

STATE OF NEW YORK  
PUBLIC EMPLOYMENT RELATIONS BOARD  
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In the Matter of the Impasse  
Between X

UNITED FEDERATION OF TEACHERS X

                          "UFT" X  
-and- Case Nos. M201-003 - M201-015  
X

THE BOARD OF EDUCATION  
OF THE CITY SCHOOL DISTRICT X  
OF THE CITY OF NEW YORK

                          "BOARD" X  
-and- X

THE CITY OF NEW YORK X

                          "CITY" X  
-----X

**Findings of Fact and Recommendations  
of the Fact Finding Board**

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of the City of New York**

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**BEFORE: FACT FINDING BOARD**

Professor Daniel G. Collins, Esq., Chairman

Martin F. Scheinman, Esq., Member

Rosemary A. Townley, Esq., Ph.D., Member

## **Procedural Statement**

The United Federation of Teachers ("UFT" or "Union") represents employees in thirteen bargaining units of the Board of Education of the City School District of the City of New York ("Board" or "BOE"): teachers, attendance teachers, bilingual teachers in school and community relations, guidance counselors, laboratory specialists and technicians, paraprofessionals, school social workers and school psychologists, school secretaries, nurses and therapists, directors and assistant directors of alcohol and substance abuse, supervisors of school safety, school medical inspectors and occasional per diem substitutes. The bargaining units other than for teachers are referred to as "functional chapters". The Union represents in total more than 100,000 employees of the Board.

The most recent teachers collective bargaining agreement and the collective bargaining units for four of the functional chapters expired by their terms on November 15, 2000. The agreements for the other eight functional chapters expired on September 15, 2000.

The Union began bargaining with the Board and the City of New York ("City") for successor contracts on September 6, 2000, the Union first having sought bargaining on January 20, 2000. The parties thereafter held bargaining sessions on November 29, 2000 and January 3 and 25, February 16 and March 9, 2001. Efforts to

achieve agreements were unsuccessful and on March 9, 2001 the Union asked the New York State Public Employment Relations Board ("PERB") to declare an impasse. PERB did so over the objection of the City/BOE and appointed a mediator, Robert L. Douglas, to assist in resolution of the dispute. Resolution was not achieved and on July 19, 2001 PERB appointed the undersigned Fact Finding Board ("Panel"): Martin F. Scheinman, Rosemary A. Townley and Daniel G. Collins, Chair. The Panel held hearings in New York City on August 15, September 7, November 28, December 1, 7, 17 and 20, 2001 and January 9, 2002. The parties filed pre-hearing briefs and post-hearing briefs and reply briefs. The record was closed on February 8, 2002.

### **The Parties' Proposals**

While there is some dispute as to whether certain proposals are now before the Panel, the parties appear to be in agreement that the items set forth below are before the Panel.

#### **Board Proposals**

##### **1. TERM OF THE AGREEMENTS**

The agreements shall be for a twenty-seven month period.

##### **2. WAGE AND BENEFIT INCREASES**

4% general wage increase effective November 16, 2000.

4% general wage increase (compounded) effective November 16, 2001.

1.10% in Additional Compensation Funds to be used to purchase recurring non-wage benefits on November 16, 2002.

\$200 Welfare Fund increase effective February 15, 2003 (pursuant to the Municipal Labor Coalition Health Benefits Agreement).

### **3. PERFORMANCE INCENTIVES**

The Board of Education shall have the right to pay additional compensation for outstanding performance. The Board shall notify the Union of its intent to pay such additional compensation.

### **4. CONTRACTUAL REFORMS**

#### **(a) Enhanced Availability of Existing Staff**

Elimination of paid sabbaticals for employees hired after July 1, 2001. (Articles 16B, 16C and 16D)

### **Union Proposals**

All contracts between the UFT and the NYC BOE will remain in full force and in effect, including all agreements negotiated between the UFT, the BOE and the City of New York since ratification of the 1995-2000 agreements and the agreements negotiated between the MLC and the City of New York concerning health benefits in January, 2001 and concerning legislation to jointly secure pension benefits in June, 2000 except as modified below.

### **1. SALARIES**

(1) Base Salaries: We propose for the period 11/16/00-11/15/02, a salary schedule for teachers from \$39,154 to \$85,890, which represents a 22.7% across-the-board increase (see attachment 1). We propose a comparable increase for all other bargaining units. The same percentage of increase shall apply to all other contractual rates, including but not

limited to per diem, per session, shortage and coverage rates and longevities, differentials, and increments. This schedule will provide salaries competitive with surrounding areas, making it possible for the BOE to attract and retain teachers qualified to help students succeed under new standards and requirements of the present knowledge economy.

(2) Special Skills Differential: \$4,000 for the acquisition of additional skills and knowledge and the utilization of skills such as National Board certification or dual certification one of which is in a shortage area.

(3) 1.5% Additional Compensation Fund.

...

#### **IV. SAFETY AND CIVILITY**

All bargaining unit contracts shall incorporate the Board of Education regulations implementing SAVE legislation.

...

#### **VI. JOB SECURITY**

In light of present budgetary uncertainties and proposed reductions:

No layoffs for all titles through the term of this agreement.

#### **VII. FUNCTIONAL CHAPTERS**

Unless expressly stated otherwise, the above proposals apply to all bargaining units represented by the union. In addition we propose the following provisions for functional chapters:

...

(4) Application of a portion of the Additional Compensation Fund to functional chapters.

### **POSITIONS OF THE PARTIES**

## **ARGUMENTS OF THE UFT**

### **Ability to Pay**

The UFT contends that the evidence shows that the City/BOE has the ability to pay for the UFT's proposals regarding salary and other matters.

It argues that as of December 31, 2001, the City's projections on revenues and expenditures, as set forth in its Four Year Financial Plan, demonstrate that there will be a \$200 million general reserve and a budget stabilization account of \$697 million. (City/BOE Exhibit 111; Brief at 54) In light of the existence of approximately \$900 million, which is unallocated in the latest financial plan update, it is clear that there are funds available to provide a settlement which exceeds the pattern.

It points to the testimony of its expert witness, Carol O'Cleireacain, Ph.D. who was a former Commissioner of the New York City Department of Finance and Director of the City's Office of Management and Budget. She testified that both the general reserve and budget stabilization accounts may serve as sources of funding for raises which exceed the pattern because such an allocation would not require any change in the budgeted spending. She also testified that these funds have increased by \$352 million.

O'Cleireacain also testified that there was \$200 million in prior payables unaccounted for in the July budget for Fiscal Year 2002 which closely matches the City's announcement that the

November 2002 updated budget plan contained \$210 million in prior payables, which the City budgeted. (Tr. at 1134-35) Thus, the UFT maintains that while there is additional money from prior payables, the City chose to allocate the money, rather than applying these funds to a salary increase. It maintains that the \$897 million in the general reserve and budget stabilization accounts could be used without affecting any of the priorities set forth in the budget for FY 2002. The UFT cautions that it may be easy to overlook the increases in the budget stabilization account because revenues and expenditures balance in the current plan year, leaving a "gap" of zero and thus the account must be considered as a surplus. It concludes that the City is now poised to end FY 2002 with a greater surplus than projected in the budget adopted in July 2001.

The UFT further contends that OMB Deputy Director David Rubenstein failed to mention during his testimony on January 9, 2002 that the budget stabilization account grew by \$322 million during a two week period from December 17, 2001 to December 30, 2001. This increase, according to Rubenstein's testimony, was due to the City's increase in its tax revenue forecast by \$322 million.

This supports O'Cleireacain's testimony that the City would adjust "to a more realistic forecast of securities industry profits."

(Tr. at 1374-75; Brief at page 55)<sup>1</sup> The UFT argues that Rubenstein did not inform that Panel that the entire increase in revenues was placed in the budget stabilization account. It, therefore, maintains that those funds have not been allocated or targeted for additional spending and thus may be regarded as a surplus.

The UFT claims that by the end of FY 2002, the City could have a \$897 million surplus. It points to the testimony of O'Cleireacain that the City Comptroller reported in December 2001 that the actual tax receipts were above those assumed in the December 4 plan. (UFT Exhibit 180 at page 25; Tr. at 1136-38; City/BOE Exhibit 109 at 15) She also testified that the City Comptroller projected an additional \$220 million in tax revenues for FY 2002, which leads to the conclusion that the City failed to include five months of actual tax collection data when it modified its current revenue projections. This is consistent with the comments of former Mayor Rudolph Giuliani, who stated in his farewell address that "(w)e always have underestimated tax receipts." Therefore, there are available funds to apply to any increases. (Brief at 56)

A review of the City's budgeting process in recent years further underscores Mayor Giuliani's comment because over the past five years there has been an average of \$1.4 billion in

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<sup>1</sup>All references to "Brief" indicate a party's post-hearing brief.

underestimated tax revenues. (UFT Exhibit 158; Brief at 56) Yet, the City/BOE witnesses apparently did not consider this underestimation in tax revenues during the course of their testimony. Rubenstein's testimony on December 17, 2001 was that the City's securities industry profit forecast of \$5.5 billion for 2001 was an appropriate one, despite the Securities Industry Association's November 2001 projection of \$11 billion in profits for 2001. (Tr. at 882-84; Brief at 56) However, two weeks after Rubenstein's testimony, the City revised its securities industry profit estimate to \$8.5 billion, which represents a 54.5% increase over the original projection of \$5.5 billion.

Although Rubenstein attributed the increase to favorable earnings reports from four major Wall Street firms, the UFT contends that the explanation of this increase is found in Mayor Giuliani's farewell address when he stated: "This is why we have surpluses every year. We have always underestimated tax receipts. We always conservatively estimate how well the economy is going to do." (Brief at 56) Mayor Giuliani also said during this farewell address that for FY 2002 there "looks to be a surplus of over \$1 billion" which is supported by the December 31 financial plan with \$897 million in unallocated monies. (Brief at 57)

The foregoing evidence belies the City/BOE's claim that it does not have the requisite ability to pay for a significant contract raise for fiscal year 2002.

Although the City has projected budget gaps in the "out-years" in its December 31, 2002 revised forecast of \$2.859 million in FY 2003, \$3.594 million in FY 2004, and \$3.509 million in FY 2005, the Panel should consider the fact that the City has traditionally projected significant out-year gaps and always ends the years by closing them. (UFT Exhibit 92, 113, and 114; Brief at 57-58) The UFT points to the April 2001 Budget Summary of the City, which "depicts a strong government, in sound fiscal condition." (UFT Exhibit 109) In addition, O'Cleireacain's testimony demonstrates that during the City's last full fiscal year, FY 2001, the financial plan showed a \$3 billion out-year gap, while the final audited result was nearly a \$3 billion surplus. It also maintains that for FY 2002, despite the worsening of the economy and the September 11 disaster, the City started its financial plan as an out-year with a \$2.6 billion gap to the now-expected \$897 million surplus. The UFT points to the Standard & Poor's report concerning future changing gap numbers that "the City has a long history of closing out-year gaps - the gap to start fiscal 2002 was a substantial \$2.6 billion." (UFT Exhibit 115; Brief at 59) The UFT concludes that the credit markets have not soured by billion dollar gaps in the out-years, despite the recent blows to the economy by a recession and the World Trade Center attack.

The UFT also points to the comments of Mayor Giuliani last April concerning the FY 2002 budget out-year gaps (City/BOE Exhibit

99 and UFT Exhibit 109 at 42) as evidence that the City always closes these gaps. This is shown by the City's persistent underestimation of baseline tax revenues or tax policy changes, such as cancellation of the income surcharge or the re-institution of a commuter tax. In addition, the City has made budget cuts, or has seen an increase in inter-governmental aid or a combination of the foregoing factors, all of which could occur over the next few years. There is no record evidence of serious doubt that the out-year gaps will not be closed, as no City/BOE witness had even remotely suggested that the City is headed for either bankruptcy or a takeover by the Financial Control Board as a result of the projected out-year gaps. The testimony of Deputy Mayor Robert Harding was clear that the City did not believe that any intervention by the Financial Control Board was warranted. (Tr. at 581-82; Brief at 59)

Both Mayors Giuliani and Michael Bloomberg have addressed the projected gap by calling for "agency actions," which include budget cuts, a usual occurrence during the budgeting cycle and not unique to the post-attack situation in the City. These actions, known as the "Program to Eliminate the Gap" ("PEG"), have been routine elements in the City's financial planning process since the 1970's fiscal crisis. Agency PEGs are at the center of the City's financial efforts to ensure budget balance because they represent actions that are under the control of the City and that neither the

Financial Control Board nor the credit agencies have demonstrated concern that the budget for the City will not be a balanced one. It points out that the April 2001 Budget Summary called for an "agency program" of \$846 million to close the gap for the coming year. (UFT Exhibit 109 at 35) The July 2001 budget contains similar and significant gap closing agency programs of \$1.678 million, \$1.511 million and \$1.136 million, for the out-years of FY 2003, FY 2004, and FY 2005, respectively. (City/BOE Exhibit 53 at 38; Brief at 60)

Mayor Giuliani added a further \$1 billion in agency gap closing PEGs for the current year, as noted in his October 9, 2001 announcement in response to the September 11 attack. It is obvious that this will have carry-over value for the out-years. The Mayor explained that "this is a \$39 billion budget (and that) you can't find a billion dollars in a \$39 billion budget without affecting a blessed thing." (UFT Pre-Hearing Brief at 98; Brief at 60) There was no apparent reaction by the bond market to this October 2001 announcement by the Mayor, as the City's bond offering sold out in a day, despite the City's official statement detailing the out-year gap. (UFT Exhibit 180-B; Tr. at 941-42; Brief at 60) The UFT also notes that the credit rating agencies have maintained the City's "A" Rating despite out-year gaps. (Tr. at 942; Brief at 60)

It also maintains that the consensus among all witnesses for both sides is that the national economy is headed into recovery,

that economic growth should pick up speed as the year progresses, and that the strengthening of the economy in the second half of the 2001 calendar year coincides with the beginning of the FY 2003. (Brief at 61)

The UFT points out that O'Cleireacain testified on December 20, 2001 that the City Comptroller forecasted a 3% decline in the Gross City Product ("GCP") for this year, while the OMB forecasted an 8.9% drop, the latter of which she characterized as "unfathomable." (Tr. at 1131-32; Brief at 61) Rubenstein testified on January 9, 2002, that the OMB changed its forecast at the end of December 2001 to a 4.5% decline in the GCP, which is a 60% improvement of its original forecast and a moving closer to the number projected by the City Comptroller, who is traditionally a "conservative monitor" of the City's finances. (Tr. at 1377; Brief at 61)

The UFT notes that there are certain new revenue sources which will result in a positive impact upon the City's forecast revenues and projections, including private insurance monies related to the attack which will become available. Although the City/BOE witnesses either professed or decided not to speculate about such monies or acknowledge the existence of them (Tr. at 935-37; Brief at 56), they did admit that the World Trade Center leasee, as well as other impacted companies, had such insurance to cover current losses, while speculating that future insurance may be unavailable

or that the cost of purchasing terrorism insurance in the future could hurt the City. (Tr. at 1369-70; Brief at 62)

Despite the concerns regarding private insurance which have been expressed by City/BOE witnesses, the UFT maintains that the City's financial plan contains no assumptions based on inflow of insurance monies to the private sector, which is fully implausible in nature. Although the City/BOE's witnesses suggested that the only monies to be expected from the federal government would be dollar-for-dollar compensation for clean-up costs (Tr. at 933-35; Brief at 62), the City/BOE later admitted, which is public knowledge, there were billions of additional dollars available to the City for recovery and development.

By way of example, the UFT points out that the Lower Manhattan Development Corporation is in the process of receiving an initial \$2 billion federal appropriation (City/BOE Exhibit 105); that PATH will be receiving \$100 million which would represent an external stimulus to the City, as PATH is not funded, owned or operated by the City; and, that more money might become available to the City in the form of a federal economic stimulus package. (Brief at 62)

The City has already recognized that "a boom in the construction industry is expected" as a result of the re-building costs attendant to the attacks. (Tr. 839-40; Brief at 63) This boom will undoubtedly have an economic impact extending far beyond jobs for

construction workers and will serve to benefit businesses, suppliers and other neighborhoods.

The UFT concludes that the economic future for the City is not a grim one and that the current economic downturn occurred at a time when the City was perhaps in its strongest financial condition in history. It believes that this downturn is being met with an unprecedented and substantial influx of resources which are targeted for stimulating the economic recovery of the City.

Although the City argues that it will not roll back tax cuts because of the potential impact on development, it also attempts to justify large expenditures such as funding sports stadia and cultural institutions as a means of stimulating the economy. (Tr. at 942-44; 947-48; Brief at 63) At the same time, the City/BOE contends that its refusal to provide a necessary increase to public school teachers is because such raises cannot be afforded at this point in time. Yet, the UFT contends, the City's budget "remains a matter of choices and priorities." (Brief at 63) It argues that the City/BOE presented no witness who testified that the short-term need for revenue is so significant that the tax cuts which have been put into place would be rescinded immediately. The UFT maintains that it should be apparent that the City will be able to survive and adjust to all of the economic forces impacting upon it at this time. It is clear through the testimony of the City/BOE's

witnesses that they believe that they could sensibly and responsibly make decisions concerning the budget.

In addition, the City/BOE's argument that it has no money to fund significant raises reveals its lack of ability to recognize any economic value to paying competitive salaries to pedagogues. The UFT contends that the testimony of its expert witness Professor Moss, N.Y.U. Professor of Urban Policy and Planning, is unrefuted that recruitment and retention of qualified teachers is directly linked to the City's economic climate. This testimony demonstrated that companies will locate their businesses to be near good workers, rather than the reverse, and that high school graduates with strong skills are desirable to those companies seeking good workers, who will locate in cities where there is such a labor pool. (Tr. at 47; Brief at 64)

If the City/BOE is serious about investing in its financial future, the UFT argues, then there is no better investment than paying for qualified teachers in its schools. The UFT asks when, if ever, will the City/BOE fund competitive pay raises for the public school teachers, if it is unwilling to do so at this point. Staffing problems which now face the schools will continue forward and never be remedied, if salaries are not raised at this time. The school children will suffer as a result. If the City/BOE delays its solution to the problem of the lack of qualified teachers, it could take much more money years from now to attract

qualified teachers, as the school system will be further eroded, as evidenced by the City/BOE's attempts to defer maintenance on the crumbling school building inventory. Moreover, it asks how much more money will be required in the future to fund a salary structure which would attract certified teachers by 2003, the effective date of New York State Education Department requirements ("SED requirements") that the schools be staffed with certified teachers only.

### **Comparability**

The UFT argues that a regional analysis properly constitutes the labor market and is the most appropriate basis of comparability for statutory purposes required under the Taylor Law. (Brief at 4-5) It notes that there is a significant salary gap between salaries paid to teachers in the City schools and those paid to teachers working in the largest 36 districts in surrounding areas at nine different salary steps. This gap is in the 20-30% range, almost 17% at the entry level to more than 30% at the maximum level of the salary range. (UFT Exhibit 146)

The UFT points out that the entry level salary for teachers in New York City schools is currently \$31,910, while the top salary, which is received by those teachers who have attained a Masters Degree, have 30 additional college credits and 22 years of service to the Board, is \$70,000. There is evidence of significant

disparity between teacher salaries and those of other professionals requiring a similar educational background including advanced degrees or skills which, when compared, demonstrates that New York City teacher salaries remain at the bottom of the list. It refers to the data presented by its expert witness, Moss, which compared a New York City teacher salary to those of common jobs in the City for people with four-year degrees including positions such as Human Resource Specialist, Writer, and Construction Manager, all of whom are paid more than City teachers. (UFT Exhibit 134; Brief at 5)

It notes that Moss further testified that there has been a loss of the "historically captive female labor pool," because the career opportunities "for women, people once predominantly in school teaching" are now in more attractive positions with more opportunities. (Tr. at 62) He stated that the legal profession is one example of a field presenting more opportunity and that in 1996-97, 44.4% of enrollees in law school were female as compared with 9.4% in 1971-72. The UFT maintains that these external influences add to the City's problem of attracting and retaining qualified professionals. (Brief at 5)

Not only is the City/BOE facing the serious problem of sufficiently staffing the schools with well-qualified and well-prepared professionals, according to the UFT, it further argues that the City/BOE will have difficulty complying with SED Regulations which mandate the hiring of only certified teachers by

the year 2003. It notes that it presented evidence that currently 17% of the teaching staff in New York City is uncertified, this figure does not include those teachers who work outside their license area, and that this data is uncontradicted on the record. (Tr. at 117; Brief at 5) While the City/BOE denies that there is a teaching shortage, the UFT points to a study by the SED which identifies areas in which the City/BOE is considered to have teacher shortages, including subject areas such as Mathematics and Science, English as a Second Language, Special Education, and Social Studies. (UFT Exhibit 198 at 4-5; Brief at 6) It also argues that there are increasingly large numbers of teachers leaving the City schools to teach in the surrounding areas (UFT Exhibits 142, 143, 188) and an even larger number of teachers retiring. (UFT Exhibit 192) The high turnover will have the probable result of making the recruitment of certified teachers an even more difficult one in the years to come. It also argues that the salary gap between the surrounding 36 school districts and the City/BOE schools has grown.

The UFT also notes the testimony of another of its expert witnesses, Stanford University Professor Linda Darling-Hammond, who stated that the City/BOE's ability to recruit and retain qualified teachers when there is a gap between offered salaries and those in surrounding areas has an impact upon the quality of education which is afforded to the City/BOE's student population. (Tr. at 315;

Brief at 6) There is further record evidence that the amount of a salary paid to an individual plays a role in an individual's choice of selecting between positions and that this should be "a self-evident conclusion." (UFT Exhibit 169; Tr. at 369-71)

The City/BOE's witnesses have failed to credibly contradict the proposition that salary levels do matter to people and that people respond well to a higher salary. It argues that there is no dispute between the testimony of Princeton University Professor Henry Farber, its expert witness, and that of the Board's Dr. Richard Evans, who in analyzing worker relocation issues found that comparable working conditions as well as salary will influence a person's choice. (Brief at 6)

The record is undisputed that the working conditions in the City are significantly more difficult than that of surrounding areas. Nor is there disagreement that class sizes are significantly larger in the City by 14.3% at the elementary level, 20% at the middle school level and 20.4% at the high school level. The evidence also shows that the statistics in the New York City schools, as compared to the rest of the State, is that the elementary class size is 19.4% larger, middle school class size is 28.1% larger and high school class size is 31% larger in New York City. (UFT Exhibits 209-10; Brief at 7) In addition, the New York City schools have more at-risk students and more non-English speaking students than those found in the surrounding school

districts, both of which are student groups requiring extra attention. (Tr. at 988-89, City/BOE Exhibit 89 at 17-19) The poor conditions of the physical plant, as well as lack of supplies, support the argument that there is a need to pay more and not less to City teachers in order to be competitive in recruitment and retention.

Although the City/BOE maintains that the salary differential between the City/BOE school teachers and those of the surrounding districts is justified because the City/BOE teachers work a shorter day (City/BOE Exhibit 81 at 17-20), the UFT argues that the instructional time for City/BOE teachers and those in the surrounding areas is virtually the same and that the teachers in the other districts have more preparation time built into their days. It charges that when the City presented its length of day analysis, the City/BOE failed to take into consideration those things that the teachers in New York City provide as part of the "contract day", such as appearing for work before the school bell rings and engaging in professional development. (UFT Exhibits 203, 205-08; Tr. at 1220-21; Brief at page 8)

The UFT also claims that the conclusion is obvious that dramatically lower salaries and less desirable working conditions will result in qualified teachers choosing to teach elsewhere, or that they will leave their positions in order to seek higher paying jobs, or retire at an early opportunity. It points to the

conclusion of a 1993 fact finding panel concerning an impasse between the instant parties which stated that "(t)he survival of the educational system requires the City/BOE to provide levels of compensation that will in the future enable it to compete more effectively with its nearby comparators." (UFT Exhibit 7 at 9; Brief at 9)

The evidence also shows that the Board, outside of this instant fact finding proceeding, admits to the severe teacher shortage and what must be done to remedy the problem (UFT Exhibits 17-21, 23, 73, 75, 76), as noted by the accounts of commentators and reports of the SED. (UFT Exhibit 189) It points to the opinion of Justice Leland DeGrasse in Campaign for Fiscal Equity, et al. v. State of New York, et al., 719 N.Y.S. 2d 475 (2001) ("CFE") who heard testimony from the Chancellor, the Deputy Chancellor, District Superintendents and other Board of Education administrators, and concluded that there was a serious teacher shortage in the City and a need for competitive salaries to attract teachers. CFE, 719 N.Y.S. 2d at 493. (UFT Exhibit 5) A SED report dated December 14, 2001, states a Board of Regents projection that by 2003 there will be "upwards of 23,000 additional certified teachers" that will be needed statewide beyond those that districts have been able to employ. (UFT Exhibit 189) This SED report found the greatest shortages in the State to be in urban and rural areas and that "most uncertified teachers with temporary licenses are

teaching in New York City, where more than half of all new hires in 1999-2000 did not meet certification standards". (Id. at 2; Brief at 10) The SED report also noted that certain factors were contributing to a teacher shortage, including attrition among novice teachers and non-competitive salaries, among others.

Although the City/BOE argues that there is no teacher shortage and points to the fact that it hired approximately 8,800 teachers this year (City/BOE Exhibit 81 at 33; Tr. at 778-79), the UFT questions the qualifications of those hired given that 42.5% of the teaching vacancies were filled by teachers lacking any certification, with an additional 19.5% lacking traditional certification. (UFT Exhibit 77; Tr. at 1206-07; Brief at 10) The City/BOE's witnesses acknowledged that there were shortages in the area of mathematics, science, and bilingual education. (Tr. at 1065, 1074; Brief at 10)

The City/BOE's response to the certification problem appears to either ignore the area entirely or to rely upon alternate certification programs. While the UFT does not object to alternative programs and in fact supported the Teaching Fellows Program, it argues that it has become clear that such alternative programs are "temporary" and "expensive band-aids." (Brief at 10) The Teaching Fellows Program costs the City/BOE between \$19,000 and \$25,000 per individual, including payment for a Masters program for a Fellow. (Tr. 1407-20) Despite these added incentives which are

beyond the increases sought by the UFT in this matter, the Board was unable to hire as many Fellows as it had projected for the past school year. (UFT Exhibit 227) It also points out that of those Fellows hired, many quickly departed. It notes that 18.5% of hired Fellows left in the 1999-2000 school year, 17.7% in the 2000-01 school year and 6.8% of those hired for 2001-02 had left by November 15, 2002. (UFT Exhibit 193)

The UFT further questions that if there is no teacher shortage, as argued by the City/BOE, then why did it seek an additional \$5 million to retain a recruiting firm to search for qualified teachers? In addition, it queries why the Board's recruiting budget went from \$0 in 1998 to \$8 million in 1999-2000 to \$43.5 million in 2000-01. (UFT Exhibits 141 and 199) The \$43.5 million spent in 2000-01 for recruitment efforts, as a result of the severe shortage required extreme efforts, such as recruitment in Europe, the Caribbean and other places throughout the world. Yet, these efforts were insufficient to fill the open positions with certified teachers and asks whether this money would not have been better spent paying teachers a proper wage. (Brief at 11)

The UFT also argues that teacher retirements in the past two years have been at a record high. In 2000-01 1,935 teachers retired, while for the 2001-02 school year, as of December 17, 2001, 2,648 teachers have filed for retirement. The City/BOE did not include these statistics in the presentation of its data which

last showed that 880 teachers retired in 1999-2000. (UFT Exhibit 192; City/BOE Exhibit 81 at 42; Tr. at 791-92) The UFT notes that its data was from the New York City Teachers' Retirement System ("TRS") which shows that in reality the number of retirements doubled from 1999-2000 to 2000-01 and that these numbers are unprecedented for years without retirement incentives.

Nor does the City/BOE argue with the UFT's contention that teachers are leaving the City/BOE system in increasing numbers, while there may be some dispute as to where the teachers are actually going. It argues that for the 1998-99 school year 32.2% of teachers had left the system by November 15, 2001, and that of those hired for the 2000-01 school year, 22.5% left by November 15, 2001, after one year of teaching experience. (UFT Exhibit 191) It points to the SED study which found that "almost 42% leave teaching in New York City in the first six years, 25% within three years." (UFT Exhibit 189 at 3) In districts throughout the rest of the State, less than 1/3 of the teaching force leaves after six years. (Brief at 13)

The record shows that a large number of teachers are leaving for jobs in the surrounding school districts where the salaries are 20%-30% higher than in the City. It points to its exhibits which demonstrate that of the districts employing 52,924 teachers in the surrounding six counties, the City/BOE presented data on districts employing 25,480 which is less than half of the teachers in the

area. The methodology used by Deputy Commissioner Pamela Silverblatt, who testified that a survey was sent to 173 school districts and that 150 responses were received (Tr. at 786), is misleading because it admits the fact that 26 of the districts responded with "Not Applicable" for both years being examined. Accordingly, the total number of districts missing from the City/BOE's data is 48 of the 173 surveyed, which is more than 25% of the districts in the area. (City/BOE Exhibit 83)

The UFT argues that its data clearly shows that 1,042 teachers left in 1999 for surrounding areas and that had the City/BOE not underreported its figures concerning this item, it would raise the number of leaving teachers to 930. The UFT's data for 2000 was that 1,330 teachers left for surrounding areas. It maintains that City/BOE's number for the same category would have been 1,177 but for the fact of its underreporting. (Brief at 14) The UFT also argues that its numbers are confirmed by the Board of Education Principal's Survey, which was ignored by the City/BOE in its presentation, which shows that a total of 1,155 teachers have left City/BOE schools between June 2000 and March 2001 for other counties in New York State. (UFT Exhibit 188)

Nor can the City/BOE dispute that 17% of its current teacher workforce is uncertified, which constitutes more than 13,500 teachers teaching hundreds of thousands of children. (UFT Exhibit 209; Brief at 15) It notes that the rate of uncertified teachers

is approximately 3% in other districts throughout the State (UFT Exhibit 13), where districts pay significantly more than the City and have better working conditions. The data is clear as to where certified teachers will choose to work.

The City/BOE's argument that certification does not matter and that the SED directive eliminating uncertified teachers by September 2003 either is not binding because its based in a Commissioner's Regulation and is not a statute, or that the regulation might not be operative by 2003, is misplaced. (Tr. at 1048-61, 1062-63; Brief at 15) The testimony of UFT expert witnesses Anthony Alvarado, the former Chancellor and District 2 Superintendent, and Darling-Hammond, were in agreement that certification is important because it helps to approximate the subject matter knowledge and ability of a teacher to teach it. (Tr. at 479-80; 302; Brief at 15-16) While the City/BOE's expert witness Professor Dale Ballou testified that "earning a teacher's certificate means jumping through a lot of hoops" to support the argument that certification is somehow not necessary for good teaching (Tr. at 1007), the UFT points out that SED establishes the regulatory criteria that must be met by practitioners in various professions, which cannot be ignored or viewed as optional. Nor is the fact that the requirements for teacher certification are enunciated in the Commissioner of Education Regulations, rather than State Education Law, relevant to this matter because

regulations have the force of law. It also maintains that the interplay of statutory authorization for implementing these regulations is found in State Education Law Section 3006 and 8 NYCRR Section 80-5.10, which is similar to that of other statutes and regulations pertaining to other professionals certified by the State. (Brief at 16)

While theoretically the Commissioner's Regulation concerning the requirement of certified teachers by 2003 could change, there is no indication that it will do so. It points to the lawsuit initiated by State Education Commissioner Richard P. Mills against New York City Schools Chancellor Harold Levy and the Board to enforce his directive that certified teachers be employed in Schools Under Registration Review ("SURR schools") which demonstrates the seriousness of the Commissioner with respect to implementing the regulations. (UFT Exhibit 196) The UFT also notes that certain new federal assistance programs are dependent upon the use of certified teachers. (UFT Exhibit 197) It is both "counter-intuitive and counter-productive" as well as "irresponsible" to think that the SED requirement may go away. The testimony by Ballou and Silverblatt regarding the Teaching Fellows Program, appears to lead to the conclusion that a person with subject matter knowledge is not necessarily a good teacher. There is no evidence to support such a conclusion. The Board's argument with respect to certification is presented without any context or

explanation of why it believes the law might change by 2003. It maintains that instead of spending money developing programs that provide only indirect support to the hiring of new teachers, the City/BOE should share part of that money to increase the salary of the teachers already in the system.

The City/BOE's argument that the surrounding area is not an appropriate comparison for statutory comparability purposes and that New York City should be compared to other large city school districts is "seriously flawed." (Brief at 19) Although the City/BOE, through the testimony of Silverblatt, maintains that the "best comparison for teachers is to other New York City employees" (Tr. at 755) and that the Taylor Law requires a comparison to those performing "similar services" with "similar educational requirements" and "training", the City/BOE recognizes that comparability with other City job titles is insufficient and, therefore, attempted to compare the City/BOE's teacher salaries to those of other large national cities maintaining that the surrounding school districts to New York City do not have the same demand for public resources as does the City/BOE. (Tr. at 756; City/BOE Exhibit 81 at 3-9) The City/BOE's comparison shows teachers' salaries ranking relatively well at the three levels chosen by the City/BOE (entry, City maximum, and maximum). However, it fails to provide a complete view of the salary schedule, unlike the UFT reports which indicates that teacher

salaries do not fare as well as the City/BOE claims. (UFT Exhibit 211)

Nor do the City/BOE's figures adjust the national city comparison by the inter-regional cost of living differences between New York City and the other cities presented in its study, and, had the City done so, it would show that "City teachers" salaries dropped toward the very bottom of the national cities comparison." (Brief at 20; UFT Exhibit 214) The City/BOE challenged the UFT's use of "ACCRA" to perform the cost-of-living calculation, yet the City/BOE does not take into consideration that ACCRA is used by many for such purposes and is referenced on the State's official website. Furthermore, it points to the testimony of Rubenstein who acknowledged that a cost-of-living index, while not perfect, is one that he had no alternative for in terms of a better model. (Tr. 1394) While people may choose to live in New York City for various reasons regardless of the cost of living, the City/BOE cannot deny the fact that such cost factors do not exist across regions.

The fact that the City/BOE presented a comparison of how teacher salary increases have compared over the years to the changes in the CPI is some indication that it recognizes the cost-of-living as a factor relevant to wage issues. (City/BOE Exhibits 24-27) It maintains, however, that the City/BOE's use of 1980 as a base year for its CPI comparison distorts the conclusions because that was the year that the City/BOE received large raises to

compensate for the lack thereof during the 1970's fiscal crisis. The use of different base years produce extremely different results as the UFT demonstrated in its Exhibits 216-18.

In addition, the UFT argues that a "national cities" comparison cannot be reconciled with the fact that the labor market for teachers is primarily a local one. (Tr. at 250) Although the parties may disagree as to the number of the teachers leaving the City schools for a position in surrounding areas, there can be no dispute that such numbers are growing. Although the City/BOE witnesses and its team attempt to diminish the value of comparing salaries to surrounding communities, such a position is belied by the sworn testimony of the Board's Chief Financial Officer, Beverly Donohue, and the CFE lawsuit which indicated that the Board did a study comparing the City/BOE salaries to those in surrounding areas to prepare for negotiation of its collective bargaining agreements with the Principals and teachers. (CFE Tr. at 1544-46; UFT Exhibit 177)

The UFT also argues that the City/BOE failed to point out in its presentation that in virtually every large city included in its study, the teachers are paid salaries which are competitive to those in the areas which surround the city, which supports the UFT's argument that the nature of the labor market is regional. It also points to certain cities such as Boston and Pittsburgh, where teacher wages were slightly higher than the entire range of wages

in the surrounding areas, as well as Chicago, Los Angeles, San Diego, St. Louis and Washington, D.C., where teacher salaries are comparable to those in the surrounding areas. It also points out that Baltimore, which the City/BOE referred to in its last fact finding with the teachers, but was not included in its current analysis, agreed to benchmark its salaries to that of the surrounding areas which results in competitive salaries. (UFT Exhibit 149, 151; Tr. at 140-41)

The UFT argues that while the City/BOE's expert witness, Evans, maintains that the New York City area district schools are "aberrant" because they spend more than the rest of the country on education (Tr. at 983; City/BOE Exhibits 12-16), the UFT argues that none of his comparators are under the direction of the same SED to which New York City and the surrounding areas are responsible to, nor do they face the same cost of living factors as those in the New York City metropolitan area. The UFT labeled the City/BOE as "aberrant" by failing to establish competitive wages for teachers in its labor market. (Brief at 24) It reminds the Panel that the standards for New York City schools and the surrounding districts are not the same as those found in California, Florida or even New Jersey, but they are the same for all the districts in New York State.

Any argument that a national cities comparison is more relevant because the cities have similar "financial strains" is not

supported by the City/BOE own exhibits. The UFT points to the Miami-Dade county-wide system and the Broward County District, including Ft. Lauderdale and surrounding areas, which were included in the City/BOE study. These districts do not fall within the paradigm of a "large, highly pressed urban center" and the Broward County District is smaller than Yonkers. The City/BOE's study shows that these districts pay the "urban teachers" the same as those of their neighboring, suburban colleagues. (Brief at 25)

The UFT further contends that the functional chapter members must be afforded the same salary increases as teachers, despite the City/BOE argument that the Panel should "break the pattern" for these school personnel, which include guidance counselors, psychologists and social workers. It argues that there is a longstanding, historical relationship among the various titles in the schools and that the non-teacher pedagogues make equally important contributions to the education of the students. (Tr. at 1248; Brief at 25)

The City/BOE has already acknowledged the importance of these functional chapter positions when it negotiated the Extended Time Schools ("ETS") agreement and increased the salary of these pedagogical positions by the same pro rata formula used for the teacher salaries. Moreover, these pedagogues have traditionally been paid more than teachers because of the result of the difference in the credentialing requirements between the two groups

of employees. The UFT points to its salary study of the largest 36 districts in the New York City surrounding area and finds that these three pedagogical titles also are paid the same or more than the teachers in those districts. (UFT Exhibit 219) It also argues that the value of attracting qualified paraprofessionals, who comprise the largest portion of the functional chapters, is not quantifiable because this position serves as the best source of minority teachers who will become certified and remain in the City school system. (Tr. at 1251-63)

The City/BOE presented a comparison of the BOE functional chapter titles of guidance counselor, psychologist and therapist to civil service employees working for the City who hold the same title. It claims that the City employees are paid considerably less than Board employees. (City/BOE Exhibit 81 at 28-31) A comparison of these two groups of employees, in the words of UFT President Randi Weingarten, is to "compare apples and oranges." (Tr. at 124) Her testimony showed that a more appropriate comparable for a School Nurse, in terms of credentialing and duties, would be a Registered Nurse ("RN") employed by the New York City Health and Hospital Corporation ("HHC"), who earns a starting salary of \$50,000, as compared to a RN employed by the Board, whose starting salary is \$38,280. (Tr. at 124-25; Brief at 26) Furthermore, more credentialing is required for a psychologist or social worker employed by the Board than that required of those

employed by the City. It also argues that a substantial amount of the work of nurses, Occupational therapists and Physical therapists is contracted out by the Board because of its inability to fill the positions. (Tr. at 124-24; Brief at 27)

### **Interests and Welfare of the Public**

The UFT contends that the "interests and welfare of the public," as set forth in the Taylor Law, would be "best served by a well-paid, well-prepared teacher in every classroom." (Brief at 32) It maintains that this statutory criterion is not limited to any single concept, such as pattern bargaining. Given that education is of primary concern at all levels of government, there can be no dispute that the public has an interest in the education of its children, both in terms of development as public citizens, as well as preparing them to assist the City in its goal of rebuilding in order to resume its place as "the economic capital of the global economy." (Brief at 32)

While the UFT has proposed a number of measures all backed by extensive research and practice, which will assist schools in meeting the needs of the school children, the City/BOE did not propose any program. Rather, it offers counter-productive

measures, such as merit pay, and "band-aids" such as alternative certification.

The testimony of UFT expert witness Alvarado demonstrates how a program could effectively address the new standards which school children are expected to meet, and the challenges to the teaching profession in helping students achieve these standards. His testimony underscored the importance of professional development, such as teacher classroom inter-visitation and teacher coaching, as well as a variety of other professional development tools. (Brief at 33-34) It notes that his work as Superintendent of District 2 was so "remarkable" that it became the subject of several studies, including a \$5 million study funded by the federal government "to document the implementation standards-based education as an example to the rest of the country." (Tr. at 486)

In addition, Darling-Hammond testified concerning a number of studies which have been done over the last 15 years to measure the determinants of student achievement, all of which show "teacher quality" to be the most critical determinant. The City/BOE does not dispute this proposition but apparently refuses to take the next step to ensure that every teacher has the required qualifications. Darling-Hammond's conclusion that "compensation matters" in terms of teacher quality has been drawn by other researchers in the field who have studied the relationship between

quality teaching and higher salaries. (Brief at 35-36; UFT Exhibit 71)

The testimony of UFT Vice-President David Sherman showed how Alvarado's teachings have been successfully applied to the ETS program which operates at 37% of the SURR schools. These schools require that all teachers be certified and that the extended, or additional time that the teacher spends in the school is targeted for individual/small group instruction or professional development. These activities have produced significant results in student performance, as evidenced by the fact that all seven of the schools which have operated under the ETS system had all been removed from the SURR list by the SED by the end of the first year of operation. (Brief at 37) Similar results would be attained if the City/BOE adopts the UFT's proposals for improved salaries and enhanced professional development which would increase the recruitment and retention of qualified teachers. It claims that the City/BOE's proposals ignore all of these considerations.

The UFT also argues that the need for such improvement at this time is critical, given that the SED has implemented newer and higher standards for student achievement. (Brief at 38) Although the City/BOE's introduction of professional development manuals undoubtedly imply that nothing has changed in teaching in ten years, such cannot overcome the testimony of the UFT's three expert witnesses that teaching has been "revolutionized" over the years

and that new approaches are needed to ensure quality teaching.  
(Brief at 38)

The UFT also argues that the concept of pattern bargaining has allowed for exceptions when salary differences were so large so as to create recruitment and retention problems or to address unique needs of a particular work force. (Brief at 38) Although the City/BOE apparently recognizes exceptions to the pattern, it appears to argue that the only instance of an exception to the pattern was when the City's was experiencing a shortage of RNs. The UFT argues that the evidence suggests otherwise.

It points out that when the Licensed Practical Nurses ("LPNs") demonstrated a loss of 10% of their staff during a six month period when salaries were not competitive, resulting in recruitment and retention problems, the City/BOE made similar arguments to those being made at the instant proceeding. For example, the City/BOE argued that the workforce had been essentially stable for two years; that other titles had similar turnover rates; that the RN turnover rate was greater than the LPN; and, that other bargaining units that had accepted the pattern also encountered difficult working conditions. (UFT Exhibit 34; Brief at 39) The LPN impasse fact finding panel found the City/BOE's proposals to be acceptable. (Id. at 57; Brief at 39)

The UFT also argues that while Commissioner James Hanley testified that the RN situation was "very serious" and that the

City spent funds on recruiting nurses from all other parts of the world (Tr. 705-06), the City/BOE's own documentation shows that it had to engage in similar efforts. The UFT notes that the Board recruiting budget rose to \$40 million last year, and recruiting occurred in Europe and the Caribbean, among other locations around the world. In addition, the Board had to introduce an alternative certification program in order to attract new teachers. The UFT concludes that the present situation concerning the recruitment and attrition rate of teachers is not distinguishable from that of the RNs during a past crisis.

The UFT argues that the City exceeded the pattern in the settlement of the March 29, 2001-March 29, 2002 collective bargaining agreement between the City and the District Council 37-represented librarians who work at the New York Public Library. (UFT Exh. 83) It argues that they received an 8% salary increase for the year, which exceeded the pattern for the current round of bargaining, but that the City denies any exception to the pattern. Hanley testified that approximately 48% of the new librarians hired leave during their first year, which he found to be significant and that any raises granted to the librarians were "hooked into some productivity increases." (Tr. at 707-08; Brief at 39)

During cross-examination of Hanley, the Commissioner acknowledged that the librarian productivity increases amounted to 5% and not the 8% increase received. Therefore, the UFT concludes

that while the City/BOE argues that there can be no deviation from the pattern, there are variations that have been agreed to when circumstances warrant. It points to the 1%-3% extra that the UFT typically received in prior rounds of bargaining. (Tr. 1273-83; Brief at 39-40)

If the City is unable to deviate from its pattern on the facts presented in this instant matter, it argues, then it is "handcuffed from paying competitive wages to its educators" and therefore has "lost the ability to govern itself rationally." (Brief at 42) The City will be moving into an area that threatens the bargains that have been made by public sector unions and government employers under the Taylor Law, which exchanges the employees' right to strike for an assurance of a fair resolution by a panel during an negotiations impasse. The statute does not provide for a disregarding of the criteria if one union with very different needs is the first to enter into a settlement with the City during a round of bargaining.

Such a situation would threaten the right to bargain if the UFT has no opportunity to have its own issues addressed during bargaining. The City/BOE's continual invoking of pattern bargaining related to its concerns for the bargaining with other municipal unions serves to ignore the ramifications to other unions that serious retention and recruitment issues within one union are not serious enough to "bring the City to the table." (Brief at 43)

It cites the findings of Fact finder David Stein, who rejected the City's identical argument concerning the "breaking of the pattern" in the LPN impasse. (UFT Exhibit 34; Brief at 43-44)

Although the City/BOE belatedly acknowledged that there is some teacher shortage in existence, it made suggestions to the Panel of various formulae within the same total amount of money in the pattern settlement to address the issue. These suggestions, such as granting a greater share of the increase to mathematics or science certified teachers, or to new hires, do not address the shortages, retention issues or other areas identified as problematic by the SED. The amount of money provided for in the pattern is simply insufficient to solve the "systemic" problems the BOE faces. (Brief at 44-45)

The UFT argues that the retention data of record clearly shows that teachers are leaving the City/BOE in increasing numbers and that the Board had difficulty in filling the spaces of those who have left or retired. It notes that the SED has brought attention to the high percentage of UFT teachers over the age of 55 as an indicia a shortage (UFT Exhibit 198; Brief at 45). This finding is further supported by the Board's own estimation that it would need to hire 40,000 to 54,000 teachers by the year 2004. (UFT Exhibit 79; Brief at 45)

Whichever attrition figures are accepted by the Panel, there can be no disagreement that the City/BOE attrition rate is higher

than any other district in the State and more teachers leave every year for surrounding districts. It maintains that any doubts that may have arisen concerning the UFT's figures in terms of teachers leaving the district should be dispelled by a comparison of the UFT's figures to those of the Board's own survey of its building principals, which was ignored by the City/BOE during its presentation, which demonstrate that the UFT's figures concerning attrition are remarkably close to those of the City/BOE. (UFT Exhibits 142, 188)

Moreover, the City/BOE's proposal that experienced teachers take less money in order to provide raises for the newer teachers is not only unfair, it would require that senior teachers bear the cost of paying competitive wages for new teachers, despite the fact that these same teachers have undergone years of serious underpayment themselves. (Brief at 45-46) This approach of "effectively robbing from teacher Peter to pay teacher Paul" cannot be supported. The City/BOE must offer more money than that which is currently available through its "so-called pattern." (Brief at 46)

It points to the decision of an interest arbitration panel that rejected an argument from New York State that declining financial resources provided a preclusion of salary increases. The Panel found that a refusal to improve salaries for comparability purposes would "unnecessarily and invariably cause a decline in

police morale.” (Police Benevolent Association of the New York State Troopers, Inc., PERB Case No. IA9S-034, M9S-334) (UFT Exhibit 56)

The UFT also argues that although the City/BOE has maintained that no exception to the pattern can be justified, the UFT maintains that it is “surprising” that “the City has refused to even offer the UFT the pattern in the first place.” (Brief at 47)

It maintains that the evidence is uncontroverted. that a large percentage of District Council 37 members, as well as other civilian workers, not only received the pattern wage increase as disclosed by the City to the public, but received an additional 1% increase in their take-home pay, through a 1% reduction in their required pension contribution. (UFT Exhibits 174-175; Brief at 47) It characterizes the testimony of Harding as an “admission” that the reduction in the City’s pension contribution to the State is equivalent to giving a pay raise to a public employee. (Tr. at 615; Brief at 48) The UFT also refers to the statement of the actuary which accompanied the legislative bill and reported a cost to the City for school year 2002 for this reduction. (UFT Exhibit 174)

The UFT maintains that the City’s pattern settlement effectively is 1% larger than the amount the City disclosed to the public and to its other unions. (Brief at 48) The City argues that this 1% was a “separate and distinct” matter not related to

the pattern settlement, and that it was "simply an ordinary readjustment of a pension contribution whose rate had been set too high." (Brief at 48) The UFT contends that the 1% difference was the result of the work of the District Council 37/City committee formed as part of the District Council 37 collective bargaining agreement. It questions how the District Council 37/City committee could work so "quietly and so quickly" to resolve a topic that is customarily opposed by the City and Albany. (Brief at 51) That additional 1% must be considered as part of the settlement, and thus was a cost to the City in excess of the pattern. (UFT Exhibit 175; Tr. 95-96; Brief at 47-50) The UFT concludes that the civilian pattern settlement is therefore 1% higher than the City/BOE is willing to admit and, therefore, its offer to the UFT does not conform to the true civilian pattern.

It also argues that the City's civilian pattern contains a job security clause that has not been offered to the UFT. (Brief at 51, footnote 35) The testimony of Weingarten demonstrates that the Board paraprofessionals would be at risk if there were to be reductions at the Board because the Board's non-UFT employees would have the benefit of such a protection. By failing to include an equivalent clause, or credit for the value of this clause given to the other employees, the City/BOE failed to offer the UFT the pattern that has been offered to other unions. (Tr. 136-37; Brief at 50-51)

The UFT further contends that while Hanley appears to request that the Panel make the presumption that the uniformed forces of Correction, Fire, Police and Sanitation are entitled to an additional 1% salary increase "because of the importance of the work," the evidence demonstrated that the uniformed forces had received the same salary package as the civilian union in six of the ten rounds of collective bargaining discussed. (Brief at 51-52)

### **"SAVE" LEGISLATION**

The UFT argues that the regulations which it had developed with the Board to implement the Safe Schools Against Violence in Education ("SAVE") legislation, a statute addressing safety issues in the schools, be added to the UFT's collective bargaining agreements. These regulations, which have been referred to by Board Assistant Deputy Counsel Christine Kicinski as the "Code of Conduct" during her testimony, covers a variety of subjects concerning safety and non-violence in the schools. Employees deal with the hazards of violence on a daily basis in the schools and that the Code of Conduct addresses these issues in a comprehensive manner. The testimony of Assistant Deputy Counsel Kicinski demonstrates the manner in which SAVE is already a part of the processes that have been agreed to by the Board and the UFT. (Tr. at 1354-59; Brief at 28-29)

The City/BOE's refusal to incorporate the Code of Conduct is "baffling" to the UFT which has worked closely with the Board on all matters pertaining the Code of Conduct and SAVE. The UFT further contends that unless the SAVE legislation is incorporated into the agreements, it has no guarantee that the Board will enforce the provisions that the parties have carefully worked to develop. The inclusion of the Code of Conduct within the agreement also provides a recourse to contractual grievance procedures in the event it becomes necessary for the employees. (Brief at 29)

#### **Merit Pay/Skills and Knowledge Differential**

The UFT also argues that the City/BOE's proposal that merit pay be included in the collective bargaining agreements is without any reason or detail, other than it is part of the supposed pattern for this round of bargaining. Alvarado testified at the hearing of how teaching is now more "collegial" in approach. He concluded that there is no merit pay system "that has actually produced student achievement gains" and that many of them which had been implemented were eventually rejected "because of the negative consequences that occur...(and that what merit pay) systems do is push people back into individual work." (Tr. at 496; Brief at 31)

It also points to the testimony of Darling-Hammond, who reviewed the research in this area, and found that "merit pay has come and gone in the 1920's, 50's, 80's" and that she herself

conducted a study in the 1980's to track policy changes in education. She found 40 some states had merit pay or career ladder plans in the 1980's...(and)...all but two of them were gone and by 1992 all had disappeared." (Tr. at 328; Brief at 31) Darling-Hammond summarized some of the problems that these merit programs create such as a lack of time and expertise of the principals to assess performance of teachers. She also noted that these systems lead to the creation of dissension in the schools, which is a disincentive to real knowledge teaching, and funding commitments. (Tr. at 328-30)

It further maintains that if the City/BOE students are to meet the new Regents' standards, learning problems must be resolved, rather than exacerbated by a merit pay system. Such a "counter-productive measure" should be dismissed and the funds be instead targeted to implement a "skills and knowledge differential" which was acknowledged by Professor Dale Ballou as an important one. (Tr. at 1065-66) The testimony of Sherman that "in no place has it been shown that (merit pay plans) have ever done anything to improve student achievement" should be considered by the Panel. Sherman's research showed that merit pay plans fail for a number of reasons, including that they are "staggeringly complex." (Tr. at 459-61)

The UFT concludes that other than its reference to the pattern as justification for the merit pay proposal, the City/BOE failed to prove that such a system would serve any educational goal.

## **ARGUMENTS OF THE CITY/BOE**

### **Ability To Pay**

The City/BOE argues that it does not have the ability to pay the proposals of the UFT. It points to its adopted budget for FY 2002 which showed budget gaps of \$2.8 billion in FY 2003, \$2.6 billion in FY 2004 and \$2.2 billion in FY 2005. This budget, which was adopted prior to the September 11, 2001 World Trade Center attack, although stable, requires a strict control over spending and oversight of revenue. It is even more critical in this post-attack period that the Panel adhere to the civilian pattern settlement in its recommendation. (City/BOE Pre-Hearing Brief at 62)

The cost impact of the attack cannot be minimized, as the City lost approximately 13.5 million square feet of office space, plus additional millions more in space that is still temporarily inaccessible. The New York Stock Exchange was closed for four trading days, its longest closure in history, hundreds of small businesses were shut down, and thousands of workers had to relocate to other locations, many of them outside New York City. The cost of clean-up and repair alone will run into the billions of dollars.

The short term and long term loss of business activity is going to be an enormous one, as the City lost almost 80,000 jobs in the month of October 2001 alone. (City/BOE Exhibit 35) The New York City Partnership and Chamber of Commerce have estimated that the cost of the attack will be \$83 billion. (City/BOE Exhibit 36; Brief at 82-83)

Despite this steep decline in revenue, there has been a surge in demand for services from the City. In addition, confidence in the City and its finances has been "severely affected" as evidenced by the November 16, 2001 Moody's revised outlook on New York City General Obligation Bonds, which dropped from "uncertain" to "negative." Moody's action indicates that the City's bonds are at risk for a downgrade in rating. (City/BOE Exhibit 37; City/BOE Pre-Hearing Brief at 83-84)

The State of New York is also facing an economic downturn as it estimated a loss in revenue of \$1.6 billion in its November 8, 2001 budget update for the current fiscal year. The State also warns that its loss in revenue could increase to \$3 billion by the end of the fiscal year. It also anticipates a revenue loss for FY 2002-03 of \$6 billion. (City/BOE Pre-Hearing Brief at 84)

The State's final, supplemental budget, which was passed on October 24, 2001 for FY 2001-02, provided \$260 million less in State funds to the City than the City had anticipated in its budget. Only 21% of the additional education aid which had been

included in the State budget was allocated to the City. Yet, the City's overall share of State education aid is 36% and its share of the total enrollment of students in the State is 38%. (City/BOE Pre-Hearing Brief at 88)

Nor are tax increases an option at this time. Despite a number of growth-generating tax cuts, the City's business and income taxes do not compare favorably with the rest of the State, New Jersey or Connecticut. (City Exhibits 39-40; City/BOE Pre-Hearing Brief at 88) In light of the tremendous need to stimulate growth in the economy post-attack, any increase in taxes would be a mistake resulting in "devastating consequences." (City/BOE Pre-Hearing Brief at 88) Despite the sustained job growth over the past seven years, the City did not recover all of the jobs lost during the recession of 1988-93 until the second half of 1999. In addition, the unemployment rate in New York City is a percentage point higher than the national average and on the rise. Moreover, there were 497,000 welfare recipients in the City as of June 2001, despite a significant reduction in the caseload of public assistance. (City/BOE Pre-Hearing Brief at 88-89)

The development of the private sector is essential to the long term economic viability of the City. Any settlement above the pattern would jeopardize gains made by the Giuliani administration since 1994 to restructure and downsize City government in order to encourage private sector growth. In addition, the "wrong signal"

would be sent to the financial markets and business community if the Panel exceeds the pattern. It would lead to the impression that the City cannot deal with the severe financial challenges that it faces. (City/BOE Pre-Hearing Brief at 89-90)

Even under the pattern settlement, the City faces significant challenges in balancing the budget. The cost of the pattern is daunting. The City/BOE points out that the wages of City employees increased faster than the CPI during the life of the last Collective Bargaining Agreement. The current offer from the City is approximately one-and-one-half times the expected change in the CPI. (City/BOE Pre-Hearing Brief at 90)

The City will need the full confidence of the business community and the public in order to persuade businesses to stay and expand in the City after September 11.

In its Pre-Hearing brief, the City/BOE offered an overview of the economic history of the City from 1975 through September 11, 2001. The concept of coalition bargaining became a reality in the mid-1970's. The City's ability to repay its debt collapsed in 1975 because the City spent beyond its resources, thereby resulting in a loss of the public's confidence. The City was not able to use credit markets to refinance its short-term notes or sell additional long-term bonds to finance any capital construction programs. In order to avoid default, the City laid off over 25,000 municipal

employees, as well as taking other efforts to avoid financial default.

Nearly 21% of the work force was eliminated from the City payroll through the end of 1978, which resulted in the layoff of an additional 60,000 employees. At the same time, EFCB was vested with the legal authority to approve or disapprove the City's financial plan, as well as any labor agreements and contracts above a specified amount. (City/BOE Pre-Hearing Brief at 91-92) The City was also required by law to maintain an expense budget which was balanced according to the strict requirements of Generally Accepted Accounting Principles ("GAAP"). In addition, a four-year financial plan was to be kept on a quarterly basis, along with the City's budget. The City had to update its revenue and expense projections for the current budget year and the four subsequent years, or the "out-years." In addition, the City Controller and Office of the Special Deputy Controller became actively involved in the review of the financial plans. (City/BOE Pre-Hearing Brief at 92-93)

The EFCB ended its "control period" in 1986, in light of the fact that the City regained access to the long-term credit markets in March of 1981. This was primarily due to the reduction in the number of its employees, the provision of no-wage increases in collective bargaining agreements, the receipt of major givebacks from the municipal unions, and the achievement of legislation in

Albany to restructure the pension systems. (City/BOE Pre-Hearing Brief at 93) Although the City's economic growth was considerable from 1980 until late 1987, the "downward spiral" began with the October 1987 stock market crash which severely impacted upon private sector financial jobs. Thereafter, the national recession impacted upon the City, all of which served to exacerbate the problems in the financial service industry and insurance and real estate sectors, all of which had become major sources of non-property tax revenue throughout the 1980's. (City/BOE Pre-Hearing Brief at 93)

Although the Financial Control Board ("FCB," formerly the "EFCB") no longer has the legal authority to approve or disapprove the City's financial plan, those accounting and budget controls that were put in place during the 1970's remain in place today. The City/BOE points out, however, that if the City ends the fiscal year with an operating deficit of over \$100 million, which is less than three tenths of one percent of the current operating budget, the "control period" would be revived, resulting in the City's loss of control over its budget and financial plans and collective bargaining agreements. (City/BOE Pre-Hearing Brief at 93-94)

The period from 1990 through 1994 was one of recession and stagnation in the local economy. The City lost approximately 300,000 private sector jobs, a \$1.5 billion tax increase was imposed on City taxpayers, and the City laid off approximately

5,900 full time employees. In FY 1992, the City had to make significant service reductions to the public in order to balance the budget.

When the Giuliani administration took over in calendar year 1994, the number of private sector jobs was down to 2.7 million, index crimes hit approximately 600,000 annually, over a million people were receiving public assistance, and the new administration faced a \$2.3 billion gap in the FY 1995 budget between revenues and expenditures. (City/BOE Pre-Hearing Brief at 94-95) The Giuliani administration determined to shrink the size of government, control crime and improve public education. It attempted to reduce the tax burden while increasing its resources to the public schools and the police force.

From calendar year 1994 to the present, the City has experienced a reduction in work force by over 22,000 employees. A series of severance programs for various civilian municipal unions were put into place, which contributed to the reductions. In addition, the City implemented targeted tax cuts totaling \$2.6 billion in FY 2000, which does not include the commuter tax repeal, which resulted in a \$500 million loss in revenue to the City. The City continues in its attempt to reduce personal income taxes which were at a high of 8.9% in 1992 and is down to 7.3% in FY 2001. The City/BOE maintains that it must provide further tax relief in the coming fiscal years in order to further reduce the personal income

tax. It is aiming for a reduction down to 6.7% by 2005, which should provide a basis for continuing recovery of the economy and invite investments and the creation of new jobs.

The City/BOE contends that there are outside sources which support its contention that it cannot resort to tax increases as a means of increasing revenue without severe consequences. It points to the report of the Citizen's Budget Commission in July 2001, which found New York City's taxes to be among the highest in the United States. The report also indicates that middle income families in the City are in the "bottom tier, ranking eight among the nine" and cautions that the City can only improve its standing "if it can prudently continue its pace of tax cutting and curb its debt issuance." (City/BOE Exhibit 41; City/BOE Pre-Hearing Brief at 96-97)

There is evidence that the tax reductions that have already been put in place has resulted in a stimulation of the economy in job growth and thereby an increase in City tax revenues. A study by the Manhattan Institute indicates that 80,000 new jobs have been generated since 1997 as a result of the City's reductions in income, sales, business and property taxes. It also notes that if the City implements the tax cuts already proposed, an additional 6,500 jobs could be created. (City/BOE Pre-Hearing Brief at 97-98)

The City argues that it has made significant progress in controlling spending, in addition to any tax cuts and reductions in

the work force. In FY 1994, total City-funded expenditures were \$21.5 billion. This number remained unchanged through FY 1996 and rose only to \$27 billion by FY 2002. This demonstrates that the City has been successful in controlling costs, as the increase is only 26% over eight years, or an annual rate of growth of just 2.9% per year, despite two labor agreements at or above the CPI.

The City was only able to keep these cost control measures in place and balance its budget in 1994 without layoffs by substantial union cooperation. The City and the unions agreed to a transitional labor agreement in 1995, including a two-year wage freeze in all the agreements, followed by a substantial wage rate increase of 13.29% over the remaining three years of those contracts. (Tr. at 98) The cooperation of the municipal unions during the negotiations of these agreements was evident that they acknowledged that the City was experiencing severe financial constraints. It points out that the levels of savings in FY 1994 and FY 1995 were \$200 million and the "transitional labor savings" were \$600 million in FY 1996, \$400 million in FY 1997 and \$200 million in FY 1998. These savings were realized only by the cooperation of the unions with the City to freeze the cost of health insurance and to seek legislation to reduce the impact of a then-pending change in actuarial assumptions and methods in pension funding.

The City/BOE argues that the pattern offered to the UFT would provide wage increases in excess of both the change in the CPI and the rate of increase in spending by New York City. The pattern provides a total compensation of 9.86% over 27 months, which is an average increase of approximately 4.4% per year. This should be compared to the CPI increase of only about 2.5% over the same 27 months. Therefore, the City/BOE concludes that the pattern would offer the "largest annual real increase in wages since 1984." (City/BOE Pre-Hearing Brief at 99)

Despite the reduction of employees by the City in various agencies, other than the uniformed police force, it points out that it has increased the number of Board pedagogical employees by 8,219, which is almost a 12% increase between December 31, 1993 and June 30, 2001. The decision to increase levels of staffing in education, despite a stabilization in enrollment, demonstrates the City's commitment to support education. From 1997 to 2001, a total of 15,000 pedagogical employees were added, or a 19% increase from 1997 to 2001, despite an enrollment which remained between 1.08 million and 1.1 million. (City/BOE Exhibit 42; City/BOE Pre-Hearing Brief at 100) The City/BOE's efforts resulted in a student-to-pedagogical ratio of 11.4 students to one pedagogical employee, which is the lowest in over a decade. (City/BOE Exhibit 43; City/BOE Pre-Hearing Brief at 100)

The City/BOE maintains that its commitment to education is further underscored by the fact that the Board (along with the uniformed agencies) was excluded from the 15% across-the-board budget reduction announced by Mayor Giuliani in October 2001. Rather, the Board and the uniformed agencies were asked to reserve only 2.5% of their budgets for reduction purposes.

The City/BOE further argues that its commitment to education is supported by the fact that total dollars spent on education rose from 26% of all City expenditures in 1994 to 31% in 2002. The growth in education spending was 51%, while remaining agencies in the City experienced a 17% growth. (City Exhibit 44; City/BOE Pre-Hearing Brief at 101) The City has undertaken considerable debt to pay for education-related projects, which is an increase of 138%, while outstanding debt for the rest of the City rose by only 26%. (City/BOE Exhibits 46 -48; City/BOE Pre-Hearing Brief at 101)

Although the City's efforts from FY 1994 to September 11, 2001 were "extraordinary," the City/BOE maintains that much more needs to be done to maintain a balanced budget every year as mandated by law. (City/BOE Pre-Hearing Brief at 102) Although the number of private sector jobs increased by 450,000, personal income rose 49% from 203 billion to 303 billion, and the unemployment rate fell from 10.4% to 5.2%. The City has made considerable progress in crime reduction, resulting in the number of FBI index crimes below

300,000, which is the lowest level since 1968. There is a 58% overall decrease in crime, and a 65.4% decrease in the murder rate.

Yet, the City still must deal with the effects of the attack. Not only must it attempt to attract new business, it must also convince businesses that were located in lower Manhattan and have moved outside the City to move back to New York. It notes that the tourism industry experienced a vast downturn after September 11. The vacancy rate at hotels in the City in September 2001 was 30% lower than the year previous and there was a 10% loss in jobs, or a 4,000 job elimination, in the hotel sector.

The attack itself will cause the City to spend massive funds for recovery and repair. Not only is the cost of debris removal estimated to be in the billions, the impact on the local economy and tax revenues is "ominous." The Independent Budget Office ("IBO") estimates a revenue loss of \$925 million in FY 2002. (City/BOE Exhibit 49 at 2; City/BOE Pre-Hearing Brief at 103)

In addition, the City projects a decline in U.S. Gross Domestic Product in the second half of 2002 for the first time in ten years. The City's adopted budget in June 2002 contained a projection of an increase in employment of 9,000 jobs in the second quarter of 2002. The budget projection now shows a loss of 130,000 jobs. The City lost almost 80,000 jobs during October 2001, which is the largest job loss in one month ever. The wage rates in the Finance, Insurance and Real Estate ("FIRE") sectors were projected

to remain flat in 2002 and the revised projection estimates a wage rate fall by 11.0%. The FIRE sector lost 24,000 jobs during October 2001. As a result, the City must now project that non-property taxes will drop by 11% in FY 2002. (Brief at 104)

The City emphasizes that it must "redouble" its efforts to maintain the gains from the past years. It also must address the "psychological effects" of the attack which impact on the ability to attract new business and residences, as well as maintain existing business and residences. The amount of office space in lower Manhattan that is now vacant has increased to 50%. The City is revising its June 2001 estimates of the out-year gaps of \$2.8 billion in FY 2003, \$2.6 billion in FY 2004 and \$2.2 billion in FY 2005. It also notes that approximately 64% of the gaps, or \$4.9 billion over the next three years, is directly attributable to the cost of the collective bargaining settlements that have been and will be negotiated in the current round of bargaining, even assuming an adherence to the civilian pattern. (City/BOE Exhibit 50; City/BOE Pre-Hearing Brief at 105-106)

Since the adoption of the FY 2001 budget, the City's efforts to close the gap for FY 2002 resulted in the application of surplus funds from FY 2001. Despite the application of the surplus, agency spending for FY 2002 had to be reduced and revenue collection needed to be increased to approximately \$637 million to balance the budget this year, FY 2002. The City also plans to sell

the Off-Track Betting Corporation ("OTB"), obtain State reimbursement for a portion of the cost of closing the Fresh Kills landfill and achieve certain debt service savings to reach a balanced budget in FY 2002. Mayor Giuliani announced on October 19, 2001 that the City planned to reduce spending in City agencies by an additional \$1 billion in order to maintain the budget balance. (Brief at 107)

The assumptions that provided the foundation of the FY 2002 budget have been regarded by certain fiscal oversight agencies to be insufficient. For example, the City Comptroller identified "risks" to the current year's budget of \$949 million, including \$250 million for the sale of the OTB Corporation and \$125 million in State aid and \$190 million in projected overtime. (City/BOE Exhibit 51; City/BOE Pre-Hearing Brief at 107-108)

Similarly, the FCB which continues to review the budget, identified "risks" totaling \$1 billion to the FY 2002 budget, recognizing the projected sale of OTB, and \$200 million in projected State and Federal funds. (City/BOE Exhibit 52; City/BOE Pre-Hearing Brief at 108)

The Comptroller of the State of New York, who makes comments concerning the budget through the office of the Special Deputy Controller for the City of New York, reported in July 2001 on the adopted budget for FY 2002. He identified risks of \$910 million, including \$250 million for the sale of OTB, \$333 million of State

and Federal activity and \$50 million for police overtime costs. He also pointed to \$145 million in health insurance costs and \$25 million in judgment and claims as risks. (City/BOE Exhibit 53; City/BOE Pre-Hearing Brief at 108) The City/BOE also points out that the IBO found \$819 million of risks in the FY 2002 Executive Budget, and referred to many of the same risks identified by other outside monitors. (City/BOE Exhibit 54; City/BOE Pre-Hearing Brief at 109) The IBO recently announced that the September 11, 2001 attacks will reduce City revenues by \$925 million in FY 2002 and \$1.8 billion in FY 2003.

The City/BOE emphasizes that all of the out-year gaps estimated when the budgets were adopted, and as commented on by the outside monitors, occurred before September 11, 2001, excepting the IBO estimates of the cost of the attack. The City was the "most optimistic" evaluator of its finances for these four fiscal years, when compared to the views of the outside monitors. (City/BOE Pre-Hearing Brief at 109-110)

The City/BOE emphasizes that the revisions made by certain of the outside monitors further supports its argument that the financial impact of the attack will be extremely significant. It points to the October 2001 report of the New York City Comptroller in which the following estimates were made concerning the impact of the attack. First, tax revenues for the first quarter of FY 2002 would be \$198 million below the adopted budget and 3.7% lower than

the same period in FY 2001. Second, major revenue collections were \$40.4 million below the plan. Third, overtime spending in the first quarter of FY 2002 was 27% above the same period in FY 2001. Fourth, between July 1, 2001 and September 30, 2001, the City's pension funds lost 9.4% of their value, which is a loss of approximately \$8 billion. (City/BOE Exhibit 56; City/BOE Pre-Hearing Brief at 110-111)

Given its dependence upon the "highly volatile FIRE sector" of the City economy, the City will continue to face great uncertainty in projecting its revenues. (City/BOE Exhibit 57; City/BOE Pre-Hearing Brief at 111) If the Panel recommends that wage levels be increased based upon the assumptions underlying the recent record revenue from the FIRE sector of the economy will only serve to expose the City to greater risks in the event of another downturn.

The Panel must consider that the City pays a "disproportionate share of both public assistance and medical assistance (Medicaid)." (City/BOE Pre-Hearing Brief at 115) The City's cost per capita for each of these items is approximately four times higher than the amount paid by localities throughout New York State. (City/BOE Exhibit 58; City/BOE Pre-Hearing Brief at 115) Nor does the City receive its fair share of State education aid, as the level of State support per pupil in the City schools is only 91% of the average of the rest of the State and 61% of the average of what is received by the State's "Big Four" (Syracuse,

Rochester, Buffalo and Yonkers). (City/BOE Exhibit 54; City/BOE Pre-Hearing Brief at 115)

The City/BOE maintains that even prior to the September 11 attack, any wage increase for UFT that exceeded the current pattern would have had a "disastrous" impact on the interests and welfare of the public. Financial stability would be imperiled, as many unions in this and future rounds of bargaining would attempt to "leap-frog" any settlement that the City/BOE reaches with the UFT at this time. It points out that each 1% increase for all City workers in excess of the current pattern would cost the City \$169 million annually. (City/BOE Pre-Hearing Brief at 84-85)

The City/BOE points out that other impasse proceedings involving the City and its unions have resulted in the recognition that the City's financial condition is critical in terms of evaluating proposals, and most certainly during times of economic stress and uncertainty.<sup>2</sup> (City/BOE Pre-Hearing Brief at 85)

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<sup>2</sup>See, e.g. City Exh. M at 7: In the Matter of the Impasse between the City Transit Police and City Transit Patrolmen's Benevolent Association, M-78-554, (June 20, 1979) (Panel: Lewis B. Kaden) ("[i]n the context of continuing fiscal crisis, no departure from the established..pattern is warranted, and none could be recommended"); City Exh. D at 13-18: In the Matter of the Impasse between City of New York and Local 3, IBEW, AFL-CIO, I-142-79, October 8, 1980 (Panel: Morris P. Glushein) (applying pattern settlement to electrical inspectors in light of the "financial straitjacket" around the City); City Exh. H at 19: In the Matter of the Impasse between Uniformed Firefighters Association and City of New York, I-210-92, 1992 (Panel: Mark M. Grossman; Philip Ross; Carol Wittenberg) (award based, in part, on the City's "precarious fiscal position").

Although the City's budget for FY 2002 is balanced, that occurred only as a result of the Mayor's decision that agencies reserve 15% of their budgets in anticipation of agency actions of \$1 billion, which was described in detail in the November 2001 modification to the financial plan. It points out that the 2002 plan already included the FY 2001 surplus. (City/BOE Pre-Hearing Brief at 86)

The City/BOE also maintains that the testimony of Hanley shows pattern bargaining is necessary to provide the leaders of the various municipal unions the opportunity to agree to "fair and reasonable settlements" and a basis for ensuring that "they will not later be embarrassed or outdone by a richer settlement" achieved by one or the other municipal unions. (Tr. at 1500-02; Brief at 13)

It argues that this proposition has been confirmed by impasse panels that have been asked to deviate from the pattern, citing to a Impasse Between Licensed Practical Nurses and Technicians of New York, Local 721, SEIU and City of New York/Health and Hosp. Corp., I-218-94, Oct. 10, 1995 (Panel: Mark M. Grossman) which held as follows: "(A)ny other approach than pattern bargaining would create unrestrained competition between City unions. Unions would be forced to engage in "leapfrogging" (and).. the members will not be satisfied unless they are successful...unions would try to one-up each other." (Brief at 14)

The City/BOE further argues that the civilian pattern for the 2000-02 round of collective bargaining was set by the April 11, 2001, agreement with District Council 37, which covers more than 104,000 employees, including 18,000 Board of Education employees. (Tr. at 688, City/BOE Exhibit 3) It points out that the "agreement has an overall cost of 9.86% over a 27 month period and contains the following elements: a 4% wage increase effective April 1, 2000; a 4% wage increase (compounded) effective April 1, 2001; a \$200 welfare fund increase effective June 30, 2002, pursuant to the Municipal Labor Coalition Health Benefits Agreement, which is valued at 0.6%; 1% in additional compensation funds to be used to purchase additional recurring benefits on June 30, 2002; application of the general wage increases to "Additions to Growth" at a cost not to exceed 0.11% over the term of the agreement; and a 0.03% cost to advance these additions to gross funding to the first and thirteenth months of the contract; and offsetting cost savings to the City of 1.14% by extending the contract expiration date by three months (from 24 months to 27 months); and, delaying use of the Additional Compensation Funds by same three months." (City/BOE/Board Exhibit 11; Brief at 15)

The City/BOE points out that this civilian pattern settlement has met acceptance with more than 25 unions including CWA; Local 1199, National Health and Hospitals Service Employees Union; the Licensed Practical Nurses and Technicians, Local 721, SEIU; the

Organization of Staff Analysts; the Doctors Council; the United Probation Officers Association; and the City and Housing Authority employees represented by Teamsters, Local 237. (City/BOE/Board Exhibit 117; Brief at 15) The Unions accepting the pattern-conforming agreements representing 84.29% of the City's civilian workforce, which is not represented by the UFT, and covers over 143,000 City employees.

The City/BOE also maintains that the pattern settlement, while consistent across the various unions, is not a "strait-jacket" as argued by the UFT. (Tr. at 26; Brief at 16) It maintains that each union is afforded the opportunity to address particular concerns of its members through negotiations. By way of example, it cites to the Civilian Patterns provision of a 1% "Additional Compensation Fund" which will be allocated by the individual bargaining unit to provide an increase to those benefits which reoccur and to do so on a mutually agreeable basis. It notes that, in the past, these additional funds have been used to increase longevity, service increments and uniform allowances, among others. The City/BOE stresses, however, that the total cost of the agreement must remain at 9.86% and if there are any unit-specific benefits which rise above the 1% in the additional compensation fund, the unions must provide an offset through some additional savings.

Although the UFT makes much of the District Council 37 Librarians' Agreement, and characterizes it as a deviation from the

civilian pattern, the City/BOE argues that the uncontroverted. evidence shows that this particular agreement was made by the New York City Public Library and not by the City. While it is a one year deal providing for an 8% increase above the civilian pattern covering approximately 400 librarians it was specifically negotiated to address recruitment and retention problems. The problem was so severe that some libraries could not open, and that there was a 50% attrition rate among first year Librarians. (Tr. at 706-09; City/BOE Exhibit 80; Brief at 17)

The City/BOE maintains that it does not serve as the employer of the Librarians, who are employees of the New York Public Library, an independent, not-for-profit agency under the auspices and jurisdiction of the National Labor Relations Board; that it did not negotiate that agreement; that the Librarians provided a quid pro quo for the additional wage increase through the providing of certain givebacks including the elimination of two personal days, a night shift differential, and paid rates which were costed at approximately 5%, among other givebacks; and that the City did not contribute any money to fund the above-the-pattern increase. (City/BOE Exh. Tr. at 706-09; Brief at 15-18)

With respect to the UFT's claim that the City has failed to offer it the civilian pattern, the City/BOE responds that such an argument "merits little response." (Brief at 112) It points out that the UFT's claim that it should be granted "credit" for

agreeing to the streamlining of the disciplinary procedures is to ignore that the "quid pro quo" for that agreement was a "expedited class size arbitration procedure" which had been sought by the UFT. (Brief at 112)

The City/BOE characterizes as "most incomprehensible" the UFT's claim that District Council 37 received some extra percentage or "secret" pension benefit that is not being offered to them. Its agreement with District Council 37 was to support legislation in Albany to amend the pension contribution system and thus was not regarded as part of the pattern. The testimony of Hanley establishes that the recent change in the pension contribution rate for certain Tier III and Tier IV employees represented by District Council 37 essentially served to correct the rates set in the 1992-95 round of bargaining when employees were permitted "buy back." (Tr. at 94-96; Brief at 113-14) It points out that the record is undisputed that the UFT was offered the same opportunity to make a deal so that its Tier III and Tier IV could "buy back" these benefits but did not do so with the City. (Brief at 14)

The UFT complaint that they had not been offered the uniformed settlement agreement is baseless because they are not a part of the uniformed forces, nor part of the uniformed coalition as evidenced by the uncontradicted testimony of Hanley. (Brief at 19) The City and its unions have now returned to the 1980-90 practice of agreeing to separate pattern settlements for its civilian and

uniformed unions, which demonstrates that such a manner of bargaining is well-formed and accepted with respect to the expectations and understandings of the unions.

Although the UFT claims that the concept of pattern bargaining had been deviated from in the past, the City/BOE argues that the facts do not support such a contention. The UFT acknowledged during the course of the fact finding hearing that the City has always emphasized that the deviation from the pattern was an extremely rare circumstance and was only done when there were "unique and compelling circumstances" presented by a union. (Tr. at 29, 1529; Brief at 21) The UFT attempted during its examination of Hanley to rely on precedent which had been allegedly set by the municipal unions to contend that deviations from the pattern in the past justified a deviation in the instant matter. (Tr. at 642-715; City/BOE Pre-Hearing brief at 40-63)

With respect to the UFT's argument that the RNs agreement and 1989 Fact Finding recommendation involving LPNs represented a break in the pattern, the City/BOE maintains that "there is a single, simple answer" to these deviations. All parties recognized that the recruitment and retention problems for those two units were "unique and compelling" and the subject of nationwide publicity and concern. (Brief at 23) The City/BOE points out that the LPN impasse panel in 1995 adopted the pattern recognizing that "...the RN situation represents an anomaly" as a result of the recruitment

and retention problems noted by the City. (City/BOE Exhibit B at 21-22; Brief at 24)

The City/BOE also argues that the UFT failed to properly characterize the 1995-00 Collective Bargaining Agreement with the Council of Supervisors and Administrators ("CSA"). That Agreement resulted in significant productivity savings including, among others, an extended day for all members of the bargaining unit, an extended work year for certain members, as well as the elimination of a floating holiday. The CSA also agreed to the establishment of a merit pay system which provided the City/BOE with greater freedom and flexibility to remove those employees who were not performing well by supporting legislation eliminating tenure for Principals, as well as modifying the grievance and disciplinary procedure for other members of the bargaining unit. Contrary to the UFT's arguments, the Assistant Principals were not "treated the same by the City," as they were given different compensation based upon the amount of additional time that they were to work. It points out that the increases were directly proportional to that time worked. (Tr. at 1288, 1463; Brief at 24-25)

Nor has the UFT ever received a settlement which was inconsistent with the concept of pattern bargaining and, during two rounds of bargaining (1990-91 and 1995-00) it established the pattern for the City's municipal unions. (Tr. at 660-63, 672-73; Brief at 25-26) The 1995-00 bargaining with the UFT resulted in

a pattern settlement. There, the teacher made the same arguments with respect to disparities between the City and surrounding communities which is it now claiming as a governing principle here.

The City/BOE further argues that, in all but two instances, the UFT accepted a settlement with the same costs to the City as those of non-uniformed unions. In both cases, additional funds were provided to the union to adjust the pattern to correct a problem that had resulted from "top-loading" choices that had been made in prior rounds of bargaining by establishing an artificially low entry level salary for teachers, which the Board later believed had to be increased for pedagogical reasons. (Tr. at 761, 1453; Brief at 26-27)

The City/BOE contends that, in both instances, the additional funds had been allocated only because the parties had mutually recognized a "unique and compelling need" and targeted the funds for that need. The City/BOE notes that in 1985 the parties engaged in Last Offer Binding Arbitration ("LOBA") and that the cost was 1.18% above the pattern. This was less than what the teachers had been seeking in arbitration, but was based upon the panel's recommendation to the City that the offer needed to be enhanced. It also points out that other steps of the salary schedule had been increased as a result of the LOBA, but were funded by both pattern funds and certain givebacks which were applicable to the new

employees. (Tr. at 650-669, 1453; City/BOE Exhibits 81 (10); Brief at 27-28)

A fact finding panel on April 23, 1993 rejected the UFT's request for a 23% wage increase based on the same arguments being made to the instant Panel and recommended that the coalition agreement be implemented. That panel viewed the continuation of pattern bargaining to be vital for the stability of the City's labor relations with its unions.<sup>3</sup>

It notes that during the 1992-95 round of bargaining, the UFT negotiated a minimum 9% increase for all represented employees, but points out that additional funds have been generated because the UFT agreed to extend the contract by nine-and-a-half months and agreed to certain "givebacks" for new employees. (Tr. at 1460; Brief at 29-30)

The City/BOE states that it is in agreement with the UFT that it did not "charge" for the retirement incentive offered in the 1995-2000 round of bargaining, but maintains that no such incentive or buyouts have ever been treated as part of the pattern or "charged" to a union, as such programs are designed to save money. (Tr. at 1285, 1463-64; Brief at 30-31)

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<sup>3</sup>City Exhibit E at 9: Board of Education of The City School District of The City of New York and United Federation of Teachers, Local 2, AM. Federation of Teachers, AFL-CIO, M92-257-269, April 23, 1993; (Panel: Arnold M. Zack, Eli Rock, and Herbert Fishgold).

The City/BOE also acknowledges that the Correction Officers Benevolent Association ("COBA") received a variable supplement fund benefit not received by other unions during the 1995-2000 round of bargaining. However, COBA did not obtain the benefit through bargaining or with the consent of the City. Rather, it was obtained through legislation passed by the State, which the City had "vigorously opposed." (Tr. at 1287, 1461-62; Brief at 30-31)

### **Comparability**

The City/BOE argues that any comparability analysis must focus upon teachers who work in other major cities and school districts in the United States, rather than a select number of school districts in the surrounding areas, in order to show that the compensation in New York City is both fair and adequate. It maintains that the 36 surrounding jurisdictions, which the UFT selected to form the bases of their comparability analysis concerning salaries, are not comparable to New York City in any way and should be rejected by the Panel.

It points to a number of differences between the City and this group of 36 other jurisdictions in terms of size of employed staff, enrollment, annual hiring and socio-economic characteristics. The City/BOE emphasizes differences in the median household income, home ownership and monies spent on housing, welfare and public transportation. (Brief at 62, Pre-hearing brief at 118-22)

It points to the testimony of its expert, Evans, who testified that "(f)iscally, tax-wise and budget-wise, New York City and the suburbs are just very, very different." (Tr. at 992; Brief at 62) The City/BOE states that their affluent neighbors have fewer responsibilities and fewer demands on their resources and, therefore, can afford to pay their teacher more than New York City, which is especially the case given the extra burdens on the City as a result of the September 11 attacks. The UFT has failed to address any of these differences and has not countered the City/BOE's evidence that these suburban jurisdictions are clearly "outliers" both in absolute terms and as a percentage of household income. (Tr. at 81-82; Brief at 62-63)

Although the UFT maintains that special treatment should be granted to its members, the City/BOE maintains that they already enjoy special treatment that would not be impacted by an adoption of the pattern settlement. It points to the shorter workday and work year that the UFT-represented employees have at this time. A teacher's workday is six hours and 20 minutes, as contrasted with the typical eight hour work day that other municipal employees must work. The City/BOE also points out that the UFT-represented employees have a shorter work year which averages only 185 days, as contrasted with the 235 days that are generally worked by the civilian employees of the City each year. Teachers are the only City employees who have paid sabbatical leave as well as automatic

annual salary step increases. Moreover, teachers are not subject to a New York City residency requirement. The City/BOE concludes, therefore, that teachers already receive special advantages not enjoyed by other City employees. (Tr. 1000-01; Brief at 63-64)

The City/BOE contends that the appropriate comparables are those jurisdictions which will most likely be confronted with the same budgetary constraints that face New York City, such as providing not only education to all students but police, fire, sanitation and health and welfare services to a large and diverse population, unlike the constraints faced by suburban districts. (Tr. at 585; Brief at 64-65) It further contends that teacher salaries in New York City compare very favorably with other major cities in the nation on the basis of three measures which are as follows: 1) total compensation; 2) total compensation per hour; and, 3) basic wage, all of which are measured at the minimum, maximum with highest educational degree, and salary with a Masters plus 30 additional credits and 22 years of service, which is the highest point on the teacher' salary schedule. (City/BOE Exhibit 81) A review of each of these measures, excepting minimum salary, indicates that New York City ranks first or second among all those surveyed jurisdictions for these three measures, despite the fact that the New York City wages do not include any increase for each school year 2000-01 as do the others.

Although the entry salary level for beginning teacher is lower than some of the surveyed jurisdictions among large cities, the City/BOE argues that this is the result of choices that the UFT made in prior rounds of collective bargaining. (City/BOE Exhibit 81 (10); Tr. at 261-62) The total compensation at the entry level is the fifth highest among large cities and school districts and the total compensation per hour is the third highest because the New York City teacher have the shortest school day and one of the shortest school years of the jurisdictions surveyed. (Brief at 65-66) Although the UFT attempted to undercut the City/BOE's analysis by focusing its study on the intermediate steps on the salary schedule (MA+6 years, MA30+10 years and MA30+15 years), as well as limiting its review to basic wages (UFT Exhibit 211), the City/BOE argues that it has shown that, at the intermediate steps, the City teachers rank either third or fourth in total compensation per net hour which, it argues that this is the most "valid measure" because it factors in both total compensation and hours worked. (Brief at 66)

While the UFT argues that certain of the large cities raise their salaries to be comparable to their suburban districts, the City/BOE points out that, during the same time period surveyed by the UFT, the cities of Boston, Dallas, Detroit, Los Angeles, Philadelphia, San Diego and Baltimore all increased the length of the workday. It also points out that Baltimore schools require an

eight hour workday, which is an increase of one hour and ten minutes in that city since 1993. (Tr. at 767-68)

While the UFT attempts to refute the data presented in the National City Study by using the "ACCRA" index, the Panel should reject such a comparison because the index is "seriously flawed." It points to the testimony of Rubenstein that there are significant problems when attempting to compare cost-of-living among cities when there is "no generally accepted (or reliable) methodology." (Tr. at 1382; Brief at 67) It also maintains that the ACCRA index suffers from other flaws such as the following: it has sampling and non-sampling errors which are not quantifiable; it is based on only 59 items requiring a review of the specifications for each even if they are not typical of the area which results in skewed numbers; it weighs all cities equally in the national average regardless of size and thus creates a higher index for large metropolitan areas; that communities can voluntarily participate in the index and thus the numbers can change depending upon the areas that report; the price of goods and services are developed by volunteers which presents a problem with respect to comparability; the survey does not account for the benefits of living in a particular city, such as cultural events; and, the index was designed only to measure differences in the cost of living for households in the top income quartile. (Tr. at 1382-89)

The City/BOE also argues that the UFT-represented functional chapter employees, such as therapists, social workers, psychologists, laboratory technicians/specialists and secretaries, should be compared to their City counterparts and not be eligible for the same wage increase. It argues that the UFT failed to provide any significant evidence as to why these five functional titles should be distinguished from their City counterparts, as their work is extremely similar, if not the same, in many cases.

Although the UFT argues that the "nature of the schooling" distinguishes the Board positions (Tr. at 1247), it maintains that no evidence was of record supporting its claim, nor did any member of the functional chapters testify, as to alleged differences between their jobs and those of their City counterparts. The City/BOE also maintains that the functional chapters enjoy a shorter workday and/or work year as compared to their City counterparts, as Board psychologists and social workers all work a 183-day work year and a six hour and 40 minute work day. Those same employees, if employed by the City, would work between 224 and 234 days a year and seven hours a day. It also points out that school secretaries work only 183 days a year while other City secretaries have a 222-234 day work year. It also points out that City therapists work a seven hour day without a paid lunch while a Board physical or occupational therapist has a six hour and 30 minute work day. (City/BOE Exhibit 81 (28-31))

The salaries earned by City/BOE employees are also significantly higher than the City employees, despite the fact that the employees spend far less time at work. For example, it points to a Board of Education Social Worker earning a maximum salary of \$73,500 while a City Social Worker, at maximum longevity, earns only \$46,054. (City/BOE Exhibit 81(31)) A salary earned by a City/BOE therapist is at minimum \$40,490, while a City therapist receives \$34,780. A guidance counselor earns a minimum salary of \$24,359 compared to \$19,642 for a City secretary. (City/BOE Exhibit 81(29-30)) Although some City titles do receive more at the minimum level, the City/BOE argues there can be no dispute that the City employees work longer hours than the City/BOE employees.

The City/BOE also argues that the UFT failed to consider the annual step increments that are enjoyed by their represented titles providing for an automatic advancement to the maximum level of the title, regardless of performance, which is not true for their City counterparts. The civil service titles in the City have limited longevity and depend upon merit pay increases to advance up the salary schedule. Nor do these employees merely move into management positions, as claimed by the UFT, as noted by the testimony of Commissioner Hanley who explained that to move to a higher classification a City employee must pass a civil service exam and then be selected from a Civil Service list for a vacancy. (Tr. at 1470; Brief at 71)

The UFT functional chapters have long received pattern-conforming settlements, such as the 17.77% pattern settlement they received in 1985, even though teachers received 1.18% above the pattern. It has been the UFT's decision to maintain "parity" relationships between teacher and functional chapters. The chapter salaries have always been established within the parameters of the pattern and there has never been, nor is there now, a justification for any deviation from them. (Tr. at 776; Brief at 71-72)

The City/BOE also contends that the UFT has failed to present evidence of "unique and compelling circumstances" that might justify the Panel's recommendation of a package in excess of the pattern offered to the civilian unions. The Union relies upon three claims to support its deviation from the pattern argument: first, they perform more complex and additional duties and tasks; second, that there is a great disparity between salaries in New York City and those in the 36 suburban communities that they identified; and, third, that there is an alleged recruitment and retention problem. The City/BOE argues that none of these alleged circumstances can be characterized as "unique" nor do they rise to the level of "compelling," especially in light of the City's serious fiscal situation at this time.

It maintains that the UFT has not demonstrated that there has been any fundamental change in the nature of teaching and maintains that virtually all City employees hold jobs that become more

complex over time. Nor does the record contain any evidence of increased productivity by teachers. The UFT's argument that the nature of teaching has changed due to "new higher standards," which it characterizes as meaning that "all students must learn, not just the quick learners." (UFT pre-hearing brief at 43-44; Brief at 75) The City/BOE argues that teachers during the early 1990's were expected to teach children how to think, including the "quick learners" and that to raise such an issue is to "denigrate" all teacher who have been teaching for many years. (Brief at 75) Moreover, Board-sponsored professional development courses have been offered to teachers even prior to the adoption of the new State standards. (City/BOE Exhibits 134-36; Brief at 76-77)

It further argues that the UFT cannot credibly argue that they deserve a wage increase based on any "productivity" increase because that is defined as doing more work or achieving more goals, without new resources being applied. Teachers have received a significant amount of resources in recent years, as evidenced by the sharp increase in the funding of the City schools, and that more than 14,000 teachers have been hired since the school year 1995-96. (City/BOE Exhibit 81(34); Brief at 78)

Nor is the UFT unique in arguing that their members should receive more than the pattern because they are working more or achieving more, as the PBA made a similar argument in 1997 to an impasse panel which rejected the proposal, despite a significant

decline in the crime rates in New York City. (City/BOE Exhibit A at 32-33) Therefore, the City/BOE concludes that the UFT has failed to demonstrate any significant change in the fundamental duties and responsibilities of teachers in New York City.

Although the City/BOE does not disagree with the UFT that the base wages of New York City teacher are different from those in the suburban school districts in Westchester, Nassau and Suffolk counties, those suburban school districts are not the appropriate comparators for purposes of the statute. The wage disparity itself does not justify a break in the pattern, nor is it a new phenomenon or an unusual one. This is evidenced by the fact that the UFT requested a 21.07% wage increase nine years ago before another fact finding panel and argued that it was needed to meet the weighted average of salaries paid in surrounding suburban districts. (City/BOE Exhibit 133; Brief at 80) That Panel denied the request and found the disparity to be "longstanding" as of 1993. (UFT Exhibit 7 at 8-9)

The wage disparity between City teachers and those in the 36 surrounding districts are not unique to the UFT. It points to the 1997 PBA impasse proceeding, which also discussed various wage differences similar to those raised in this proceeding, where the Panel ruled that "(t)he disparity between the salaries of New York City Police Officers and those in nearby suburbs...is not

(dispositive). We rule in this dispute that the pattern is controlling." (City/BOE Exhibit A at 34)

Nor did Arbitrator Grossman accept the "break the pattern" argument in 1995 in the LPNs' proceeding. That Union argued that the wage disparity between the LPNs employed by HHC and those in other hospitals within the City itself were significant. The arbitrator "recognized that many other groups of City employees could make the same argument". (City/BOE Exhibit B) (Brief at 81)

The testimony of the City/BOE's expert witness, Evans, shows that the four New York counties surrounding the City and their school districts should be regarded as "outliers" with respect to spending in the educational sector because "when you look at how much they spend (per) student, they are really off the map." (Tr. at 992) The City/BOE argues that these counties rank at the top in terms of education spending as a percentage of median income, as they spend from 22% to 23%, as opposed to other counties which spend much lower percentages. Nor does the cost-of-living factor into this situation because, as testified to by Evans, the average per student expenditure in the surrounding school districts found in Nassau, Rockland, Westchester and Suffolk counties nearly double the average of the four counties surrounding San Francisco. (Tr. at 986; City/BOE Exhibit 89 (16); Brief at 82)

The City/BOE argues that with respect to any alleged recruitment or retention problem, the UFT failed to demonstrate

that there was any crisis in these areas. Nor did it show that the Board was facing challenges in the areas of recruitment or retention or that it was experiencing either "unique" or "compelling" circumstances in attempting to do so. The teacher head count increased by 27% since 1991, as it hired 35,000 new teachers since the school year 1998-99 and approximately 9,000 new teachers for the fall of 2001. (City/BOE Exhibits 81(22, 32-33)) It also maintains that the "needs projection" that the UFT relies upon projects a need for only 17,000 new teacher over the next few years which is close in number to that which the City/BOE hired during its last two hiring cycles.

The attrition rates for teachers are no higher than those for other municipal units. Although the "raw numbers" of teachers retiring may have increased, retirements as a percentage of those eligible to retire has declined in recent years. Only a "tiny percentage" of the teacher work force, as 2.4% of the teachers eligible to retire did so in school year 2000-01.

Even if the Panel accepts the figures submitted into evidence by the UFT, the "so-called exodus" of New York City teachers to suburban school districts is very limited and represents 1.6% of all teachers taking positions in one of the six surrounding counties to New York City. The evidence strongly suggests that any "exodus" that may have occurred is attributable not to salary levels, but rather to a desire of the teacher to work in a specific

community or near his/her residence. (City/BOE Exhibits 24, 116; UFT Exhibit 142; Tr. at 13-14, 245; Brief at 84)

The City/BOE's expert witness, Ballou, presented a statistical analysis demonstrating a "strong positive relationship" between the distance of the school district from the City and the New York City teacher switching to that particular suburban school district. The study conducted by the City's Office of Labor Relations ("OLR") showed that 72% of those teachers who left had already lived outside of New York City, as opposed to the 27% of teachers overall who reside inside the City. (City/BOE Exhibit 116 (2)) The OLR study demonstrated that the "leavers" residing in Westchester, Nassau and Suffolk counties left the New York City schools to take positions in their own county of residence. Thus, it concludes that any salary disparity between the City schools and the suburbs could not stop such an attrition. (Tr. at 1418-1421; City/BOE Exhibit 116(6))

Moreover, the City/BOE argues that the OLR study which examined the residences of teachers identified by the UFT as taking suburban jobs and leaving New York City schools considers a number of variables, most significantly the fact that a large percentage of those who left the New York City schools lived in counties such as Nassau or Suffolk. (Brief at 119) It also argues that additional data generated by the OLR survey demonstrates that no conclusion can be drawn from the data submitted by the UFT

concerning reasons why teachers leave teaching jobs in New York City. Accordingly, the City/BOE concludes that the UFT's salaries proposal will not stop any attrition, nor reduce it in any significant way.

The City/BOE acknowledges the recent increase in the number of uncertified teachers in its work force, but argues that "at least as things now stand" the SED policy will prohibit the employment of uncertified teachers as of September 2003.

Consideration must be given to the fact that the percentage of new teachers who have been hired without certification has substantially declined over time, according to a study conducted by the IBO. It found that over 75% of the new teachers hired in 1990 were uncertified (City/BOE Exhibit 20 at 1), as opposed to the current 2001-02 school year where the percentage had dropped to 42.5%. (UFT Exhibit 77) Those thousands of teachers who hold temporary licenses are afforded an alternate route to entering the system, as they might not have had the chance to work in the New York City public schools otherwise. The IBO study reported that over 50% of the teachers holding temporary licenses when hired by the Board become certified within the time period allowed by the State. (City/Board Exhibit 20) It points out that, since 1992, in excess of 14,000 teachers entering the school system on temporary licenses have become certified. (Tr. at 779; City/BOE Exhibit 21)

There has been a national shortage of teachers in certain subject areas, at least prior to the recent downturn in the economy, in the areas of mathematics, science, bilingual education, special education and foreign language. (City/BOE Exhibit 30) It should not be surprising, therefore, that over 45% of those uncertified teachers hired in school year 2000-01 were teaching in those areas. The problem of hiring certified teachers is one faced by every school district and not one that is unique to the City/BOE.

It also claims that there is probably no other school district in the country that teaches as many subjects, trades and crafts, in as many languages as does the City Board of Education, in such languages as Haitian/Creole, Hebrew, Chinese, Hindu and Russian, among others. (City/BOE Exhibit 31) The expectation that there is a pool of certified teachers to meet all subject matters and in these languages is an unreasonable one at this time. Furthermore, many hundreds of certified teachers were "lost to the school system" during 2000-01 because the SED required that newly hired certified teachers be assigned to SURR schools. (City/Board Exhibit 84)

The City/BOE had no control over the SURR Teacher placements, nor did the new teachers have any other preferences honored regardless of where they lived. As a result, there were hundreds of certified teachers who had applied to the City schools and were

offered positions, but ultimately turned down the appointments, not because of salary levels, but because they wanted to have some choice in where they would teach. This factor was recognized by Weingarten who was quoted in the New York Times as stating, "You will lose people when you mandate where they work." (City/BOE Exhibit 34 at 3)

Nor is there any evidence that these uncertified teachers are unqualified to teach in the City schools, as there is no dispute that they must have a Bachelor's Degree and meet minimum educational requirements in their subject area. Once the City/BOE hires them, they are trained and mentored both before and during the school year and have to work toward certification in order to receive a renewal of the temporary license. (Tr. at 779; City/BOE Exhibits 15, 22, 81(35))

The problem of certification and the issuance of temporary licenses is not one experienced by New York City alone. In school year 1999-2000, California issued over 30,000 temporary licenses and Illinois issued more than 22,000. (City/BOE Exhibit 91(15)) The private schools, many of which are regarded as "most elite" of the independent schools, as a rule do not require certification when employing teachers. (City/Board Exhibit 18 at 1) The UFT's own expert witness, Darling-Hammond, testified that approximately 34% of teachers in private schools nationwide are not certified, a figure twice the current uncertified rate in New York City schools.

Also, she noted that uncertified teachers make up more than 20% of the work force in at least half of the charter schools that were recently surveyed. (Tr. at 1092; Brief at 88-91)

The City/BOE further maintains that it is possible for educational policies to change and that "the importance of teacher certification is a controversial question, 'hotly debated' in the academic literature." Also, Darling-Hammond identified certification as being one of six characteristics that appear to impact on teacher performance. (City/BOE Exhibit 91 (7); UFT Exhibit 167B) Darling-Hammond referred to one study which found that mathematics and science teachers with temporary or emergency certification performed just as well as those with full certification. (Tr. at 1082-83)

The recent draft of a SED report concerning certification of teachers, put into evidence by the UFT, acknowledges that certification in and of itself may not be sufficient to attract all potential candidates to teaching. (UFT Exhibit 189 at 3; Brief at 121)

Furthermore, the City/BOE argues that the recent past with respect to hiring uncertified teachers does not serve as a "fair predictor" of its ability to recruit them in the future because the City, as well as the nation, has recently ended an extensive period of economic growth coupled with the highest level of employment ever demonstrated on record. (Brief at 92) The unemployment rate

in New York City has significantly increased and new jobless claims are at the highest level in nine years. (Tr. at 994) The City has absorbed the impact of this increased rate as evidenced by a layoff in City-based firms such as American Express, Citibank, and AOL/Time Warner, as well as the fact that the City's largest employers are hiring fewer college graduates than in recent years. (Tr. at 994; City/BOE Exhibit 89 (24)) It points out that the Bureau of Labor Statistics reported that the New York City metropolitan area lost 160,000 jobs between July 2000 and September 2001. (Tr. at 994)

The teaching work force in the City increased by 4% between August 2000 and August 2001, while the labor force grew less than 1% during the same time frame. (Tr. at 995; Brief at 94) It points to the testimony of Evans, that college graduates are beginning to consider alternative careers, including teaching, because they are having difficulty seeking other positions in the job market. (Tr. at 994-95)

In addition, there are 4,411 applications for the New York City Teaching Fellows program for next year, which is four times the amount received the previous year at the same time. Given the evidence that indicates that additional people will be seeking teaching positions in the near future, the City/BOE concludes that there is an expanded pool to tap and that any problems they had in

the past hiring certified teacher should be "substantially diminished." (Brief at 94)

The City/BOE finds sufficient flexibility within its proposal to address certain of the UFT's concerns and issues. It notes that the CPI-U is estimated to increase by 4.82% between October 30, 2000 and December 31, 2002 and that under the pattern settlement the UFT-represented employees would receive compensation of more than twice that amount over a 27-month term of the collective bargaining agreement. (City/Board Exhibits 81 (26, 27); Brief at 97) Teachers working in the 36 suburban school districts that the UFT cited in its submission are generally receiving wage increases less than those proposed by the City in its pattern offer. (City/BOE Exhibit 114) It also notes that parochial school teacher working for the Archdiocese of the City of New York recently accepted wage increases of 3%, 3% and 5% and their salary schedules are lower than those of the City teacher. (Tr. 1473; City/BOE Exhibit 81 (2,3); Brief at 98)

The City/BOE also argued that there is a potential for "creative bargaining" and offered four applications of the pattern and maintains that they address certain concerns and issues raised by the UFT. (Brief at 98-103)

While no proposal was made by the UFT, its argument "seems designed to invite the Panel" to recommend that any above-the-pattern increases be funded through extending the work day for

teachers. (Tr. at 410-21; Brief at 103) The City/BOE argues that if the Panel were to make any such recommendation, the only method that would be appropriate for costing this proposal would be the ETS model the parties have used in the past. (City/BOE Exhibit 120) Under this model, any additional time worked is in proportion to the percentage of the extension of the work day.

The City/BOE maintains, however, that a recommendation of "more time for money" would be inappropriate given that neither party proposed it, the record lacks evidence as to how the extra time could be productively used and for what purpose and would be fundamentally opposed to the fiscal situation the City faces at this time. If the work day is extended by 20 minutes for teacher under the ETS model, the costs would be over \$288 million for the first year and, if extended to all ETS titles, the cost would rise to nearly \$335 million. (City/BOE Exhibit 120)

Performance-based compensation is an important and essential part of the pattern settlement. (Tr. at 1473-74; City/BOE Exhibit 3 at 4) It points to the testimony of Hanley that merit pay is an integral part of the pattern bargaining proposals and that there is no reason why UFT-represented employees are unable to participate in such a program. (Tr. at 1473-74; Brief at 105-106) Certain commentators have found this to be a "invaluable tool for recruiting and retaining teachers" as well as improving their skills, along with student achievement. (UFT Exhibit at 24)

It notes that the UFT has failed to even consider the issue, which serves as a basic element of the Uniformed Forces Coalition settlement. If teaching is more challenging today than it was before, as claimed by the UFT's witnesses, then it questions why the UFT will not accept even the possibility of merit pay for individual performance in the classroom. The UFT's claim that such programs have failed to work in the past is not persuasive. (Tr. at 460; Brief at 106-07)

The primary means of having students reach their potential is through greater accountability and by tying compensation to student achievement. It points to a study of the National Commission on Mathematics and Science Teaching for the 20<sup>th</sup> Century entitled "Before It's Too Late" which states that the development of incentives is directly related to accountability for teacher and is a criterion of professional competence. (UFT Exhibit 39; Brief at 107-108) Under the current salary schedule, the only incentives that are built in are those of graduate education and longevity, which have not been shown to improve a teacher's ability to become more effective in any major way. The City/BOE emphasizes that it is not proposing that the fixed salary schedule be eliminated but rather that it be supplemented with performance pay compensation to reward outstanding teachers and to motivate others.

Although the UFT maintains that its proposals are tailored to address claimed recruitment and retention problems with respect to

teachers, its proposal for a 22.7% wage increase for all UFT-represented employees bears no relationship to any alleged problem for a number of reasons; the UFT does not propose increasing merely starting salaries, but salaries for all teachers; the allegation that most New York City teachers leave to teach in suburban school districts between one and seven years of experience would not be addressed by any UFT proposal, as only a small proportion of the settlement money would go to teachers in that category; the salary increases proposed are the same for common branch teachers and teachers who work in non-shortage areas as those who work in areas that the UFT claims present a difficulty in recruitment; and, the UFT seeks a retroactive increase in salaries which cannot have any effect on potential recruitment. (Brief at 114-116)

Nor is there any reliable evidence that the salary differential between the suburban school districts and the City schools is the motivating factor behind teachers taking jobs in the outlying areas. It points to Evans, who testified that salary is but one factor as to why teachers change school districts, which is supported by the U.S. Department of Education's Teacher Follow-Up Survey. The survey found that "one of the primary reasons that teachers give for changing jobs is family or personal move." (Tr. at 979-80) It points to the OLR survey that between 46% and 53% of teachers who leave the City for suburban school districts switch for family or personal reasons and that only between 10% or 15% of

those teachers surveyed stated that they made the switch because of better salary or benefits. (Tr. at 979-80; City/BOE Exhibit 89 (9)) (Brief at 116)

The City/BOE maintains that the UFT's expert witness, Farber, did not present evidence to support the proposition that teacher move to suburban schools for monetary reasons. The analysis performed by Farber was limited in the amount of data and does not provide the opportunity for extrapolation as to the reasons why teachers leave the City schools in the first place. Nor was any relationship demonstrated between salary differential and those teachers leaving City schools over a period of time. (UFT Exhibit at 169 (L-S); Brief at 117-118)

The City/BOE argues that even if Farber's data were accepted as valid, the only conclusions that could be drawn are that some teachers left the Board to take teaching jobs in the suburbs, for reasons unknown, and that certain suburban districts are competitive with one another, with respect to salary and certain other benefits. (Tr. at 1006-06; Brief at 117-18) Nor did Farber take into account in his analyses any variables other than salary, unlike the City/BOE's expert Ballou who, when replicating Farber's study, considered the variable of distance from the City. That resulted in a finding that showed the estimated amount of salary to be not statistically significant. (Tr. at 1039-40; Brief at 117-118)

## OTHER CITY/BOE PROPOSALS

### Elimination of Sabbaticals

UFT-represented teachers are eligible for a year-long, paid leave of absence after 14 years of service (City/BOE Exhibit 23, Article 16.b). These sabbaticals are used for study or "restoration of health" and the teacher receives 70% of normal pay. Other regularly appointed teachers may apply for a "restoration of health" sabbatical for six months after serving seven years, and receive 60% of their regular pay.

The City/BOE urges that the sabbatical leaves be eliminated for those teachers appointed to the school system after July 1, 2001 only, because the cost of that benefit represents a "misallocation of available teacher resources." (Brief at 110) It argues that these leaves provide another means of reducing the time that teachers are in classrooms. Over the past two school years over 1,550 teachers have taken either a one-year or six-month sabbatical. (City/BOE Exhibit 94)

In addition, the survey conducted by the OLR of the schools in major cities demonstrates that the majority do not offer sabbaticals. (City/BOE Exhibit 81 (21)) For those large city districts that do provide sabbaticals, none has terms as generous as those available in New York City. Moreover, it points out that of the 49 local school districts that responded to the OLR study,

only 5 currently grant sabbaticals. (Tr. at 766) It characterizes these leaves as a "luxury" which is no longer affordable and thus should be eliminated effective immediately for those newly appointed teachers.

### **Skill and Knowledge Differential**

With respect to the UFT's proposal that a Special Skills Differential of \$4,000 for those teachers who acquire certain additional skills, such as National Board Certification or dual certification in one of the shortage areas, does not clearly articulate how to implement such a program nor provide any justification for it. The City/BOE maintains that if any skill differential were to be implemented, it must be regarded as a cost item and therefore fall within the 9.86% pattern settlement.

Nor has the UFT explained how the proposal is to be quantified, or acknowledged that those teachers who are paid incentives for National Board Certification in the states cited by the UFT are paid with state funds. (Tr. 446-49; Brief at 122-123) There is no evidence that a teacher certified in more than one subject would be responsive to the needs of the City school system, because that teacher would probably have to be moved into the shortage area, thereby creating another opening which would need to be filled.

Moreover, the City/BOE argues that the UFT's definition of the differential would, in practice, be so broad as to apply to every member of the bargaining unit. Given that lifelong learning should be part of any teacher's job description such a special differential would be inappropriate.

Any claim by the UFT that its proposed skills differential is similar to the Certified First Responder Differential ("CFRD") which was agreed to by the City and Firefighters in 1997 is misplaced. That differential was targeted for entirely new duties and skills not part of the Firefighters' job, is applied on a per tour differential and is not a flat payment. It is only paid to a Firefighter who is actually assigned to a company scheduled to respond to CFR calls and is on duty. (Tr. 734-35) (Brief at 124)

### **No Layoff**

The City/BOE also argues that the UFT's proposal that no layoff occur for any titles throughout the term of the agreement is inappropriate because the \$3.6 billion budget gap which the City has projected for FY 2003 will result in inevitable expenditure cuts. The record demonstrates that the City has already directed its agencies to reduce their budgets by up to 20%, excepting the uniformed agencies and the Board of Education which are to reduce their budgets by 5% and up to 10%. (City/BOE Exhibit 106) The City/BOE terms as "imprudent at best" to impose any limitations on

its ability to balance the budget and to make choices with respect to the reductions and expenditures.

### **"SAVE" Legislation**

Although the City/BOE and the UFT agree that school safety is a primary concern, the UFT's proposal that the Safe Schools Against Violence in Education Act ("SAVE") would be incorporated within the collective bargaining agreement must be rejected. It would place a burden on the collective bargaining process with issues that do not impact on bargaining unit members. Thus, the subject is a non-mandatory one that cannot be recommended by the Panel. Moreover, it argues that the UFT proposal is a prohibited subject of bargaining, as public policy prohibits the bargaining away of any school district obligation concerning proper standards in the classroom. It is a very expansive statute to improve school safety throughout the State which was achieved through the amendment of five separate State statutes. (Tr. at 1349)

The City/BOE points out that in order to be in compliance with SAVE, it was required to develop and complete a system-wide Code of Conduct which covers the rights, responsibilities and protections of a variety of constituents, and that the "vast majority" of these constituents are outside the scope of the UFT's bargaining unit. (Tr. at 1354; Brief at 126) Only one section of the Code of Conduct, Chancellor's Regulation A-443, deals with a teacher's role

in the student disciplinary process in terms of removing a student from the classroom who is "substantially disruptive" or "substantially interferes" with the teacher's authority. (City/BOE Exhibit 102 at 51)

Incorporation of the Code of Conduct into the contract would no doubt result in giving all UFT- represented employees the right to file grievances over matters that strictly pertain to school supervisors and/or students. (Tr. at 1349, 1354; Brief at 127-128) The City/BOE maintains that even if the proposal were a mandatory subject of bargaining, the Panel should not consider its recommendation because a majority of the issues covered in the Code of Conduct have no relation to the UFT's bargaining units. It also points out that Chancellor's Regulation A-443 already provides teachers with the right to appeal to the Chancellor a principal's decision concerning the length of time that a student is removed from a classroom and/or the decision to set aside a removal. Therefore, the teachers already have an appeal process to use if they have concerns. (Tr. at 1356-58)

## **Findings**

Certain introductory remarks are appropriate. This Board is confronted with relatively few issues. Unlike many other impasses where each of us have served, these parties have not presented dozens of open issues. Instead, the parties have presented

extensive evidence and argument on the limited issues in dispute. Given the size of these bargaining units, a school system serving 1.1 million students educated in 943 elementary, intermediate and junior high schools, 200 high schools and 60 special education schools, this is a remarkable testament to the sophistication of the parties. Moreover, it is important to note that these parties have already resolved several issues that are ordinarily the most vexing in other collective bargaining settings.

First, the parties, as part of the negotiations between the City and the Municipal Labor Coalition, agreed on June 6, 2000, to support legislation to enhance pension benefits for members of the various New York City retirement systems, including the New York City Teacher Retirement System. On January 11, 2001, again through the negotiations between the City and the Municipal Labor Coalition, the parties entered into an agreement resolving all issues of health care and welfare fund benefits for this round of bargaining. President Weingarten was the Chair of the Municipal Labor Coalition. Obviously, these two (2) agreements took many potential "hot" issues off the table.

Second, beginning in March 2000, the UFT and the Board of Education were involved in meetings regarding issues that otherwise would have been addressed in this round of bargaining. This grievance/arbitration committee, addressed issues that were significant to both the Board of Education and to the Union.

The Board of Education insisted upon improvement in the disciplinary procedures that would enable it to act more quickly in removing individuals it believed should not be educating children either due to misconduct or incompetence. This included the Board's desire to have certain teachers accused of serious offenses be removed from the payroll pending the completion of the disciplinary proceeding. In addition, the Board proposed a dramatic overhaul of the arbitration system insofar as it applies to "letters in the file." That arbitration process had bogged down as a result of the standards and precedent regarding letters in the file.

The UFT sought procedures to expedite class size and reorganization grievances. It argued that the current system effectively eliminated any opportunity to remedy class size and reorganization claims, even when the Union prevailed. In addition, the UFT complained of the backlog in having regular grievances processed to arbitration and that pending cases had languished unaddressed for years.

This committee met throughout 2000. It made great progress. When the parties began formal negotiations in January and February 2001, they determined to establish four (4) subcommittees. The fourth of those committees, titled Grievance/Arbitration, served as a continuation of the work begun by the Union and Board of

Education in March 2000. As of January 2001, the committee was joined by representatives of the City.

These grievance/arbitration issues that had plagued the parties for years were ultimately resolved in the subcommittee, subject to agreement on all other issues in negotiations. Significantly, revisions relating to the grievance and disciplinary process; including broadening the grounds for which teachers may be suspended without pay<sup>4</sup>, streamlining the resolution of disciplinary cases, procedures to expedite class size and reorganization grievances, a process to address the backlog, clarification of the circumstances in which teachers can be immediately removed from the classroom for misconduct, simplifying various duplicate proceedings and revamping letters in the file arbitrations are all tentatively agreed upon, subject to the resolution of this round of bargaining.

Thus, prior to the formal hearings in this dispute, the parties had addressed and resolved important issues. Many of them were at the highest level of each party's agenda. Some of the tentative agreements constitute historical change.

What remains is fundamentally an economic dispute. The Panel intends these findings and recommendations to assist the parties in reaching final resolution on the issues that remain. We hope our Report provides the impetus to continue the progress already made

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<sup>4</sup>Certain changes require legislative action.

in this round of bargaining by advancing problem-solving and constructive negotiations.

With these principles in mind, we turn to the issues before the Panel.

Pursuant to Section 209(3)(b) of the New York State Public Employees' Fair Employment Act (the "Taylor Law"), the Fact Finding Board is empowered to "make public recommendations for the resolution of the dispute". Section 209(3)(a) does not set forth the standards to be applied by the Panel in making a "fair and reasonable" recommendation. Instead, fact finders routinely follow the standards of Section 209(4)(c)(v) which sets forth the criteria utilized in interest disputes under the compulsory interest arbitration section of the Taylor law. The criteria are:

- a. comparison of the wages, hours and conditions of employment of the employees involved in the arbitration proceeding with the wages, hours and conditions of employment of other employees performing similar services or requiring similar skills under similar working conditions and with other employees generally in public and private employment in comparable communities;
- b. the interests and welfare of the public and the financial ability of the public employer to pay;
- c. comparison of peculiarities in regard to other trades or professions, including specifically, (1) hazards of employment ; (2) physical qualifications; (3) educational qualifications; (4) mental qualifications; (5) job training;
- d. the terms of collective bargaining agreements negotiated between the parties in the past providing for compensation and fringe benefits, including, but not limited to, the provisions for salary, insurance and

retirement benefits, medical and hospitalization benefits, paid time off and job security.

Comparability, ability to pay and the interests and welfare of the public are the factors set forth in Section 209(4)(c)(v) routinely utilized in fact findings by neutrals. We agree that these are the relevant criteria. Our recommendations are premised upon an evaluation of comparability, ability to pay and the interests and welfare of the public.

The parties introduced considerable evidence regarding the appropriate comparables for employees represented by the Union. Simply put, the UFT insisted that the largest 36 school districts in the four counties surrounding New York City are the most relevant comparison. These counties are Nassau, Suffolk, Westchester and Rockland. The Union emphasized that these districts vary in their socio-economic composition ranging from cities like Yonkers, Mt. Vernon and New Rochelle to wealthy and low income suburban areas. It is from these largest 36 districts that the UFT extrapolated its proposals regarding wages. In the Union's view, these 36 districts are the appropriate comparison because this is the labor market from which the Board of Education must compete for employees. The Union asserted, notwithstanding the City/BOE's assertion to the contrary, that teachers have a local rather than a nationwide market.

In contrast, the City/BOE argued that the appropriate comparability analysis for UFT-represented employees is primarily City civilian employees. The City/BOE emphasized that the relevant criteria requires a comparison of the wages, hours and conditions of employment with the other employees performing similar services or requiring similar skills under similar working conditions in comparable communities. In the City/BOE's view, given the uniqueness of New York City and its school system, which is largely funded by the City, the only appropriate comparison for UFT-represented employees are the civilian employees of the City.

The City/BOE asserted that the 36 jurisdictions selected by the UFT are not comparable to New York City in any respect. For example, the City/BOE argued that 31 of the 36 school districts have enrollments of under 10,000 in contrast to New York City's enrollment of 1.1 million. Those districts employ on average only about 600 teachers, whereas New York City employs more than 80,000. Those districts hired approximately 97 new teachers for School Year 2001-2002, whereas the Board of Education hired about 8,800.

Also, the City/BOE insisted that the socio-economic characteristics of the City and those suburbs are far different. It cited data that the median household income in New York City is \$38,224 compared to \$61,026 in Nassau County, \$53,560 in Suffolk County and \$55,040 in Westchester County. Home ownership is twice as high in Westchester as in New York City and even higher in

Nassau and Suffolk County and that New York City spends 31 % of its budget on housing, welfare and public transportation as contrasted with only 9% spent on those needs in the suburban counties. (City/BOE pre-hearing brief at pages 132 and 133 and City/BOE post-hearing brief at page 62).

In addition, the City/BOE argued that if external comparisons are to be used, the only appropriate comparison is to the nation's other major cities and school districts. These "National Cities" are cited by the City/BOE as it has in prior impasses and according to the City/BOE are the only potential appropriate external comparisons.

Prior fact finding boards and prior arbitration boards have had to grapple with the question of whether the surrounding suburbs or the National Cities are the more appropriate comparator to UFT-represented employees. We adhere to the determinations that both the National Cities and the surrounding districts are relevant for evaluation purposes. Comparability rather than identity of jurisdiction is all that is required under the relevant criterion. Differences in degrees of comparability can be taken into account when evaluating the evidence drawn from jurisdictions with different degrees of comparability. Thus, we agree that both the comparables stressed by the City/BOE and the Union are germane.

However, regarding external comparisons, our emphasis is on the surrounding school districts. These are the most appropriate

comparables. We are not convinced that there is a national market for teachers. Instead, we are persuaded that New York City competes with the surrounding geographic locations for teachers, other pedagogues and other UFT-represented employees. While common sense demonstrates that communities like Great Neck, Scarsdale and Briarcliff are not comparable to New York City for all of the reasons cited by the City/BOE, we find particularly significant the cities in Westchester like Yonkers, Mt. Vernon and New Rochelle. So, too, are the similar socio-economic communities in Nassau County, such as Hempstead and Freeport significant. We have given special weight to these communities in our analysis of the appropriate comparisons of employees "generally in public and private employment in comparable communities".

A substantial portion of the presentation in this proceeding involved discussion of the civilian pattern. The City/BOE noted that over 143,000 employees are currently covered by collective bargaining agreements adopting the pattern originally established by the City and District Council 37 on April 11, 2001. More than 25 municipal unions representing these employees have accepted this municipal pattern. The City/BOE insisted that the Union must be encompassed within this civilian pattern. It also claimed that the UFT could make no persuasive argument to be covered by the "Uniform Pattern" in light of the fact that UFT-represented employees are not uniformed employees.

The Union introduced considerable evidence that, in essence, maintained there is no pattern in this round of bargaining. It cited differences in the agreements signed by municipal employees, the increased take home pay for a large segment of District Council 37 and Local 237, IBT members and other civilian workers due to a reduction in their required pension contribution which is not available to the UFT-represented employees, and that librarians received wages above the civilian pattern which were beyond the productivity gains provided to the City to offset amounts beyond the civilian pattern.

In this round of bargaining, especially in light of the events of September 11, 2001, we conclude that the civilian pattern comports with the statutory criteria regarding comparability and the interests and welfare of the public. It also is appropriate under the ability to pay criterion. This is because pattern bargaining has been, in our view, the governing principle in New York City municipal labor relations for decades. In addition to being the cornerstone of municipal labor relations, pattern bargaining has been an integral part of the relationship between the UFT and the City/BOE. Departing from the pattern might destroy the delicate paradigm underscoring municipal pattern bargaining. The evidence is overwhelming that pattern bargaining has fostered stable and orderly labor relations among municipal labor unions, uniformed and civilian, whether they be large or small unions. It

has been reaffirmed time after time by impasse panels asked to address the issue.

Moreover, pattern bargaining makes good sense. It permits the City/BOE to more predictably budget its resources and to avoid the "leapfrogging" and "one-upmanship" which is devastating to the budgetary process as well as to morale and stable labor relations within the City. No party or work force is advantaged by unrestrained competition among unions.

Further, basic adherence to a pattern bargaining protects a bargaining unit or bargaining units that first reach agreement with the City or receive the first award or recommendation in a particular bargaining round. No bargaining unit would be willing to proceed with bargaining or with fact finding or arbitration so as long as it remained possible that it might be embarrassed by subsequent agreements, recommendations or awards that improve upon what it first agreed to or was awarded. No labor leader would risk settlement without the assurance that he or she would not later be outdone by a richer settlement achieved by one of the other municipal units. Stated simply, without pattern bargaining, it would be difficult, if not impossible, for any unit to settle first. We do not believe that the good faith of any bargaining unit settling early should be jeopardized by subsequent agreements, absent compelling reasons.

Pattern bargaining has been implicitly acknowledged repeatedly between the parties. In many rounds, the UFT accepted the established pattern. In fact, we note that the evidence demonstrates that in certain prior bargaining rounds it was the UFT that went first and set the parameters for City bargaining with other municipal representatives. The City kept its "promise" and held subsequent unions to the pattern.

We also believe that pattern bargaining provides an impetus for quick settlements which have a number of advantages for the City/BOE and for City and Board of Education workers. It encourages voluntary settlement rather than resort to impasse. We simply do not believe that any bargaining relationship is enhanced by the rejection of relevant previously agreed to contracts.

In short, we agree with the long line of fact finders and arbitrators who have accepted the merits of pattern bargaining. This is particularly true, here, given the enormous challenges to the City stemming from the terrorist attack as well as the fact that the next round of bargaining will begin soon.

Yet, within the pattern there has always been ample room to address specific exigencies that may arise. The City/BOE acknowledge that the pattern is not a "strait jacket". After all, even when a pattern exists there must be room for each unit to bargain unique aspects requiring special attention and special solutions. The parties must be free to negotiate terms that are of

significance to the members of the bargaining unit. Solutions to compelling unit problems have been sometimes achieved by "creative" bargaining, for example, by generating productivity savings or extending a unit settlement duration beyond that of the pattern.

We also note that it has long been established that even in the wake of pattern bargaining, the advent of unique, extraordinary, compelling and critical circumstances have required and permitted making modifications without abandoning the pattern.

We disagree with the UFT that the 20-30% gap in salaries between its represented employees and the salaries paid to employees in comparable communities justifies deviation from the pattern. We also reject the position that difficult working conditions faced by Board of Education employees regarding class size, instructional technologies and resources, infrastructure and safety and security justify deviation from the pattern. Finally, despite considerable evidence introduced by the Union, we simply cannot conclude that ordinary or typical recruitment and retention difficulties justify deviation from the pattern. After all, we agree with the City/BOE that many groups of employees point to disparities between their wages and those of employees performing similar work in the suburbs or elsewhere. This alone is hardly a compelling circumstance and provides no basis for deviating from the pattern. In fact, many agencies complain of recruitment difficulties. Certain titles have unfilled positions for long

durations as market forces preclude finding individuals willing to accept employment. Even in those circumstances, we conclude difficulties caused by lower compensation than that paid in the competing market for such employees is an insufficient basis for undercutting the established pattern given the deleterious impact that could ensue.

So, too, do we conclude that the Librarian Agreement cited by the UFT is insufficient to justify abandoning the civilian pattern. First, we cannot help but take notice that the Librarian Agreement applied to only 400 librarians. Of greater significance is the evidence regarding the circumstances surrounding that negotiations, the funding of that agreement and the productivity and managerial opportunities afforded by that accord. In fact, as more fully addressed below, we subscribe to the view that increased productivity should be compensated outside the pattern without in any way impacting upon the pattern.<sup>5</sup>

We agree with the UFT that the welfare of the public is also served by a teaching force that is stable and its morale is high. After all, the interests and welfare of the public are not limited solely to the public's financial interests and welfare. By necessity, it also must involve the community's interests and

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<sup>5</sup>Although the UFT argument was that City/BOE employees provide an essential function - a view that we, of course, adopt - we specifically reject the argument that the City/BOE was obligated to offer the uniform pattern to UFT-represented employees.

welfare in having its workforce continuing to serve its essential needs and providing the essential services that an education system must serve. Thus, if we concluded that the pattern settlement was not fair and reasonable, even if it had been accepted by other civilian unions, we would be inclined to reject such a proposal. If that was the case, such a result would not serve the interests and welfare of the public.<sup>6</sup>

However, the pattern offered is a reasonable one. As recommended, herein, a nine (9%) percent rate increase to all incumbent employees along with the other recommendations contained below is fair and just. During the same time period, the actual and projected CPI is less than 5%, well below the 9.86% cost of the civilian package. Wage increases in the 36 districts cited by the Union in 2000-2001 averaged 3.23% and 3.39% in 2001-2002.

In all, we are persuaded that a package which deviates from the salary increases and benefit enhancements provided to municipal employees would be unwise. Because it enhances stable labor relations and offers a reasonable and fair increase to UFT-

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<sup>6</sup>The City in the current round of bargaining has reverted to its 1980's practice of putting forth a slightly more generous offer for uniformed than for civilian employees, in this case an improvement of 10.03% over 24 months or 12.49% over 30 months. The Uniformed Forces coalition accepted that offer and 10 of the 13 constituent unions in that Coalition have ratified new contracts based on it. The PBA is not a constituent member and is currently before a PERB impasse panel seeking improvements considerably in excess of those agreed to by the Uniformed Forces coalition.

represented employees, we conclude that the pattern settlement serves the interests and welfare of the citizens of New York City. After all, the settlement pattern was accepted by these 143,000 employees as being appropriate before the events of September 11, 2001.

In this regard, we conclude that the offer proffered by the Union of 22.7% over the course of the 27 months would invariably adversely affect the morale and efficiency of municipal employees. The cost of this proposal is \$1.28 billion, \$757 million above the pattern settlement. As we conclude, below, such a proposal is basically beyond the City's ability to pay, especially given the events of September 11, 2001, we also believe that the size of the UFT's requested increase does not serve the interests and welfare of the public. It would severely damage the City's financial condition.

We turn next to the criterion involving ability to pay. The fiscal outlook of the City subsequent to September 11 is uncertain. Fortunately, no other City in the United States has ever had to face what New York City has and is facing. The situation is so fluid that we are compelled to note that both parties' projections in their pre-hearing memoranda filed in November 2001, had to be modified at the time the post-hearing briefs were filed in February 2002.

Yet, certain things are known. Most of the period covered by our recommendation falls within Fiscal Years 2001 and 2002. Some portion falls within Fiscal Year 2003. For Fiscal Year 2001, the City experienced a large surplus, approximately 2.9 billion. Clearly, if that had continued, the City/BOE might have been able to fund the 757 million dollar difference between the City/BOE and Union's proposal.

For Fiscal Year 2002, circumstances changed dramatically. While the budget is balanced, and there may well be a surplus, this is due to the use of prior year's balances and because agencies other than the Board of Education and uniformed services were required to reduce their budgets by 15% and may face an overall 20% cut. The Board of Education and uniformed services were required to reduce their budget by 2.5% and may face an overall 5% cut.

The out-years beginning in FY 2003 are more tenuous. While the numbers have evolved, and the Union is correct that previous claims about the size of out-year gaps have been overstated due to the City's conservative financial forecasting, the fact remains that there is a consensus that the gap in FY 2003 will be in the \$2.5 to \$5 billion range. Under any reasonable view, this is a strong indication that the City has a limitation on its ability to pay.

Thus, we conclude that applying the statutory criterion of ability to pay we do not find that, the City has the ability to pay

the 22.7% wage increase proposed by the UFT. Instead, in large measure because we agree with the Union that the contract term covers a good part of the time when finances were better, and we do not believe that any UFT-represented employees should be disadvantaged by the delay in completion of the bargaining process, we find that the City does have the ability to pay the pattern settlement to all UFT-represented employees. While we recognize that this offer was made on September 5, 2001, before "everything changed" on September 11, 2001, we reject any claim that the City lacks the ability to pay for the pattern settlement.

This is not to dismiss the enormous impact that September 11 had on the City's economy. We accept that 30 million square feet of office space were destroyed, damaged or at least temporarily inaccessible, that hundreds of small businesses were closed down and thousands of workers were dislocated, that 17,000 jobs were immediately lost as a result of the attack and that another approximately 80,000 jobs were lost in October 2001 alone. Also, more troubling in the long run is the fact unemployment rose sharply with the jobless rate being the highest in 9 years. This will be exacerbated by many large companies announcing plans to relocate out of New York City or to remain with at least large parts of their operations in the location they relocated to after the attacks.

On the other hand, we agree with the UFT that the quality of education imparted by the schools should not fluctuate with prevailing economic conditions. We, too, do not want children to be unfairly impacted upon in their educational opportunities because they happen to be in the school system during a poor economic cycle. We also agree with the statement of Basil Paterson, Esq. that economic uncertainty should not cause the City/BOE to offer its school children inferior schools.

Thus, for all of the foregoing, we have determined that despite the unforeseen circumstances, there is simply no basis to argue a lack of ability to fund the pattern settlement, as specified below. While an increase beyond the pattern, is, arguably within the City's ability to pay, other considerations described above, namely, the important policy of pattern bargaining and the interests and welfare of the public dictate adherence to the pattern in this round of bargaining.

The pattern in this round calls for wage increases of 4% rate increase on the first day of the contract, 4% on the first day of the thirteenth month and 1% as an additional compensation fund available on the last day of the 27 month contract. The issues raised by the Union lead us believe that the parties should maximize the increases to the pay scale. To that end, we find that the 1% proffered as an additional compensation fund be applied as an across the board wage increase so that the UFT wage increases

are 4% and 5%, to be discussed infra. This was one of the illustrations of the pattern presented at the hearings by the City/BOE. This should be effectuated, however, at a cost consistent with the pattern.

However, we do not believe that simply applying across the board increases addresses what we consider to be a unique, extraordinary, compelling and critical circumstance. This circumstance is the fact beginning in 2003 the Commissioner of Education of the State of New York has dictated that all teachers must be certified. This is a problem of unprecedented proportion. This imposed deadline is a departure from years of waivers and a premise of the Board's operation. It requires the parties negotiate specific remedies to address it. We disagree with the City/BOE that this does not constitute a crisis. As the Board of Education's documents indicate, the Board will need to hire approximately 40,000 teachers by September 2004. The conclusion is inescapable that the Board is facing an extraordinary recruitment problem. The facts below underscore why this creates a crisis.

For the 2001-2002 School Year, the Board of Education hired approximately 8,800 teachers. Of these 8,800 teachers, almost 43% of them were uncertified. In the last 3 years, the Board hired almost 26,000 teachers and the percentage of uncertified teachers was approximately 55%. At this time, almost 17% of the over 80,000 teachers in the system are uncertified. Most school

districts have 2-3% of uncertified teachers. By the very terms of the Commissioner's ruling, the Board would not be able to use these teachers beginning in September 2003. There is no way to avoid the import of this determination. Besides the usual recruitment challenges facing the Board in an ordinary year, which now require only certified teachers for the class of new hires, approximately an additional 13,500 incumbent uncertified teachers must be replaced by September 2003.

The City/BOE pointed out that since the 1990's the number of uncertified teachers has been approximately the same. Beginning in the early 1990's, about 11% of the teaching force was uncertified. This number of uncertified teachers evolved to 14% and now stands at 17%. In the City/BOE's view, given the enormous increase in the number of teachers added to the staff, from 62,900 in 1991 to 81,271 in 2001, this increased number of uncertified teachers is not alarming. It is also pointed to the fact approximately 14,000 temporary license holders had become certified since 1992.

However, the City/BOE's argument fails to take into account that it can no longer utilize Preparatory Provisional Teachers ("PPT"). As of September 2003, as a matter of policy, the SED will not give holders of PPTs temporary licenses to teach while working towards certification. In light of the fact that the Board spent 43.5 million dollars in recruitment for 2001-2002, in order to obtain approximately 8,800 teachers, approximately 43% of which

were not certified, the conclusion is inescapable that the system faces a crisis regarding the need to attract certified teachers. Whether much of the money used for recruitment came from the Federal Government or the State Government is of no moment. The fact is that the Board of Education expended over \$4,900 dollars, per individual, in order to obtain each of these teachers.

We reject the argument that there is no recruitment problem because individuals have been found to fill open positions. Because of the Commissioner's Regulations, without a change that will facilitate certified teachers being attracted into the system no amount of money added to the recruitment budget plausibly can accomplish the needed and required result. We believe the gap in starting salary between \$31,910 in New York City and \$37,208 in the surrounding districts is too much for the Board to overcome. In fact, even the City/BOE's National Cities survey demonstrates that the starting salary is not competitive.<sup>7</sup>

Much of the City/BOE's presentation focused on the fact that it was not clear that State certification is a proxy for quality. An expert called by the City/BOE testified in length that certification is an unnecessary credential. Ballou emphasized that

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<sup>7</sup>Nor are we convinced that the downturn in the City's economy will provide the necessary credentialed candidates to "substantially diminish" the crisis, as suggested by the City/BOE.

successful private schools and parochial schools generally do not require State certification as a condition of employment.

Given the determination by the Commissioner, the previous Consent Order of August 2000; requiring the assignment of newly hired certified teachers to teach in SURR schools, and the overlay of the Federal Government imposing teacher certification requirements, the debate over the wisdom of having teachers be certified is a waste of resources.

Moreover, we conclude that certification is a measure of quality. We reject any argument that obtaining certified teachers is unimportant. Not only do we conclude that certification demonstrates a level of competency, but also because we conclude that the citizens of New York City and the public at large view certification as a measure of a qualified teaching force, we believe it is essential for both the teaching that goes on and the perception of the education system by the parents, potential employers, potential college admission offices and politicians deciding on which institutions to support that the system recruit, retain and motivate teachers to become certified. Stated otherwise, our conclusion about the need for certified teachers would be the same even if the Board was able to get a further waiver from the Commissioner on having a fully certified faculty after September 2003.

We have deliberated long on how to facilitate the recruitment necessary to address this unique, extraordinary, compelling and critical circumstance. We recommend that 1%, or approximately 56 million dollars, be set aside to provide bonuses, beginning September 2002, for certified pedagogues. The largest amounts of this pool ("recruitment fund") shall be targeted to new hires in order to attract certified pedagogues into the system.

Yet, while the case for a retention problem is less compelling, and supported primarily by anecdotal evidence of qualified teachers and other pedagogues being lost to surrounding districts during the middle years of a pedagogue's career with the Board, we are concerned that incumbent certified pedagogues, or those about to be certified, will have their morale adversely affected if newly hired certified pedagogues receive bonuses while they do not.<sup>8</sup> For this reason, out of this 1% pool, we believe that some amount shall be set aside for each incumbent pedagogue who is certified, or about to be certified. In deciding how to best spend this portion of the monies not used for recruitment, the

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<sup>8</sup>There is no question that teachers have left the Board to teach in surrounding districts where salaries are higher. The parties disagree strongly though as to the number of teachers who have so moved. They also disagree as to whether the evidence establishes that such movement was salary related. On the latter point, the parties introduced conflicting testimonial and documentary evidence by distinguished academic economists. The Panel wishes it to be clearly understood that it cannot say that there is not a salary related retention problem, only that the problem has not been demonstrated by the available evidence.

parties shall utilize all available data regarding exit interviews and other relevant research.

We recognize that bonuses are not going, alone, to solve the recruitment crisis. Along with the wages recommended, herein, and the additional compensation described below that is recommended in exchange for the productivity increase of a longer school day, we are hopeful that the minimum starting rate will be sufficient to attract certified teachers. In fact, as more fully described below, we believe that the combination of the salary increases, the certification bonuses and the additional compensation for the longer day will result in a salary for a starting teacher as of September 2002 of \$40,000, as fully described on page 135. If this entire package of recommendations is accepted by the parties, this will make the Board of Education competitive in recruiting certified pedagogues. For example, Yonkers' beginning salary is \$40,068.00. It will also dramatically improve career compensation and reduce the disparity with the relevant comparable communities. Inevitably, this should encourage retention of pedagogues.

How shall this additional money be funded without abandoning the pattern? We recommend three solutions. First, the pattern assumed that the 4% and 5% rate increases would be compounded, as did all of the City/BOE's illustrations of the pattern. We recommend that they not be compounded. Instead, effective on the date of the second increase, the salaries of all UFT-represented

employees shall be increased by a total of 9%. This provides a .26% savings from the pattern, as calculated by the City/BOE.

Second, we recommend that in order to offset the costs of these bonuses that the salary increases recommended apply only to incumbents on payroll at the time of the agreement. Since they are no longer part of the system, UFT-represented employees who have left the Board other than for retirements, and who have, in essence, exacerbated the recruitment problem emphasized by the Union, shall not receive any increase as a result of this recommendation.

Third, we recommend that the timing of the second wage increase, 5%, be delayed slightly, perhaps for a month or two beyond the beginning of the 13<sup>th</sup> month, and/or extending the contract term in order to generate monies to fund this recommendation.

Our recommendation regarding recruitment also addresses the City/BOE's argument that an across the board increase beyond the 9% recommended for all pedagogues, even those who have many years in the system, is an inefficient use of funds. The City/BOE asserted that providing increases to all teachers would not facilitate recruitment. We agree with some aspects of this argument. For this reason, in formulating our recommendation regarding recruitment, with the added benefit of enhancing retention, we targeted certified pedagogues.

The pattern offered to other employees included a \$200.00 welfare fund increase effective February 15, 2003, pursuant to the Municipal Labor Coalition Health Benefits Agreement. This constitutes a .6% cost. There is absolutely no reason why this increase, a lynchpin of the Municipal Labor Coalition's negotiations regarding health and welfare, should not also apply to UFT-represented employees. We recommend this benefit be provided to all UFT-represented employees.

Regarding salaries, the Union requested a special skills differential for the acquisition of additional skills and knowledge, such as National Board Certification or dual certification, in a particular shortage area in the system. We believe that these special skill differentials have some merit. It may enhance the ability to retain the most qualified pedagogues and may be used to reward areas where the greatest need exists. However, we simply can find no basis for additional monies beyond those recommended above. If the parties determine that these are important priorities, the appropriate mechanism is to fund these from the 1% "recruitment fund". Such skills differential may enhance the ability of the Board to attract certified individuals. Obviously, the parties must determine how these differentials will work and whether they are efficacious for the system.

The District Council 37 pattern included a no layoff guarantee for all titles through the term of this Agreement. We perceive

this guarantee as part of the basic pattern being proffered by the City/BOE. Regardless of the circumstances of September 11, and despite the almost 20% reduction planned in most City agencies, we recommend that this basic component of the pattern also apply to UFT-represented employees.

The Union proposed to incorporate the Board's regulations implementing the SAVE legislation into the Collective Bargaining Agreement. Considerable written submissions were introduced addressing whether this proposal is a mandatory subject of bargaining. Without in any way determining that legal question, we believe that there is no persuasive reason for the proposal at this time. Accordingly, this proposal is rejected.<sup>9</sup>

The City/BOE proposed to make all teachers eligible to receive additional compensation, beyond the traditional salary schedule, based upon their own measurable job performance. The City/BOE insisted that the right to implement such compensation programs was a key element of settlements entered into this round of bargaining for both civilian and uniformed forces.

Perhaps because so many of the UFT-represented employees are pedagogues, considerable testimony and documents were introduced about the wisdom of individual merit pay. This is a complex issue.

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<sup>9</sup>So, too, are other UFT proposals that the City/BOE alleged were nonmandatory denied. While some of the workload issues are of concern, we do not find appropriate, at this time, recommending additional binding procedures. Instead, we view these issues as requiring more discussion between the parties.

We are aware of the successes and failures of such programs in other locations in New York State and other locales. Suffice it to say, we are persuaded that programs work best when they are consensual. It is essential that if any type of merit pay program is adopted that all of the stakeholders agree with its premises, standards and implementation methodology. Also, given our overriding concern in this process to achieve a more competitive salary structure for City/BOE teachers, we have no desire to hamstring, in any way, the parties' dedicating all available funds to that goal.

For these reasons, as well as the fact that there is very little time left under the term of the Agreements for which we are making recommendations, we conclude it best to remand this proposal to the parties for further consideration. So as to ensure that this issue is seriously addressed, we recommend the Chancellor, the President of the UFT and the New York City Commissioner of Labor serve, or appoint a high ranking designee, as co-chair on a committee to investigate the viability and desirability of merit pay.

The City/BOE also proposed eliminating sabbaticals for newly hired teachers appointed to the school system after July 1, 2001. It claimed that this would have the desired result of keeping experienced teachers in the classroom. Currently, teachers represented by the Union are eligible for a year long pay leave of

absence after 14 years of service. Year long sabbaticals are granted to teachers for study or restoration of health during which time the teacher receives 70% of normal pay. Regularly appointed teachers may also receive a special 6 month sabbatical for "restoration of health" after 7 years of service. Teachers on special sabbaticals receive 60% of their regular pay.

The evidence seems inconclusive on this issue. However, in light of the fact that our main focus in this Report is to encourage the recruitment of certified pedagogues, it is inimical to that result to remove a benefit from new hires that will continue to be received by their colleagues. At this time, this would "send the wrong message". Moreover, present sabbatical eligibility requires at least 7 years of service. Since the problems facing the Board are immediate, it is difficult to see how curtailing sabbaticals not sooner than 6 or 7 years hence would provide any amelioration, no less a solution for the problems that are central to this proceeding. Accordingly, the City/BOE's recommendation to eliminate sabbaticals for teachers hired after July 1, 2001, is rejected.

There remains what can only be described as an implicit issue in this case. Throughout its presentation, the Union compared its teachers to individuals working in suburban school districts. The City/BOE emphasized differences in those suburban communities, but also stressed the differences in the working conditions in those

suburban communities. Most of the attention by both parties involved the work day of New York City teachers in comparison to their colleagues in the suburbs. The Union emphasized instructional time whereas the City/BOE emphasized the undisputed fact that New York City School teachers work a shorter day, approximately 36 minutes shorter than teachers employed by the relevant suburban school districts.

We believe that the Board has a good point. While instructional time and planning time are obviously different, we are persuaded that the true measure of comparability is the length of the working day. After all, we agree that the other tasks performed by pedagogues beyond instructional time are essential elements of a pedagogue's role in a school. In this time, when school districts in the surrounding areas have increased their instructional day, and have increased the requirement that pedagogues undergo professional development, we believe the time is ripe for additional productivity to be built into the system.

The evidence is overwhelming that all school districts especially the New York City Public School System require an emphasis on professional development. The evidence also established that the current school day and configuration of that school day is inadequate to accomplish the goal of developing pedagogues to address the requirements of their positions. We are struck by the fact that the concept of "lifetime learner" is here

and is essential to address the overwhelming needs of the students served by the system and in order to meet the heightened standards based education requirements set by the State.

We also are persuaded that a longer school day helps children. The evidence introduced about the ETS is compelling. In fact, our view coincides with Commissioner Hanley's on the last day of hearing regarding extended time schools. He said, "It does make sense. It has worked well. I don't know if it's in today's papers but the result of the latest SURR schools, is it in today's paper? It has worked well. There is no question about it. We just don't have the money." (Commissioner Hanley at page 1478, transcript hearing of January 9, 2002). Below, we have addressed the cost of a longer day.

Based upon the applicable comparables, we believe that the length of the school day of New York City compares unfavorably with the relevant comparable districts. We also note that the City/BOE exhibits demonstrate that many National Cities have negotiated longer school days with their teachers' unions. If New York City students are to compete, we agree that a longer day is essential.

On balance, we conclude that an increase of 20 minutes per day for all ETS titles (teachers, para-professionals, guidance counselors, secretaries) is in order. As to the appropriate additional compensation for such extended day, the parties have negotiated a formula in their ETS Agreement. Both sides, when

asked by the Panel, agreed that this previously adopted formula is appropriate.

The value of an additional 20 minutes is approximately 6% percent. We believe that it is an excellent investment in the school system if the money is made available for this purpose. We note the newspaper articles about the State potentially making available additional monies through bond sales for schools in FY 2003, and thereafter. We conclude that if the money is available, no one can doubt the value of a longer day.

Given the timing of this recommendation, in April 2002, we recommend the parties consider extending the terms of their new collective bargaining agreements for some short duration. This will have the desired impact of giving the parties time to determine whether recruitment and retention has been enhanced by these recommendations. It may also provide a potential funding source.

While we are, of course, mindful of the enormous strain on the City/BOE's resources as a result of September 11, we are persuaded that this investment in a longer school day, is essential and provides the basis for the type of productivity necessary in these challenging times.

Of course, this 20 minutes extra pay will have a propitious effect. While designed to address the system's need for additional instruction and professional development, it also will supplement

the salaries of pedagogues which will, hopefully, have a further positive impact on the recruitment and retention of pedagogues. Yet, since the UFT is "paying for" this additional compensation in time, it conforms with the basic principles of the pattern and mirrors, in concept, the Librarians' Agreement which has been emphasized in this proceeding. This additional time also will permit mentoring, counseling, classroom coaching, inter-visitation, professional development and other lifetime learning that the record established, especially through the testimony of Alvarado, are necessary in order to have a first class education system.

As to the use of the additional 20 minutes per day for pedagogues, we agree with the City/BOE that the time must be constructively and productively used. As a starting point, we recommend that 10 of those minutes be utilized, at the discretion of the Board, for additional instructional time with students. The other 10 minutes shall be used for mentoring, counseling, classroom coaching, inter-visitation and professional development as a means of ensuring students meet the heightened standards. In order to efficiently utilize and manage these 10 minutes of non-instructional time, we recommend that the Board be permitted to cumulate these 10 minutes per day into hour or 2 hour blocks so the time may be used most efficiently.

We view these recommendations as formulating an overall method to deal with the underlying issues that precluded the parties from

settling. Taken in their entirety, they will dramatically improve the opportunity for the Board to attract and retain qualified teachers and other pedagogues. For example, if accepted, in toto, the starting salary for a certified teacher will increase from its current level of \$31,910 to \$40,000 once the salary increases are implemented, the extended day is in place and the bonuses are paid. This will apply as follows:

\$31,910	(Current starting salary)
<u>    x 9%</u>	
\$34,782	(Across the board increase)
\$34,782	
<u>    x 6%</u>	For extended school day
\$36,869	(Additional twenty (20) minutes)
\$36,869	
<u>  + 3131</u>	(Bonus for newly hired certified teachers)
\$40,000	Starting Salary

In summary, an \$8,090.00 increase in the minimum salary beginning September 2002 as a result of these measures shall favorably impact upon the Board of Education's ability to attract qualified certified pedagogues. It will substantially assist the Board in addressing the "crisis" that it have only certified teachers in place by September 2003. That crisis must be addressed now.

Also, these recommendations will encourage current PPT's to become certified and assist in retaining certified pedagogues. They also increase career compensation making the Board's salary

guides, as of September 2002, more competitive with relevant surrounding districts. Further, these recommendations reaffirm the civilian pattern in these negotiations. Finally, the lengthened school day will provide more instructional time and will facilitate professional development to enhance instruction so as to better prepare students for the challenges of the new millennium.

## **RECOMMENDATIONS**

The Panel recommends as follows:

1. Terms of the Agreements  
The Agreements shall be for a term of twenty seven (27) months, unless the parties agree on a longer period.
2. Wage and Benefit Increase  
Effective on the first day of the Agreements there shall be a 4% wage increase to all UFT-represented employees.

Effective on the first day of the fourteenth or fifteenth month of each Agreement, there shall be a further 5% wage increase (non-compounded) to all UFT-represented employees.

These increases shall apply only to incumbents on payroll at the time the new Agreements are effective, except for individuals who retired from the system during the terms of the Agreement who are eligible for these increases.

Effective September 2002, there shall be established a recruitment fund equal to 1% (not more than \$56,000,000) which shall provide bonuses for certified pedagogues. The parties may utilize some amount of these monies for special skills differentials, dual certification bonuses, etc.

Welfare Fund. Effective February 15, 2003, a Welfare Fund increase of \$200, pursuant to the Municipal Labor Coalition Benefits Agreement.

- 3. Performance Incentives  
A committee co-chaired by the Chancellor, the President of the UFT and the New York City Commissioner of Labor, or his or her high-ranking designee, shall be established to investigate the viability and desirability of merit pay.
- 4. No Layoff  
There shall be no layoffs for all titles through the terms of these Agreements.
- 5. Other Proposals  
All other proposals that have been considered by the Panel in this Report are denied.
- 6. Additional Time  
In accordance with our Findings above, including the usage of the time recommended, assuming monies are made available from another funding source, for all ETS titles, the work day shall be increased by 20 minutes, and pursuant to the ETS Agreement, each individual's wages shall be increased by 6%.

Respectfully submitted,

\_\_\_\_\_  
Date

\_\_\_\_\_  
/S  
Martin F. Scheinman, Esq.

On this      day of                      2002, before me personally came and appeared MARTIN F. SCHEINMAN, ESQ. , to me known to me to be the individual described herein and who executed the foregoing instrument and he acknowledged to me that he executed the same.

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NOTARY PUBLIC

\_\_\_\_\_  
Date

\_\_\_\_\_  
/S  
Rosemary A. Townley, Esq., Ph. D.

On this     day of             2002, before me personally came and appeared ROSEMARY A. TOWNLEY, ESQ. , Ph.D., to me known to me to be the individual described herein and who executed the foregoing instrument and he acknowledged to me that he executed the same.

\_\_\_\_\_  
NOTARY PUBLIC

\_\_\_\_\_  
Date

\_\_\_\_\_  
/S  
Professor Daniel G. Collins, Esq., Chairperson

On this     day of             2002, before me personally came and appeared PROFESSOR DANIEL G. COLLINS, ESQ. , CHAIRPERSON, to me known to me to be the individual described herein and who executed the foregoing instrument and he acknowledged to me that he executed the same.

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NOTARY PUBLIC