

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

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In the Matter of the Impasse

-between-

UNITED FEDERATION OF TEACHERS,
Local 2, American Federation of Teachers,
AFL-CIO

M2004-253, 268-279

- and -

CITY OF NEW YORK/
NEW YORK CITY DEPARTMENT OF
EDUCATION

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FINDINGS OF FACT
AND
REPORT AND RECOMMENDATIONS
OF THE
FACT-FINDING PANEL

BEFORE: The Fact-Finding Panel

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Ralph S. Berger, Esq., Member
Jack D. Tillem, Esq., Member

APPEARANCES: For the United Federation of Teachers

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BACKGROUND

The United Federation of Teachers (UFT) is the exclusive bargaining agent for all non-supervisory pedagogical employees, as well as certain other employees, employed by New York City and the Department of Education of the New York City School District (City/DOE). There are thirteen additional contracts for units other than teachers (the Functional Chapters). The Functional Chapter contracts cover: attendance teachers, bi-lingual teachers in school and community relations, guidance counselors, laboratory specialists and technicians, paraprofessionals, school social workers and psychologists, school secretaries, nurses and therapists, directors and assistant directors of alcohol and substance abuse, supervisors of school security, school medical inspectors, sign language interpreters, and occasional per diem substitutes.

The UFT and the City/DOE have been in a collective bargaining relationship for many years. The most recent collective bargaining agreements for teachers and all functional chapters covered the period November 16, 2000 – May 31, 2003, the terms of which remain in full force and effect.

On May 22, 2003, the UFT requested negotiations for successor agreements with the City/DOE. The first bargaining session was held on September 17, 2003, at which time the UFT presented its proposals. The next session was held on February 6, 2004, at which time the City/DOE presented its proposals. Further bargaining sessions were held during the period of February – October of 2004.

Pursuant to a Declaration of Impasse filed by the UFT with the New York State Public Employment Relations Board (PERB) on December 2, 2004, PERB determined on December

23, 2004 that an impasse existed and appointed Chief Administrative Law Judge Philip Maier as mediator. Mediation failed to resolve the impasse and, on April 6, 2005, PERB appointed this Panel to hear the dispute and to make recommendations for its resolution.

Hearings were held on this matter on June 10, 13, 24, 26 and 30, 2005. The parties submitted both pre-hearing briefs and post-hearing briefs and the record was closed on August 5, 2005. The Panel met in Executive Session on August 1, 2005 and September 10, 2005. Following the hearing and prior to the Panel issuing its Report and Recommendations, the Chair engaged in mediation efforts with the parties because of the number of complex issues before the Panel that we determined were best resolved by the parties directly. Although mediation did not result in a complete agreement on all issues, mediation resulted in narrowing the differences on many issues and in mutual agreement on some issues.

The City/DOE operates the largest public school system in the nation. With a student enrollment of 1.075 million for the 2004-2005 school year, the system is comprised of 1,011 elementary, intermediate and junior high schools, 298 high schools and 58 special education schools. The system employs approximately 148,000 people, of whom 118,955 are represented by the UFT.

In 2002, the governance structure of the school system was changed by act of the State Legislature. The prior structure of a central board of education appointed by the mayor and borough presidents, a chancellor appointed by the central board, and 32 community school districts each with its own community school board was replaced by the City's new Department of Education, which is headed by a chancellor appointed by the mayor. There are now ten geographic regions, each led by a regional superintendent who manages approximately 12 local instructional superintendents. The legislation left the Department of Education in existence as a

legal entity and as the legal employer of the system's employees. As a result of this restructuring, responsibility for the system was effectively given to the mayor.

The City funds approximately 41% of the DOE's operating budget which, for Fiscal Year 2006 (July 1, 2005 – June 30, 2006), is \$5.7 billion. In addition, debt service and pension contributions raise the City's funding of DOE expenditures to 50%, or \$8.4 billion for FY 2006.

The school system and its employees serve a diverse student population with extraordinary needs beyond those of any other school district. More than 13% of the system's students are English Language Learners among whom more than 180 languages and dialects are spoken. Special Education programs serve more than 158,000 students diagnosed with learning disabilities or other special needs. Transportation services are provided for 657,000 students daily. Approximately 860,000 meals are served to students each day and approximately 65% of all students are eligible to participate in the free lunch program.

POSITIONS OF THE PARTIES

UFT Contract Proposals

1. Salaries

A. *Base salaries: The UFT proposes, for the period 6/1/03 – 5/31/06, across the board salary increases of eighteen percent (18%) compounded: six percent (6%) across the board for the period 6/1/03 – 5/31/04, six percent (6%) across the board for the period 6/1/04 – 5/31/05 and six percent (6%) across the board for the period 6/1/05 – 5/31/06 for all bargaining units. The same percentage increases shall apply to all other contractual rates, including but not limited to per diem, per session, shortage and coverage rates and longevities, differentials, increments, ranges, incumbent rates and minimums and maximums.*

The UFT takes the position that its salary proposal is required to ensure that the salaries of teachers are competitive with those in the City/DOE's geographic region so that City schools can better retain experienced staff and so that City educators are not demoralized by inferior pay.

The UFT notes that for years salaries of City teachers have lagged behind those of the 36 surrounding districts such that as of the 2003-2004 school year, teachers in the four surrounding counties, depending on their placement in their salary schedules, earned 14-26% more than their counterparts in the City (with the exception of the starting salary, where special attention was paid during the 2000-03 round to disproportionately increase that salary level to recruit certified teachers).

The UFT states that salary comparisons with surrounding school districts are appropriate and that City salaries must be competitive with surrounding districts inasmuch as the labor market for teachers is local. It notes that prior Panels in the 1993 and 2002 UFT/City fact finding cases have found the local labor market to be most appropriate for making such comparisons and points to the Committee on Fiscal Equity (CFE) trial court decision which stated that "...New York City competes in a comm. on labor market for teachers and other college-educated individuals with Westchester, Nassau, Suffolk, Rockland, and, to a lesser extent, Orange and Putman Counties."

The UFT points to recent experience demonstrating that increased pay brings about a more qualified teacher workforce. It notes that in the space of a year, the City virtually wiped out its large number of uncertified teachers by increasing starting salaries by 22%. In the last round of UFT/City bargaining, when salaries were increased from 16% to 22% across the salary schedule, the rate of uncertified teachers fell from 17% to less than 2%.

The UFT states further that the City has lost over 24,000 teachers in the last three years. It points out that in the 2003-04 school year 3,459 fully certified teachers resigned, in addition to 5,617 who retired, and that in November, 2004, approximately 25,000 City teachers, one-third of the teaching force, had three years experience or less. It notes that the City loses 40% of all new teachers after three years and that nearly half are gone by six years. UFT research indicates that last year 59% of those who left the system for other teaching positions cited low salaries as a factor; that 68% of those who left after working in the City schools for 3 to 10 years cited salaries as a factor in their decision to leave; and, that 72% say they are now receiving higher pay in their new positions.

The UFT argues that City teachers are faced with the most challenging teaching assignments imaginable and that working conditions compare unfavorably to the surrounding area: larger class sizes that contain larger numbers of at risk children, a high percentage of economically disadvantaged and limited English proficient students, chronically insufficient resources and support, and greater problems of safety and security.

The UFT notes that, even with its salary proposal, salaries for City teachers will still not be on par with those in surrounding districts, which have seen salary increases of upwards of 4% for each of the last two years; the 18% increase would simply allow progress to be made in that pursuit.

The UFT states that the City has the ability to meet its salary proposal, given the surplus of \$3.3 billion (or higher) at the close of FY 2005 and the fact that the outside credit rating agencies have given the City its highest credit ratings in history; that the City's claims of inability to pay demonstrate no more than an unwillingness to pay, a reflection of priorities

which the Panel may reorder; and, that the City's citation of out-year budget gaps is not credible, given its consistent history of closing such gaps each and every year.

Finally, the UFT asserts that application of the DC 37 settlement will cede whatever ground was made up by the June 2002 Agreement and will cause the City to fall further behind the salaries of the surrounding area, exacerbating the already critical retention crisis. It notes that the DC 37 construct, *i.e.*, a non-recurring cash bonus of \$1,000 for the first year, 3% in the second year, and 1% in year three with the possibility of an additional 1% for productivity is insufficient to make any headway toward the mandates of the CFE, especially when the UFT's salary trails the average of the salaries in the surrounding 36 districts by as much as 26%. The UFT states that its contract cannot be settled merely by replicating the "pattern" established by the DC 37 agreement.

B. In addition to the base salary demand, the UFT proposes the following salary enhancements:

- 1. a career ladder for all titles;*
- 2. skills and knowledge salary differentials for teachers, guidance counselors, secretaries, nurses, speech teachers and other employees who obtain additional certifications or licenses reflecting special qualifications beyond the minimum required by BOE;*
- 3. differentials for serving in low performing and/or hard to staff schools.*

The UFT states that its proposal for differentials is on top of a competitive wage base and geared to recruit and retain highly qualified educators. The career ladder provides a salary ladder for teachers from intern to resident teacher to career teacher and finally to lead teacher. At each level teachers are given the support and professional development they require. The UFT maintains that the career ladder is an important retention tool, keeping the best, experienced teachers in the classroom.

The UFT states that the skills and knowledge differential would reward educators who undertake additional training directly related to the needs and initiatives of the City/DOE to meet new mandates proffered by the City/DOE or demanded by the needs of students; and, that the low performing/hard to staff differentials recognize educators who volunteer to work in the most difficult schools.

2. Job Security

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

The UFT asserts that this proposal is necessary as, since the expiration of the current agreement, the City/DOE has threatened certain bargaining unit members with layoff, e.g., stenography and typing teachers and paraprofessionals.

3. Retirement Legislation Support

The UFT and the BOE will jointly support legislation to allow active Tier II, III and IV members covered by these Agreements to retire at age 55 after 25 years of service without penalty.

The UFT asserts that this proposal is an attempt to make the entire “package” of the teacher’s job more appealing, thus enhancing retention and morale. It notes that those deciding to make teaching a career are more likely to stay, knowing that they can retire on a regular pension after 25 years of service.

4. Professional Issues

A. Article 6, Subsection A(2) shall be amended to provide a school day that is uniform at all levels (subject to modification through the school based options process) instead of the current usage of the additional 100 minutes.

The UFT acknowledges that the 100 minutes added in June 2002 has not been utilized successfully. It notes that the current usage has been modified three times at the City/DOE's request and that the professional development has been less than successful because it often has not met the differentiated needs of teachers. This proposal would evenly distribute the 100 minutes so as to create a uniform school day of 6 hours and 40 minutes, allowing for more instructional time and better coordination of bus schedules. Allowing modifications through the SBO process could best serve the educational goals of individual schools.

B. Teachers will not be subject to disciplinary action for their decisions regarding classroom instruction when such decisions are consistent with research-based professional practice and are aligned with state and city education standards.

The UFT states that the City/DOE has instituted rigid mandates regarding methods of instruction which have curtailed and stifled teachers' professional judgment, thereby eliminating their ability to modify and adapt instructional materials and methods to increase student achievement. Moreover, teachers who deviate from these mandates are subject to discipline. The UFT cites as examples: students must be seated in clusters and not in rows; teachers are not to lecture for more than ten minutes; only student-created materials may be hung on classroom walls.

The UFT asserts that teachers should not fear repercussions when they voice their opinions, nor should they fear discipline for bringing materials and information to the classroom in order to provide added help for their students. It intends this proposal to permit a professional, honest and open discussion among educators that respects their knowledge and experience.

C. Amend Article 8 to add a subdivision to provide that teachers will be provided sufficient time and training to administer standardized tests, performance assessments and other mandated instructional activities, including ECLAS2, IEP's, performance binders and promotion portfolios, and will be relieved of the excessive and duplicative paperwork generated by the above.

The UFT notes that the State's testing requirements have been extended further by the passage of the No Child Left Behind Act on the federal level and the imposition of a new series of interim assessments for grades K-8 under the City/DOE Child First Initiative. It points out that there has been no systematic approach to deal with the lack of time for completing test-related activities. The UFT Elementary Classroom Survey of 2005 indicates that 63.5% of elementary teachers report the loss of more instructional time to paperwork this year. More than 65% reported that at least some classroom time was spent doing mandated paperwork. Moreover, mandated assessments and diagnostic tools, which require implementation, analysis and preparation of reports for each child have added to the increased paperwork requirements.

The UFT intends its proposal to provide teachers with sufficient time to do these vital tasks within a uniform school day.

D. Class Coverage

- 1. Amend Article 7, Section N(3) to provide that when teachers are engaged in ECLAS2, IEP and statewide performance assessments or any mandated staff development, their classes shall be covered by substitute teachers rather than being broken up.*
- 2. Modify Article 7, Sections N(2) and (3) to provide that the BOE shall establish a substitute teacher reserve pool to provide substitute teachers for schools that experience a shortage of substitutes.*

The UFT intends this proposal to end the practice whereby, when a teacher's schedule changes due to testing, mandated paperwork or mandated professional development, the administration often breaks up the class and assigns small groups of students to other classes. The students end up in a new class in the middle of a different lesson and the classes which they join are disrupted.

E. Class Size

1. *Modify Article 7, Subsection M(2) to provide that in no event shall the maximum class size for any class exceed 34. Any changes to effectuate this shall not result in the reduction of the number of pupil class contact hours per week in any subject area (i.e., students shall have no fewer classes per week in that subject area in order to comply).*

2. *Modify Article 7, Subsection M(3) to provide that the UFT and the BOE will jointly agree on the use of funds from the resolution of the CFE litigation to reduce class sizes in all grades and divisions.*

The UFT notes the existence of solid research that links class size reduction with improved student outcomes and points out that current contractual limits allow class sizes in music and physical education to be as high as 50 students. The UFT intends its proposal to reduce these oversize classes and to ensure that students suffer no reduction in class time as a result of this change.

F. Professional Conciliation: The professional conciliation process (Article 24 of the Teacher CBA, and various articles of other CBAs) will be changed so that if the professional conciliation procedure fails to resolve a matter at the school or district level, the Union may submit the matter to a Panel of Educational Advisors whose members shall be selected by agreement of the Board and the Union. A panel member shall hear and decide the dispute within ten days. The determination, in writing, will be advisory to the Board and the Union. If either side rejects the determination the reason for the rejection is to be stated in writing.

The UFT states that in the current climate there are few opportunities for teachers to openly question mandates and strategies imposed by principals, local instructional superintendents or the Chancellor. It notes that under the current procedure a teacher can discuss differences in instructional approach with the DOE in a non-binding process which the DOE conciliator can terminate with no further action if a settlement is not reached.

The UFT intends its proposal to allow for an advisory opinion based not on proscription, personalities, politics or power, but on what is best for teaching and learning as viewed by a third party, with each party held accountable for rejecting such recommendation.

5. Discipline and Grievance

A. Steamline the grievance procedure by reducing it from three steps to two steps. Grievances not resolved as step one (school level) will proceed to step two (Chancellor's level). Time limits at these steps will be the same as under the present contract's steps 1 and 3, as will the time and the method for proceeding to arbitration. Arbitration days will be added to meet the requirements of this change. Salary and leave arbitrations will be expedited by hearing five cases per day with expedited procedures.

The UFT states that with all time limits met, it takes up to 68 school days from the filing of a Step One grievance to the filing of a Demand for Arbitration, and that most grievances require much more time because of failure to schedule hearings and render decisions in a timely manner. It notes that the elimination of Step Two would save at least thirteen school days and would facilitate the “declared objective” of the grievance procedure which is the “prompt and informal resolution of employee complaints.”

The UFT states further that this new construct would still give those at the school level the opportunity to resolve the matter with the principal while also preserving the Chancellor's ability at his level to issue consistent/uniform decisions on a city-wide basis.

Because the scheduling of arbitration hearings may be more than a year from the date of the Demand for Arbitration, the proposal would include additional arbitrator days to those presently in Article 22(B)(5) of the Teachers' CBA.

B. Employees who are found, pursuant to a due process proceeding, to have engaged in sexual abuse of a student will be terminated. Employees who have been the subject of false accusations of corporal punishment, sexual abuse or other similar serious charges will be made whole by the BOE.

The UFT states that if an arbitrator determines that an employee has engaged in sexual abuse, the arbitrator must terminate that employee. At the same time, the UFT also states that an employee falsely accused has the right to have his/her reputation restored and to be made whole.

C. Expand the Peer Intervention Program (PIP) to address alleged incompetence by providing intensive short-term intervention, starting with a principal referral or

evaluation, or an educator self-referral, and then having a peer intervenor work with the educator for 90 days. The principal would be able to make a determination as to further remediation or termination after three months of intervention, not a whole year. If the intervention doesn't work, the intervenor would counsel the person out of the profession. If the educator still wants a hearing and the BOE still believes the teacher should be terminated, then the fact that intervention didn't work would be allowed into evidence.

The UFT states that the PIP program was negotiated into the Agreement in 1987 and has gained national recognition over the years. During the last ten years, 475 of the 687 teachers who entered the program were helped to improve to the point of earning a “satisfactory rating.” The UFT proposal would extend the program, on an expedited basis, to instances where the DOE anticipates charging a teacher with incompetence. The UFT states that if a teacher is incompetent and does not improve in a relatively short time, after peer assistance, the proposal would facilitate the removal of the teacher from the classroom in a humane and professional manner.

6. Functional Chapters

A. All school nurses, occupational therapists and physical therapists shall have a work year aligned with the teachers' work year, from September through June.

The UFT notes that the employees encompassed by this proposal are currently employed on a 12-month basis and that their 12-month status, rather than any actual need for their services, has dictated how many are employed during the summer months. The UFT states that implementation of this proposal would align their work year with the actual needs of the system, resulting in more efficient staffing of school health programs.

B. The paraprofessional pay structure and the Career Training Program for paraprofessionals shall be revised to reflect current Federal and State qualification and certification mandates, and to better address the BOE's continuing teacher recruitment and retention problems.

The UFT states that, while paraprofessionals (“paras”) were first employed by the City/DOE during the late 1960s, it was not until 1980 that the State Education Department

compelled the DOE to recognize the pedagogical status of the paras and to comply with certification requirements for employing them as Teaching Assistants.

The UFT states further that the NCLB Act now requires higher qualifications for paras: 6 credits within one year and an additional 12 credits within the next two years; thereafter, Level III paras must have 75 hours of professional development every five years; paras who have 18 credits plus one year of prior para experience can, alternatively, opt to become a Pre-Professional by matriculating in a college program leading to a teacher or equivalent certification; they have five years to earn 30 semester hours and their Pre-Professional status is renewable.

The UFT urges that the Career Training Program needs to be aligned with the new State certification standards for paras and that para compensation should be aligned accordingly.

C. A workload review mechanism shall be provided for Psychologists, Occupational Therapists, Physical Therapists, Social Workers, Speech Improvement Teachers and Lab Specialists similar to that agreed upon for Secretaries and Guidance Counselors in the 2000-2003 agreements.

The UFT states that those in titles encompassed by this proposal work in critical shortage areas and experience excessive workloads. It seeks to expand the existing workload review procedure for Secretaries and Guidance Counselors to these employees so that their claims of excessive workloads may be reviewed through a procedure ending at the Chancellor's level.

7. Safety

Modify the first paragraph of Article 10, Subsection B to read: The principal is charged with the responsibility of maintaining security, safety and discipline in the school. To meet this responsibility he/she shall develop, in collaboration with the Union chapter committee and the parents association of the school a comprehensive safety plan, including uniform enforcement of the code of conduct, subject to the approval of the Chief Executive of School Safety and Planning.

The UFT notes that student discipline problems are a major reason for teachers leaving the school, district or profession. It urges that maintaining order and ensuring safety must be a high priority.

8. Quality of Life Issues

A. *Catastrophic illness bank: Unused sick leave days may be donated to a bank to be used by persons suffering from catastrophic/long-term illnesses on a one-to-one basis.*

B. *Employees will be reimbursed for transportation and parking expenses when required by the employer to attend professional development or other mandated meetings outside their regular work location (e.g., Teachers' College professional development, other schools).*

C. *A joint labor-management committee will be established to develop proposals to address other quality of life issues including, but not limited to, methods for employees to address family care and day care issues, and parking at or near work sites.*

The UFT states that adoption of these proposals will improve retention by improving the quality of life for teachers. It notes that currently days contributed to a sick leave bank are credited as one day for every two donated. This proposal would allow for one-for-one donation to a city-wide bank. It notes, further, that when employees are mandated to attend staff development classes, the DOE should provide reimbursement of expenses. Furthermore, a joint committee should establish an ongoing review of such situations as care for elderly parents, day care and parking, all of which will improve the quality of life and attractiveness of working as a New York City educator.

City/DOE Contract Proposals

1. Salaries

A. *(i) a \$1,000 pensionable lump-sum payment upon ratification; (ii) a 3% wage increase at the start of the 13th month of the agreement; (iii) a 2% wage increase (compounded) in the 25th month of the agreement, 1% of which is to be funded by Union*

productivity; and, (iv) the possibility of additional increases subject to mutually agreed upon productivity savings.

B. Subject to availability of internal funding through mutually agreeable productivity improvements: (i) payment of signing bonuses and/or salary differentials for certain license areas in which the DOE has a shortage of teachers such as math, science, and special education; (ii) payment of annual bonuses to UFT-represented personnel in schools that experience sustained growth in student achievement; and, (iii) establishment of lead teacher positions, with a \$10,000 salary differential, as a recruitment and retention tool for principals, particularly in high-need schools.

A. Salaries

The City/DOE proposes that the UFT accept the salary settlement which DC 37 reached with the City on April 20, 2004. The City/DOE states that this settlement has established the civilian pattern for this round of bargaining. This settlement has an overall cost of 4.17% over 36 months.

The City/DOE notes that since the DC 37 settlement was ratified, 12 other civilian unions have reached pattern-conforming agreements with the City. In total, 127,669 employees or over 46% of the City's total non-uniformed represented workforce are now covered by pattern settlements. This includes more than 19,000 employees at DOE. The City/DOE points out that these DOE employees include principal administrative associates (represented by CWA), school guards (represented by IBT) and audio-visual aide techs (represented by IATSE); school aides, school lunch helpers, secretaries and paraprofessionals represented by DC 37; and, that many others serve as school-based support personnel and work side-by-side with UFT members.

The City/DOE states that any recommendation by this Panel that exceeds its proposal embodying the DC 37 agreement would have serious consequences for the interest and welfare of the public. It avers that were such a recommendation to be made and adopted, it would inevitably open the door to unrestrained competition among the City's many unions in this and future rounds of bargaining and would upset the fiscal balance that the City is attempting to

achieve. It argues that to depart from the pattern by any degree whatsoever would unleash the kind of catch-up and leapfrogging that maintenance of the pattern prevents.

The City/DOE states that for decades pattern bargaining has been the cornerstone of stable labor relations between the City and its municipal unions that represent more than 350,000 employees. It points to the 1995 impasse award in the dispute between SEIU and the City/HHC in which Panel Chairman Mark Grossman noted that “[t]he interest and welfare of the public require that, in the context of NYC collective bargaining, pattern bargaining be the general rule.” The City/DOE argues that impasse panels of well-respected arbitrators have repeatedly and unequivocally rejected attacks against the concept of pattern bargaining – citing compelling need for pattern bargaining from both labor relations and fiscal perspectives. It argues that the history of pattern bargaining in the City demonstrates that it has been a principle accepted by the UFT and other municipal unions for at least 30 years, since the fiscal crisis of 1975. It argues, further, that the UFT has never received a settlement contrary to the principles of pattern bargaining, on occasion even establishing the pattern for other unions. It notes that in the 1995-2000 round, the UFT established the pattern and, after its membership refused to ratify the agreement, entered into a reconfigured settlement that conformed to the pattern in every material respect. The City/DOE points out that in all but two instances (1985 and 1993) the UFT has been offered and has accepted a settlement with the same cost to the City as those received by other unions. In those two instances, argues the City/DOE, additional funds were allocated only because of a unique and compelling need that was mutually recognized; the amount was limited to that necessary to fix the problem; and, the money was carefully and narrowly targeted at a mutually agreed upon solution.

With respect to issues of salary comparability, the City/DOE urges that the appropriate comparisons are to be made with other City employees and with teachers in the nation's other major cities. It states that whether considered in absolute terms or relative to those of other City employees, the overall compensation of UFT-represented employees is more than fair and equitable. The City/DOE points out that UFT-represented employees already receive important advantages not available to other City employees: a shorter workday (6 hours and 40 minutes as compared to 8 hours) and work year (on average only 185 days as compared with 229 days); paid sabbatical leave, a benefit available to no other City employees; and, no City residency requirement.

The City/DOE states that comparisons with the nation's other major urban areas are the most meaningful because these jurisdictions are likely to be confronted with budgetary constraints similar to those that exist in New York, and that these other urban areas must provide police, fire, sanitation, correctional and health and welfare services in addition to public schools. Thus, contends the City/DOE, the wages of large urban districts will likely control for these same financial constraints under which all budgetary decisions must be made. The City/DOE concludes that the only rational compensation comparison external to New York City that can be made is with the nation's other large cities and school districts.

The City/DOE points to a survey it did in May 2003 of 17 school districts nationwide, *i.e.*, the nation's ten largest urban districts by population, the five largest school districts by student enrollment (not included in the ten most populous urban districts), and two other large East Coast urban districts – Boston and Washington, D.C. From this survey, the City/BOE argues that at each of three points along the salary scales, (i) minimum salary, (ii) masters degree

plus 30 credits and 22 years of service, and, (iii) maximum salary, New York City teacher pay ranks first or second among the surveyed jurisdictions.

The City/DOE states further that compared to relevant economic indicators, new York City teachers have been and will continue to be favorably compensated; that New York City wage increases have greatly exceeded, and will continue to exceed, the Consumer Price Index; and, that, relative to private sector pay, New York City teachers have been increasingly well compensated.

As to the financial ability of the public employer to pay, the City/DOE notes that the importance of the City's fiscal condition, both at present and after a possible award, has been recognized time and time again in New York City impasse proceedings. It avers that the City's budgetary picture is one of structural imbalance in that the City's recurring revenues derived from taxes and other sources are exceeded, year after year, by the City's recurring expenses.

The City/DOE states that its current financial situation can only be understood in the context of the 1975 fiscal crisis and its aftermath. The City/DOE points out that as a result of the fiscal crisis the State of New York intervened, imposing rigorous fiscal monitoring controls on the City to ensure both that the City would cease to run at an operating deficit and that it would not do so again. The Financial Emergency Act required, and continues to require, budget balance looking at forecasts of performance at the beginning of each budget year and also looking back at actual spending and revenue results for each year. The City was and is required to create a rolling four year financial plan with its budget and to update the plan on a quarterly basis. In each financial plan, the City updates its revenue and expense projections for the current budget year and for the four subsequent years. In 1986 the Emergency Financial Control Board ended its "control period." However, under State law, if the City were to end a fiscal year with

an operating deficit of over \$100 million, or less than one-half of a 1% wage increase for the unionized work force, the “control period” would be reimposed. The City would lose control over its own budget and all its financial plans and contracts, including labor agreements, would again be subject to approval by the Financial Control Board.

The City/DOE states that in its current four year plan, projected gaps in the out years are forecast to be \$4.5 billion for FY 2007, \$4.2 billion for FY 2008 and \$3.7 billion for FY 2009. It states further that “surpluses” at the end of a fiscal year are always rolled into the next fiscal year in order to mitigate the impact of such gaps. Thus, any “surplus” at the end of FY 2005 does not represent a pot of money which can be freely distributed at whim. Indeed, the City/DOE points out that the recent surge in tax revenues in FY 2005 that have enabled the FY 2006 to be balanced is not expected to continue and the consensus among the City’s budget planners and independent analysts is that tax revenues will decline beginning in FY 2006 and going forward. Thus, the City argues, the revenue surge of the recent past is essentially a misleading indicator of the City’s capacity to absorb above-pattern increases for the UFT, and recommending such increases on that basis would be a grave mistake.

B. Additional Compensation Proposals

The City/DOE states that the current lockstep salary schedules deprive the system of the ability to tailor an individual teacher’s pay to reflect both his/her performance and market realities. As a result, the City/DOE cannot reward its best performers, provide incentives for them to take on its most difficult assignments, or recruit teachers with credentials that are in high demand. The City/DOE states that its proposed salary differentials for growth in student achievement and for teachers serving in shortage license areas are efficient solutions to the recruitment and retention issues presented by high-need, low-performing schools and shortage

license areas. It contends that its performance-based pay proposal is a reasonable and fair way of proceeding to motivate teachers and link compensation to student performance. Maintaining the salary schedule will guarantee an established salary base while outstanding teachers will be rewarded for their effectiveness in the classroom. The City/DOE states that its proposal for differentials for shortage license areas such as math, science, special education, bilingual education, speech occupational and physical therapists, represents a common sense way to confront these shortages by offering competitive salaries for teachers and professionals with skills and knowledge for which there is a high market demand. This approach, it notes, is the manner in which any business or organization responds to difficulties attracting qualified applicants on a particular field or specialty. Finally, as to its proposal for lead teacher positions, the City/DOE explains that the Chancellor would decide which schools to place lead teachers and how many positions to create. These positions would be concentrated in high-need schools that have the most difficulty attracting and retaining experienced, successful teachers. The City/DOE states that lead teachers would improve the training and mentoring of new and low performing teachers and would reward and provide promotional opportunities to those teachers who are most effective in the classroom.

2. Professional Activity Periods

Administrators shall have the authority to assign teachers during their professional activity periods to (i) cover for absent colleagues without having to provide additional pay, (ii) small group student instruction or activities; (iii) perform administrative duties, e.g., monitoring of hallways, cafeterias, recess or dismissal; or, (iv) participate in professional training.

The City/DOE states that the original purpose of the professional activity periods added to the 1995-2000 agreement was to encourage teachers to enhance student achievement in

collaboration among principals, staff members and parents. The City/DOE argues, however, that in practice the professional activity periods have not been used, on the whole, in furtherance of educational goals; that principals are not permitted to assign or direct teachers during these periods; that Circular No. 6 requires that such periods shall be self-directed and do not require a teacher to be in a specific location at a set time; that there is no requirement that a teacher do anything education-related during these periods; and, that the contractual prohibition on assigning administrative duties hamstrings principals from providing for their schools' most basic needs.

The City/DOE urges that its proposal will ensure that these periods are put to best use for students and student achievement.

3. Seniority Transfers and Excessing

The City/DOE proposes to eliminate the seniority transfer mechanism and to modify the rules regarding excessed personnel...In lieu of seniority, integration, and SBO transfer mechanisms, the City/DOE would allow UFT-represented personnel to apply for vacancies city-wide and would have principals make final selection decisions following consultation with a joint committee of teachers and administrators. In addition, the City/DOE proposes to allow excessed teachers to apply for vacancies in their license areas across the City and offer excessed personnel full salary and benefits until selected for a vacancy for up to 18 months.

The City/DOE asserts that the current seniority transfer mechanism and rules regarding excessed personnel together result in thousands of teachers transferring into positions each year without any regard for whether they are right for the schools, in many cases bumping new teachers out of positions for which they were hired and exacerbating the migration of experienced teachers out of the high-need schools which most urgently need them. It notes that it is widely believed that these mechanisms are major obstacles to closing the gap in student performance levels between high-performing and low-performing schools. When a principal's

authority to screen and hire qualified candidate is trumped by teacher seniority rights, teachers use their seniority to leave low-achieving, high-need schools, which perpetuates higher turnover rates in such schools and severely detracts from the quality of instruction in those schools.

The City/DOE points out that currently, satisfactory-rated teachers have the right to transfer by seniority to vacancies in the system or to positions occupied by most first year teachers in their license area, without so much as an interview with the principal. An excessed teacher can bump a less senior teacher in his/her license area within the district or system-wide.

The City/DOE views the current system to be highly disruptive and detrimental to the goals of the school system for the highest quality education for the City's students.

4. Discipline and Grievance

A. All disciplinary hearings pursuant to §3020-a of the Education Law should be heard by the City's Office of Administrative Trials and Hearings.

The City/DOE points out that a change of venue for 3020-a hearings is permitted by §3020.4 of the Education Law. It notes that the parties have already agreed that disciplinary hearings are held before one member of a panel of impartial arbitrators. The City/DOE states that OATH has extensive experience in presiding over disciplinary disputes and that the parties will benefit because OATH's administrative law judges do not serve at the pleasure of the parties and are thus insulated from the inevitable pressure to avoid upsetting one of the parties who may terminate an arbitrator's tenure on a permanent panel. The City/DOE argues that the parties, therefore, can be certain that each case will be decided strictly on its merits.

B. Tenured Teachers and other tenured employees who have been convicted of, or who have pled guilty to, any felony should be suspended without pay pending the final outcome of the 3020-a disciplinary process.

The City/DOE points out that currently a tenured pedagogue may be suspended without pay during the pendency of 3020-a charges only when he/she has been convicted or pled guilty to a felony crime: (1) concerning the criminal sale or possession of a controlled substance, a precursor of a controlled substance or drug paraphernalia, or (2) involving the physical or sexual abuse of a minor or student. It states that there is no reasonable basis for distinguishing between types of felonies and that common sense justifies this proposal because the rationale for allowing no-pay suspension involving statutorily-provided felonies equally supports allowing no-pay suspension in cases involving all other felonies.

C. In 3020-a proceedings, a mandatory penalty of discharge should apply to any tenured pedagogue (i) found by a hearing officer or arbitrator to have engaged in sexual misconduct involving a student or other minor, or (ii) found (or pled) guilty of criminal charges for such conduct.

The City/DOE states that it should be beyond any dispute that any individual who has engaged in sexual misconduct involving a student or other minor should not be working with children. It notes that the parties appear to be close to agreement on this matter.

D. Teachers should be able to append a response to any material placed in their personnel files but should not be allowed to grieve or arbitrate such material.

The City/DOE maintains that allowing teachers to grieve letters to the file is a waste of time and resources. Further, the City/DOE argues that the process is duplicative because warning letters may be tested in subsequent disciplinary proceedings. The City/DOE proposes that teachers should not have the right to grieve or arbitrate letters to the file.

E. In a 3020-a proceeding in which a tenured pedagogue is charged with incompetence, the good-faith professional judgment of a superintendent, principal, or assistant principal that the individual is incompetent should create a presumption that there is just cause for the discipline sought by the Department. This presumption may be rebutted if the tenured pedagogue establishes bad faith or arbitrariness by a preponderance of the evidence.

The City/DOE states that perhaps nowhere else is it so difficult to remove an incompetent employee as it is in the New York City public schools. It argues that the system is so onerous that a principal who undertakes to remove a single poor performer will have to spend literally hundreds of hours over the course of years: conducting numerous observations, providing the teacher opportunities and assistance for improvement, documenting shortcomings, and writing memos and letters to the file, each of which may be grieved and arbitrated. According to the City/DOE, the burdensome nature of the system is a major deterrent to the removal of poor performers. It notes that of the 80,000 UFT-represented teachers employed by the DOE, only four were terminated for incompetence in the last two years.

The City/DOE states that its proposals address two main problems. First, under its proposal, materials such as warning letters that are placed in a teacher's file could be answered by the teacher with a written response to be included in the file, but would no longer be grievable or arbitrable. Second, the City/DOE proposes to restore meaning to the just cause standard in incompetence cases by clarifying the burdens of production in such cases, so that the administrator's professional judgment is the most important factor in determining a teacher's competency, so long as that judgment is not arbitrary and has been made in good faith. The City/DOE states that with such a presumption in place, due process for tenured personnel will remain an effective check against bad faith or arbitrary decisions.

F. Tenured pedagogues facing discipline for chronic absence or lateness should be subject to an expedited hearing process.

The City/DOE sets forth two reasons for this proposal. First, cases of chronic lateness or absenteeism usually involve relatively little in the way of factual disputes. The record of the employee's attendance is generally undisputed, thus allowing an expedited process to be used without harm to the interests of the parties. Second, in such cases, in order for discipline to be

effective, it must be prompt. Prolonged delays in the imposition of discipline undermine the very purpose of progressive discipline which is normally effective in these cases. An expedited process would eliminate such delays.

FINDINGS OF FACT

AND

OPINION

At the outset, the Panel recognizes that the New York City school system is unique, as is the job of the City's teachers. New York City is the largest and most complex school system in the country, serving 1.1 million children, a large majority of whom are African-American and Latino and many others of whom are recent immigrants who do not speak English. This diversity presents a special pedagogical challenge for both the DOE and its approximately 80,000 teachers.

Mayor Bloomberg has identified education as "one of (his) highest priorities." As the "education Mayor", he sought and accepted responsibility for the operation of the City's schools and has promised to deliver "a better school system" with "some of the best teachers in the country." The Mayor spoke about the importance of teachers to a student's achievement and success. He testified that "...the support that a teacher gives a child as well as just imparting information is what ... education is all about."

Chancellor Klein reiterated the Mayor's view when he commented that "the most important thing for any kid is to have a good teacher. Bottom line, having a great teacher matters." And as UFT President Weingarten stated, "teacher quality matters." Mindful of these statements, the Panel's Report and Recommendations are designed to address the joint

goals of the City/DOE and the UFT, namely, to affect quality education of the City's students in a manner that fairly rewards teachers.

The Union has a long history of negotiations with the City which is special and unique and which includes a variety of settlements: contracts in which the parties reached voluntary agreement without declaring impasse; contracts in which the UFT set the pattern for a given round of bargaining; and contracts where the UFT agreement addressed the unique needs of its members, but was also consistent with the pattern. In one negotiations round, the contract concluded in a LOBA and in several other rounds, the parties settled on the basis of a fact-finding report. A number of times, the UFT was able to receive wage increases in excess of the "pattern" either because of the infusion of additional state funds, (e.g. Excellence In Teaching) or by generating savings. The City has never considered these agreements to be inconsistent with the pattern as long as the above-pattern increases were funded by outside sources or through internal savings.

In this case, the City stated its willingness to give teachers greater increases based on savings and reforms. The Panel is able to recommend increases above the "pattern" as a result of proposals that generate savings and/or represent valuable school reforms identified by the City/DOE as important to the successful operation of the school system.

The Panel approaches its responsibilities in this case with several goals in mind. First and foremost, we view ourselves as a vehicle for much needed reform sought by the City/DOE and understood by the Union to be in the best interests of achieving a high quality education for all of the City's school children.

The Chancellor described the education system as one that "needs dramatic and profound change" and the Panel has accepted the Chancellor's challenge. We recommend a

series of reforms that we believe will ultimately allow for the improvement of the education system. Some reforms can be realized during the term of the current contract and are valued in determining our recommended wage increases. Others, such as the “retention package,” which includes the creation of a citywide master teacher program and bonuses for hard to recruit specialties, cannot be realized or even recommended for implementation during the term of this agreement. Instead, the Panel recommends these longer term programs premised exclusively on future funding. The Panel anticipates that such funding may not become available until the City receives state funds as a result of the recommendations of the Committee on Fiscal Equity. Moreover, the Panel is mindful of the Mayor’s admonition that no guarantee exists that the City will receive money as a result of the CFE lawsuit. It is for this reason that these recommendations are prospective.

Second, the Panel will recommend fair increases for teachers and other UFT represented employees through its recommendations for across-the-board salary increases. In this regard, the Panel is particularly cognizant of the gains teachers achieved as a result of the previous contract settlement in which the sizable gaps between the salaries of the City’s teachers and the salaries of teachers in comparable suburban districts were significantly reduced. The City’s recruitment problem was virtually resolved through a series of efforts, including increasing the hiring rate. This increase allowed the DOE to effectively eliminate having to hire uncertified teachers, whose number decreased from 17% to less than 1%. As Chancellor Klein testified, during the past two years, the DOE was able to replace nearly 12,000 uncertified teachers with teachers who are certified, leaving only 950 uncertified teachers in the system.

One of the Panel's goals is to ensure that the gains previously achieved are not lost and that the City's progress in recruiting qualified teachers is maintained and protected. As former Chancellor Anthony Alvarado testified, "In the long run, the delivery of instruction is through, with and by teachers. It is the quality, the knowledge and the skill the teachers possess that determines the quality of learning that students have."

Third, the Panel views this fact-finding as an opportunity to further support and promote the City's efforts to improve student achievement by adding crucial instructional time to the school day. The Panel views the addition of small group instruction as an effective way of contributing to the progress the City has already achieved through the efforts of the DOE's leadership and ultimately, the delivery of educational services by teachers in classrooms. The Panel is aware of the City's achievements in improving test scores, particularly in the lower grades. We are also aware that improvement is not as marked across the board in middle and high schools. In sum, the Panel is sensitive to the demands of the curriculum mandated by the state and the need for student performance to continue to improve at all levels. We view this proposal as a vehicle to help achieve progress towards that goal.

In this regard, the Panel is keenly aware of the parties' agreement to accept the Recommendations of the 2002 Fact Finding Panel to lengthen the school day by 20 minutes, only a portion of which was earmarked for additional instruction. The Panel is also aware that despite the City's expenditure of significant funds toward that end, the benefit of the additional time has yet to be fully realized. The Panel is further aware that the parties renegotiated utilization of the 20 minutes four times, culminating in a one-year agreement covering the upcoming school year.

The Panel is persuaded of the critical importance of additional instructional time to the continued improvement in student performance and will recommend adding 10 minutes to the school day to be added to the 20 minutes previously negotiated to create 150 minutes per week to be devoted solely to small group instruction for students who have been designated as children in need of assistance. We are convinced that the additional teacher-student instruction addressed by the City/DOE's experts is necessary to help the City's school children attain the standards set for educational achievement. Moreover, the Panel is confident that this additional instruction will help foster the promotion of school children from grade to grade.

The Panel is cognizant of the fact that it has not addressed the specifics of each and every proposal submitted by the parties. We have focused on the issues that we maintain are most appropriate for resolution by a fact finding panel. It is hoped that the parties' adoption of our recommendations on these issues will result in a new collective bargaining agreement.

The Panel believes that its recommendations are in the best interests of the City/DOE, the UFT and its members. Furthermore, we believe that the recommendations contained herein help serve the needs of our City's student population.

Statutory Criteria

Section 209 (3)(b) of the New York State Public Employees' Fair Employment Act empowers a non-compulsory fact finding panel to "make public recommendations for the resolution of the [parties'] dispute." The Act does not set out the standards to be applied by the panel in making a recommendation. Therefore, fact finders routinely employ the

standards contained in § 209 (4)(c)(v) of the Civil Service Law which set forth criteria to be applied in compulsory interest arbitration under the Act:

1. 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;
2. the interests and welfare of the public and the financial ability of the public employer to pay;
3. 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;
4. the terms of collective 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 of the public employer to pay and the interests and welfare of the public are those factors set forth in § 209 (4)(c)(v) frequently and routinely used in fact finding proceedings. We agree that these are relevant standards for the evaluation of the parties' proposals; thus, our recommendations are based upon our evaluation of those proposals as measured against the standards of comparability, ability to pay and the interests and welfare of the public. Therefore, it is appropriate that we discuss our view of these standards as they relate to the facts and circumstances of the instant proceeding.

Comparability

The parties introduced a great deal of evidence and testimony with respect to comparability specifically directed to the question of what the appropriate comparables for UFT-represented employees should be. As indicated above, the UFT urges that the largest 36

school districts in the four counties surrounding New York City, *i.e.*, Nassau, Suffolk, Westchester and Rockland, are the most appropriate and relevant for comparison with New York City teachers. The UFT noted that these districts include a wide range of socio-economic and demographic factors, from the very poor to the very wealthy. The UFT looks to these districts for comparability because it asserts that the teacher labor market is a local/regional labor market within which New York City and these districts compete for employees.

The City/DOE rejects the UFT's reliance on the 36 surrounding districts, finding them in no way comparable to New York City. The City/DOE notes that the relevant standard set forth in the Act 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. Given the uniqueness of New York City and its school system, the City/DOE urges that the most appropriate comparison to be made is with other New York City civilian employees. The City/DOE further urges that, if any external comparison is to be made, the only appropriate comparison for New York City can be with the school districts in the nation's largest cities, which would be the most likely to have financial and other constraints similar to those confronted by New York City.

With respect to external comparisons, the Panel is of the opinion that, while both national cities and surrounding school districts are instructive for the purpose of evaluating the parties' compensation proposals, the school districts surrounding New York City represent the more appropriate comparators, especially the school districts of Yonkers, Mt. Vernon and New Rochelle in Westchester County. We are persuaded that the teacher labor market is more a local/regional one rather than a national labor market. Thus, we believe that New York City

competes with surrounding school districts for teachers and other educational employees and that comparisons of salaries and other working conditions between New York City and the surrounding districts are more useful and relevant than comparisons with large districts nationwide. We note that prior fact finding panels have similarly concluded that regional rather than national comparisons are more appropriate and we have found nothing in the record of this proceeding which would cause us to depart from such prior findings. We also note that salary increases in these 36 districts over the three year period covered by the proposed contract show average increases of 3.52%, 3.48% and 3.82% respectively. Unfortunately, there is no information for the three most comparable cities, Yonkers, New Rochelle and Mt. Vernon for 2004-2005 and 2005-2006.

A significant portion of this proceeding has been devoted to the issue of pattern bargaining and the City/DOE proposal that the UFT settlement conform to the established civilian pattern for this round of bargaining. Since the DC 37 settlement in April 2004, 46% of the union-represented civilian workforce is now covered by pattern-conforming agreements with the City. This includes more than 19,000 employees at DOE. Pattern bargaining has been a fact of life in municipal labor relations in New York City for decades and its merits have been recognized and accepted by numerous fact finding panels over the years and is the most appropriate and sensible approach for the City's overall labor relations practices. Likewise, this Panel recognizes the validity of pattern bargaining as an appropriate vehicle to ensure ongoing rationality and stability in New York City labor relations. While we believe there must always be flexibility within the context of the pattern to account for unique and compelling circumstances presented in individual bargaining situations, we are convinced that pattern bargaining should serve as a benchmark for our recommended increases.

Ability to Pay

As noted above, the UFT has urged in this proceeding that the City/DOE has the ability to fund the UFT's compensation proposals, pointing to surpluses generated at the end of every fiscal year and to a wealth of evidence as to the financial health of New York City now and as projected into future years. The City/DOE disputes the UFT's view of the City's fiscal situation and cautions that New York City does not generate surpluses that are available for additional spending, but rather rolls each year's remaining fund balances into subsequent fiscal years to reduce future expenses and/or deficits.

The Panel has considered all of the evidence and testimony presented with regard to ability to pay. Having done so, we find that the issue need not necessarily be determined. As will be seen when we set out our recommendations, we have adopted a salary recommendation which is pattern-conforming while providing for additional monies to be generated by reforms and/or productivity savings. Our recommendations fall within the parameters of the civilian pattern already in place, with additional monies funded by internal savings. Based upon this approach, there is no question that the City has the ability to pay.

Interests and Welfare of the Public

We believe that the interests and welfare of the public are best served by having a teaching staff which is fairly compensated and whose morale is high. All citizens of New York City, including parents and students, are best served by a school system which is in a position to compete for and retain the highest quality educational staff and is thus able to provide the best possible education for the children of this city. At the same time, the interests

and welfare of the public require stable and orderly labor relations as well as fiscally sound and responsible collective bargaining agreements between the City and its employees.

Taking these principles into account, we believe that our recommendations will serve the public interest while providing the basis for an agreement that is fair and reasonable for both parties. In particular, we believe that students and their parents will be better served with the addition of instructional time to be delivered in a small group format.

RECOMMENDATIONS

The parties proposed a three-year contract, covering the period June 1, 2003 through May 31, 2006. The Panel recommends a 37-month contract covering the period June 1, 2003 through June 30, 2006. With regard to proposed salary increases, the UFT has proposed a 6% wage increase on June 1 of each year. The City has proposed a total increase of 4.17%: \$1,000 bonus in year one; 3% increase in year two; and 2% increase in year three, 1% of which must be paid for from productivity savings.

We begin with the “pattern” of 4.17%. We find, initially, that the \$1,000 bonus in year one should be converted to a salary increase to be added to the employee’s base pay. In addition, there is a conversion factor that, in this case, has been valued at .22%.

The Panel also recommends that teachers provide additional coverages for their colleagues when absent, valued at .23%. Moreover, we recommend that in order to participate in much needed additional professional development, teachers report to school on the two days before Labor Day and on one other day that they do not currently work. This time has been valued at 1.62%.

We recommend that an additional 10 minutes of time per day to be added to the 20 minutes agreed upon in the last round of bargaining to be devoted exclusively to small group instruction. Based upon the findings in the 2002 Fact Finders' Report and Recommendations, the 20 minutes has a value of 6%. We, therefore, find the additional 10 minutes has a value of 3%.

The Panel has considered and adopted certain of the reforms sought by the parties. As discussed more fully below, the Panel has recommended reforms which include: modifications to Circular 6 and professional activity periods; expediting the grievance procedure; and changes to the discipline and arbitration procedures. Based upon the figures presented by the parties, there is an overall monetary value of 1.5% for these and the other reforms discussed below.

When the savings and the value of the recommended reforms are added together, the Panel is able to recommend a total increase of 11 percent over three years: 2.0% in year one, 3.5% in year two; and 5.5% in year three. These increases are to be compounded. With regard to the increases, we recommend that with the exception of individuals who have retired since the expiration of the last contract, those eligible for retroactive salary increases must be working on September 12, 2005, the date of this Report and Recommendations. Further, the Panel recommends that the 2.0% increase for year one be paid on the last day of the 12th month of the contract; that the 3.5% increase for year two be paid on the last day of the 24th month of the contract; and that the 5.5% increase for year three be paid on the first day of the 30th month of the contract.

The Panel firmly believes that these increases will allow New York City teachers to keep pace with increases in comparable districts over the 37-month term of this Agreement.

Further, the increases recommended by the Panel compare favorably with salary increases in suburban areas adjacent to the City.

The Panel recognizes that the recommended reforms cannot be implemented until after the beginning of year three of the contract. The delayed payment in the last year of the contract allows the parties sufficient time to reach agreement on the implementation of our recommended reforms.

The Panel expects that other UFT represented employees covered by this Fact Finding Report will work the equivalent additional time to that of teachers, or will negotiate an equivalency.

REFORMS

The following includes an explanation of the reforms adopted by the Panel. They have all been valued by the City/DOE and addressed by the Mayor, the Chancellor and/or the City/DOE's witnesses at the fact finding hearing as critical to the effective operation of the City's school system. As stated previously, these reforms have been monetarily valued at 1.5%.

Circular 6

We turn first to Circular 6 and professional activity periods. Under the current Circular 6 agreement, teachers are granted "professional activity periods" in which they select an activity from a menu of options of educational activities including, but not limited to, small group instruction, one-to-one tutoring, student advisement and student assessment. The professional activity period, however, is self-directed. Moreover, it excludes certain administrative duties including homeroom and recess, cafeteria and bus supervision. Having

reviewed the record evidence on this issue. The Panel concludes that there is a need for greater accountability by teachers regarding work performed during professional activity periods. Additionally, we believe that administrators need to have more authority in assigning teachers professional activity period duties.

In furtherance of these goals, the Panel recommends that: (1) a list of the number of available positions for each activity to be set by the principal in consultation with the chapter leader; (2) selection of activities by teachers be from among a menu of choices, including administrative duties; and (3) teachers be able to participate in the selection of activities on an annual basis. The Panel urges the parties to negotiate the specifics of the menu referenced above as well as its implementation.

Expedite the Grievance Procedure

The UFT seeks to streamline the grievance procedure by eliminating Step 2. The UFT cites a backlog of 233 grievances, some of which are more than one year old, that have not yet been scheduled for hearing. The Panel recommends the elimination of Step 2 of the grievance procedure. It is antithetical to the smooth functioning of an effective grievance procedure to allow grievances to become stale. When this happens, employee morale is adversely affected and uncertainty as to the resolution of a particular issue exists for both parties. We find that this change will result in more expeditious hearings and also represents a cost savings to the City/DOE.

Discipline and Arbitration

The City seeks a number of modifications to the current disciplinary system for tenured teachers which are discussed in detail below:

- A. Refer all Disciplinary 3020-a Proceedings to the City's Office of Administrative Trials and Hearings.**

The Panel has carefully reviewed the record evidence regarding the City/DOE's proposal that all disciplinary hearings pursuant to Section 3020-a of the Education Law should be heard by the City's Office of Administrative Trials and Hearings (OATH). For the reasons set forth below, the Panel rejects this proposal.

Under the current system, disciplinary hearings are held before a neutral arbitrator selected from a panel of experienced labor-management arbitrators mutually selected by the parties. The City/DOE argues that having OATH's administrative law judges hear these cases "will benefit the parties" because these individuals "do not serve at the mercy of the parties before them." Rather, OATH judges are "insulated from the inevitable pressure to avoid upsetting one of the parties who may terminate an arbitrator's tenure on a permanent panel." According to the City/DOE, utilizing OATH judges will insure that "each case will be decided strictly on the merits" and without concern that the arbitrator is "'keeping score' of his/her past decisions."

The members of the panel of arbitrators currently utilized by the parties to hear disciplinary cases "serve for a maximum of a one-year term" after which time both "parties must agree to have arbitrators continue to serve on the panel." Thus, both the Union and the DOE presently have input as to which arbitrators are selected for and remain on their panel. The City/DOE's proposal would eliminate any input from the Union regarding the selection and retention of arbitrators if City-employed hearing officers were utilized.

Under the City/DOE's approach, the appearance of fairness would seriously be called into question. The trier of fact in tenured teacher disciplinary matters would be an individual who serves at the pleasure of the City, and who would be presiding over a case involving charges brought by the New York City Department of Education.

With regard to the City/DOE's impression that certain arbitrators "count decisions", the Panel reminds the parties that any arbitrator who engages in this practice does not enjoy a reputation that would allow him/her to be selected for, much less remain, on the parties' Section 3020-a panel. Under the current system, the parties have the ability to insure that they mutually select individuals as members of their arbitration panel who are of the highest caliber, experienced in tenured teacher disciplinary matters, and are regarded as truly impartial. Moreover, as previously indicated, the present system contains certain "checks and balances" that allow the parties to remove an arbitrator from the panel after only one term. For all of these reasons, the Panel concludes that neutral arbitrators mutually selected by the parties should continue to hear disciplinary cases pursuant to Education Law Section 3020-a and rejects the City/DOE's proposal on this issue.

B. Utilization of the Just Cause Standard in 3020-a Proceedings Involving a Tenured Pedagogue Charged with Incompetence.

The City/DOE seeks to replace the just cause standard in incompetence cases with a presumption of incompetence based on the professional judgment of the superintendent or principal, providing that judgment is made in good faith. The Panel rejects the City/DOE's proposal for the following reasons.

The just cause standard is one that has been overwhelmingly accepted and applied by employers and labor unions throughout the United States in both the public and private sectors. It is consistently utilized in discipline and discharge cases for all levels of employees. The concept of just cause as a condition precedent for disciplinary action has become a cornerstone of sound labor relations in the modern day unionized work setting. Moreover, and importantly in this case, the just cause standard is a statutory one for education cases in New York State and has been accepted and applied by virtually every other school district in

the state. In fact, there is no record evidence to show that any school districts outside of New York State do not adhere to this standard.

The Panel is persuaded that the just cause standard allows the City/DOE a fair opportunity to prove its case against a teacher whom it believes to be incompetent, while at the same time protecting a tenured teacher's due process rights. The record is devoid of any compelling evidence to convince the Panel that it should recommend changing this well established standard. Accordingly, the City/DOE's proposal is rejected.

C. Mandatory Penalty of Discharge for All Tenured Pedagogues Found to Have Engaged in Sexual Misconduct Involving a Student or Minor.

The Panel recommends that a tenured pedagogue who has been indicted or charged with criminal conduct based on an act of sexual misconduct involving a student or minor, or who is charged with sexual misconduct under 3020-a, be suspended without pay upon a finding by an Arbitrator of probable cause that sexual misconduct was committed. Such suspension without pay shall continue until the matter is resolved. It is expected that the 3020-a proceeding will be completed within two months. In the event that the teacher's 3020-a hearing is adjourned upon the request of the DOE, the teacher shall be restored to the payroll.

The Panel recommends further that where a tenured pedagogue has been found to have engaged in sexual misconduct involving a student or minor, a mandatory penalty of discharge shall apply. It goes without saying that tenured pedagogues who are found to have engaged in sexual misconduct involving a student or minor should not be permitted to work with children.

The Panel is aware that there may be cases in which an individual is wrongly accused of sexual misconduct. Under those circumstances, the DOE shall take such action necessary

to restore the falsely accused employee's reputation, including removing all references to the charges from the employee's personnel file, restoring any back pay, and confirming to any regulatory agency the finding that the employee was falsely accused.

D. Tenured Pedagogues Who Have Pled Guilty to or Been Convicted of a Felony Should be Suspended Without Pay Pending the Final Outcome of the 3020-a Disciplinary Process.

The current system of suspending a pedagogue without pay pending the outcome of a 3020-a proceeding only if and when the tenured pedagogue has already been convicted of or pled guilty to a felony concerning the criminal sale or possession of a controlled substance or drug paraphernalia, or a felony involving the physical or sexual abuse of a minor or student defies common sense. The Panel finds that suspension without pay in all cases involving guilty pleas to or convictions of a felony offense should be equally applied.

E. Elimination of the Right to Grieve Letters to the File.

Currently, teachers are allowed to arbitrate disciplinary letters that principals write which are placed in their personnel file. The Panel finds that this process results in a very significant waste of time, effort and resources. Administrators, union representatives and teachers themselves spend valuable time challenging the legitimacy of these letters, which could be better spent in pedagogical activities. Moreover, the current procedure is duplicative because these warning letters may be tested in a subsequent disciplinary proceeding. The Panel recommends that the right to grieve letters to the file be eliminated. In exchange for foregoing this right, a teacher shall have the right to append a response to any letter; and if disciplinary charges do not follow, the letter and response will be removed from the file at the end of three years.

F. Time and Attendance Expedited Hearing Process.

The Panel finds that an expedited hearing procedure is particularly suited for time and attendance cases because the individual's record is generally undisputed. Accordingly, we recommend the utilization of an expedited procedure for these types of cases. This procedure should include: written notice to the employee and the Union of the charges; a pre-hearing conference with the exchange of documents; expedited hearings limited to ½ day; and the designation of a single arbitrator to hear all time and attendance cases. This expedited procedure should be utilized before the DOE seeks termination pursuant to Section 3020-a.

G. Elimination of Seniority Transfers and Bumping.

Under the current transfer and bumping procedures, the vast majority of positions held by first year teachers are considered vacancies and may be filled by an excessed teacher or senior teacher exercising his/her bumping rights. This system creates uncertainty among first year teachers who may not know whether or not they are able to return to their school until September. This practice may also contribute to the high attrition rate of new teachers. Additionally, principals do not have the right to interview teachers bumping into their schools and, therefore, have no input into their selection process and no ability to determine whether the teacher is a good match for that particular school.

The Panel recommends modification of the current system of seniority transfers and bumping. First, the Panel recommends that no vacancy be declared if a teacher is currently filling the position. Second, the Panel recommends that the parties negotiate a date certain for giving an incumbent teacher notice that he/she will be excessed. Third, the Panel recommends that any excessed teacher or any teacher who wishes to exercise his/her transfer and/or bumping rights must be interviewed by the principal and a committee of teachers,

similar to the procedure used to fill positions in SBO schools. The final decision, however, shall be made by the principal. Fourth, the City/DOE has recommended that an excessed teacher who does not find a new position within 18 months of being excessed be terminated from the system. We specifically reject this proposal.

COVERAGES FOR ABSENT COLLEAGUES

The Panel concludes that there is a valid basis to increase teacher coverages in middle school and high school and, therefore, recommends that principals be allowed to assign teachers to cover for their absent colleagues up to 12 times per academic year. Obviously, the increase from two to 12 coverages per year per teacher results in significant productivity savings.

PROFESSIONAL DEVELOPMENT DAYS

A review of the record shows that both the City/DOE and the UFT presented expert witnesses who stressed the importance of increased professional development time. In particular, the need for professional development prior to the commencement of the school year was underscored repeatedly. Accordingly, the Panel recommends that three professional development days be added to the school year, the two weekdays before Labor Day and an additional day on which teachers do not currently work to be agreed upon by the parties.

ADDITIONAL INSTRUCTIONAL TIME

The Panel recommends the addition of 10 minutes per day to the school day, to be added to the previous addition of 20 minutes per day, to be used solely for small group instruction. We define small group instruction as consisting of a teacher-student ratio of no

more than one to 10. We also recommend that small group instruction be defined to include tutorials and test preparation.

The purpose of our recommendation is threefold: one, to maximize the utilization of time previously negotiated between the parties that was not fully realized; two, to allow for critical teacher-student interaction for those students designated to be in need of assistance; and three, to support the parties' goals of improving student performance, including student test scores and pass rates.

Our proposal can be implemented in a variety of ways to meet the needs of the various types of schools in the New York City school system. Accordingly, we propose a menu of options for selection. The Panel is not inclined to recommend an exclusive list of menu options, recognizing that the parties are far more knowledgeable with regard to how these options are best configured and utilized. In any event, a menu of options allows for the instructional configuration to vary from school setting to school setting, based on the needs of the local student population or other factors.

The Panel recommends that the utilization of the 150 minutes per week, including whether the time should be used solely for small group instruction or whether some portion of time should be set aside for tutorials and/or test preparation, shall be at the discretion of the Chancellor. He may determine that the configuration of time shall be determined centrally or, he may determine that each principal should be held accountable for the delivery of an additional 150 minutes per week of small group instruction or tutorials and/or test preparation.

For purposes of example only, the Panel suggests that the 150 minutes can be used either during the school day or the school day can be extended to incorporate the time. Schools can choose to utilize blocks of 30 minutes each day, dividing each class of students

into five groups to provide very small group instruction and to guarantee that every student has the ability to have additional instruction once a week. Or, a school can also choose to divide the time into three 50 minute periods per week. Other schools might designate certain students as those in need of assistance in order to offer them additional instruction two or three times a week. In SBO schools, the principal and teachers may want to decide jointly on a configuration that works best for that particular school.

In order to ensure that the maximum number of students is not exceeded, the Panel recommends an expedited arbitration procedure to allow the UFT to seek both a cease and desist order as well as monetary penalties for exceeding the small group instruction size limit.

The Panel recognizes that the Chancellor may prefer to utilize the additional 150 minutes of instructional time per week during the regular school day, or he may choose to extend the school day by 10 minutes per day. Regardless of how the Chancellor chooses to configure the additional 10 minutes per day to create 150 minutes of instructional time per week, the valuation remains the same. Specifically, based on the valuation of the 20 minutes contained in the Report of the 2002 Fact Finders, the Panel values the additional 10 minutes of time per day at 3%.

LONG TERM REFORM RECOMMENDATIONS

The following contain our recommendations for long term reform programs proposed either by the City/DOE or the UFT. We note that issues such as working conditions in the schools and student discipline have not been testified to or placed squarely before us. We also reiterate that these recommendations are exclusively prospective, premised on the eventual receipt of CFE funds from the state.

A. Bonuses and/or Salary Differentials for Shortage License Areas.

Both the City/DOE and the UFT acknowledge the problem in recruiting and retaining qualified applicants to teach in particular license areas such as math, science and special education. The problem is particularly acute in high-need and low-performing schools. Recognizing that these shortages are both local and nationwide, the Panel endorses a bonus plan for shortage license areas. The Panel recommends bonuses as opposed to differentials, which are incorporated into a teacher's base salary. The parties are urged to consider both one-time recruitment bonuses as well as bonuses in recognition of a teacher's success at the end of the year, coupled with his/her commitment to return in the fall. The parties might also consider housing bonuses in recognition of the difficulty some applicants experience in finding adequate and affordable housing when considering moving to New York City.

B. Performance Based Bonuses

The Panel recommends that the parties adopt a pilot program of school-wide performance based bonuses to reward teachers and others whose efforts result in sustained growth in student achievement. The Panel recommends that the bonus proposal be targeted for high-need schools where there is a greater need and opportunity for growth in student achievement. The Panel notes that one of the UFT's key witnesses, Anthony Alvarado, endorsed school-based bonuses as a way to encourage teachers to work collaboratively towards a common goal. He noted that "the greatest motivator of teachers is their being able to see a direct relationship between their work and the learning of students...."

The pilot program should also help high-need schools to attract and retain qualified and successful teachers. The parties need to agree on the designation of hard to recruit specialties.

They also need to agree upon the criteria for eligibility, bonus amounts, and a schedule as to when bonuses will be paid.

C. Salary Differentials at MA-5 through MA-7

The Panel is persuaded that the attrition rate of less senior teachers poses a retention problem for the City's school system. We are aware that the City's attrition rate may not be out of line with attrition statistics for teachers nationally. Nevertheless, an attrition rate of nearly 50% in the first six years of service is extremely concerning.

The Panel recognizes that salaries alone are not the reason for the attrition of less senior teachers. Nevertheless, the Panel is persuaded that salary is a significant contributing factor to the City's high attrition rate. We are cognizant of the fact that a significant salary gap for teachers at MA-5 through MA-7 exists between New York City teachers and teachers in surrounding districts. Therefore, the Panel recommends that the parties increase the salaries of teachers at MA-5 through MA-7.

D. Lead Teacher Positions

The Panel has heard evidence from witnesses from both parties regarding the value of creating lead teacher positions citywide. The program would select some of the City/DOE's most talented teachers and place them in high-need schools. The lead teacher position financially rewards teachers who are particularly effective in the classroom. At the same time, the lead teacher position creates a career ladder, allowing talented teachers to provide much needed training and mentoring of both new teachers and others who are struggling to perform. The program will allow successful teachers to share their skills and knowledge with other teachers. It is hoped that assigning lead teachers to new teachers, in particular, can

contribute to a decrease in the high attrition rate of teachers during their first years of teaching.

The parties have already implemented a successful lead teacher program at low-performing schools in District 9 of Region 1 in the Bronx. Under that program, lead teachers work in pairs, spending one preparatory period together, and splitting the remainder of the day between teaching and providing professional help to teaching staff. There is agreement that the lead teacher program has been successful in attracting and retaining teachers in District 9 and in improving fourth grade reading scores. The Chancellor testified about the importance of the lead teacher position by observing that, “Talent draws talent... Talent attracts talent” and “Talent can train and support talent.”

The Panel recommends that the parties adopt the agreement they negotiated and implemented in District 9 by creating a city-wide lead teacher program. We recommend, however, that the Chancellor have the authority to select the schools in which lead teachers shall be placed as well as to determine the total number of lead teacher positions to be created.

E. Class Size Limitations

The Panel recommends that the parties jointly agree on the use of CFE funds to develop a program for the reduction of class size in all grades and divisions. The Panel is aware that the ability of the City/DOE to reduce class size is affected by the availability of classrooms and school buildings. Accordingly, we recommend that the initial focus of reducing class size, to the extent feasible, be in the early years of elementary schools and in low-performing schools.

As stated previously, the Panel wishes to emphasize that the long term reform recommendations are all prospective in nature and are premised upon the receipt of additional monies in the form of CFE funds or other funds from the state.

Dated: September 12, 2005

Carol A. Wittenberg
Chair

I, CAROL A. WITTENBERG, do hereby affirm upon my oath as Arbitrator that I am the individual described in and who executed this instrument, which is my Report and Recommendations.

(Dated)

(Signature)

Ralph S. Berger
Member

I, RALPH S. BERGER, do hereby affirm upon my oath as Arbitrator that I am the individual described in and who executed this instrument, which is my Report and Recommendations.

(Dated)

(Signature)

Jack D. Tillem
Member

I, JACK D. TILLEM, do hereby affirm upon my oath as Arbitrator that I am the individual described in and who executed this instrument, which is my Report and Recommendations.

(Dated)

(Signature)

