the State's commitment to early childhood education and quality child care, as well as the fact that many, if not most, of these child care providers are at the low end of the income scale in our state, I believe that the effort to find additional funds for this group is necessary and justified. That is, if improved child care and early learning are truly priorities of the State, they must be priorities in difficult economic times as well as when the economy is booming.

3. Interest Arbitrator's Decision on Subsidy Rate Increases

To reiterate, I will award subsidy rate increases of 1.6% effective July 1, 2009, and an additional 2.0% effective July 1, 2010 for both the Licensed and the Exempt providers.

⁵⁷ I have also taken account of the fact that these costs are calculated as if all subsidies are paid completely by the State at the maximum rate. Actual paid rates range from 6-13% less, however, *see* Exh. E-15A. Thus, while I agree that the State wisely calculates the cost of the contract proposals on a "worst case" basis, i.e. with an assumption that the maximum rates will be paid by the State, given past experience, the actual cost is likely to be somewhat less. In addition, families are responsible for co-pays that also reduce the amount payable by the State by some amount. Exactly how much is a matter of dispute. The Union, using data it received from DEL covering the period February through June of 2008, calculates the parent co-payments at approximately 8% of the total Working Connections and WorkFirst payments. See, Excel Spreadsheet provided by Union Counsel Robert Lavitt via e-mail on Friday, August 22, 2008 at 4:51 PM. The State contests the accuracy of the Union's calculations (noting, for example, that the 2% deduction for Union dues does not seem to be accounted for), and the State apparently has not been able to reconcile the data with official DEL data. Declaration of Carole Holland dated August 21, 2008 and provided via e-mail from Assistant Attorney General Laura Wulf at 4:45 PM on August 22. When I initially requested this kind of data, I assumed that the information would be readily available and that the parties could quickly agree, by looking at historical trends, on the percentage of the projected costs to the State, or at least a range of percentages, that would likely be borne by the families. Unfortunately, the task proved more difficult than I expected. While on this record I cannot resolve the parties' disputes about the data, it is clear that some portion of the amounts projected by the State in costing the subsidy proposals will actually be the responsibility of the families. Increases in the caseload, of course, conceivably could offset these "savings" to the State, but for reasons stated previously, I cannot determine the precise effect of future caseloads on the costing of these subsidy increases. Therefore, I have used the parties' data, which does not account for possible caseload changes in either direction, in applying the "ability to pay" criterion.

AWARD

Having carefully considered the evidence and argument, I hereby render the following AWARD:

1. With respect to the Unions' proposals concerning Article 11.2, I award no change in the language of the first paragraph;

2. With respect to the Union's proposed changes to the second paragraph of Article 11.2, I award the following changed language:

Infant Pay Differential and Age; Enhanced Toddler Rate

[no change in first paragraph]

For Licensed Family Child Care providers there shall be an Enhanced Toddler Rate, applicable in months twelve (12) through seventeen (17), equal to one hundred fifteen percent (115%) of the Regular Toddler Rate. The percentage increases in subsidy rates set forth in Article 12.1 shall first be applied to the previous Toddler Rates in order to determine the new Regular Toddler Rates. The Enhanced Toddler Rate shall then be fifteen percent (15%) more than the Regular Toddler Rate. The Regular Toddler Rate shall also be used to calculate the Infant Pay Differential set forth in the first paragraph. ~~age required for the infant subsidy shall be birth to 18 months.~~

3. With respect to the parties' respective proposals concerning Article 12.1, I award the following language:

Subsidy Rate Increases

Subsidy rates for Licensed Providers shall be increased across the board by one and six-tenths of one percent (1.6%) effective July 1, ~~2007~~ 2009 and ~~three two percent (2%) (3%)~~ effective July 1, ~~2008~~ 2010.

Subsidy rates for Exempt Providers shall be increased by one and six-tenths of one percent (1.6%) effective July 1, ~~2007~~ 2009 and ~~three two percent (2%) (3%)~~ effective July 1, ~~2008~~ 2010.

4. Consistent with the terms of the statute, the parties shall bear the fees and expenses of the Interest Arbitrator in equal proportion.

Dated this 25th day of August, 2008

A handwritten signature in blue ink, appearing to read "Michael E. Cavanaugh", written over a horizontal line.

Michael E. Cavanaugh, J.D.
Interest Arbitrator