

AMERICAN ARBITRATION ASSOCIATION

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In the Matter of the Arbitration between

OPINION

UNITED FEDERATION OF TEACHERS, LOCAL 2,
AMERICAN FEDERATION OF TEACHERS, AFL-CIO
(UNION)

AND

AWARD

-and-

NEW YORK CITY DEPARTMENT OF EDUCATION

Grievance: UI Lesson Plans

AAA Case No.: 13 390 00864 13

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BEFORE: Deborah M. Gaines, Esq.
Arbitrator

APPEARANCES: FOR THE UNION:
Ellen Gallin Procida, Director, UFT
Grievance Department
Diane Mazzola, UFT Special Representative

FOR THE EMPLOYER:
Kerri Crossan, Director, Labor Relations

In accordance with the October 14, 2007 through
October 31, 2009 Collective Bargaining Agreement between
the parties, the undersigned was selected to hear a
grievance filed pursuant to the Agreement and render a
binding determination. Hearings were held at the offices
of the American Arbitration Association in New York, New
York on May 7, 2013, June 3, 2013, June 19, 2013, July 25,
2013, August 19, 2013, September 25, 2013, October 3, 2013,
October 8, 2013, October 18, 2013, November 21, 2013,

December 17, 2013, January 16, 2014, February 5, 2013,
February 27, 2014 and March 17, 2014.

The parties were afforded full and fair opportunity to examine and cross-examine witnesses (including rebuttal witnesses), submit documentary evidence and make arguments in support of their respective positions.

ISSUE:

The parties could not agree upon the issue to be decided. Instead, each party submitted a proposed issue and made arguments in support of their position. They then authorized the undersigned to determine the issue based upon their arguments and the entire hearing record. After carefully reviewing the entire record before me, including consideration of the parties' arguments and cases submitted in support of their positions, I determined the issues to be decided are as follows:

1. Is the grievance as it relates to collection of lesson plans arbitrable?
2. Did the Department of Education violate Articles 8(E) and/or 20 of the parties' collective bargaining agreement by:
 - a. Allowing principals to mandate the specific elements or components of lesson plans; and/or
 - b. Allowing the collection of lesson plans?
3. If so, what shall the remedy be?

RELEVANT CONTRACT PROVISIONS

**ARTICLE EIGHT
Education Reform**

E. Lesson Plan Format

The development of lesson plans by and for the use of the teacher is a professional responsibility vital to effective teaching. The organization, format, notation and other physical aspects of the lesson plan are appropriately within the discretion of the teacher. A principal or supervisor may suggest, but not require a particular format or organization, except as part of a program to improve deficiencies of teachers who receive U-ratings or formal warnings.

**ARTICLE TWENTY
MATTERS NOT COVERED**

With respect to matters not covered by this Agreement which are proper subject 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 leave, 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 the employees in the bargaining unit shall continue in force during the term of this Agreement, except insofar as change is commanded by law.

RELEVANT SPECIAL CIRCULARS

SPECIAL CIRCULAR NO. 28,
1990-90
December 6, 1990
ISSUED BY CHANCELLOR JOSEPH FERNANDEZ

Subject: LESSON PLANS

Planning by teachers is a critical element in the education of our students. This planning provides a blueprint for such educational priorities as the implementation of curriculum, the development of long and short-term expectations for student learning, the integration of

subject areas, monitoring of pupil progress and modifications of strategies and objectives based upon student performance and need.

A pupil oriented, sequential and self-evaluative approach to lesson planning provides a solid foundation for effective teaching which best meets the needs of students as a group and as individuals. Recognizing the fundamental importance of teacher planning for student learning, and in order to encourage development and sharing of successful instructional practices, the New York City Public Schools and the United Federation of Teachers have incorporated the following into our 1990-91 Agreement:

The development of lesson plans by and for the use of the teacher is a professional responsibility vital to effective teaching. The organization, format, notation and other physical aspects of the lesson plan are appropriately within the discretion of the teacher. A principal or supervisor may suggest, but not require a particular format or organization, except as part of a program to improve deficiencies of teachers who receive U-ratings or formal warnings.

In line with our belief in the educational value of lesson plans as an instrument developed by teachers within the context of a school's educational philosophy to help students learn, the specifics of each plan will be left to the professional judgment of the teacher. Lesson plans are for the personal use of the teacher. In line with the New Agreement, central, district and school level mandates regarding "the organization, format, notation and other physical aspects of the lesson plan" will not be issued and those established prior to the date of this circular will no longer be in effect.

Furthermore, as indicated in the Agreement, a principal or supervisor may require a particular format or organization only "as part of a program to improve deficiencies of teachers who receive U-ratings or formal warnings" (e.g., a letter in a teacher's file that articulates a deficiency in the planning aspect of instruction).

Within the school community of supervisors, teachers and students, lesson planning is recognized to be a vehicle for furthering instructional outcomes and a way of enhancing professional development. If the development of a school

instructional plan is a collaborative effort among supervisors and teachers, as part of that process teachers may be encouraged to share and coordinate lesson planning. Since the mechanical, ritualized collection of lesson plans does not further these goals, it is prohibited.

Professional supervisory practice includes an array of activities, such as time spent in classrooms demonstrating teaching techniques, assuring that professional development occurs and determining that appropriate curriculum outcomes are realized. Supervisors may, as part of a program to evaluate and improve instruction, request an individual teacher to indicate his or her planning strategies and how these strategies involve coordination of curriculum, student progress and outcomes (e.g., as part of a conference prior to or following a formal observation). Furthermore, a procedure must be established in each school to ensure that appropriate instructional activities are conducted when a teacher's class must be covered because of absence or emergency. Such activities should be relevant to the educational priorities for the individual class.

Given the importance of lesson planning for student learning, I strongly recommend that school staff take advantage of the expertise of their colleagues and share with each other different and innovative approaches to planning and instruction. Teachers and supervisors are encouraged to discuss successes (as well as problems) related to planning as part of a collaborative staff development programs and faculty conferences. Planning for the needs of unique populations such as our limited English proficient and special education students will be enhanced by this professional exchange of ideas. Teachers new to our profession can also benefit from access to the planning strategies or experienced colleagues and supervisors. School-based management/shared decision-making (SBM/SDM) schools should consider utilizing varied and unique approaches to lesson planning to maximize the student outcomes described in their SBM/SDM plans.

This emphasis on peer interaction and diversified instructional strategies is part of a larger commitment my administration has made to increased student achievement and professional evaluation and development. As the 1990-91 Agreement with the UFT states:

The UFT and Board of Education are committed to attracting and retaining the most competent staff and will strive towards the creation of an evaluation and professional development plan that gives each staff member choices and a role in his/her own professional growth. This program should enable staff to assist in the professional development of less experienced colleagues.

To this end, the UFT and the Board of Education will establish a joint committee which will undertake a one-year study to seek out and put into place a high quality prescriptive evaluation of professional growth system.

We will seek to enhance and develop skills and knowledge as well as provide a means of identifying those whose teaching competence is in question.

The expanded opportunities for teachers to develop individual planning procedures of high quality in a collegial atmosphere, as well as the establishment of the joint committee to focus on evaluation and professional development hold great promise. It is crucial that the accumulated talent, experience and dedication found in our public schools be marshaled for the success of all our students.

BACKGROUND

In 1990, the parties negotiated the provision in their contract, cited above, entitled, "Lesson Plan Format."

Prior to this time, the parties' Agreement did not address the subject. Historically, supervisors collected lesson plans on a weekly basis and the principal or assistant principal of the school mandated the specific elements of the plan and even the type of paper they could be written on.

The Lesson Plan Format provision constituted a major change for the parties. As a result, then Chancellor, Joseph Fernandez, issued Special Circular 28. Although issued by the Chancellor, the DOE and UFT drafted the circular together. The circular provides greater detail regarding lesson planning, and expressly prohibits the "mechanical, ritualized collection of lesson plans."

[Joint Exhibit 6]

In June 2000, Chancellor Harold O. Levy issued a memorandum eliminating numerous regulations and Chancellor's Circulars. However, Special Circular 28 was one of the circulars that were left in full force and effect. It remains incorporated into the parties' Agreement pursuant to Article 20 (Matters not Covered).

Article 8E and Special Circular 28 have been the subject of grievances and arbitrations since being negotiated in 1990. However, for the most part, those grievances have dealt mainly with issues of format of lesson plans or the collection of plans for an individual teacher or a group of teachers at a particular school.

According to the Union, a broader conflict arose as a result of the Quality Review Process. Quality Review is a two to three day evaluation of a school by an external reviewer who "visits classrooms, talks with school leaders

and uses a rubric to evaluate how well the school is organized to support student achievement.” [DOE Website Union Exhibit 23]. The Union contends that the Quality Review plays an essential role in the evaluation of principals and, as a result, principals began mandating requirements for lesson plans.

The Union filed a grievance on December 21, 2012 alleging, “The Board of Education has dictated the manner in which teachers are to write lesson plans in violation of Articles 8E and 20 of the collective Bargaining Agreement.” [Joint Exhibit 2]. A conference was held on January 8, 2013. The Union filed a Demand for Arbitration on April 10, 2013 and the undersigned was assigned to hear the case.¹

Summary of the Union’s Evidence

The Union presented numerous witnesses in both its direct and rebuttal case. Their testimony covered three main areas: 1) the parties bargaining and grievance history; 2) the role of lesson plans; and 3) the types of lesson plan requirements being promulgated by principals which the Union contends violate the parties’ Agreement. First, American Federation of Teachers President, Randi Weingarten and former Vice President of Educational Issues

¹The Chancellor’s Decision was not issued until May 7, 2013, the date of the first hearing in this matter.

for the UFT, David Sherman testified about the 1990-91 round of negotiations and the events leading to the issuance of Special Circular 28.

AFT President Randi Weingarten testified regarding the negotiation of the 1990-1991 Agreement and some of the history following it. She testified that she held the position of legal counsel to UFT President Sandra Feldman at the time and played a lead role in the negotiations. She noted that this negotiation was the first with Chancellor Joseph Fernandez who had recently been recruited from the Miami-Dade school system.

According to Weingarten, the parties had a strong desire to reform the system and provide more autonomy at the school level for both teachers and principals. She characterized it as a "new day" and stated that the structure of the bargaining over non-economic issues was interest based. She noted that the parties met together to discuss how to solve specific problems and the issue of lesson planning was among them.

It was against this backdrop that Weingarten described the bargaining that took place regarding Article 8E. She testified that both parties understood that planning was a critical function of teaching, but lesson plans were not helpful when they became formulaic. She testified that the

UFT's proposal on lesson plans stemmed from the idea that teachers must have the authority to do them in the way they thought best. To that end, it proposed:

LESSON PLAN FORMAT

The development of lesson plans by and for the use of the teacher is a professional responsibility vital to effective teaching. The organization, format, notation and other physical aspects of the lesson plan are appropriately within the discretion of each teacher. A principal or supervisor may suggest, but not require, a particular format or organization.
[Union Exhibit 6a]

Weingarten testified that the parties also examined what had happened in Miami-Dade, because Chancellor Fernandez had been successful there. The DOE proposed language from the Miami-Dade Agreement, which read:

Lesson planning is an essential part of the teaching process and a proper subject for evaluation. The principal or supervising administrator has the authority to determine whether or not instructional objectives and related content are consistent with Board educational policy decisions and established instructional guidelines. The format or organization of lesson plans is best determined by the individual teacher. Principals or supervising administrators may suggest, but not require, a particular format or organization. Only where a principal has documented deficiencies through classroom observation using the Teacher Assessment and Development System (TADS) may a teacher be required to use a set form in preparation of lesson plans.

Lesson plans shall reflect objective(s), a way of monitoring student progress, and homework assignments. It is agreed that the manner in which these components are to be reflected in a lesson plan shall be left to the discretion of the individual teacher except as

noted above. Teachers shall not be prohibited from reflecting required lesson plan components through utilizing abbreviated notation and/or referencing techniques. For example: "RSVP V-10", as a notation, would reference a "lesson card" which would provide all necessary information required for appropriately teaching a vocabulary lesson. Similarly, a subject area reference and a DCPS objective number would adequately indicate the objective of a lesson in social studies, science, or other subject area. The objective need not be written out in its entirety.

Teachers are required to develop weekly plans but not yearly or nine-week plans except on a voluntary basis. It is agreed that lesson plans are for the use of the teacher and any procedure for assessing lesson plans shall be consistent with agreed-upon observation/evaluation procedures and shall not require the teacher to spend time making an extra copy(ies) of a lesson plan.

Teachers of exceptional students shall be permitted to meet the requirements of this Article through regular lesson plans or written IEP implementation plan(s).

For purposes of this Article, "classroom teachers" shall exclude support personnel such as counselors, media specialists, school psychologists, and visiting teachers.

[Union Exhibit 6b]

Weingarten testified that the Miami-Dade language provided teachers with less discretion over their lesson plans. She noted the UFT believed the language gave too much control to superintendents. It also disagreed with tying lesson plans to the evaluation process in the manner the Miami-Dade provision did. She noted that the parties settled on language almost identical to the UFT's proposal, except for

including language that limits discretion for U rated teachers.

Weingarten testified that following the negotiation of the new contract, many questions arose from teachers and principals regarding what the new provision meant. She noted that Special Circular 28 was drafted to explain the new provision and to avoid having multiple interpretations. She noted that many of the questions that arose centered on what was format versus content of a lesson plan.

Weingarten noted that over the years, there had been some issues that arose as a result of new educational standards being discussed and/or implemented as a result of initiatives like Goals 2000. She stated that certain reforms had taken a more compliance driven/top down approach to management. According to Weingarten, the Union continually raised Special Circular 28 as an issue when it believed these programs conflicted with the contract.

David Sherman, former Vice President for Educational Issues of the UFT testified more specifically about the drafting of Special Circular 28. He testified that he was thoroughly involved in both the negotiation of Article 8E and was one of the main drafters of the circular.

Sherman testified that prior to Fernandez arriving in New York, a transition committee was established by the

Chancellor in order to learn more about the system and identify areas that needed to be addressed. During this time, he traveled to Miami with then UFT President Feldman to discuss various issues of importance with the new head of schools. He noted that the Chancellor and the Union had a strong desire to change the culture of the school system. The most important component of this change was the School Based Management/Shared Decision Making philosophy that became the major part of Article Eight (Education Reform) of the Agreement. He noted that these provisions were designed to change the top down structure of the school system and provide greater responsibility to practitioners in the classroom.

With respect to lesson plans, the transition committee discussed the need to let New York City teachers know they were trusted and respected like other professionals. Sherman testified that Fernandez communicated to him that he saw lesson plans as a bridge between him and the teaching force. Fernandez spoke about his 20 years of teaching experience and how dispiriting it was to have his plans collected weekly and how, after so much time, he could literally do them on a napkin.

Sherman testified that after the contract was negotiated, there was a backlash from principals regarding

the lesson plan provision. Fernandez, he said, wanted to demonstrate the change was coming directly from the Chancellor and the parties began drafting a circular for the purpose of amplifying the contract language and spelling out the parameters of change. Sherman testified that he worked directly with his DOE counterpart, Lynn Savage in drafting the circular.

According to Sherman, the parties wanted to address planning as a process. He testified that the circular did not discuss particular strategies or methodology because that was to be left in the hands of the teacher.

Catalina Fortino, the current UFT Vice President of Educational issues testified about planning and the role of lesson plans as well as the issues that she became aware of which the Union believes violate the contract. Fortino is employed by both the Department and the UFT. As a DOE employee, she is the Director of the Teacher Center, which provides professional development to teachers in order to support state and city educational initiatives. The Teacher Center runs approximately 135 locations throughout the City. According to Fortino, she works with Networks and Coaches to provide conferences and coaching for high needs schools.

Fortino testified that she has provided professional development classes on planning. She testified that at the heart of planning is what she termed, the "professional conversation." This involves engaging the teacher to discuss his or her students and the strategies that need to be employed to effectively teach. She testified that she does not use a template in her training because planning means thinking about instruction, not scripting it. She testified that in order to properly assess planning, a supervisor or coach must observe the classroom. She noted that this philosophy is addressed in Special Circular 28.

As the UFT Vice President on Educational Issues, Fortino testified that she frequently meets with UFT Delegates to discuss issues of concern regarding instruction and the contract. She testified that during the 2012-2013 school year, the major issues raised by the Delegates dealt with the common core, curriculum writing and lesson plans under the Danielson rubric.²

According to Fortino, she received emails and phone calls from Chapter Leaders advising her that principals were mandating format and collecting lesson plans in 2012. Fortino obtained documents from: 1) PS 40, which she

² Fortino explained that Charlotte Danielson is an educational researcher whose work is central to the new evaluation process. She noted that Danielson has presented at numerous UFT sponsored conferences.

testified showed the principal was requiring a format and collection during the school's Quality Review [Union Exhibits 32, 33 and 34]; 2) MS 8 requiring 13 questions in each lesson plan [Union 32]; 3) the inclusion of pivotal questions and an Aim rather than the use of the term essential question or objective at IS 51 [Union Exhibit 35]; 4) requiring teachers to input lesson plans into a database called "ATLAS" in which the components are big ideas, essential questions, common core standards; 5) listing of items to be included in all lesson plans at New York City Museum School [Union Exhibit 37]; 6) required elements for lesson plans at PS 131 [Union Exhibit 38]; 7) curriculum map template at Bushwick High School [Union Exhibit 39]; 8) a memo to teacher at PS 132 requiring submission of weekly lesson plans and an attached template following an unsatisfactory lesson plan review [Union Exhibit 40]; 9) Lesson plan form for JSS 194 in District 25 [Union 41]; 10) lesson plan requirements for HS of Arts and Imagination [Union 43]; 11) and 7 mandated requirements for lesson plans at PS 135 [Union 44].

UFT Secretary Michael Mendel testified regarding the change in lesson planning requirements that he experienced as a teacher. Prior to the 1990-91 contract, he testified was required to write lesson plans daily and hand them in

to the principal weekly for review. He noted he was required to have specific components or titles in his plans. Following the negotiations for the 1990-91 contract, he testified, these requirements changed. He testified that his plans were no longer collected. He noted that if a supervisor came to the room, he or she could ask for the plan. He testified that the elements of the plan were left to him and considered the content of a lesson plan to be derived from the curriculum.

Chapter Leader Bertha Bell Lee testified about the changes in lesson plan format that led her to file a grievance on behalf of 42 teachers at her school PS 306, which is still pending.³ She testified that on October 16, 2012, Principal Burroughs distributed a letter to the teachers providing them with a lesson plan format with 11 different components. The principal advised teachers that if they chose not to use the template they still had to include a list of 11 components in their lesson plans. [Union Exhibit 10]. Bell Lee testified that she met with Principal Burroughs to discuss the matter. She stated that when she advised the principal that she could not dictate

³ The information she provided was solely to provide examples of the types of mandates principals are requiring.

format, Burroughs told her she wanted lesson plans to be "how she wanted them".

In addition, Bell Lee testified she also received complaints from the Middle School teachers regarding lesson plans. They advised her that the Assistant Principal required teachers to email her their lesson plans on a weekly basis to her for review and that these plans were returned with edits that needed to be made.

District 7 Representative Patricia Filomena testified about the requirements for lesson plans at Exploration High School in the Bronx she believes constitute improper requirements of format and collection. She stated that a lesson plan template was posted around the school, which teachers must follow. In addition, she testified, the principal issued a memo requiring that lesson plans be sent to the special education teacher and Assistant Principal of the school.

UFT Delegate Marina Trotman, a teacher at PS 233, testified regarding changes to Lesson Plan requirements that occurred after the school's Quality Review in April 2013. She said that during the Quality Review, lesson plans were improperly collected. She testified that the school received a Quality Review score of "Developing", which the Reviewer advised was due to the school's lesson

plans not being cohesive. Trotman testified that on May 10, 2013, the school held professional development training on lesson plans. The Agenda for the conference provided, "Introduction of the Use of Competency ie to Evaluate Personal Lesson Plans of Teachers at MS 233." [Union Exhibit 18] She testified that the Danielson Framework for teaching was also distributed during the training.

Chapter Leader Gail Ericson, who teaches at PS 233, also testified. She testified that Superintendent Wilkins, who performed the review, advised her that the school's rating was mainly due to its lesson plans.

She corroborated Assistant Chapter Leader Trotman's testimony that the school held a professional development conference regarding lesson planning following the Quality Review. She testified that she came to it late, but teachers advised they were concerned that they would be required to follow certain format and guidelines in their lesson plans. Ericson testified that she discussed the issue with the principal and told her that the contract prohibits evaluation on lesson plans. The principal advised her that she had concerns regarding lesson plans, which required changes.

She testified that teachers at the school informed her that after the Quality Review, they were now required to

have three essential questions in their lesson plan and a component termed "flow".

Special Representative Eileen Fields testified regarding changes she believes are being required as a result of the new evaluation process. She testified her colleague advised her that she was given a lesson plan template that was going to be required for the school when the Danielson framework got adopted in the Fall.

Chapter Leader Kerry Eck, a classroom teacher at Explorations Academy, testified regarding lesson plan requirements that were instituted in her school in April 2013 prior to the school's Quality Review in May. She testified she received a poster (Union Exhibit 25) with color-coded boxes containing specific elements that were required to be in her lesson plans. She testified that she was also required to hang the poster in her classroom. Eck stated that a faculty conference was held about one week prior to the Quality Review. During the conference, teachers were advised the lesson plan template was a requirement. Eck believed about five teachers in her school received some form of discipline regarding poor planning as a result of these changes.

Robert Riccobone, former Deputy Staff Developer, testified regarding his experience in handling grievances

on behalf of the Department after the lesson plan language became part of the contract. He testified that he received training regarding the circular, but did not remember it specifically. He noted that the circular allowed the teacher to develop the lesson plan in their own way to support their own work. He maintained that assessment of planning was to be based on the delivery of a lesson and not from the plan itself.

Riccobone testified that one grievance he recalled involved a principal placing a letter in file of a teacher who completed his lesson plan on the back of a matchbook. The grievance was resolved in favor of the teacher, even though, he noted, the teacher engaged in a "ridiculous act" because ultimately the form of the lesson plan was up to the teacher.

Robert Reich, former Deputy Director of Labor Relations testified on the Union's rebuttal case. He testified that he was part of the bargaining team for the 1990-91 negotiations and following negotiations, provided training on the circular. He testified that prior to the circular, the Department could mandate all aspects of lesson plans. He noted that after, the Department could not mandate anything if the teacher was not in danger of a U rating.

Summary of the Department's Evidence

The Department presented a number of witnesses who testified with respect to not only lesson planning requirements within the schools, but also the role of the its Labor Relations office with respect to the implementation of the lesson plan language and handling of disputes under the grievance process. Specifically, Director of Labor Relations David Brodsky testified about the training that the Office of Labor Relations provided to supervisors. He testified that his office explained to supervisors that they could not dictate the structuring or ordering of a lesson plan unless a teacher has a "U" rating or is in danger of receiving one. He testified that supervisors were advised that the substantive elements of a plan could be required. In that regard, the Office of Labor Relations published a document entitled "Frequently Asked Questions" regarding the labor contract that is intended as legal guidance for supervisors, he testified. He noted that the document contains several FAQs on lesson plans.

With respect to the resolution of grievances under Article 8E and Special Circular 28, Director of Labor Relations David Brodsky acknowledged he had not been part of the negotiating process for the 1990-91 contract.

However, he testified he provided training for principals and supervisors regarding lesson plans. He testified that since 2003, the Department has tracked Step II grievances in a database system. He presented a compilation of Step II grievances that were filed by the Union regarding lesson plans. He testified that he believed none of the grievances had been appealed to arbitration by the Union.

Brodsky testified that within the past year, it became apparent that there was a dispute between the Union and the Department between what is content and format in a lesson plan. He testified that the dispute was born out of a larger issue regarding the evaluation process and the adoption of the Danielson rubric as part of the process.

As part of the Department's rebuttal case, Brodsky submitted historical documents from the Department's records regarding the implementation of the lesson plan format language. Specifically, he found notes from meetings the Chancellor had with Deputy Chancellor, Lyn Savage, and the Director of Labor Relations, Tom Ryan. These notes included a draft Q&A was sent to Chancellor Fernandez on March 15, 1991 from Executive Director of Labor Relations Tom Ryan that provided in relevant part:

The most controversial issue that has been brought to my attention is whether supervisors may still require a lesson plan to reflect such traditional elements as

an aim, motivation, materials to be used, pivotal questions and a homework assignment. I believe the UFT would perceive these requirements as a retreat from the contractual agreement and the philosophy of the Special Circular. On the other hand, superintendents and supervisors will contend that without these requirements in the lesson plans in some form, their ability to supervise and monitor the teaching being done in the schools will be seriously impaired.

[Department Exhibit B]

The draft Q&A was never distributed, but other records show there were meetings within the Department between the Chancellor and others regarding a grievance that raised this issue. Surveys were sent to other major school districts around the country, which asked them about whether they had specific requirements for lesson plans.

[Department Exhibit C]

Gary Laveman, who functions as a Chancellor's Representative, testified about both his experience in handling grievances regarding lesson plans and also as a teacher in writing them. Laveman testified that in his role as a Chancellor's Representative, he has ruled that principals can dictate what is put in the plan, but the manner in which the information is presented (format) cannot be. He described format as whether the plan was written on the computer, longhand, typed or on loose-leaf paper.

The Department also presented numerous instructional leaders who testified about their knowledge of current requirements for lesson plans from principals as well as their experiences as teachers and principals during their extensive careers with the Department.

Anita Skop, who is currently Community Superintendent of District 15, testified. With respect to her current role, she stated that she is a rating officer for principals and their rating is determined by whether they meet their objectives. She testified that she also conducts Quality Reviews of schools. She noted that she reviews planning by visiting classrooms, speaking with teachers and reviewing individual lesson plans.

Based upon her discussions with principals in her District, she believed they have specific requirements for lesson plans. She testified that in the schools she visited lesson plans consistently contained; 1) an, "aim"; 2) a "procedure"; and 3) "differentiation". She testified that as part of her job, she meets consistently with the leadership of the UFT and the issue of lesson plans has never arose.

Skop also testified regarding her experience as a teacher from 1986-1995. She noted that she was required to write lesson plans for every class and the plans were

collected regularly. Her plans included an "aim", "differentiation", and annotation to the curriculum. She testified that when she was formally observed, a special template was required and used in the pre-observation meeting. She testified that she was never advised that principals could not require certain elements to be in her lesson plans.

Skop testified that she did not believe there were any major changes to planning requirements when she became a staff developer. In that role, she worked with 6 or 7 schools and the issue of planning arose frequently because of its importance to good teaching. She stated that the requirements varied between schools and many of the elements were similar to those that were required when she was a teacher.

Skop testified that as a Regional Instructional Specialist in 2003 for Districts 19, 23 and 27, she conducted professional development workshops with literacy coaches. This included developing lesson plan templates that were shared with the District's principals. She testified that the templates were created to assist the schools in their transition to the Balanced Literacy program. The template contained: 1) a "focus"; 2) a "read aloud"; 3) "shared reading"; 4) a "guided practice"; and 4)

a "writing activity". She testified that no objections were raised regarding this template.

Robert McCubbin testified regarding his experiences as a teacher from 2006 to 2012. He testified that he was required to write a lesson plan for every class. He described lesson plans as requiring three main things: an objective or a goal, a standard and an activity. He noted that he learned what needed to be included in lesson plans from his graduate teacher training at NYU. His experience in the classroom, he said, confirmed his belief. He testified that these things could be memorialized in a plan differently. According to McCubbin, in 2009, Principal Emily Gad instituted new requirements which including a learning target. He believed he could be disciplined if her failed to include the required elements of a plan.

Diane Foley has been employed by the Department for approximately 30 years. As a teacher from 1984 to 1991, she testified that there were specific requirements for lesson plans. She stated that the plan had to include and she testified that the requirement that they be collected ended in 1991. She testified that the plan had to include an "aim" and a "do now".

According to Foley, when she became an Assistant Principal in 1991, the same requirements were applied. She believed these district wide policies.

Foley testified that when she became the Director of Educational Initiatives from 1998-2003, she was involved in the roll out of the Balanced Literacy program. She recalled that the model required changing elements in the lesson plan to support the program. She testified that the changes were only semantic.

Foley testified that when she became a Local Instructional Superintendent (LIS) she was responsible for approximately 15 schools. She testified that based upon her interactions with principals in her district, she believed that they had specific requirements for lesson plans. She testified that in this role she met with UFT representatives. She testified that the issues of excessive paperwork and ritualized collection of plans arose on occasion. She testified that the UFT never asserted principals could not mandate the components of a lesson plan.

Denean Spellman, Principal of PS 233 testified about the lesson plan requirements in her school. She testified that after becoming principal she began to assess her teachers and issued requirements for lesson plans. She

stated that lesson plans had to include a "teaching point", "guided practice", "motivation", and "homework". She testified that these requirements were stated in the faculty handbook. [Department Exhibit 1 and 4]

She testified that in 2012, her school received a rating of "Developing" in its Quality Review. According to Spellman, the rater advised that the rating was related to what she found to be a lack of initiative and consistency in teaching, which was reflected in their lesson plans. Specifically, it was noted that many lesson plans lacked questions. She testified that she added the requirement to have essential questions as a result. [Department Exhibit 4]. She acknowledged on cross examination that in addition to the lesson plan issue, her school also had a low proficiency in reading and other key areas that also impacted the Quality Review rating.

Aimee Horowitz testified regarding her experience with lesson plans as a Department employee since 1995. As a teacher, she testified that she always had to include an "aim", "motivation", "pivotal questions", "summary", "materials" and "process" in her lesson plans. She received TIPS on how to develop a good lesson plan. [Department Exhibit 5] She testified that she believed she would be subject to discipline if she refused to include

these elements in her plans. She testified that during her time as a teacher, she never heard from the UFT Chapter Leaders that this was an issue of concern.

Horowitz testified that she also served as an Assistant Principal. She testified that she was responsible for approximately 30 members of staff. She noted that lesson plan requirements were the same as when she was a teacher. She testified that planning was always a major topic of discussion. In order to guide instruction, she distributed a memo on the characteristics of a good lesson [Department Exhibit 6]. She testified that the UFT never raised any issues with her regarding lesson plans during that time.

As Principal of the College of Staten Island High School, she testified that she directly communicated her requirements for lesson plans to her teachers. She noted that the requirements were derived after collaboration with her staff. She testified that she never had to discipline anyone for failing to meet her lesson plan requirements. She stated that she worked closely with her UFT Chapter Leader during this period and lesson plans were never an issue of concern.

Horowitz testified that she became Superintendent of 58 high schools in 2010. In that role she served as the

rating officer of the principals of these schools. This required her to meet frequently with principals and learned from her interactions with them that most require specific elements in lesson plans.

In addition, she also performed quality reviews of many schools. She testified that as part of the process, she meets with Chapter Leaders from the UFT and the issue of lesson plans never arose.

According to Horowitz, a lesson plan is a road map for instruction that lets you know if a plan was put in place and whether it was altered during the lesson. She believes it allows the supervisor to determine if the teacher is thinking logically and whether they met the objective of the lesson.

Susanna Hernandez testified that she is the Principal of Aspirations High School. She testified that she has specific requirements for lesson plans in her school which include: 1) a learning target; 2) criteria for success; 3) activity; 4) guided questions; and 5) a final share. She testified that these requirements are spelled out in the school's faculty handbook. According to Hernandez, she has never had to discipline anyone regarding their failure to include the required elements in a plan.

She testified that the lesson plan chart introduced into evidence as Union Exhibit 25 was created in January 2013 with the participation of the teachers in her school. She testified that the school needed to increase its vigor and the lesson-planning chart was part of this process. She testified that as long as the elements of the chart were included in a lesson plan, it was not necessary to include the boxes in the plan.

Hernandez disputed that she is collecting plans as alleged by Chapter Leader Eck. Rather, she testified, the requirement to forward lesson plans to the special education teacher came about as a means to promote communication. She discovered that teachers were pushing in to classes without sufficient understanding of what was going on in the classroom.

Laura Feijoo has worked for the Department for 21 years in various capacities, including teacher, assistant principal, Network Leader, Superintendent, and Senior Superintendent. She testified that as a teacher from 1989 to 1997, she was required to write lesson plans with the following elements: 1) aim; 2) do now; 3) development of the lesson; and 4) homework. She noted that when she began all lesson plans had to look the same and that she believed

she could be disciplined if she did not meet these requirements.

When she became an assistant principal, she testified that there was no longer the need for all lesson plans to look alike; she stated that some had more detail than others. She continued to believe that failure to abide by the required elements would result in discipline.

Feijoo testified that when she became a principal she had requirements for lesson plans. She noted that the school was moving to the "Workshop Model" and the lesson plan requirements included 1) a goal; 2) mini lesson; 3) multiple group activities; 4) group share; and 5) follow up activities. She testified that this required clear guidance about how to best implement the change. As a result, she developed group best practices in which teachers collaborated to find the best planning methods. She testified that she never had to discipline any teacher for failure to follow the lesson plan guidelines.

Feijoo testified further that as a community superintendent and Network Leader she had opportunity to engage in discussions about instruction and lesson plans. She testified that within the District she served, principals required different things with respect to lesson

plans. She never heard any complaints or issues raised by the UFT regarding lesson planning.

Finally, Josh Thomases, who is currently Deputy Chief Academic Officer for Instruction testified. His testimony centered on his experience as a founding teacher at El Puente. He noted that in 1996, when he began teaching, the school did not have any lesson plan requirements. He testified that after the first year of instruction, the school began to review its own performance and decided to establish common practices for lesson planning. This included having; 1) a goal; 2) how you will meet that goal; and 3) how you will determine whether the goal was met. He testified that he believed teachers could be disciplined for failing to meet these requirements. He testified that he recalled one teacher being disciplined. However, he acknowledged that the teacher had larger performance and planning issues.

He testified that lesson plans are used by supervisors to understand continuity and context in the classroom. He testified that plans show whether the teacher is thinking and planning for classes in a connected and coherent manner. During his time at El Puente, Thomases testified that he was never aware that any of the Chapter Leaders had concerns about the lesson plan requirements of the school.

POSITIONS OF THE PARTIES

The Position of the Union

As a threshold matter, the Union disputes the Department's contention that the collection issue is not arbitrable. It argues it has fully complied with its contractual obligation contained in Article 22C paragraph 3 which provides:

The proceeding proceeding shall be initiated by the Union filing with the Board a notice of arbitration . . . [t]he notice shall include a brief statement setting forth precisely the issue to be decided by the arbitration and the specific provision of the Agreement involved.

The Union maintains that it has set forth the issue in its statement and has cited the specific articles, which it maintains, were violated.

The Union contends that the Department's reliance on the Greco Award is misplaced. It notes that in that case the Union had argued at the lower steps of the grievance violations of two distinct contractual provisions, but included only one provision in its demand for arbitration. In upholding the Department's contention that the Union failed to raise one of the issues to arbitration, the Arbitrator noted that the Union failed to cite the specific provision in involved. The Arbitrator held that the clear limitation in the Agreement provides both parties the

opportunity to know what issue and agreement provision the parties are bringing to arbitration.

It notes that in the instant matter, the collection issue is fully encompassed by the specific contract provisions cited by the Union in its demand. To the extent that the issue may not be fully apparent from its statement of the issue, the Union maintains, it is clearly related and covered by the Agreement.

The Union maintains that the parties' prior decisions on arbitrability concern whether the each party is on notice or should be on notice of the claim in order to understand the size and scope of the dispute. It notes that it raised the issue of collection in the lower step of the grievance proceeding and a close reading of the Chancellors' Decision demonstrates this. Moreover, it notes that there is no prejudice to the Department in this case since it had every opportunity to defend against this claim.

As to the merits, the Union maintains the Department is reverting to its practices prior to the negotiation of Article 8E and issuance of Special Circular 28 by collecting, evaluating and dictating what must be included in lesson plans. The Union maintains Article 8E and Special Circular 28 clearly prohibit these practices.

According to the Union, the parties' Agreement provides teachers with sole discretion over what is included in a lesson plan and how the plan is to be used so long as that teacher is not U rated or under a formal warning.

The Union contends the clear meaning of the contract words "format" and "organization", as they relate to lesson plans, are terms of art whose meaning is understood by pedagogical professionals to mean the elements and structure of the lesson plan. It cites the testimony of Randi Weingarten, David Sherman, Michael Mendel, Catalina Fortino, Robert Riccobono, Robert Reich and the numerous other educators who testified to support its position.

That the contract language prohibits such mandates is demonstrated by the historical context in which it was negotiated, the Union maintains. It notes that Weingarten and Sherman both testified that the desire of the parties was to provide teachers with more professional responsibility. It notes that this grant of discretion is demonstrated by the differences between the language the parties ultimately adopted versus the Department's original proposal, which came directly from the Miami-Dade Agreement. It notes that the Miami-Dade language provided that the content of a lesson plan, referred to as "organization and format" were "best determined by the

individual teacher", but that the determination of the teacher as to organization and format in the Miami-Dade contract was not absolute. Paragraph 2 of that the Miami-Dade language provides that lesson plans must include certain elements, the Union points out.

The Union notes Article 8E provides New York City teachers far greater discretion. The provision begins by stating that lesson plans are "by and for the use" of the teacher. Moreover, it argues, the addition of the words "notation and other physical aspects of the lesson plan" in Article 8E demonstrate that the words format and organization do not relate to merely how a lesson plan looks.

It argues that in constructing this clause, the words notation and other physical aspects of the plan are coupled together, which show they are meant to deal with the physical elements of the plan. It contends this is supported by the fact that a supervisor may dictate format and organization for U rated teachers. It questions how format and organization could relate to a plan of improvement if they related only the layout of a lesson plan.

The Union maintains that any ambiguity regarding the meaning of Article 8E is resolved by Special Circular 28,

which provides that the "specifics of the plan" are left to the "professional judgment" of the teacher. It maintains that in construing contract language all words have meaning and if the purpose of the parties was to only grant discretion over the physical layout of the plan, the parties would not have needed to draft such an extensive document.

The Union maintains the Department's own documents show that the use of the term "format" includes the components of a lesson plan. It points to the lesson plan guide developed in District 21, [Union Exhibit 57], which on page 11 sets forth the "lesson plan format" and lists the components of the lesson plan. Likewise, it points to the manner in which the Department tracks its own cases as indicating the word format is used to refer to the components of a lesson plan. Specifically it notes that the 2006 grievance filed by Bertha Bell Lee dealt specifically with the right of the Department to dictate the components of a lesson plan and it is characterized in their records as a grievance about "format."

Most importantly, the Union notes Special Circular 28 provides unequivocally:

In line with our belief in the educational value of lesson plans as an instrument developed by teachers within the context of a school's educational

philosophy to help students learn, the specifics of each plan will be left to the professional judgment of the teacher. Lesson plans are for the personal use of the teacher.

[Joint Exhibit 6]

The Union maintains that the circular makes clear that in examining planning, the supervisor has many available options including spending time in classrooms, demonstrating teaching techniques, providing professional development opportunities and request and individual teacher to indicate his or her planning strategies. Thus, it argues, the circular clearly prohibits lesson plans being used for any other purpose than by the teacher.

The Union dismisses the notion that the Department has consistently interpreted the language to allow collection for quality review and to mandate components in a plan. It cites Department witness Josh Thomases, currently the Deputy Chief Instructional Officer, who testified that when he began, teaching in 1996, there were no requirements about what his lesson plan had to include. It notes that the requirements he testified that his school adopted stemmed from the school taking part in a special program - the NY Performance Standards Consortium. It argues that the teachers in that school had to approve of the collaborative program being adopted and the staff was part of the implementation of a standardized lesson plan.

Moreover, it argues that witnesses Robert Riccobone and Robert Reich, both of whom worked for the Department, testified that the Department understood that it could not dictate format of the plan, which includes the elements of a lesson plan. It maintains the Instructional Supervisors who testified on behalf of the Department failed to assert any contractual authority for their perceived right to dictate the format of lesson plans.

Turning to the issue of collection, the Union argues the Department is using the Quality Review process to "bootstrap" the issue. It maintains the Department cannot use the Quality Review process to mandate requirements that violate existing provisions of its contract. It cites prior arbitration awards for this authority. It maintains, the contract and circular make clear that lesson plans are "by and for the use of the teacher". Collecting plans for evaluation of lesson plans or of a school's progress, it maintains, falls outside the scope of the Agreement.

Finally, the Union maintains that any argument the Department makes that it has somehow waived its rights under the contract by not raising cases to arbitration must fail. It notes that the number of lesson plan grievances is "so small as to be insignificant, given that approximately 3000 Chancellor level grievances each year

and that only 175 arbitration dates are allotted per year. It notes that in fact, two of the cases cited in the Department's listing of grievances were in fact appealed to arbitration. Grievance Department Director Ellen Procida testified that both Christine Butler and Gail Epperson grievances were resolved in the Union's favor at the arbitration level. Moreover, the Bertha Bell Lee grievance filed in 2006 was resolved by specifically changing the order in the memo from "must" to "I recommend" and changing "mandate" to "suggestions". [Union Exhibit 46].

Moreover, it argues that arbitration precedents have long recognized that failure to file grievances related to clear contract language does not bar that party, after notice to the violator, from insisting on compliance with the plain language of the contract. It cites several past arbitrations for this proposition.

As a remedy, the Union seeks: 1) an order for the Department to cease and desist from dictating organization and format of lesson plans that "makes clear that requiring components violates the Agreement." [Union Closing p. 38]; 2) a directive ordering the Department to cease and desist the collection and evaluation of lesson plans; 3) a directive to the Department that the Contract and Special Circular mandate lesson plans are by and for the use of

only the teacher; and 4) that any and all discipline stemming from the Department dictating lesson plan format and/or organization, lesson plan collection and/or evaluation be rescinded.

The Position of the Department

The Department maintains that the Union failed to advance the ritualized collection issue to arbitration and is, therefore, precluded from seeking a finding or remedy on the issue. It argues the Union has the burden to advance any unresolved issues to arbitration, under Article 22C of the parties' agreement. It notes the Union's Demand for Arbitration provided in its statement of the nature of the grievance "in the matter of UI lesson plans .. contending the Department's requiring lesson plans to be prepared contrary to and inconsistent with the collectively bargained agreement in violation of Article(s) 8E and 20 of the Collective Bargaining Agreement." It argues that the issue of collection cannot be inferred from this statement.

Regardless of whether the Union raised the issue of collection at the Chancellor level, its failure to raise it in its Demand for Arbitration means it was not advanced. No explanation was provided for this failure and under the parties' precedential awards it should not be considered.

As to the merits of the collection issue, the Department argues that Special Circular 28 prohibits only the "mechanical" and "ritualized" collection of lesson plans. It maintains the types of collection cited by the Union (i.e. the Quality Review Process) do not violate the parties' Agreement. It notes Quality Reviews occur at most, once per year, and its purpose is the evaluation of the educational progress of a school. The collection of plans for such an event cannot be deemed "mechanical or ritualized" within the meaning of Special Circular 28, it maintains.

The Department argues that the numerous witnesses who testified made clear that the major impact of the circular was ending only the routine collection of lesson plans. Moreover, the Department argues that the Union has been aware that the Department has always taken the position that it may collect lesson plans from teachers who are either U rated or danger of receiving a U and they have never advanced this claim to arbitration.

Turning to the central issue in the case, the Department maintains the contract is clear and unambiguous. It argues that arbitrators have long held that where contract language is clear and unambiguous, the plain meaning of the terms must be honored. It notes the terms,

"format, organization and notation" have clear, universally accepted meanings and these definitions must be used to determine the parties' intent with respect to Article 8E.

Citing the dictionary, the Department argues, "organize" means "to arrange or assemble into an orderly structured, formal whole." Notation is defined as "a system of figure or symbols used in specialized fields to represent numbers, quantities, tones or values." "Format" it maintains, is defined as "a plan for the organization and arrangement of a specified production; the form or layout of a publication." Applying these definitions to Article 8E makes it clear, the Department avers, the contract can only be read as providing teachers discretion over how they may arrange their lesson plans into a whole (e.g., where the objectives go in relation to the homework), which figures or abbreviations they use to represent data therein (e.g., are their groups indicated by letter or number), and how what layout or medium they use (e.g., outline form, narrative, index cards, notebook). It maintains the contract does not permit teachers to determine the actual data or information contained in a plan, only how that data is conveyed.

To the extent that the language may be deemed ambiguous, the Department maintains that the Union cannot

change the parties' intended meaning of how these words were defined. It argues the contract language provides express limitations upon what is within a teacher's discretion. It argues this limitation is highlighted by the parties' negotiations. It cites the Department's original proposed language from the Miami-Dade Agreement to demonstrate that the Department always meant the term "format" refer to the layout of the four specific components that are required in lesson plans under that agreement: 1) objectives; 2) activities; 3) a way of monitoring student progress; and 4) homework. It argues there is no evidence that the Chancellor ever agreed to a definition of format that changed from this original understanding.

The Department maintains that the testimony of former Deputy Director of Labor Relations Robert Reich is unreliable to establish that the meaning of the language was that principals were barred from offering mandates regarding lesson plans. It cites the 1991 draft Q&A composed by Director of Labor Relations Tom Ryan to refute this point. It notes that the document states:

"Supervisors have the authority to determine whether instructional objectives and content are consistent with educational policy decisions and instructional guidelines. Supervisors may require lesson plans reflect objectives, activities, a way of monitoring

student progress, and homework assignments, although the manner in which these components are reflected in a lesson plan shall be left to the discretion of the individual teacher. The purpose of this professional initiative is to free teachers to bring new energy and creativity to lesson planning . . ."

The draft Q&A, therefore, shows the Department never believed teachers had the unfettered discretion as to what may be included in a lesson plan.

The Department further cites the Carla Delbaun Decision to also show that Reich's testimony was not reliable on this point. It notes the grievant in that case received a letter to file noting her plans were merely copies of the prior weeks plan. The Step II decision issued by Reich did not state that the removal of the letter to file was due to a violation of the circular. Rather, it maintains the decision required removal of the letter at the end of the school year only if the teacher received an "S" rating.

The Department maintains that the March 1991 memo from Director of Labor Relations Ryan to Chancellor Fernandez demonstrates that the parties had differing interpretations of Article 8E soon after the contract was negotiated.

Ryan's memo provided, in relevant part:

The UFT would "perceive these requirements as a retreat from the contractual agreement and the philosophy of the Special Circular" and was seeking to discuss this with the Chancellor.

The Department maintains that the UFT understands that principals' mandates on lesson plans constitute content and not format. It cites the UFT's Q&A section of its website, which provides:

"Can my supervisor ask to see my lesson plan?

Lesson plans are essential tools for all teachers, no matter how new or experienced. AS the educator responsible for providing classroom instruction to your students, you are responsible for developing lesson plans and you can determine their format, organization, notation and content.

It argues that the UFT has clearly stated that they understand content to mean curriculum and that they are not in control of content. Thus, their choice of including "content" in this Q&A confirmed that they did not believe the word format would sufficiently convey to new teachers the understanding that format included the components of a lesson plan.

The Department maintains that even if the undersigned deems the language to be ambiguous, the language has historically been interpreted to allow principals to require the information to be contained in a lesson plan. It argues the Union's witnesses Bertha Bell Lee, Gail Ericson and Marina Troutman all noted that throughout their years as teachers they have all been required to have

certain information in their lesson plans. It notes that Ericson testified that a "teaching point" was always required in her plans and it was not grieved because "that is what teachers do anyway."

The Department maintains that the credible record evidence demonstrates that principals have always mandated what information goes into a lesson plan. The Department argues that it presented eight witnesses with extensive careers as educators who testified that they had either been required by their principal to include specific information in their plans or as administrators required specific components in their lesson plans.

The Department maintains that the grievance must be denied because the UFT has been aware of the Department's interpretation of the contract language and has acquiesced to this interpretation for years. It notes that the Department has issued Q&A's regarding the contract that have included answers that advise principals that they "may require specific content of lesson plans if you believe that such content is necessary for effective planning."

[Department Exhibit 15, page 34] This guidance was re-issued in 2007 with the same language and no issues were raised by the Union, the Department argues. Moreover, the Department contends that the grievance and arbitration

records submitted into the record demonstrate that the Union was well aware that the Department did not consider format to include the elements of a lesson plan.

Finally, the Department argues that the Union's contentions violate the very notions of professionalism it argues teachers are required to achieve. It maintains that lesson plans provide the roadmap that educators rely on to deliver good lessons. They are used then to ensure a level of quality in the classroom. It maintains that evaluating planning must be based on more than one observation. Principals and supervisors, it maintains, have an obligation to ensure that students get the very best education possible and it is important to intervene before a U rating. The Department argues that while a lesson plan does not guarantee a good lesson, the requirement to include specific elements in a lesson plan ensures that teachers are at least thinking about a lesson in a way that maximizes the educational value of the lesson. It argues that the Chancellor Fernandez clearly sought to give teachers more creativity and flexibility in how they create plans, however, there is no evidence that he sought to eliminate lesson plans as a tool for the Administration. It argues that to sustain the Union's grievance would amount to allowing teachers to create no plans at all. It

asserts the Union has in fact defended that right in the Orlando Cole case, in which the teacher merely strung together a list of song titles. Such a decision the Department maintains would, in fact, diminish the professionalism of teachers.

Decision

A threshold issue in this case is whether one aspect of the grievance, lesson plan collection, is arbitrable. The Department maintains that to whatever extent the Union may have raised the issue at the Chancellor's level it is still responsible under the parties' Agreement to advance it to arbitration. It avers the Union's demand for arbitration does not sufficiently describe this aspect of the grievance and, therefore, the collection issue should not be considered.

While the Demand for Arbitration does not specifically mention collection, I find it has been sufficiently raised by the Union to be arbitrable. The parties have a substantial body of precedent on the issue of arbitrability. The overriding concern in those cases is ensuring that neither party is prejudiced by the failure to learn the size and scope of the claim, consider the issue and respond to it.

I find none of these concerns present in the instant matter. I credit UFT Representative Diane Mazzola who testified that she represented the Union at the Chancellor's level and that during the proceeding she raised the issue of collection and submitted documentation at the hearing related to it.⁴ While the Chancellor's Level decision does not address collection in its determination, collection is alluded to in the recitation of the Union's position. [Joint Exhibit 3]

Most importantly, the contract provisions cited by the Union fully encompass the collection issue, which the contract requires. Moreover, there is no prejudice to the Department because it was on notice of the Union's claim at the outset of the arbitration. This proceeding was held over the course of one year and included 15 days of hearing. During this time, the Department had the opportunity to and, in fact, presented extensive evidence to address the issue. Under these circumstances I find no basis to exclude this aspect of the grievance as not arbitrable.

Turning to the merits of the dispute, I first address the issue of whether the contract prohibits the Department

⁴ I note that the Step II decision was not issued until the arbitration began and, therefore, would not have placed the Union on notice that the Department had not considered that issue in its decision.

from mandating the elements of a lesson plan. After carefully considering the entire record before me, I find the Department violated Articles 8E and 20 of the Parties' Agreement when it allowed principals to dictate the specific elements and/or components of teachers' lesson plans. My reasons follow.

At the outset, it is important to distinguish lesson plans from actual classroom instruction. This grievance does not concern the Department's right to require specific aspects of instruction, such as the curriculum being taught; the classroom procedures required to be in place; or the methods of instruction that should be used, such as differentiation or even assigning students "do nows" during classroom time. Rather, it concerns a much more narrow issue; the extent to which the parties' collective bargaining agreement provides teachers with the discretion to develop their own lesson plans to further the instructional goals and priorities set by the Department.

I note that my role as arbitrator is a limited one. It requires me to interpret the parties' Agreement as written. Where the parties chosen words are clear and their intentions manifest from their agreement, I must then give full force and effect to the product of their negotiations without regard to anyone's judgment after the

fact, my own included, regarding the wisdom or effect of those contractual terms.

With these principals in mind, I turn to the parties' Agreement. Article 8E of the contract provides teachers with the discretion over the "format, organization, notation and other physical aspects of the lesson plan." Supervisors, under the provision, may "suggest, but not require, a particular format or organization, except as a part of a program to improve deficiencies of teachers who receive U ratings or formal warnings."

Special Circular 28 was issued by the Chancellor to implement the language contained in 8E and is made part of the parties' Agreement pursuant to Article 20. The circular specifically sets forth the parameters of the lesson plan policy contained in Article 8E. It states, in relevant part:

In line with our belief in the educational value of lesson plans as an instrument developed by a teacher within the context of a school's educational philosophy to help students learn, the specifics of each plan will be left to the professional judgment of the teacher." [Joint Exhibit 6]

The Department contends that, notwithstanding this grant of discretion to teachers, it has never bargained away its right to dictate the content of a lesson plan; which it defines as the elements or components of the

lesson plan⁵. As such, it maintains, principals have the right to mandate particular elements so long as they do not require them to be arranged or laid out in a particular manner. The Department contends this interpretation of the Agreement accords with the ordinary meaning of the word format.⁶

While the parties dispute how the term "format" should be defined, I find it unnecessary to delve into whether there is sufficient record evidence to determine the parties intended the language to have a specialized pedagogical meaning beyond the generally accepted understanding of the term, as the Union argues. Rather, the meanings attributed to the word "format" by both parties fall squarely within its generally accepted usage. The word "format" has multiple meanings. In addition to referring to "layout or medium", it can also be defined as the "choice of material". [See, Merriam-Webster's Collegiate Dictionary, 2003]. This definition encompasses the elements or components of a lesson plan. Thus, on its face, the provision could be deemed ambiguous.

In fact, both readings are plausible. The wording of the provision would appear to indicate the words in

⁵ The Union contends that the content of a plan refers to the curriculum.

⁶ It argues the Agreement should be interpreted using the normal and ordinary meaning of the language since there was no evidence presented that the parties negotiated these terms to have a specialized meaning.

question relate to the plan's appearance. Specifically, the phrase "other physical aspects of the plan" suggests the words preceding it also deal with appearance related items. However, when the term "format" is examined in the context of the entire Agreement (including Special Circular 28), it becomes clear the contract provides teachers with discretion over the specific elements of a lesson plan and how they may be organized within a plan.

In determining the parties' intentions with respect to contract language, arbitrators seek to examine the terms in the entirety of the Agreement and give effect to all words contained in the agreement and construe them in a manner that yields logical results. Using the Department's definition, "format" would either refer to the arrangement of the elements or to the layout or medium of the plan. Either definition is problematic because it would result in the term being synonymous with another term in the agreement. If format were defined as the arrangement of elements, then it would mean the same thing as "organization". Likewise, if the term referred to whether a plan was in "outline form, narrative, index cards, [or in a] notebook" as the Department argues, it would be synonymous with the phrase, "other physical aspects of the plan".

Moreover, the contract lists "organization and format" as the first two areas over which a teacher has discretion. Their importance is underscored by the fact that a supervisor may only mandate "organization and format" as part of a program to improve deficiencies of a U rated teacher. Whether the plan is written in a notebook, on index cards or in narrative versus outline form does not seem to bear any relationship to the improvement of planning and instruction.

The Department disputes this interpretation by arguing the party's negotiating history demonstrates that it never intended the word "format" to include the components of the lesson plan. Specifically, it argues that the Miami-Dade language it originally proposed provides teachers with discretion over format and organization but, nevertheless, provides that all lesson plans must reflect "objectives, a way of monitoring student progress and homework." [Union Exhibit 6b] Thus, it maintains the components of a lesson plan were clearly not part of the definition of the word format and it is not reasonable to believe the Chancellor would have agreed to a different meaning of such an important term.

This argument, however, is not persuasive. While the parties' negotiating history may assist in determining

intent, there is no need for such extrinsic evidence where the parties own Agreement demonstrates its intent. Ultimately, the parties did not adopt the Miami-Dade language. While both the Miami-Dade and the UFT-DOE provisions deal with lesson plan format, each has distinct differences that impact its interpretation. Most importantly the parties' agreement specifies that a lesson plan is "by and for the use of the teacher", whereas the Miami-Dade Agreement makes it an actual subject of evaluation (versus planning).

The significance of that difference is reflected in Special Circular 28. Because the parties' negotiated this document to implement Article 8E, it takes precedence over any extrinsic evidence of the parties' intentions. The circular, by virtue of Article 20, has been incorporated into the parties' Agreement since December 1990 and remains unaltered to this date.

To that end, it describes a lesson plan as an "instrument developed by teachers within the context of a school's educational philosophy to help students learn" and provides that the **"specifics of the plan will be left to the professional judgment of the teacher. Lesson plans are for the personal use of the teacher."** [Emphasis added] These words are critical in determining the scope of the

discretion afforded the teacher. The circular makes clear that lesson plans are instruments created by teachers to assist them in meeting the educational priorities set by the Department. Accepting that a lesson plan is the written document that denotes in some manner what a teacher will teach, how they intend to do that and how they will assess whether they have achieved success, the elements of the plan are the manner in which the teacher goes beyond the basic framework to give expression to the plan.

Of course, teachers are not afforded unfettered discretion in this area. The circular, in fact, specifically says that the lesson plan is to be developed within the "context of the educational philosophy of the school." Clearly the parties did not intend for teachers to create a plan in a vacuum; it should be reflective of the school's educational priorities and the ways in which it is organized to promote learning.

While the parties have hotly contested this issue, their history to date demonstrates that, to a large extent, there is not much new ground being covered. Although the Department contends the Union has acquiesced to the Department's position that principals may mandate the elements of lesson plans, the record evidence does not demonstrate this. Rather, it shows that there were a

number of Chancellor Level grievances that were not appealed to arbitration. However, the record evidence also shows that the Union has proceeded to arbitration or obtained settlements consistent with its position. For example, the Bertha Bell Lee grievance from 2006 shows that the case was settled in the Union's favor at the Chancellor's level. In that case, the Union grieved a memo from a principal, which it claimed required teachers to include specific elements of a lesson plan. Ultimately the settlement resulted in the memo being amended to change the word must to "I recommend" and "mandates" to "suggestions." [Union Exhibit 46]

Likewise, the credible record evidence does not show that the Department has always mandated lesson plans. While the Department's witnesses consistently testified that they believed principals had the authority to mandate the components of lesson plans and, in fact had done so, closer inspection of their testimony does not support this statement⁷.

For example, Superintendent Anita Skop testified that she believed the principals she oversaw mandated specific elements to be included in lesson plans. She stated that

⁷ This is not to suggest that any of the witnesses were fabricating any facts. Rather, it is the interpretation of these facts that is at issue.

her belief was based on discussions with principals and her examinations of lesson plans in the schools she visited. Her testimony did not include what the discussions were that led to her conclusion.

Her testimony that the plans within a school appeared uniform is not sufficient evidence to demonstrate that these terms were mandatory. Article 8E and Special Circular 28 encourage principals to provide guidance and suggestions to teacher in developing lesson plans. Moreover, the circular makes clear that a lesson plan is to be developed "within the context of a school's educational philosophy to help students learn." Therefore, one would expect teachers to develop their plans in accordance with supervisory expectations and the educational mandates of a school.⁸ Thus, to the extent a teacher is required to include differentiated instruction in a lesson or give students "do nows" during class, it is not surprising that a teacher's lesson plan might include such things explicitly.

The testimony of Aimee Horowitz and Laura Feijoo highlight the distinction between mandating and suggesting lesson plan components. Horowitz testified that as a

⁸ In fact, the UFT website contains advice to new teacher who have questions regarding lesson plans to discuss them with the supervisor for guidance on their expectations. [Department Exhibit 17a]

teacher, beginning in 1995, she was always required to include the following elements in her lesson plans: 1) aim; 2) materials; and 3) process. Examination of the document she provided outlining these requirements, however, does not show it to be a directive. Rather, the memo, entitled: Tips for Effective Teaching provides in relevant part:

8. Plan for Success! Careful lesson planning is truly key for effective teaching. A proper plan **should include:** (A) a clear, well-defined aim in the form of a question for student analysis and assessment; (B) a motivation to raise the student's interest in the topic; (C) procedures and activities for the development of the lesson; (D) source materials and thought-provoking questions to actively engage students in the learning process; (E) a summary activity or question to provide students with the opportunity to assess and take/defend a position on the issue presented by the aim; and (F) an application activity which will connect and/or relate the major concepts and ideas of the lesson with a current situation in the students' world today. [Emphasis added]
[Department Exhibit 5]

While the paragraph sets forth the elements of a proper plan, it does not use mandatory language with respect these elements. It provides guidance about how the administration believes proper planning should be performed, which accords with the parties' Agreement.

Moreover, the information Horowitz distributed to her teachers when she became Assistant Principal of the school did not contain any mandates with respect to the elements of a lesson plan. She distributed a memo to her staff

entitled "Characteristics of a Good Lesson - A checklist."

With respect to lesson plans specifically, it provides:

- Planning is a must. A **written lesson plan** of some concrete form is to be used. [Joint Exhibit 6]

The majority of the document spoke to the elements of an actual lesson rather than a lesson plan. However, its guidance on lesson plans clearly does not list any mandated elements. Instead, it requires only that an actual written plan be used.

It is significant that both Horowitz and Feijoo's testimony was similar in describing lesson plan requirements when they became principals. Horowitz testified as principal of the High School of Staten Island College she communicated with her teachers directly about lesson plan requirements. She noted the requirements were derived after collaboration with her staff. Likewise, Feijoo testified she also developed lesson plan guidelines in collaboration with her staff. She noted that she became principal when her school was moving to the "Workshop Model", which had particular requirements for planning. She testified that the teachers required specific guidance during the transition. As a result, she developed group best practices with her staff to find the best planning methods.

While I have no doubt that Horowitz and Feijoo believed these practices to be requirements, the manner in which they were accomplished falls squarely within the parameters of Special Circular 28. Special Circular 28 encourages the development of collaboration and sharing best practices with respect to planning. In fact, it provides that the desire to encourage these practices is the reason for the inclusion of Article 8E in the parties' Agreement.

Likewise, the testimony of Deneen Spellman also highlights the difference between the idea of mandating components versus suggesting and providing guidance on planning expectations. The record evidence shows Spellman did not issue what could be considered mandates with respect to lesson plans until 2012. She testified that when she became principal of PS 233 she issued a staff handbook that required the following elements to be included in a lesson plan: 1) guided practice; 2) motivation; and 3) homework. However, examination of the 2008-2009 handbook she cited provided, in relevant part:

Planning

Lesson plans are an integral part of student achievement. They allow teachers to provide focused differentiated instruction. The development of lesson plans by and for the use of the teacher is a professional responsibility vital to effective teaching. Lesson plans must be cumulative from the

beginning of the school year to the last day of school. Lesson plans must accompany each lesson taught. They must be present when teaching and available for review by administration.

While there are various lesson plan formats, every lesson should include the following:

- o Teaching point - Explains the skill or concept of the lesson.
- o Development - Activating prior knowledge; questioning; opportunities for student discussion; group work; medial and final summaries
- o Assessment - An evaluation of student mastery and the effectiveness of the lesson
- o Homework - An extension of the lesson for practice at home.

The components listed above do not refer to lesson plans; rather they refer to lessons.

However, in 2012, she issued a handbook that could be construed as a mandate. With respect to lesson plans it provides:

While lesson plan formats may vary, every lesson plan should include the following:

Teaching point . . .
Development . . .
Assessment . . .
Homework.

If you need clarity on the content of a lesson plan, please refer to the Danielson rubric, Domain 1 (competency 1e). Lesson plans will be evaluated using this rubric and will have a direct impact on your annual evaluation.
[Department Exhibit 4]

This language can be read as a directive because it advises that the actual lesson plan will be evaluated using a rubric.

Turning to the issue of collection, after carefully reviewing the entire record before me, I do not find sufficient record support to determine the Department is precluded from collecting lesson plans from teachers for any purpose. My reasons follow.

The Union argues that because Special Circular 28 specifically sets forth that "[l]esson plans are for the personal use of teachers", they may not be collected or evaluated. While the contract provide a number of limitations on the manner in which lesson plans may be used, it does not strictly prohibit collecting lesson plans from teachers. In fact, Special Circular 28 explicitly prohibits only the "mechanical, ritualistic collection of lesson plans". The parties have a decades long and sophisticated relationship with respect to collective bargaining. Had they meant to prohibit any type of collection of lesson plans, they would have said so explicitly.

As the parties noted, all teachers are required to have a written lesson plan for every class. Conceivably a spot check by a principal to ensure this could include a form of collection that serves a purpose of the parties' Agreement. While the Union contends the plan is not reviewable, I do not find the circular goes that far.

Rather, it notes that planning and proper instruction are its goals and to that end it denotes the types of supervisory practice that support that aim. For example, beginning a conversation with a teacher to assess their planning strategies. However, the plan itself can be a starting point for that conversation. The circular makes clear that the plan cannot be seen in isolation. Rather, it is part of the whole area of planning.

Likewise, the type of collection highlighted by the Union in this case, that of the Quality Review, does not automatically fall into the category of mechanical or ritualized collection. The Department's stated purpose with respect to the Quality Review Process is to evaluate how well the school is organized to support student achievement. [Union Exhibit 53] The review includes a two or three day visit by a reviewer in which they meet with staff and students. Included in this review is classroom visitation to understand planning. Reviewers are advised to examine or collect lesson plans of teachers whose classrooms they visited. This process was confirmed by Reviewers Skop and Horowitz who testified that they visited classrooms and reviewed the lesson plans of teachers they observed. If performed in accordance with its stated procedures, the Quality Review does not on its face violate

Special Circular 28. The circular specifically sets forth the terms for how planning may be evaluated, which includes observation and discussion about planning standards.⁹

The Department, however, cannot institute policies to serve as a smokescreen for the mechanical, ritualized collection of lesson plans or other type of impermissible activity under Article 8E or Special Circular 28. Such action would, of course, be reviewable under the parties' grievance and arbitration procedure.

⁹ This would not preclude a grievance regarding a particular Quality Review in which violated Article 8E or Special Circular 28 occurred.

Based on the above, I make the following

AWARD

1. The grievance, as it relates to the issue of collection is arbitrable.
2. The Department violated Articles 8E and 20 (Special Circular 28) by allowing principals to mandate the specific elements of lesson plans.
3. The Department shall cease and desist from allowing principals to issue such mandates for teachers who have not received U ratings or formal warnings.
4. The Department did not violate Article 8E and/or 20 of the parties' Agreement by allowing lesson plans to be collected for reasons other than formal or informal observations.
5. The undersigned shall retain jurisdiction for purposes of implementation of this Award for four months from the date of its execution.

Dated: May 16, 2014

Deborah M. Gaines

Deborah M. Gaines

Affirmation

State of New York }
County of New York } ss:

I, DEBORAH GAINES, do hereby affirm upon my oath as Arbitrator that I am the individual described in and who executed this instrument, which is my award.

Deborah M. Gaines

Date: May 16, 2014
