

AMERICAN ARBITRATION ASSOCIATION
VOLUNTARY LABOR ARBITRATION

In the Matter of the Arbitration between

UNITED FEDERATION OF TEACHERS, LOCAL 2,
AFT, AFL-CIO,

Union,

-and-

NEW YORK CITY DEPARTMENT OF EDUCATION,

Employer.

Grievance: Collaborative Team Teaching
Case No.: AAA 13 390 02858 02

OPINION

AND

AWARD

Q 18980

K 18992

C 12730

Q 18877

BEFORE: Leonard R. Kershaw, Esq.
Arbitrator

APPEARANCES:

For United Federation of Teachers
Ellen Procida, Special Representative

For NYC Department of Education
Daniel McCray, Esq.
Director, Office of Labor Relations and Collective Bargaining

In accordance with Article Twenty-Two (Grievance Procedure) of the 1995-2000 collective bargaining agreement ("1995-00 Agreement") (Joint Exhibit 1) of the parties (hereinafter "Union" and "Department") covering Teachers, the undersigned was duly designated to serve as Arbitrator.

Hearings were held before the Arbitrator in the offices of the American Arbitration Association, New York, New York on January 23, 2003, June 25, 2003, October 14, 2003, December 12, 2003 and January 22, 2004. The parties were afforded a full and fair hearing, including the opportunity to present evidence, examine witnesses and make arguments in support of their respective positions. After evidence was presented, the parties made closing arguments orally, supplemented by post-hearing briefs and reply briefs which were transmitted to the Arbitrator by the American Arbitration Association by letter dated February 26, 2004. The evidence adduced during the arbitration hearing, the arguments of the parties made during and at the close of the arbitration hearing and in their written submissions, and various case law submitted during the hearing and with the written submissions have been fully considered by the Arbitrator in the preparation of this Opinion and its accompanying Award.

ISSUE

At the hearing held on January 23, 2003, the parties were unable to agree upon the precise Issue to be presented to the Arbitrator for determination. Consequently, each party submitted its own proposed statement of the Issue in dispute and the parties agreed that the Arbitrator should frame the Issue to be decided.

The statement of the Issue proposed by the Union is:

Did the Department of Education violate Article 20, specifically the New Continuum, the IEP Manual and memoranda and directives regarding

Special Education, when it failed to implement full time Collaborative Team Teaching service as mandated by student IEPs, thus affecting teachers' working conditions?

If so, what shall be the remedy?

The Issue statement proposed by the Department is:

Did the Department of Education violate Article 20 when Districts 8, 11, 15, 25 and 30 provided one teacher for the coverage of Collaborative Team Teaching classes during preparation periods?

If so, what shall be the appropriate remedy consistent with the Agreement?

When, as here, the parties have not been able to agree upon the Issue to be decided, an arbitrator may arrive

at a precise statement of the issue or issues after studying the entire record of the case, including, if available, such matters as the original grievance statement and the grievance procedure minutes, the demand for arbitration and any reply of the other party, correspondence of the parties, the transcript of the hearing (or the arbitrator's notes), the parties' exhibits, and the parties' briefs.

Elkouri & Elkouri: How Arbitration Works 324 (5th ed. M. Volz & E. Goggin 1997). After careful review of the positions of the parties and the entire record of proceedings the Arbitrator finds that the Issue to be determined in this proceeding is as follows:

Did the Department violate Article Twenty, unnumbered paragraph 3, in connection with coverage of full-time Collaborative Team Teaching classes during preparation periods?

If so, what shall be the appropriate remedy?

RELEVANT CONTRACT PROVISION

Article Twenty (Matters Not Covered) of the 1995-00 Agreement states:

With respect to matters not covered by this Agreement which are proper subjects for collective bargaining, the Board agrees that it will make no changes without appropriate prior consultation and negotiation with the Union.

The Board will continue its present policy with respect to sick leave, sabbatical leaves, vacations and holidays except insofar as change is commanded by law.

All existing determinations, authorizations, by-laws, regulations, rules, rulings, resolutions, certifications, orders, directives, and other actions, made, issued or entered into by the Board of Education governing or affecting salary and working conditions of employees in the bargaining unit shall continue in force during the term of this Agreement, except insofar as change is commanded by law.

(Joint Exhibit 1 at 127-28).

BACKGROUND

In June 2000, following use of various pilot programs involving delivery of special education services to students with disabilities in the least restrictive environment, the Department created policy concerning special education which it expressed in a document entitled Special Education Services as Part of a Unified Service Delivery System (The Continuum of Services for Students with Disabilities) ("New Continuum") (Joint Exhibit 3).¹ The basis for the New Continuum is current best practices in education which "center upon

¹Special education is a complex, highly regulated area. References to the framework of special education herein will be limited to certain general background information and specific elements of special education pertinent to the narrow issue in dispute.

the development of the 'whole school' or 'neighborhood school' approaches which create a single, unified and efficient service delivery system for all students, disabled and non-disabled, living in a single community." (Id. [Executive Summary]). Thus, "the [N]ew [C]ontinuum begins with the provision of an array of general education interventions and supports the development of a unified, whole school approach to service delivery." (Id.). A basic principle of the New Continuum is that "services provided in general education with special education supplementary aids and services should be the first option considered for any disabled student determined to require special education services and should be provided, to the greatest extent possible, in the neighborhood/district school." (Id.). "The continuum describes a broad range of special education services that will be offered by the New York City Public Schools, provides a basis for IEP² Teams to develop service recommendations and informs parents of options available for students with disabilities." (Id.). "[C]reation of innovative instructional models which maintain the least restrictive environment and more closely address student needs" is encouraged. (Id.). As relevant to the instant matter, among the special education services included in the New Continuum is Collaborative Team Teaching ("CTT"). (Id.).

With respect to CTT, the New Continuum states:

Collaborative Team Teaching is an integrated service through which students with disabilities are educated with age appropriate peers in the general education classroom. It provides students the opportunity to be educated alongside their non-disabled peers with the full-time support of a special

²Individualized Education Program

education teacher throughout the day to assist in adapting and modifying instruction.

Collaborative Team Teaching ensures that students master specific skills and concepts in the general education curriculum, as well as ensuring that their special education needs are being met including meeting alternative curriculum goals.

The Collaborative Team Teaching classroom consists of one special education teacher and one general education. When they team teach, the general and special education teacher meet to co-plan and prepare lessons, activities and projects that incorporate all learning modalities. Together, the general and special education teacher carry out instruction employing a range of methodologies.

The number of students with disabilities in a Collaborative Team Teaching class may not exceed forty percent of the total class register. Collaborative Team Teaching classes must adhere to general education class size limits. Under Collaborative Team Teaching, classes that normally have a class size limit of twenty students will increase to twenty-five students, with a maximum of ten students having disabilities.

While Collaborative Team Teaching is generally provided full time, Collaborative Team Teaching may be provided for less than the entire day or on an individual subject basis in a departmentalized school program.

(Id. at 31).

Whether CTT is an appropriate special education service to be provided to a disabled student is determined by an IEP Team consisting generally of a general education teacher, a special education teacher, a district representative, the student and a parent of the student.³ When CTT is determined to be appropriate for a disabled student, such determination must

³Depending on the purpose of a particular meeting, other IEP Team participants may include an education evaluator, school psychologist, school social worker and school physician. (Joint Exhibit 4 at 4-5; 8 NYCRR § 200.3).

be reflected in the student's IEP (Joint Exhibit 4 at 7-8) by indicating Collaborative Team Teaching next to Recommended Services on page 1 of the IEP (Id. at 16. See Union Exhibit 1). If CTT is less than full time, the IEP must indicate CTT part time and the number of periods per week the student will receive the service. (Joint Exhibit 4 at 16). Additionally, CTT must be entered on page 7 of the IEP under Supplementary Aids and Service. When CTT is to be full time, the designation "all" is entered on page 7 of the IEP under categories pertaining to area of instruction and periods per week. (Id. at 48, 52. See Union Exhibit 1). If CTT is to be provided on less than a full-time basis, then the number of periods per day/week are identified on page 7 of the IEP under the category of periods per week. (Joint Exhibit 4 at 49).

Transition to the New Continuum apparently began in September 2000. (See Joint Exhibit 5 ["Getting Started" at 2]). Additionally, a memorandum to Superintendents from the Office of School Programs and Support Services, dated December 12, 2000, outlined various steps that needed to be taken and provided time lines for their accomplishment. (Joint Exhibit 5 and the attachment thereto ["Getting Started" at 2]). As an element of the transition, revision of student IEPs, consistent with services to be provided under the New Continuum, was to commence in February 2001 (Joint Exhibit 5 ["Getting Started" at 2, 17]), with a general expectation that new service recommendations, including CTT, would be implemented beginning in September 2001 (Id. at 17).

In June 2001, the Union filed a grievance alleging violation of the first paragraph of

Article Twenty of the 1995-00 Agreement on the basis that the Department was implementing the New Continuum without negotiating working conditions of affected employees. (See Department Exhibit 2). The grievance was denied and, thereafter, was submitted for arbitration. (Department Exhibit 2. See Department Exhibit 3). At the arbitration level the grievance was settled. (Department Exhibit 3).⁴ As that grievance was pending action, other grievances were filed which, in relevant part, alleged violations of Article Twenty of the 1995-00 Agreement in that implementation of full-time CTT was inconsistent with the New Continuum because coverage of CTT classes was provided by only one teacher during preparation periods.⁵ (Joint Exhibit 2). The CTT-related grievances were denied and the matters were submitted for arbitration resulting in the instant proceeding. (*Id.*).

POSITION OF THE DEPARTMENT

As a preliminary matter, the Department argues that the complaint made by the Union about CTT is not a grievance as that term is used in the parties' collective bargaining agreement because the Union is seeking to enforce students' IEPs. Noting that the contractual definition of a grievance excludes, in part, "any matter to which (1) a method of review is prescribed by law, or by any rule or regulation of the State Commissioner of Education

⁴Reference to the settlement contained in Department Exhibit 3 is made only for background information purposes.

⁵A preparation period is time when a classroom teacher is out of the classroom to prepare future lessons, attend meetings and engage in other appropriate education-related activities.

having the force and effect of law, or by any bylaw of the Board of Education . . .," the Department maintains that challenges to development or interpretation of students' IEPs are governed by federal law and regulations of the State Commissioner of Education. One review process, notes the Department, provides for impartial hearings which afford parents the opportunity to challenge development or interpretations of IEPs applicable to their children. According to the Department, decisions resulting from the impartial hearing process are binding upon the Department and ultimately are subject to review in federal court. A second type of review process, observes the Department, is a more general complaint procedure by means of which teachers may challenge the Department's interpretations of students' IEPs.

Notwithstanding the Union's position that the content of students' IEPs affects teachers' working conditions, the Department insists that the contractual definition of "grievance" excludes review of IEPs from the grievance and arbitration process with the result that enforcement of students' IEPs is not arbitrable. Thus, contends the Department, the Arbitrator has no authority to step into the shoes of reviewing entities established by law and regulation to express an opinion or make a decision about the meaning of students' IEPs.

Non-arbitrability of enforcement of students' IEPs, claims the Department, was recognized by the Union, prompting it to negotiate a special education dispute resolution procedure. According to the Department, such procedure, among other things, allows the Union to complain ultimately to the Chancellor that IEPs are not being followed. The Department notes, however, that the Chancellor has the final word about such complaints and

arbitration is not available.

The Department insists that, initially, it did not protest the submission of the instant matter to arbitration because it believed that the Union was asserting an arbitrable contract claim pertaining to Article Twenty of the collective bargaining agreement. According to the Department, however, it did not waive its right to assert that alleged violations of students' IEPs do not constitute a grievance and, therefore, are not subject to arbitration. The Department maintains that it did not agree to arbitrate disputes about students' IEPs and, in fact, could not have agreed to such process because to do so would violate public policy.

With respect to an alleged violation of Article Twenty of the collective bargaining agreement based on the level of coverage of CTT classes during preparation periods of a CTT team, the Department argues that the Union failed to establish the existence of any requirement that such team must be "double prepped;" that is, replaced by two teachers. The Department insists that teacher coverage of CTT classes during preparation periods of regular CTT teams was and continues to be within the discretion of administrators of individual schools.

Addressing the Union's reliance on a phrase in the New Continuum which refers to "special education support throughout the day," the Department claims that such phrase never was intended to apply to preparation periods of CTT teams which often take place when students assigned to CTT classes attend art or music classes. "Double prep" or assignment of two teachers to cover CTT classes during preparation periods of regular CTT teams would

be impossible, the Department insists, due to the severe shortage of special education teachers. Moreover, claims the Department, double prep during students' art or music classes would be wasteful because special education teachers are not licensed in such areas and do not regularly perform duties involving such subject matter areas. In any event, contends the Department, the New Continuum is Department policy, not a negotiated agreement created by the parties; therefore, the Department's interpretation of its policy should be given great deference.

Assuming, without conceding, that there is a policy providing for double prep during preparation periods of regular CTT teams, the Department claims that such policy, which involves staffing, is a permissive subject of bargaining which is not mandatorily negotiable because it relates to a policy decision affecting the level of service to be provided. The Department maintains that an action or decision to change teacher coverage during the preparation periods of regular CTT teams does not constitute a violation of the third paragraph of Article Twenty of the collective bargaining agreement because the reference in such provision to "salary and other working conditions" makes clear that the provision applies only to mandatory subjects of bargaining and not a permissive or non-mandatory subject of bargaining such as staffing.

According to the Department, any arbitration award that extends to reach of the third paragraph of Article Twenty to permissive subjects of bargaining would have an absurd result; namely, that the Department, without knowing it, waived everyone of its management

rights which is not a prohibited subject of bargaining. In other words, the Department argues that management rights important to the Department exist in writing; thus, if Article Twenty covers permissive subjects of bargaining, the result would be that the Department's written manifestations of management rights would be frozen in place by operation of Article Twenty and the Department would not be able to effect change without obtaining the Union's agreement. The result, argues the Department, would be that the Department's management rights would be converted from permissive to mandatory subjects of bargaining. The Department contends that it would be absurd to suggest that such a massive and total waiver of management rights is what the parties intended by Article Twenty or that such a waiver, even if explicit and knowing, would be permissible as a matter of public policy.

The absurdity of the Union's position, asserts the Department is not the sole basis for which it should be rejected because the parties, in a 1972 case involving promotion procedures, arbitrated the scope of Article Twenty which resulted in a concession by the Union that the phrase "proper subjects for collective bargaining" applies only to "working conditions." According to the Department, PERB case law, developed over many years, establishes that working conditions are mandatory subjects of negotiations, whereas management rights are permissive or prohibited subjects. By definition, maintains the Department, a change in a permissive subject of bargaining is not a change in working conditions which must be negotiated. The subject of the instant dispute, argues the Department, which concerns teacher coverage of CTT classes during preparation periods of

regular CTT teams, is a permissive subject of bargaining because it relates to the Department's level of service provided to students. Thus, asserts the Department, assuming without conceding, that the Department has a policy concerning teacher coverage of CTT classes during preparation periods, negotiations about teacher coverage are not required because the subject is neither a working condition nor a proper subject for collective bargaining. Any contrary conclusion, insists the Department, not only would change the meaning of a prior arbitration award applicable to the original intent of the parties, but also would have the absurd result of effecting a complete waiver of all of the Department's management rights without the knowledge or consent of the Department.

The Department requests the Arbitrator to deny the grievance in its entirety.

POSITION OF THE UNION

Addressing the arbitrability issue raised by the Department, the Union argues that the Department waived any arbitrability claim by not asserting it at the commencement of the arbitration proceeding. When the Department, without raising an issue of arbitrability participated in the proceedings and allowed the Union to present its case, the Union insists that the Department waived any right it may have had to object to arbitration and manifested its agreement to grant the Arbitrator authority to render a decision on the merits of the dispute between the parties and to fashion an appropriate remedy. Even if the dispute was not arbitrable initially, the Union maintains that once the Department permitted the matter to

proceed without objection, it waived any arbitrability claim.

Because the Department waited until the Union had presented its case in chief before objecting to arbitrability, the Union claims that its case has been prejudiced. As a matter of equity, the Union contends that an arbitrability claim may not be asserted after the Union has presented evidence regarding the merits of the dispute.

As an additional argument in opposition to the Department's position that the instant matter is not arbitrable, the Union points to the arbitration decision in Epstein and Mindlin, AAA Case No. 1339-0601-80 (Stark, Arb.) (February 17, 1981), in which the arbitrator denied the Department's claim that the matter was not arbitrable because the Union's appeal to Step 3 of the grievance procedure was not timely. After reviewing facts concerning the manner in which the underlying grievances were processed and decided, and noting that the pre-arbitration decisions did not comment on timeliness or arbitrability, but decided the grievances solely on the merits, Arbitrator Stark denied the Department's timeliness argument stating:

The grievance and arbitration procedures are not like a card game where one holds his trump card until the final play and then uses it too confound and defeat the opponent. When the parties are in possession of all the relevant facts, as they were here, it is incumbent on them to make their positions known at Step 3 in order to allow the other party to decide whether the matter is worth pursuing. To hold otherwise would encourage surprise tactics, increase the time and costs of case handling, and may result in unnecessary and useless arbitrations.

As for the substance of the Department's of arbitrability claim which is based on the applicability of law and regulations concerning which, the Department contends, the

Arbitrator is without power or authority to act, the Union counters that it has the right to process grievances alleging violation of contractual rights and review of such grievances clearly is within the purview of the Arbitrator. According to the Union, the grievances underlying this arbitration proceeding allege violations of Article Twenty, unnumbered paragraph 3, of the collective bargaining agreement because the Department failed to adhere to its policy concerning teacher coverage applicable to CTT and, therefore, violated its obligation under Article Twenty, unnumbered paragraph 3, to continue its policy in effect during the term of the Agreement. Such failure, contends the Union, adversely affected the working conditions of teachers assigned to CTT. Thus, insists the Union, the allegations in the grievances state a clear contract violation which is appropriate for review and determination by means of the contractual grievance and arbitration procedures.

Regarding the merits of the dispute, the Union argues that the Department's policy concerning CTT which is addressed in the New Continuum requires two teachers, a general education teacher and a special education teacher, when CTT is provided full time throughout the day. Such staffing, claims the Union, provides full-time support of a special education teacher throughout the day to assist in adapting and modifying instruction and is required by the Department's policy as articulated in the New Continuum. The Union asserts that the Department's policy applicable to CTT staffing does not contain any exception or exclusion for preparation periods.

Thus, maintains the Union, when teachers comprising a CTT team are out of the

classroom during their preparation periods, teaching coverage for their full-time CTT class must continue to be provided by both a general education teacher and a special education teacher. The Union insists that if the Department intended to utilize a different staffing pattern during preparation periods it certainly would have stated such intention in the New Continuum which was carefully written by Department representatives. The lack of expression of a different staffing pattern for full-time CTT classes during preparation periods, asserts the Union, must be construed against the Department whose representatives selected the language for the New Continuum.

At bottom, argues the Union, the Department's decision not to staff full-time CTT classes with two teachers during preparation periods is all about money; the Department simply does not want to spend the money to staff full-time CTT classes with two teachers for the entire day. According to the Union, however, the evidence shows both that it is inappropriate to deny the special education service of full-time CTT for reasons of money and that budget surpluses existed with which to satisfy the policy requirement applicable to teacher coverage for full-time CTT classes.

With respect to the Department's position that a shortage of special education teachers precluded their assignment to full-time CTT classes during preparation periods, the Union contends that the Department considered the shortage issue in development of staffing policy for full-time CTT classes and also expanded selection criteria applicable to CTT teachers.

The Union argues that the Department's failure to continue its policy regarding

staffing of full-time CTT classes adversely affects the working conditions of teachers. According to the Union, when one teacher is assigned to cover a full-time CTT class during preparation periods of the regular team, that teacher solely is responsible for 25 students instead of being able to share such responsibility with another teacher. One adverse effect of such responsibility, contends the Union, is that the teacher cannot teach effectively when a student acts out in the classroom. When such circumstance occurs, the Union claims that the sole classroom teacher must interrupt efforts to provide instruction in order to address the special needs of the student who has created a disruption.

Additionally, maintains the Union, when one teacher is assigned to a full-time CTT class such teacher must plan different lessons providing for different instructional methods and materials because less individualized attention is given to students when one teacher, rather than two, cover a CTT class.

The Union requests the Arbitrator to sustain the grievance and remedy the Department's alleged violation of Article Twenty by directing the Department to follow established policy respecting staffing of full-time CTT classes by assigning two teachers to such classes throughout the entire school day. The Union also requests the Arbitrator to retain jurisdiction over implementation of the remedy during the 2004-05 school year to ensure that the Department does not eliminate the full-time CTT service.

DECISION

A. Arbitrability

In one of several pre-arbitration decisions addressing the grievances at issue herein, the Department asserted that the issue giving rise to the grievances; namely, coverage of full-time CTT classes by one teacher during preparation periods, is not arbitrable. (Joint Exhibit 2). Nonetheless, during discussions to identify the issue in dispute at the commencement of this arbitration proceeding, the Department did not raise arbitrability as an issue.

Despite its silence about arbitrability during preliminary discussions at the start at the arbitration process, the Department, among other things, claimed in its opening statement that the at-issue grievances essentially allege violation of students' IEPs providing for CTT and that such allegations do not constitute a grievance reviewable by means of arbitration. Concerns about implementation of students' IEPs, asserted the Department, are reviewable under procedures established by law and regulation and also are subject to review in a new contractual Special Education Dispute Resolution Process which does not provide for arbitration.

Then, at the close of the Union's case in chief, the Department argued that the instant matter is not arbitrable because it involves issues of law which are beyond the reach of the Arbitrator. The Department reiterated its position, expressed in its opening statement, that the new Special Education Dispute Resolution Process pertains to the dispute and that such process does not provide for arbitration. Responding to the Union's strenuous objection, on

grounds of waiver, to the Department's arbitrability stance, the Department insisted that the issue of arbitrability cannot be waived.

At the conclusion of the arbitration proceeding both parties vigorously addressed the arbitrability issue in their oral and written closing arguments. Those arguments are summarized herein in position statements of the parties.

It is clear from the content of the Department's arbitrability position that substantive, not procedural, arbitrability is at issue. Generally, a substantive arbitrability defense raised for the first time at arbitration is not found to have been waived because the issue is whether the arbitrator has the power to reach the underlying question. If the arbitrator does not have such power, the lack of power cannot be overcome, regardless of when the defense of non-arbitrability is raised. Fairweather's Practice and Procedure in Labor Arbitration 114-15 (3rd ed. R. Schoonhoven 1991). Despite the fact that the Department did not raise arbitrability when the issues to be determined by the Arbitrator were discussed at the start of the arbitration proceeding, the Arbitrator finds that for purposes of this case and without intending to establish precedent for any other the matter, the Department did not waive the right to address the scope of the Arbitrator's jurisdiction and power by means of an arbitrability claim even though that claim was not asserted during the issue-discussion phase of the proceeding.⁶

⁶While not dispositive of the arbitrability issue herein, in the Arbitrator's view the most appropriate time to raise a question of arbitrability is at the start of the arbitration proceeding so that all participants in the process are aware at the outset of all issues requiring attention, evidence and argument. Although the Department claims that it did not become aware of the

Notwithstanding the Department's assertion that the Union has alleged violation of students' IEPs and that such allegation does not fall within the definition of a grievance which is reviewable by means of arbitration, the Arbitrator finds that the issue in dispute concerns an alleged violation, misinterpretation or inequitable application of the third paragraph of Article Twenty of the collective bargaining agreement; namely, that with respect to teacher coverage for full-time CTT classes during preparation periods, the Department did not continue in effect its staffing determination expressed in the New Continuum which the Department, by resolution, established as policy. Consequently, the Arbitrator finds that the instant matter is arbitrable.

B. Merits

As expressed previously herein, the Arbitrator, after careful review and consideration of the parties' positions and the entire record of proceedings, finds that the Issue to be

need to address the matter of the Arbitrator's jurisdiction and power until after it had heard the evidence presented by the Union in its case in chief which, according to the Department, revealed that the focus of the dispute pertained to implementation of students' IEPs rather than an alleged violation, misinterpretation or inequitable application of Article Twenty of the collective bargaining agreement, the Arbitrator does not find such position persuasive. At least one grievance decision rendered by the Department in the steps prior to arbitration in this matter asserted that the grievance under consideration was not reviewable in the grievance procedure. (Joint Exhibit 2). Moreover, the Department, in its arbitration opening statement which immediately followed discussion of the issue in dispute, maintained that the underlying grievances alleged violations of students' IEPs which were not subject to review by means of grievance and arbitration. Thus, the Arbitrator finds that the Department knew at the outset of the proceeding that arbitrability was an issue and it should have raised such issue at the commencement of the proceeding.

determined in this proceeding is:

Did the Department violate Article Twenty, unnumbered paragraph 3, in connection with coverage of full-time Collaborative Team Teaching classes during preparation periods?

If so, what shall be the remedy?

The referenced contractual provision states:

All existing determinations, authorizations, by-laws, regulations, rules, rulings, resolutions, certifications, orders, directives, and other actions, made, issued or entered into by the Board of Education governing or affecting salary and working conditions of employees in the bargaining unit shall continue in force during the term of this Agreement, except insofar as change is commanded by law.

(Joint Exhibit 1 at 128).⁷

It is undisputed that the Department adopted the New Continuum by resolution dated June 21, 2000. (See Department Exhibit 2 at 4). As relevant to CTT, the New Continuum states:

Collaborative Team Teaching is an integrated service through which students with disabilities are educated with age appropriate peers in the general education classroom. It provides students the opportunity to be educated alongside their non-disabled peers with the full-time support of a special education teacher throughout the day to assist in adapting and modifying instruction.

Collaborative Team Teaching ensures that students master specific skills and concepts in the general education curriculum, as well as ensuring that their special education needs are being met including meeting alternative curriculum goals.

⁷It is undisputed that the provision was continued without change in the parties' successor collective bargaining agreement. (See Department Exhibit 1 at 1).

The Collaborative Team Teaching classroom consists of one special education teacher and one general education. When they team teach, the general and special education teacher meet to co-plan and prepare lessons, activities and projects that incorporate all learning modalities. Together, the general and special education teacher carry out instruction employing a range of methodologies.

The number of students with disabilities in a Collaborative Team Teaching class may not exceed forty percent of the total class register. Collaborative Team Teaching classes must adhere to general education class size limits. Under Collaborative Team Teaching, classes that normally have a class size limit of twenty students will increase to twenty-five students, with a maximum of ten students having disabilities.

While Collaborative Team Teaching is generally provided full time, Collaborative Team Teaching may be provided for less than the entire day or on an individual subject basis in a departmentalized school program.

(Joint Exhibit 3 at 31).

A preliminary matter requiring determination is whether Article Twenty, unnumbered paragraph 3, applies to the New Continuum and its CTT component. The plain language of the contractual provision, finds the Arbitrator, demonstrates such application. First, Article Twenty, unnumbered paragraph 3, in part, covers "All existing . . . resolutions"⁸ It is

⁸At the time the New Continuing was adopted by the Department - June 21, 2000 - the provisions of the parties' 1995-2000 Agreement already had been in effect for a period of years. It is clear, therefore, that unnumbered paragraph 3 of Article Twenty of the 1995-00 Agreement, which required all existing resolutions, among other things, to continue in effect during the term of the Agreement, did not apply to the New Continuum, and specifically the CTT component thereof, because when the 1995-00 Agreement became effective, the New Continuum and its CTT component were not in existence and, therefore, were not covered by the reference in Article Twenty, unnumbered paragraph 3, to "existing resolutions."

This technicality does not end this matter, however, because the language of Article Twenty, unnumbered paragraph 3, of the 1995-00 Agreement was continued in the parties'

undisputed that the New Continuum with its CTT component is an existing resolution of the Department. Second, the CTT component of the New Continuum affects working conditions of CTT teachers because it pertains to staffing for CTT and touches generally on the conditions under which CTT teachers are to prepare and deliver instruction; that is, co-planning and preparation and joint delivery of instruction. Such conditions, finds the Arbitrator, affect the time, effort and content of the planning process, as well as the environment in which instruction is provided which, in turn, affect the effort required to deliver instruction. These various factors, finds the Arbitrator, relate to workload which is a working condition of CTT teachers.

Thus, notwithstanding the Department's various arguments pertaining to inapplicability of Article Twenty, unnumbered paragraph 3, to the New Continuum and its CTT component, the Arbitrator finds that the contractual provision is applicable and requires continuation of the CTT portion of the New Continuum.⁹ Exactly what must be continued,

successor agreement covering the period November 16, 2000 through May 31, 2003, the terms of which took effect sometime subsequent to June 10, 2002 following ratification by the parties. Thus, Article Twenty, unnumbered paragraph 3, of the successor agreement is applicable to the New Continuum and its CTT component which existed when Article Twenty of the successor agreement took effect.

Although the several grievances underlying this arbitration proceeding predated the successor agreement, Article Twenty of which applies to the New Continuum as described above, the issue raised in such grievances continued unabated after the successor agreement took effect and at arbitration the parties had full opportunity to address such issue in the context of both the current language of Article Twenty, unnumbered paragraph 3, and the content of the New Continuum.

⁹Although the CTT provision of the New Continuum comments on staffing for full-time CTT classes which is a non-mandatory subject of bargaining, an employer, as here, may

however, is at the core of the instant dispute.

According to the Union, when the Department, regardless of how the determination is made, provides full-time CTT it must, pursuant to the CTT provisions of the New Continuum, deliver the service throughout each entire school day, utilizing a general education teacher and a special education teacher to provide instruction together. The gravamen of the instant manner, asserts the Union is that the Department deviates from the full-time CTT service arrangement during teacher preparation periods when it requires the presence of only one teacher in a classroom for which full-time CTT has been determined to be appropriate. The result, argues the Union, is that the working conditions of the single coverage teacher, e.g. workload, are adversely affected during preparation periods when the solo coverage is provided.

For its part, the Department maintains that staffing of full-time CTT classes during preparation periods is within the discretion of individual schools. Moreover, the Department contends that the content of the CTT portion of the New Continuum was not intended to require instruction by both a general education teacher and a special education teacher during teacher preparation periods which typically occur when a full-time CTT class is engaged in art or music or other subject matter areas for which the CTT approach is not necessary.

In this contract dispute, whether full-time CTT requires the services of both a general

voluntarily negotiate about a non-mandatory subject of bargaining and agree to extend its collective bargaining agreement to such a subject; thus, placing such subject within the ambit of the contractual grievance and arbitration machinery for enforcement purposes.

education teacher and a special education teacher in the classroom throughout each entire school day, including teacher preparation periods, must be determined by the language of the New Continuum providing for CTT. The specific language relied upon by the Union is contained in the first, third and fifth paragraphs of the CTT provision which state, respectively, that:

Collaborative Team Teaching is an integrated service through which students with disabilities are educated with age appropriate peers in the general education classroom. It provides students the opportunity to be educated alongside their non-disabled peers with the full-time support of a special education teacher throughout the day to assist in adapting and modifying instruction.

* * *

The Collaborative team Teaching Classroom consists of one special education teacher and one general education teacher. When they team teach, the general and special education teacher meet to co-plan and prepare lessons, activities and projects that incorporate all learning modalities. Together, the general and special education teacher carry out instruction employing a range of methodologies.

* * *

While Collaborative Team Teaching is generally provided full time, Collaborative Team Teaching may be provided for less than the entire day or on an individual subject basis in a departmentalized school program.

(Joint Exhibit 3 at 31).

From the language of the fifth paragraph of the CTT provision it reasonably may be inferred that full-time CTT means CTT for the entire school day, and the Arbitrator finds, absent language expressing a contrary intent, that the entire school day embraces preparation

periods.

Thus, the Arbitrator finds that when the Department provides CTT on a full-time basis such service, consistent with the third and fifth paragraphs of the CTT provision, must be provided for the entire school day, including preparation periods, by a general education teacher and a special education teacher who, together, carry out instruction employing a range of methodologies. Such joint delivery of instruction implements the reference in the first paragraph of the CTT provision to "full-time support of a special education teacher throughout the day to assist in adapting and modifying instruction."

The evidence establishes that in some instances when the Department implemented full-time CTT it did not provide such service for the entire school day. Specifically, the evidence shows that during some preparation periods, the Department did not provide instruction to full-time CTT classes by utilizing the services of both a general education teacher and a special education teacher. Instead, instruction during such preparation periods was provided by a single teacher. Such arrangement, the Arbitrator finds, was contrary to the CTT provisions of the New Continuum applicable to full-time CTT which the Department was required to continue in force during the term of the collective agreement and, therefore, violated Article Twenty, unnumbered paragraph three, of the collective bargaining agreement.¹⁰

¹⁰To the extent that the Department's action also may have been contrary to students' IEPs requiring CTT full time, such issue, as argued by the Department, would not fall within the definition of a grievance and, therefore would not be subject to review by arbitration. The appropriate review mechanisms applicable to students' IEPs are those provided by law and

Accordingly, and based on the foregoing, the Arbitrator finds and makes the following

regulation and that provided by the contractual Special Education Dispute Resolution Procedure (Department Exhibit 1 [Appendix K]) which does not provide for arbitration.

AWARD

The Department violated Article Twenty, unnumbered paragraph three, in connection with coverage of full-time Collaborative Team Teaching classes during preparation periods.

The grievances are sustained.

As a remedy, when the Department provides CTT on a full-time basis it shall deliver such service by utilizing a general education teacher and a special education teacher to provide instruction jointly throughout the entire school day, including preparation periods.

The Arbitrator declines to retain jurisdiction, as requested by the Union, over implementation of the remedy during the 2004-05 school year to ensure that the Department does not eliminate full-time CTT service. Whether such service is appropriate is a matter for determination by IEP teams and other authorized assessment entities.

STATE OF NEW YORK)
COUNTY OF ALBANY) ss.:

I, Leonard R. Kershaw, do hereby affirm upon my oath as Arbitrator that I am the individual described in and who executed this Instrument, which is my Award.


LEONARD R. KERSHAW, ESQ.
ARBITRATOR

DATED: May 15, 2004
Albany, New York