

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss

SUPERIOR COURT
CIVIL ACTION NO.

Boston Teachers Union,)
 Plaintiff)
 v.)
 Mayor Martin J. Walsh,)
 Superintendent Brenda Cassellius,)
 The School Committee of the)
 City of Boston,)
 Defendants)

**COMPLAINT AND MEMORANDUM OF LAW IN SUPPORT OF THE
REQUEST FOR TEMPORARY RESTRAINING ORDER**

The Plaintiff, Boston Teachers Union, Local 66, AFT, Massachusetts (“BTU”) submits this Memorandum of Law in support of its Request for a Temporary Restraining Order to prevent the Defendants Mayor Martin J. Walsh (“Mayor Walsh”) Superintendent Brenda Cassellius (“Cassellisu”) and the appointed School Committee of the City of Boston (“School Committee”) from refusing to allow any BTU member from electing to be fully remote now that the “citywide COVID-19 positivity rates” have risen above 4.0%. The express language of a duly negotiated September 9, 2020 Memorandum of Agreement (“MOA”) provides Teachers that very election and now, less than one month later, the School Committee has refused to adhere to those terms in violation of the MOA, the parties collective bargaining agreement and G.L. c. 150E.

JURISDICTION & VENUE

The Court has original and statutory jurisdiction over the subject matter of this action by virtue of G.L. c 212, §4, and G.L. c. 214, §1. The relief is authorized by G.L. c. 231A, §§1 et. Seq. and G.L. c. 214, §. Venue is appropriate in this Court, pursuant to G.L c. 223, §1, in that the BTU and mayor and School Committee are located in Suffolk County and that is their usual place of business.

FACTS

1. The BTU is an employee organization within the meaning G.L. c. 150E.
2. The School Committee is charged by law with the general oversight of the operations of the Boston Public Schools.
3. The School Committee has recognized the BTU as the exclusive bargaining unit representative for more than 10,000 teachers and other professionals including school nurses, psychologists, guidance counselors, paraprofessionals, and substitute teachers employed by Boston Public Schools and City on a Hill Charter Schools.¹
4. On March 13, 2020, the School Committee closed all in-person operations due to the COVID-19 Public Health Crisis. Shortly, thereafter on April 17, 2020, the parties reached an Agreement on the effect of the pandemic on the terms and conditions of employment resulting from the closure of schools for 2019-2020.
5. On August 14, 2020, the School Committee filed a Reopening Plan with Department of Elementary and Secondary Education (“DESE”) and, in due course, the BTU demanded

¹ The School Committee and the BTU are parties to a collective bargaining agreement in effect from September 1, 2018 to August 31, 2021.

that the School Committee bargain over the impacts of that decision on the terms and conditions of the employment for the bargaining unit.

6. After negotiations, on September 9, 2020, the parties entered into the aforementioned MOA which provided in relevant part:

If the citywide COVID-19 positivity rates rise above 4% citywide, BPS will transition to full remote learning for all students and BTU bargaining unit members will have the option to be remote as well. When the Boston Public Health Commission or other City or State authority determines that the school district can reopen, BTU bargaining unit members will be expected to return to BPS buildings.

Exhibit A.²

7. On October 1, 2020, the School Committee began a “phased-in hybrid learning model” that provided both in-person and remote services to students with special needs, who are English Language Learners; or who are homeless. This was the first time that BTU members had provided in-person services to students since March of 2020.
8. On Wednesday, October 7, 2020, Mayor Walsh announced that as the citywide COVID-19 positive rate was 4.1%, most students would go to remote learning but in-person classes for the 1,300 high-need students who returned to class last week would continue.
9. Contemporaneously, Cassellius sent the following letter:

All BPS Educators and Staff,

As part of our announcement this morning that we are delaying the next phase of the school reopening plan, we also shared that high priority students who already started in-person learning will continue reporting to school to access the teaching and support services they need to thrive academically and socially. Please be advised that schools will reopen for all high priority students tomorrow, Thursday, October 8, 2020. The relevant provision of the Memorandum of Agreement with the Boston Teachers Union states, in its entirety:

² The effect of September 9, 2020 MOA was confirmed by reference in a September 29, 2020 duly negotiated Memorandum of Agreement entitled BPS/BTU Hybrid Learning Agreement.

If the citywide COVID-19 positivity rate rises above 4% citywide, BPS will transition to full remote learning for all students and BTU bargaining unit members will have the option to be remote as well. **When the Boston Public Health Commission or other City or State authority determines that the school district can reopen, BTU bargaining unit members will be expected to return to BPS buildings.** [Emphasis added.]

Today, the Boston Public Health Commission determined that schools can reopen and continue offering in-person learning to the high priority students with their teachers and other staff on site. The Massachusetts COVID-19 Command Center and Department of Elementary and Secondary Education concur with the BPHC's determination that the school district can reopen for in-person learning for our highest need students. Public health officials will continue to monitor the data and our Boston-specific metrics to assess if additional restrictions are needed or if the spread is too great to continue in person education for the high priority students. It is important to remember that the 4% is a conservative approach, lower than that advised by state, federal and other agencies and was established in the context of bringing back all students in the hybrid model.

Accordingly, as our highest need students are reporting to schools for in-person learning on October 8th, educators and staff who provide education and services to such students will be expected to report to their school buildings on Thursday, October 8th.

Attached hereto as Exhibit B.

10. "[T]he citywide COVID-19 positivity rate" at this time remains "above 4% citywide..." as provided in the September 9, 2020 MOA.

ARGUMENT

The four factors a trial court must consider when evaluating this request are well-established: "(1) a likelihood of success on the merits; (2) that irreparable harm will result from denial of the injunction; and (3) that, in light of the [moving party's] likelihood of success on the merits, the risk of irreparable harm to the [moving party] outweighs the potential harm to the [nonmoving party] in granting the injunction." Garcia v. Dep't of Hous. & Cmty. Dev., 480 Mass. 736, 747 (2018) ("Where a party seeks to enjoin government action, the judge also must

“determine that the requested order promotes the public interest, or, alternatively, that the equitable relief will not adversely affect the public.” [citations omitted])

1. Likelihood of Success on Merits

The BTU is likely to succeed on the merits of any declaratory action, charge of prohibited practice pursuant to G.L. c. 150E, §10(a)1 & 5, and/or contractual arbitration because one month ago the Defendant engaged in mandatory bargaining with the BTU about the impact of the re-opening of Boston Public Schools on terms and conditions of employment the bargaining unit. See Lynn v. Labor Relations Comm'n, 43 Mass. App. Ct. 172, 179 (1997). Then when a condition that was specifically contemplated in that agreement, i.e. when “citywide COVID-19 positivity rates rose above 4%,” occurred, the Defendants immediately reneged on that MOA.

The relevant provision of the MOA is unambiguous. See Balles v. Babcock Power Inc., 476 Mass. 565, 571–72 (2017) (“When contract language is unambiguous, it must be construed according to its plain meaning.” [citation omitted])

If the citywide COVID-19 positivity rate rises above 4% citywide, BPS will transition to full remote learning for all students and BTU bargaining unit members will have the option to be remote as well. When the Boston Public Health Commission or other City or State authority determines that the school district can reopen, BTU bargaining unit members will be expected to return to BPS buildings.

The meaning of the first sentence does not seem in dispute. The City’s COVID-19 positivity rate rose above 4% citywide. Per the agreement, in response BPS was to go full remote and all BTU bargaining unit members were to be allowed to elect to do the same. This did not occur. Consequently, the Mayor and School Committee violated their agreement with the BTU.

The City attempts to justify this breach by asserting that this was permissible because the Boston Public Health Commission stated that BPS could “reopen.” This is too clever. On October 1, 2020, BPS opened to in-person student services. It did not close on October 7, 2020. It has **not**

closed at all since it opened on October 1, 2020. Thus, it cannot open again.³ Indeed, the Superintendent's letter concedes that this is a continuation of in-person learning, rather than a suspension and subsequent reinstatement of the program:

As part of our announcement this morning that we are delaying the next phase of the school reopening plan, we also shared that high priority students who already started in-person learning *will continue reporting to* school to access the teaching and support services they need to thrive academically and socially.

Exhibit B (emphasis supplied). Accordingly, the second sentence of the relevant provision of the MOA cannot be invoked to justify the refusal of the defendants to follow the plain language of the provision and permit BTU members to teach remotely.

The Mayor and the School Committee bargained with the BTU in bad faith by negotiating an MOA they immediately disregarded and by implementing a change in student services without negotiating with the employee organization. See School Committee of Newton v. Labor Relations Commission, 388 Mass. 557 (1983), see also Commonwealth of Massachusetts et al and Alliance AFSCME/SEIU, Local 509, 25 MLC 201, 205 (1999).

2. Irreparable Harm

The Mayor and the School Committee are risking the health and welfare of their most disadvantaged students and their staff by violating the MOA. “If the plaintiff suffers a substantial injury that is not accurately measurable or adequately compensable by money damages, irreparable harm is a natural sequel.” Ross-Simons 102 F.3d at 19, citing Multi-Channel TV Cable Co. v. Charlottesville Quality Cable Operating Co., 22 F.3d 546, 551 (4th Cir. 1994); K-Mart Corp. v. Oriental Plaza, Inc., 875 F.2d 907, 915 (1st Cir. 1989); Danielson v. Local 275, Laborers Int'l

³ The word “reopen” is a transitive verb that in this context means “to open again” or “to begin again.” <https://www.merriam-webster.com/dictionary/reopen>

Union, 479 F.2d 1033, 1037 (2d Cir. 1973). “The necessary concomitant of irreparable harm is the inadequacy of traditional legal remedies. The two are flip sides of the same coin: if money damages will fully alleviate harm, then the harm cannot be said to be irreparable,” and, of course, vice versa. K-Mart Corp., 875 F.2d at 914.

Death and disability are the most irreparable of harms. Teachers and School staff with underlying illnesses, including pre-existing heart damage, breathing disorders like asthma and chronic obstructive pulmonary disease (COPD), or other high-risk factors such as age or immune deficiency, are at substantial risk of severe disease and death from COVID-19. It is known that COVID-19 can cause severe organ damage most commonly in the heart, lungs, and brain.⁴ Brain inflammation caused by COVID-19 may also increase risk of developing dementia, Alzheimer’s disease, and Parkinson’s disease.⁵ While older BPS staff and middle-aged staff are more likely to have an underlying illness or condition that may worsen COVID-19 symptoms and outcomes, people of all ages and health statuses are at risk of lasting COVID-19 complications. Moreover, the Boston Public Schools students, whose interests should be paramount to both sides, are being exposed by the Mayor and School Committee to a level of risk that the parties found unacceptable only one week ago.

Risk of what? Damage to the heart muscle, known as myocarditis, and inflammation of the pericardium (the membrane that surrounds the heart), known as pericarditis, are associated with COVID-19. COVID-19 is caused by an acute respiratory virus and is associated with viral pneumonia which can damage the alveoli, or air sacs, of the lungs. Lung damage from COVID-19

⁴ Mayo Clinic. October 7, 2020. <https://www.mayoclinic.org/diseases-conditions/coronavirus/in-depth/coronavirus-long-term-effects/art-20490351>

⁵ Supra.

could lead to long-term breathing problems or “breathlessness.”⁶ COVID-19 is associated with Guillain-Barre syndrome⁷ and stroke, particularly among previously healthy young adults.⁸

Younger adults and those who experienced only mild COVID-19 symptoms may suffer heart damage from COVID-19. COVID-19-related heart damage may also cause the long-term symptoms some COVID-19 patients in recovery experience. These heart-related long-term symptoms include shortness of breath, chest pain, and heart palpitations.⁹ COVID-19 related heart damage may also increase risk of heart failure and future heart complications.¹⁰

3. Balance of Equities

The balance of equities favors the BTU. The question is, essentially, who will suffer more: “the hardship to the nonmovant if the restrainer issues as contrasted with the hardship to the movant if interim relief is withheld.” K-Mart Corp., 875 F.2d at 914–15, citing Aoude v. Mobil Oil Corp., 862 F.2d 890, 892 (1st Cir. 1988); Hypertherm, Inc. v. Precision Products, Inc., 832 F.2d 697, 699 & n. 2 (1st Cir. 1987); Planned Parenthood League of Massachusetts v. Bellotti, 641 F.2d 1006, 1009 (1st Cir. 1981). The BTU does not propose no in-person student services be provided. Rather, the BTU’s position is that additional in-person services must be done deliberately, in accordance with the law and with an eye to protecting high risk staff and students.

The Mayor and the School Committee previously agreed with the soundness of that proposal. Why else would it have agreed that when the citywide COVID-19 rate passed 4.0%, BPS would need to go full remote? The obvious implication is that after the City hit 4.0% it was

⁶ George PM, Barratt SL, Condliffe R, et al. Respiratory follow-up of patients with COVID-19 pneumonia. *Thorax* Published Online First: 24 August 2020. doi: 10.1136/thoraxjnl-2020-215314

⁷ *N Engl J Med* 2020; 382:2574-2576 DOI: 10.1056/NEJMc2009191

⁸ *N Engl J Med* 2020; 382:e60 DOI: 10.1056/NEJMc2009787

⁹ Centers for Disease Control and Prevention. September 16, 2020.

<https://www.cdc.gov/coronavirus/2019-ncov/long-term-effects.html>

¹⁰ *Supra*.

not safe to provide in-person services. Now, less than a month later, as the City is in the midst of a spike and with the weather getting colder, the Mayor and the School Committee's position on to COVID-19 has become more laissez-faire.¹¹ There has been no explanation as to why they have changed course.

4. Public Interest

All contracts should be honored and there is a strong public policy favoring collective bargaining between public employers and employees. Somerville v. Somerville Mun. Employees Ass'n, 451 Mass. 493, 496–97 (2008) (We have recognized a strong public policy favoring collective bargaining between public employers and employees over certain conditions and terms of employment). See, e.g., School Comm. of Pittsfield v. United Educators of Pittsfield, 438 Mass. 753, 761–762 (2003); Worcester v. Labor Relations Comm'n, 438 Mass. 177, 180–181 (2002). This policy is codified in the broad statutory language of G.L. c. 150E, § 6, providing that “[t]he employer and the exclusive representative...shall negotiate in good faith with respect to wages, hours, standards [of] productivity, and performance, and any other terms and conditions of employment” in keeping with the objective of creating a collective bargaining agreement. G .L.c. 150E § 7 (d) further provides that where there is a conflict between a statute and the parties' collective bargaining agreement, the collective bargaining agreement “shall prevail” if the statute

¹¹ “It is reasonable to assume SARS-CoV-2, the virus that causes COVID-19 will spread more efficiently in the winter season for two reasons: 1) most respiratory viruses follow seasonal patterns and peak in winter (December - March in the Boston area) due to the colder climate and drier air and 2) people spend more time in-doors in the winter due to cold weather, making outdoor socializing (a common socialization harm reduction measure for reducing COVID-19 spread) more difficult and in-person socialization more likely.”

URL=<https://www.frontiersin.org/article/10.3389/fpubh.2020.567184>

DOI=10.3389/fpubh.2020.567184

is one that is enumerated therein. See Chief Justice for Admin. & Mgt. of the Trial Court v. Office & Professional Employees Int'l Union, Local 6, 441 Mass. 620, 629 (2004).

The foregoing must be read with even greater urgency when an employer and labor organization collectively bargain in an effort to make sure that students and school staff can remain safe during a pandemic. The public interest is manifest. The Mayor and the School Committee's indeliberate action is not just illegal and disingenuous but dangerous.

CONCLUSION

For the foregoing reasons, the BTU's Request for a Temporary Restraining Order should be granted.

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Date: October 8, 2020

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Mayor Martin J. Walsh,)	
Superintendent Brenda Cassellius,)	
The School Committee of the)	
City of Boston,)	
Defendants)	

REQUEST FOR A TEMPORARY RESTRAINING ORDER AND
A SHORT ORDER OF NOTICE

The Plaintiff, Boston Teachers Union, Local 66, AFT, Massachusetts (“BTU”) hereby requests a short order of notice and declaratory and injunctive relief requiring the Defendants, Mayor Martin J. Walsh (“Mayor Walsh”), Superintendent Brenda Cassellius (“Cassellius”) and the School Committee of the City of Boston (“School Committee”) to comply with the express language of the duly negotiated September 9, 2020 Memorandum of Agreement (“MOA”) that provides:

If the citywide COVID-19 positivity rate rises above 4% citywide, BPS will transition to full remote learning for all students and BTU bargaining unit members will have the option to be remote as well.

The “citywide COVID-19 positivity rates” have risen above 4.0% but Mayor Walsh and the School Committee have refused to allow BTU bargaining unit members the option “to be remote as well.” This is a violation of the MOA, the parties collective bargaining agreement and G.L. c. 150E.

Consequently, the BTU requests that a Temporary Restraining Order be issued directing Mayor Walsh, Cassellius and the School Committee to comply with the terms of the MOA because: the BTU is likely to succeed on the merits; its member's will suffer irreparable harm if the relief is denied; granting the motion outweighs the potential harm to the Defendants; and it is in the public interest to take steps ensure the health and welfare of school staff and students. See Garcia v. Dep't of Hous. & Cmty. Dev., 480 Mass. 736, 747 (2018).

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