

COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF LABOR RELATIONS

In the Matter of
ANDOVER SCHOOL COMMITTEE
and
ANDOVER EDUCATION ASSOCIATION

Case No.: MUP-20-7795

Date issued: March 15, 2024

Hearing Officer:

Margaret M. Sullivan, Esq.

Appearances:

Robert Hillman, Esq. - Representing the Andover School
Elizabeth Paris, Esq. - Committee

Mark Hickernell, Esq.- Representing the Andover Education
Association

HEARING OFFICER'S DECISION

SUMMARY

1 The issue in this case is whether the Andover School Committee (School
2 Committee, District, or Employer) violated Section 10(a)(5) and, derivatively Section
3 10(a)(1) of Massachusetts General Laws, Chapter 150E (Law) by removing allotted time
4 from special education (SPED) teachers' schedules to perform case management duties
5 without providing the Andover Education Association (Union) with prior notice and an
6 opportunity to bargain to resolution or impasse over the decision to remove case
7 management time and the impacts of the decision on bargaining unit members' terms
8 and conditions of employment. For the reasons described below, I find that the School
9 Committee violated the Law as alleged.

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Statement of the Case

On January 15, 2020, the Union filed a charge of prohibited practice with the Department of Labor Relations (DLR) alleging that the School Committee violated Section 10(a)(5) and derivatively Section 10(a)(1) of the Law. A DLR investigator investigated the charge on June 4, 2021. On July 15, 2021, the investigator issued a complaint alleging that the School Committee violated Sections 10(a)(5) and 10(a)(1) of the Law by removing case management time from the SPED teachers’ schedules without providing the Union with prior notice and an opportunity to bargain to resolution or impasse over the decision and the impacts of the decision on bargaining unit members’ terms and conditions of employment. The School Committee filed its answer on July 26, 2021.

I conducted a video conference hearing on April 7 and May 31, 2022, at which both parties had an opportunity to be heard, to call witnesses and to introduce evidence. The parties submitted their post-hearing briefs on or about August 15, 2022. Upon review of the entire record, including my observation of the demeanor of the witnesses, I make the following findings of fact and render the following opinion.

Stipulated Facts

1. The Andover Education Association (“Association” or “Union”) is an employee organization within the meaning of Section 1 of the Law.
2. The Town of Andover (“Town”) is a public employer as defined in G.L. c.150E, s.1.
3. The Andover School Committee (“Committee” or “District”) is the Town’s representative for the purposes of collective bargaining with school employees.
4. The Association is the exclusive bargaining representative for a bargaining unit comprised of special education teachers and other professionals employed by the Committee in the Andover Public Schools.

Findings of Fact¹

1 **Relevant Contractual Provisions**

2
3 **2011-2014 CBA**

4 Article 36

5 Time and Learning – General Concepts

6 36.01 The Committee/Administration shall have the right to implement a high school
7 schedule consistent with the following (Hereinafter some called “extended block
8 schedule”), anything contained in this Agreement to the contrary notwithstanding:
9

10 1. **Extended Teaching Blocks:**

11 ***

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13
14 5. **High School Schedule Committee:** The Parties agree to establish a high school
15 scheduling committee with representatives from the Association, representatives from the
16 Administration of the Andover Public Schools, and parent representatives from the school
17 council of the high school. The Parties agree to engage a neutral facilitator to assist the
18 scheduling committee, and the scheduling committee shall convene in February of 2013.
19 Implementation of any new agreed upon schedule shall be at the beginning of a school
20 year provided that such an agreement was reached on or before December 1st of the
21 school year prior to implementation.

22 ***

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24
25 **2017 – 2020 MOA dated June 14, 2017**

26 **Article 7(F)**

27 The Parties agree to establish a joint labor management committee for the 2017-2018
28 work year to review guidelines on caseload and workload for special education teachers,
29 speech and language pathologists, school psychologists, social workers, and guidance
30 counselors in order to make recommendations to the parties; recommendations are
31 subject to bargaining.²

32 **Special Education Teacher Duties**

¹ The DLR’s jurisdiction in this matter is uncontested.

² The record does not indicate whether this joint labor management committee convened and took any actions. As of June 14, 2017, the date of this MOA, SPED teachers had not been assigned any “H block” duties as described in this decision.

1 Andover High School SPED teachers work in the SPED Department, which also
2 includes educational team facilitators, psychologists, speech and language pathologists,
3 social workers, a hearing specialist, an occupational therapist, and others. SPED
4 teachers generally have three responsibilities. First, they teach academic classes for
5 students who receive special education services (SPED students). That could involve
6 teaching a small, substantially separate³ class, or co-teaching a class for the language-
7 based disabilities program. The second responsibility is to provide academic support to
8 SPED students. For example, if a student has a reading or writing goal as part of their
9 individualized education plan (IEP), they receive academic support from a SPED teacher
10 in the area of their goal. The students that a SPED teacher has in academic support
11 classes may or may not also be in the SPED teacher's academic classes. The third area
12 of responsibility is case management for the approximately eighteen students that SPED
13 teachers have in their caseloads.⁴

14 The SPED teachers' case management responsibility is to be the liaison between
15 an assigned student, the student's family, and the student's general education (Gen Ed)
16 teachers. The primary job of a case manager is to become a trusted adult to the student
17 and the student's family. They build a rapport with the students and work with them on
18 their IEP goals. The case manager is the point of contact for families if there is a problem

³ A substantially separate class is a small group class that has no more than eight students and is separate from the inclusionary program.

⁴ The students whom the SPED teacher is assigned to for case management are not necessarily the same students whom they have in their academic classes. During the 2020-2021 school year, less than 50% of the students in a case manager's caseload were in an academic class with them.

1 at the school, and they communicate with their students' families to discuss the students'
2 educational progress. They also communicate with their assigned students' Gen Ed
3 teachers⁵ to ensure that those teachers are familiar with the student's IEP goals, that the
4 student receives the accommodations and assistance that they need, and to learn how
5 the student is doing in their classes. Case managers monitor their assigned students'
6 progress, check for grades and missing assignments, and email the student's teacher
7 where necessary.⁶ In addition to these relational aspects of the case management
8 responsibility, SPED teachers are responsible for handling SPED-related paperwork, i.e.
9 completing IEP progress reports four times per year, as well as IEP goals and objectives.⁷

10 **The 4X4 Schedule**

11 Before the District implemented the 7+H schedule at the High School that is at
12 issue in this case, it had what was known as a 4X4 block schedule in place. School days
13 were divided into four, 82-minute periods or blocks, which gave the students four, 82-
14 minute classes each day. In one semester, teachers taught three classes per day and
15 had one period off as a preparation period. Then in the second semester, the Gen Ed

⁵ For example, if a SPED teacher has a case management caseload of fourteen students, and each student has seven teachers, the case manager has ninety-eight interactions to maintain. During the 2020-2021 school year, SPED teacher Renee Drueke (Drueke) had fifteen students in her case management case load.

⁶ There are privacy issues that affect how SPED teachers perform their duties. SPED Program Head Jean Tarricone (Tarricone) had advised the teachers not to use student names in email messages because emails could be subject to a public records request. Drueke tries not to perform case management duties in front of general education students because her case management duties impact the privacy of her SPED students.

⁷ Educational team facilitators draft the overall IEP. At the beginning of a school year, the case manager reviews their students' IEPs and ensures that every IEP service is included in the student's schedule. If an IEP service is missing, the case manager contacts the evaluation team facilitator to alert them to the issue.

1 teachers taught two academic classes, had a third block as a preparation period, and a
2 fourth period that was a duty block. A duty block was a non-academic assignment had
3 the teachers would perform, i.e. hall monitor duty. Gen Ed teachers taught six classes per
4 year, and SPED teachers taught five classes per year. Each semester, SPED teachers
5 taught 2½ classes, and the other half class was their case management time.⁸ Thus, in
6 the 4X4 schedule, SPED teachers had 41 minutes every day to do case management,
7 which amounted to 123 hours per year. The amount of time that SPED teachers were
8 allotted for case management was comparable to the amount of time that Gen Ed
9 teachers were allotted for their duty blocks.

10 **The Fact-Finder Recommendation and Schedule Committee**⁹

11 At some point prior to February of 2012, the School Committee sought to eliminate
12 the teachers' duty block and require Gen Ed teachers to teach three academic subjects
13 in both semesters of a school year. The School Committee and the Union were not able
14 to agree on a new schedule for the high school and agreed to bring the schedule dispute
15 to a neutral factfinder. Diane Zaar Cochran was appointed as the fact-finder and
16 conducted a fact-finding hearing. She issued a report in April of 2012 in which she

⁸ The School Committee argues in its brief that the record does not contain any "official teacher schedules" that show that SPED teachers had case management time built into the 4X4 schedule, or that SPED teachers had a specific amount of case management time built into the 4X4 schedule. However, none of the School Committee's witnesses rebutted the Union witnesses' testimony that they had and used specific amounts of time in the 4X4 schedule to perform case management duties. Consequently, I credit Drueke's testimony regarding the time that SPED teachers had available for case management duties in the 4X4 schedule.

⁹ The parties use the terms "Schedule Committee" and "Scheduling Committee" interchangeably.

1 recommended that the parties form a new high school scheduling committee to devise a
2 new schedule for the 2013 -2014 school year.

3 The first post-factfinding scheduling committee¹⁰ (Scheduling or Schedule
4 Committee) meeting took place in April of 2013, and it included a neutral facilitator,
5 teachers, school administrators, and parents.¹¹ The Scheduling Committee met on a
6 regular basis from April of 2013 to June of 2014. The parties agreed that the schedule,
7 which the Scheduling Committee created and presented, would be the schedule going
8 forward, and they referenced this agreement in Article 36 of the 2011-2014 collective
9 bargaining agreement. Both parties understood that there would be no regular, traditional
10 bargaining over the new high school schedule.¹²

11 During a discussion about special education at one of the Scheduling Committee
12 meetings, Committee member Drueke explained that case management time needed to
13 be built into the schedule for SPED teachers. D'Alise agreed with Drueke. Drueke also
14 stated that SPED teachers "needed to go down to teaching four classes so they had a
15 commensurate amount of time in order to do case management." The record does not
16 contain any evidence of a response to Drueke's statements from members of the school
17 administration who were on the Scheduling Committee.

¹⁰ The parties had formed a scheduling committee in October of 2011 in an effort to avoid the fact-finding process, but the committee members were unable to agree on a school schedule at that time.

¹¹ The Scheduling Committee included Drueke, Teacher Rebecca D'Alise (D'Alise), Teacher Peter Hall, Teacher Mindy Reidy (Reidy), Administrator Nancy Duclos, (who later became the Assistant Superintendent of Curriculum and Instruction), Building Principal Dr. Chris Lord, Guidance Program Lead Alixa De Kelley (De Kelley), Science Program Lead Steve Sanborn, and two parents.

¹² The parties engaged in impact bargaining over the new schedule in the fall of 2014.

1 At some point in 2014, the Schedule Committee agreed on a new high school
2 schedule which they called the “7+H Schedule.” They explained the 7+H schedule to the
3 high school faculty and administration in June of 2014 using a PowerPoint presentation.
4 The PowerPoint slides included sample schedules for Gen Ed classes, electives, and
5 SPED classes. The sample SPED schedule included four classes and a block of time
6 labeled as case management.¹³ Then School Superintendent Dr. Marinel McGrath
7 (McGrath) attended the presentation.¹⁴ No one in attendance at the June 2014
8 presentation indicated that the sample schedules did not accurately reflect the Schedule
9 Committee’s work.

10 **Impact Bargaining over the 7+H Schedule**

11 After the Schedule Committee presented the 7+H schedule to the administration
12 and faculty, the Union and the School Committee set up impact bargaining sessions for
13 the fall of 2014.¹⁵ The first impact bargaining session was held on October 17, 2014.¹⁶

¹³ Drueke testified that the pages containing sample schedules, including the SPED schedule that contains a block of time for case management, was presented in June of 2014, and the School Committee presented no contrary evidence. Consequently, I credit Drueke’s testimony.

¹⁴ Dr. Sheldon Berman (Berman) became the District Superintendent at some point during the 2015-2016 school year. The date of Dr. Berman’s appointment is not in the record.

¹⁵ In the fall of 2014, the School Committee held open meetings to acquaint parents with the new schedule.

¹⁶ The School Committee representatives at that session were: School Committee members Annie Gilbert and Paula Colby Clements, Attorney Elizabeth Valerio, Superintendent McGrath, Human Resources Director Candace Hall, and Assistant Superintendent Nancy Duclos. The Union representatives were MTA representative and negotiator Lisa Nazarro (Nazarro), then Union President Kerry Costello (Costello), Drueke, Reidy, D’Alise, Brian Shea, Pat Thompson, Peter Otis (Otis), and Karen Waters. All of the representatives who attended the October 14 session also attended the November 5 session, with the exception of Otis.

1 At the outset of that session, Nazarro stated that the purpose of the bargaining was to
 2 impact bargain over the high school schedule. Nazarro then mentioned five broad
 3 categories: 1) Teacher Responsibilities; 2) Timeline; 3) Special Education; 4) Curriculum;
 4 and 5) Misc. When she mentioned "Special Education," she noted "Delivery of services,
 5 Case Management, Anomaly in schedule." There were two other bargaining sessions on
 6 dates that are not disclosed in the record, and the parties met for a final bargaining
 7 session on November 5, 2014. At the conclusion of the November 14 session, they
 8 signed a memorandum of agreement (MOA). Other than Nazarro's reference to Case
 9 Management at the first bargaining session, no one made any proposals regarding time
 10 allotted for case management duties, and there was no bargaining over case
 11 management time during the impact bargaining sessions.¹⁷

12 The MOA that the parties signed provides in pertinent part as follows:

- 13 **1. The parties agree that the Committee has satisfied all of its bargaining**
 14 **obligations associated with the change in the high school schedule."**
 15 **2. Upon implementation of the new high school schedule, the Parties agree**
 16 **to:**
- 17 **a. Delete Article 36 in its entirety.**
 18 **b. Amend Article 7-04 by replacing "7:45 A.M." as the students['] starting**
 19 **time at the Section High school with "7:44 A.M."**
 20 **c. Add a new Section 14 to Article 7 as follows:**
- 21 **7-14**
- 22 **A. Definitions:** (emphasis in original.)
- 23 1. "Instructional Day"
 24 2. "Schedule Cycle"
 25 3. "Student Learning Community"

¹⁷ The record contains no evidence of any other statements or discussion regarding case management during any of the bargaining sessions.

- 1 4. "Professional Learning Community"
- 2 B. High School Work Day
- 3 A Schedule Cycle will include the following:
- 4 1. Over the course of a cycle, an average of 75% of a teacher's
- 5 instructional day will be designated to teaching assignments. These
- 6 teaching assignments will include class time and time a teacher is
- 7 assigned to Student Learning Community periods.
- 8 2. Over the course of a cycle, no teacher will be required to teach more
- 9 than 5 course sections and an additional section of Student Learning
- 10 Community.
- 11 3. No teacher will be required to teach more than four periods in a day
- 12 which can include the Student Learning Community period.
- 13 4. Teachers will be scheduled for one prep period a day that is no fewer
- 14 than 60 minutes.
- 15 5. No less than 5% of a teacher's Schedule Cycle will be devoted to a
- 16 professional learning community.

17 **The Steering Committee**

18

19 At some point following the completion of impact bargaining, a Steering Committee

20 replaced the Schedule Committee to ensure that the component parts of the schedule

21 worked and to "sell" the schedule to others.¹⁸ The Steering Committee held meetings to

22 discuss the new schedule with students, parents, professional educators, and parent

23 teacher organizations.

24 In May of 2015, the Steering Committee presented the 7+H schedule to the high

25 school faculty and administration again to remind them that it would be implemented.

26 McGrath attended this presentation as did the other members of the Steering Committee.

27 Reidy shared the same PowerPoint presentation with the faculty and administration that

28 she had shared in June of 2014. The presentation added new information and slides

¹⁸ The Steering Committee members included the members of the Scheduling Committee, with a few additional teachers and then High School Principal Philip Conrad (Conrad).

1 pertaining to future implementation steps, but it included the same sample SPED
2 schedule, which depicted four classes and a block of time labeled as case management.

3 The District did not implement the 7+H schedule for the upcoming 2015-2016
4 school year. The parties and the Steering Committee believed that they needed a year
5 or more to plan and organize all the component parts of the new schedule, and the District
6 wanted to ensure that the new schedule was implemented properly and complied with
7 state educational requirements. Additionally, there was a financial cost to the 7+H
8 schedule, and the District needed to add elementary school teachers at that time.
9 Ultimately, the District decided to hire additional elementary teachers and delay the
10 implementation of the 7+H schedule. Thus, the 4X4 schedule remained in place during
11 the 2015-2016 and 2016-2017 school years. During those years, Gen Ed teachers taught
12 six classes per year, and SPED teachers taught five classes per year.

13 **The 7+H Schedule**

14 The 7+H schedule replaced the 4X4 schedule in the 2017 – 2018 school year. The
15 7+H schedule is an eight-day rotating schedule. Each day has five periods, and the
16 students do not have two of their classes. The eighth - or “H” - slot is called H Block, and
17 it is a support period for students. Because there are only five classes per day, there is
18 no H Block period on three days during the eight-day rotational cycle.

19 There are two components to H Block: H1 and H2-5. H1 is an advisory-type
20 program that focuses on social-emotional learning and skills for success. Two teachers
21 meet with a group of approximately 24 - 28 students in a classroom,¹⁹ and students stay

¹⁹ During the 2018-2019 school year, Drueke and her co-teacher shared the responsibility for about 24-25 students in the H1 block. Drueke and her co-teacher had 26-28 students together in the H1 block during the 2019-2020 school year.

1 with the same H1 teacher for all four years of high school. H1 advisory groups include
2 both SPED students and Gen Ed students, and SPED teachers co-lead advisory groups
3 with Gen Ed teachers. H2-H5 is an academic time for students and teachers to use for
4 intervention and enrichment. H2 – H5 are time periods on certain days during the 8-day
5 cycle where a student can sign up to see particular teacher,²⁰ or a teacher could contact
6 a student, for extra help. Some teachers are in more demand than others, and
7 consequently, teachers could have 10-20 plus students in their rooms during an H block
8 period.

9 **Implementation of the 7+H Schedule**

10 2017-2018

11 The District did not implement the entire 7+H schedule during the 2017-2018
12 school year. Instead, it implemented different parts of the schedule over three school
13 years: 2017-2018, 2018-2019, and 2019-2020. During the 2017-2018 school year, the
14 District rolled out an H1 curriculum, developed an H Block handbook, and provided
15 training on the new software that supported the H Block system. During the 2017-2018
16 school year, the District only assigned Gen Ed teachers to classrooms for H2-H5 blocks;
17 SPED teachers were not assigned H2-H5 responsibilities. As a result, a SPED student
18 who was in a SPED teacher's academic class, i.e. a substantially separate class, could
19 not access that SPED teacher for an H block period and would not have the same time
20 as would a Gen Ed student to meet with their teachers during H block. However, the

²⁰ Students used a software program called Enriching Students to sign up to see a particular teacher at a particular time.

1 District assigned SPED teachers to perform H1 block duties along with Gen Ed
2 teachers.²¹

3 In August of 2017, when Drueke received her schedule, she noticed that she had
4 been assigned to six classes, “student enrichment” during the H blocks, and had no case
5 management time. She emailed Tarricone on August 26, 2017 to complain about these
6 and other issues with her schedule.²² By email on August 27, 2017, Guidance Director
7 De Kelley responded to Drueke and others that: “Regarding H Block ignore the room #
8 for h2-h5 that is your case management time.”²³ So during the 2017-2018 school year,
9 Drueke and other SPED teachers used the H2 – H5 portion of their schedules for case
10 management time. However, this schedule gave the SPED teachers fewer hours during
11 the school year for their case management duties that they had with the 4X4 schedule.²⁴
12 As a result, Drueke had to perform some of her case management duties after school
13 and during her prep period.

²¹ School Committee witness Kerrilyn McCarthy (McCarthy) testified that SPED teachers do not have H1 block responsibilities. McCarthy did not begin her employment with the District until the summer of 2020. Consequently, to the extent that her testimony conflicts with Drueke and William Hecht’s (Hecht) testimony about the H1 duties assigned to them beginning with the 2017-2018 school year, I credit Drueke and Hecht’s testimony.

²² She also alerted the Union officers, but they did not file a grievance or a prohibited practice charge. This was the first time that Drueke realized that the Union had not reached an agreement to reduce the SPED teachers’ class load to four classes.

²³ De Kelley’s response alerted Drueke to the fact that SPED teachers were now required to perform H1 block duties. Drueke brought this information to the Union’s attention, but the Union did not file a grievance over it.

²⁴ Drueke credibly testified that the 4X4 schedule provided SPED teachers with 123 hours of case management time per school year. Their yearly case management time was reduced to 95 hours under the newly-implemented 7+ H schedule in 2017-2018 and 2018-2019, when the SPED teachers performed case management duties during the H2 – H5 time blocks.

1 Conrad, who became the high school principal in July of 2015,²⁵ believed that H
2 block would be implemented so as to apply to SPED students and SPED teachers.²⁶
3 Conversely, Drueke believed that the schedule, which the Schedule and Steering
4 Committees had devised, would have given SPED teachers more case management time
5 than they previously had because they could perform these duties during H1 and H2-H5
6 time periods, rather than be assigned other duties during those blocks of time.

7 On May 14, 2018, Conrad advised Drueke and other SPED teachers that “I
8 understand that you have missed some Case Management Time due to the time
9 commitment during the expanded use of H1. I would like to offer you three (3) professional
10 days to make up for some of the time that you have lost. This combined with
11 unencumbered PLG time should approach the hours missed. You can use all three (3)
12 days, up to the three (3) days, or none at all. That is up to you...” Drueke used the three
13 professional days that Conrad offered for case management duties.

14 2018-2019

15 During the 2018-2019 school year, a committee of teachers and administrators
16 revamped the H1 curriculum. SPED teachers were assigned to co-lead H1 advisory
17 groups again, and, as in the 2017-2018 school year, they were not assigned H2-H5 block
18 duties. Instead, they used the H2-H5 time blocks for case management. However, the
19 SPED teachers did not receive three extra professional days during the year for case
20 management duties as they had in May of 2018.

²⁵ Conrad left his position with the District on June 30, 2020.

²⁶ Conrad was not a member of the Schedule Committee, but he was a member of the Steering Committee. He did not attend the impact bargaining sessions.

1 2019-2020

2 At the beginning of the 2019-2020 school year, the District added SPED teachers
3 to the full H block rotation for the first time and advised them that they would be required
4 to have H1 to H5 block duties.²⁷ The District had found that SPED students were unable
5 to contact their SPED teachers during H2-H5 block periods because the SPED teachers
6 were unavailable. There had been one SPED teacher available during the H2-H5 block
7 period²⁸ but he did not have all of the SPED students, and the SPED students did not all
8 have him as a teacher. The District wanted to ensure that all the students – Gen Ed and
9 SPED students - had all of their teachers available to them during H2-H5. The 7+H
10 schedule, as fully implemented in 2019-2020, did not contain any specific blocks of time
11 that were designated for SPED teachers to perform case management duties.

12 The assignment of H2-H5 duties to SPED teachers took the SPED teachers by
13 surprise because they were not prepared for this assignment, and it eliminated the
14 specific time periods (H2-H5 blocks) that had been designated for case management.
15 When the SPED teachers voiced their concerns, Conrad spoke to them about it and
16 immediately looked at ways to mitigate the assignment of H2-H5 block duties to SPED
17 teachers so they could prepare for those responsibilities. One of the first steps was to

²⁷ Conrad testified that SPED teachers were assigned to H2-H5 duties in 2019-2020 as “the next logical step” in “trying to do one thing after another” in terms of rolling out the H block schedule. He created a document in June of 2019 entitled “Andover High School 7+H Schedule At-a-Glance for 2019-2020.” When creating this document, he did not rely on the PowerPoint presentation that had been shown to the faculty and administration in 2014 and 2015.

²⁸ The record does not contain any details about this particular teacher’s assignment.

1 allow teachers to use their PLG²⁹ time for case management duties. The District also
2 assigned two teachers to a classroom rather than one, and allowed them to trade off with
3 each other, so that one teacher could use that time for case management. The number
4 of students who could come see a SPED teacher during this time was limited, so the
5 SPED teachers would be seeing fewer students than Gen Ed teachers saw during H2-
6 H5. Specifically, the District capped the number of SPED students per class per teacher
7 during the H2-H5 blocks at four students. By assigning another SPED teacher and that
8 teacher's group of students to the same classroom, there would be two SPED teachers
9 and six to eight students in a classroom. Additionally, the District allowed the SPED
10 teachers to alert the assistant principal if they needed to block themselves off for a day to
11 perform their case management duties.

12 There is no evidence that the District had notified the Union that it would be
13 assigning H2-H5 block duties to SPED teachers in the 2019-2020 school year, and the
14 District did not bargain any of the schedule adjustments referenced above with the
15 Union.³⁰ When the SPED teachers received their schedules in August of 2019, they
16 brought their concerns to the Union. The Union filed an information request with the
17 School Committee, as well as a grievance. The Union did not process the grievance to
18 arbitration but filed the prohibited practice charge underlying this case in January of 2020.

²⁹ PLG stands for "professional learning group." "PLG time" refers to time during the day, separate from H blocks, that a teacher had to work on a professional learning project.

³⁰ Conrad testified that he had some "interaction" with Union President Costello in the Summer of 2019 regarding the continued implementation of the 7+H schedule. Matt Bach (Bach) became the Union president in July of 2019, and there is no evidence of conversations between Conrad and Bach.

1 **The Impact of the Full 7+H Schedule on Case Management Time**

2 The full implementation of the 7+H schedule in the 2019-2020 school year and the
3 assignment of SPED teachers to H 1-5 block duties eliminated specific blocks of time that
4 had previously been allotted to SPED teachers and designated as case management
5 time. The 4X4 schedule had provided SPED teachers with 123 hours of case
6 management time per school year. The yearly case management time was reduced to 95
7 hours under the 7+H schedule as implemented in 2017-2018 and 2018-2019, when the
8 SPED teachers performed case management duties during the H2 – H5 time blocks but
9 were assigned H1 block duties.³¹ Once the 7+H schedule was fully implemented in the
10 2019-2020 school year, SPED teachers had no specific time periods in their schedules
11 which were designated for case management duties, and had to perform case
12 management duties during their preparation periods or after school.

13 At some point during the 2019-2020 school year,³² Conrad asked Assistant
14 Principal Caitlin Brown (Brown) to use the H block scheduling software to calculate the
15 percentage of time that SPED teachers were using during H2-H5 blocks. Brown

³¹ Drueke credibly testified to the total number of hours of case management time under the 4X4 and 7+H schedules and no other witness provided evidence that rebutted or discredited her testimony. She also testified that she believed that the schedule that the Schedule and Steering Committees devised would have given SPED teachers two more hours of case management time per year – 125 hours – because they could perform these duties during H1 and H2-H5 time periods, rather than be assigned other duties during those blocks of time.

³² In March of 2020, the School District shut down in-person instruction for students at the onset of the COVID-10 pandemic. The District tried to utilize some aspects of the 7+H schedule, but were, in Conrad's words, "scrambling" to engage the students in academics and social-emotional learning. The record does not describe how the 7+H schedule functioned while schools were closed during the pandemic. The schools returned to full-time in-person instruction as of the 2021 to 2022 school year.

1 produced a chart in April of 2020 that compared the number of actual student
2 appointments with SPED teachers during H2-H5 block, with the number of possible
3 available appointments, and then recorded that information in the chart as a percentage.
4 For the fourteen SPED teachers listed on the chart,³³ the percentage of appointments
5 with students ranged between 14% to 39%. Conrad reviewed Brown's chart and believed
6 that it showed time during the H2-H5 blocks in which SPED teachers did not have
7 scheduled events and could have performed their case management duties.³⁴

8 McCarthy, who is the SPED Program Head, opined that SPED teachers have time
9 to complete their case management tasks during the school day, either during H2-H5
10 blocks, academic support blocks, or academic classes. For example, for students who
11 are in a SPED teacher's academic class and their case management case load, the SPED
12 teacher could perform case management duties for that student during H block if the
13 student came to see the SPED teacher for assistance with the academic class.³⁵ During
14 academic support blocks, SPED teachers have time to check-in with students about how

³³ One of the names on the chart was an individual whom Conrad believed was a teaching assistant, Patty Trant.

³⁴ Conrad testified that he "would have approved" of SPED teachers using the time during H2-H5 blocks that they were not scheduled to meet with students to perform case management duties. The record does not indicate whether he shared that opinion with SPED teachers in the 2019-2020 school year.

³⁵ McCarthy testified that SPED teachers are able to perform case management duties during H1, because they are not assigned an advisory block, and the School Committee asserted in its brief that SPED teachers do not perform H1 advisory duties. However, as previously noted, the record is clear that the District assigned H1 block duties to SPED teachers beginning in the 2017-2018 school year, and continued those assignments in 2018-2019, and 2019-2020. Consequently, McCarthy's opinion about the SPED teachers' availability during the H1 block during her employment in the District is of limited utility because it is factually flawed.

1 they are doing in their classes and could focus on the student's IEP goal areas or discuss
2 other projects. McCarthy acknowledged that completing case management duties during
3 a teacher's academic classes is "a little more challenging" but could be built into a class
4 by having the class perform certain functions, like writing down homework in an
5 assignment journal.

6 There is no evidence in the record describing how a SPED teacher could perform
7 the case management duties that involve privately interacting with a SPED student or a
8 SPED student's parents during academic support periods, academic classes, or H blocks,
9 when they were also involved with other students.

10 Opinion

11 A public employer violates Section 10(a)(5) of the Law when it implements a
12 change in a mandatory subject of bargaining without first providing the employees'
13 exclusive collective bargaining representative with prior notice and an opportunity to
14 bargain to resolution or impasse. School Committee of Newton v. Labor Relations
15 Commission, 338 Mass. 557 (1983). The duty to bargain extends to both conditions of
16 employment that are established through a past practice as well as conditions of
17 employment that are established through a collectively bargained agreement. Town of
18 Burlington, 35 MLC 18, 25, MUP-04-4157 (June 30, 2008), aff'd sub nom. Town of
19 Burlington v. Commonwealth Employment Relations Board, 85 Mass. App. Ct. 1120
20 (2014); Commonwealth of Massachusetts, 20 MLC 1545, 1552, SUP-3460 (May 13,
21 1994). To establish a unilateral change violation, the charging party must show that: 1)
22 the employer altered an existing practice or instituted a new one; 2) the change affected
23 a mandatory subject of bargaining; and 3) the change was established without prior notice

1 and an opportunity to bargain. City of Boston, 20 MLC 1603, 1607, MUP-7976 (May 20,
2 1994).

3 The Union argues that case management duties are substantive job duties or
4 assignments and are therefore mandatory subjects of bargaining. It further argues that
5 the parties maintained a long-standing past practice of scheduling case management time
6 into the SPED teachers' schedules, and that the Employer changed this practice when it
7 removed case management time from SPED teachers' schedules in August of 2019. The
8 Union asserts that it never bargained away this practice or waived its right to insist on it.

9 Conversely, the Employer argues that the Union has not met its burden of proof
10 because: 1) there was no past practice regarding SPED case management time; 2) the
11 Employer bargained with the Union extensively over the details of the high school
12 schedule; 3) SPED teachers have time to complete their case management
13 responsibilities in their existing schedules; and 4) the Employer's use of H-block is a
14 matter of educational policy and therefore, within its managerial prerogative. I am not
15 persuaded by the Employer's arguments and address each one in turn.

16 First, I find that there was a long-standing past practice of allotting case
17 management time to SPED teachers in their schedules. That practice existed during the
18 years that the District maintained a 4X4 block schedule; it continued as the District
19 transitioned to the 7+H schedule; and it remained in place when the 7+H schedule was
20 initially implemented. Contrary to the School Committee's argument, Drueke credibly
21 described the case management time that was built into the 4X4 block schedule. The
22 School Committee provided no witness testimony to rebut Drueke's testimony that the
23 SPED teachers taught 2½ classes each semester on the 4X4 schedule and had a half

1 class period – 41 minutes per day – in which to complete case management duties.
2 Although the Committee notes the absence of Aspen software documentation regarding
3 case management time, the Committee cites no case law for the proposition that a past
4 practice must be documented in writing, and I know of none.

5 When the Scheduling Committee presented the 7+H schedule to the high school
6 faculty and administrators in May of 2014, and the Steering Committee presented it again
7 in June of 2015, their PowerPoint presentations included a block of time in SPED
8 teachers' schedules that was labeled as case management. Although the School
9 Committee may not have collaborated in the creation of the PowerPoint slides, School
10 administrators, as well as School Committee representatives on the Committees,
11 observed the PowerPoint presentations and did not object to or correct the case
12 management information that was explained and illustrated. In short, the Employer gave
13 no indication that the 7+H schedule would not include case management time, and its
14 representatives' silence during the Committees' presentations shows its understanding
15 that the 7+H schedule included designated case management time.

16 This recognition is also apparent during the initial roll out of the 7+H schedule.
17 During the 2017-2018 school year, SPED teachers were not given responsibilities during
18 H2-H5 blocks and performed their case management duties during those time periods.
19 When Drueke received an initial 2017-2018 schedule that included H2-H5 duties,
20 Guidance Director De Kelley advised her to "ignore" the assignment and stated: "that is
21 your case management time." Later that school year, Conrad offered the SPED teachers
22 three professional days to make up for some of the case management time that had been
23 lost in the transition to the 7+H schedule. SPED teachers continued performing case

1 management duties during H2-H5 blocks during the 2018-2019 school year, and the
2 School Committee does not argue that it was unaware of that situation. For these
3 reasons, I find that the parties maintained a practice of giving SPED teachers designated
4 periods of time to perform their case management duties during the implementation of
5 the 7+H schedule.

6 Second, the School Committee changed that past practice when, in August of
7 2019, it assigned SPED teachers to perform other duties during H2-H5 blocks for the
8 2019-2020 school year and eliminated their case management time.³⁶ By this time, the
9 District had realized that SPED students were unable to meet their SPED teachers during
10 H2-H5 blocks because the SPED teachers were not available at that time. The District
11 wanted to ensure that SPED and Gen Ed students had equal access to their academic
12 teachers during those time periods.

13 The assignment of H2-H5 block duties to SPED teachers took the teachers by
14 surprise, and they voiced their concerns to Conrad. Conrad looked at ways to modify
15 their H2-H5 responsibilities but maintained the requirement that they be available to
16 students during that time frame. The School Committee did not notify the Union that it
17 would assign H2-H5 block duties to SPED teachers in the 2019-2020 school year and did
18 not bargain any of the specific schedule adjustments with the Union.

19 The loss of designated case management time impacted the SPED teachers by
20 requiring them to complete their case management duties at other times during the school
21 day or during non-working hours. Here, as in Amesbury School Committee, 11 MLC 1049,

³⁶ The School Committee began to assign SPED teachers to H1 duties in the 2017-2018 school year.

1 MUP-5254, (July 11, 1984), Supplementary Decision and Order on Compliance, 13 MLC
2 1196 (October 9, 1986), the employer's action forced employees to do more work in less
3 time. Although the employer in Amesbury added an additional teaching period to
4 department heads' caseloads rather than maintaining the workload but reducing the time
5 in which to complete the tasks, the end result is the same. In both cases, the employees
6 had to work harder, or for longer hours, or after the workday to complete their duties. Id.
7 at 1198. As the CERB stated in Amesbury, "it is axiomatic that obligating an employee
8 to complete more work in less time affects standards of productivity, a mandatory subject
9 of bargaining." 13 MLC at 1198.

10 In so finding, I reject the School Committee's contention that the SPED teachers
11 have ample time during their schedules to perform their case management
12 responsibilities. The School Committee contends that SPED teachers can complete
13 these duties during their academic support blocks by building skill development into
14 everyday classes. They also contend that SPED teachers can work with students on
15 schoolwork and IEP goals during academic classes and can complete other case
16 management responsibilities during their H2-H5 blocks.³⁷ However, as School Committee
17 witness McCarthy acknowledged: completing case management tasks during a teacher's
18 academic classes is "a little more challenging." That would be particularly true if a student
19 in the SPED teacher's case management case load was not in any of the teacher's
20 academic classes. Moreover, it is undisputed that a case manager is supposed to

³⁷ The School Committee's argument that the SPED teachers can complete their case management duties during their unassigned H1 block period has no factual support, because I have found that SPED teachers are assigned to H1 block advisory classes.

1 become a trusted adult to their assigned SPED students and the SPED students' families,
2 and none of the School Committee's witnesses explained how a SPED teacher could hold
3 private conferences or build a trusting relationship with a student and their family during
4 H block time periods where the teacher was simultaneously required to interact with other
5 students. In light of the individualized, diverse, and confidential³⁸ responsibilities that
6 case managers are required to perform, the School Committee did not demonstrate that
7 SPED teachers could actually or effectively perform these duties during H block periods.

8 I next consider the School Committee's argument that it satisfied any bargaining
9 obligation that it might have had because the parties bargained over all the details of the
10 high school schedule, and the Union waived its right to bargain over SPED case
11 management time. The School Committee makes two main points to support its position.
12 First, it states that the parties raised the issue of case management time during the 2014
13 impact bargaining sessions and the Union received the opportunity to explore and fully
14 bargain over it. It further argues that the District discussed the high school schedule in
15 detail prior to implementation, and the Union had ample time to discuss how case
16 management time would fit into it. The School Committee also contends that the parties
17 agreed to a new high school schedule that did not carve out case management time for
18 SPED teachers. I find that the Union did not waive its bargaining rights by inaction,
19 acquiescence, or contract.

³⁸ The record indicates that the District emphasizes SPED student confidentiality and had advised teachers not to use student names in email messages. Drueke tries not to perform case management duties in front of Gen Ed students because those duties impact the privacy of her SPED students.

1 First, the Union did not waive its bargaining rights by inaction. Where a public
2 employer raises the affirmative defense of waiver by inaction, it bears the burden of
3 proving that the union had: 1) actual knowledge of the proposed change; 2) a reasonable
4 opportunity to negotiate prior to the employer's implementation of the change; and 3)
5 unreasonably or inexplicably failed to bargain or to request bargaining. School Committee
6 of Newton, 388 Mass. at 570. Such a waiver will not be lightly inferred. Town of Natick
7 and IBPO, 2 MLC 1086, 1092, MUP-2098, 2102 (August 26, 1975) and cases cited
8 therein. Here, there is no evidence in the record that the School Committee proposed to
9 eliminate case management time from SPED teachers' schedules either during the 2014
10 impact bargaining sessions, or immediately preceding the change in August of 2019.
11 Consequently, the Union could not have had actual knowledge of the proposed change.³⁹
12 And even if the School Committee had proposed to eliminate case management time, the
13 Union raised the issue during the 2014 impact bargaining sessions and included it in the
14 PowerPoint presentations that documented the new schedule. As previously noted,
15 Drueke and the Union protested the loss of case management time from the 2017-2018
16 school schedules, and the Committee promptly restored it. Thus, rather than establishing
17 that the Union waived its right to bargain over the exclusion of case management time in
18 SPED teachers' schedules, the record shows that the Union addressed and insisted upon
19 it at every opportunity.

³⁹ Although Conrad may have believed that SPED teachers would eventually be assigned to H block, he began his employment in July of 2015 and did not attend the Scheduling Committee meetings or the impact bargaining sessions. He also did not testify that the School Committee ever conveyed this belief to the Union.

1 I similarly find that the Union did not waive its bargaining rights by contract,
2 acquiescence, or agreement. An employer asserting the affirmative defense of contract
3 waiver “must demonstrate that the parties consciously considered the situation that has
4 arisen, and that the union knowingly waived its bargaining rights.” Massachusetts Board
5 of Regents, 15 MLC 1265, 1269, SUP-2959 (November 18, 1988) (citing Town of
6 Marblehead, 12 MLC 1667, 1670, MUP-5370 (March 28, 1986) (further citations
7 omitted)). In determining whether a union has contractually waived its right to bargain,
8 the CERB first examines the language of the contract to determine whether the language
9 on which the employer relies expressly or by necessary implication gave it the right to
10 make the change without bargaining. If the language is ambiguous, the CERB must
11 attempt to discern the parties’ intent from their bargaining history. Massachusetts Board
12 of Regents, 15 MLC at 1269-1270 (citing Melrose School Committee, 9 MLC 1713, 1725,
13 MUP-4507 (March 24, 1983)).

14 Here, the School Committee has not pointed to any language in the parties’ 2014
15 MOA or any collective bargaining agreement which eliminates case management time,
16 and its argument is not premised on any specific discussion or agreement reached during
17 the negotiations. Nor has the School Committee proffered any evidence that the parties
18 specifically bargained over case management time during their negotiations and that the
19 Union agreed to its demise. Rather, it contends that the Union did not take the opportunity
20 to bargain its inclusion and eventually agreed to a high school schedule that eliminated
21 it. This argument is without merit.

22 First, the Union was not obligated to obtain the School Committee’s agreement to
23 continue a long-term practice; the School Committee was obligated to bargain to impasse

1 over any decision to change or eliminate it. Second, there is simply no evidence that the
2 parties ever agreed to a schedule that omitted case management time, and the inclusion
3 of case management time block in the 2014 and 2015 PowerPoint slides unequivocally
4 demonstrates that the Union never agreed to such a schedule. The record indicates that
5 the issue was never discussed in length by the Scheduling Committee, the Steering
6 Committee, or at the impact bargaining negotiations. Compare Town of Westborough, 25
7 MLC 81, 87, MUP-9779, MUP-9892 (June 30, 1992) (defining what constitutes part of the
8 bargain as those matters that were embodied in the agreement and that were consciously
9 explored and consciously yielded during bargaining). As a result, the practice remained
10 in place.

11 Finally, I reject the School Committee's argument that it was not obligated to
12 bargain over the elimination of allocated time to perform case management duties from
13 the SPED teachers' schedules. Although it is well settled that school committees have
14 the exclusive prerogative to determine matters of educational policy without bargaining,
15 Board of Higher Education v. Commonwealth Employment Relations Board, 483 Mass.
16 310 (2019), the principle of non-delegability is to be applied only so far as necessary to
17 preserve the employer's discretion to carry out its statutory mandate. Massachusetts Bd.
18 of Higher Educ./Holyoke Community College v. Massachusetts Teachers Ass'n/Mass.
19 Community College Council/National Educ. Ass'n, 79 Mass. App. 27, 32 (2011). Here,
20 the School Committee does not have to bargain over its decision to provide SPED
21 students with the same access to their academic teachers during the H2-H5 periods that
22 Gen Ed students receive as that decision is a matter of educational policy. However, the
23 fact that the School Committee does not have to bargain over the decision to provide

1 SPED students with equal access does not negate its obligation to bargain over the
2 means of ensuring that access and the impact on the SPED teachers' terms and
3 conditions of employment of how access is provided.

4 In Taunton School Committee, 28 MLC 378, MUP-1632 (June 13, 2002), the
5 CERB considered whether the school district was obligated to bargain over its decision
6 to implement block scheduling as a means of complying with the state Department of
7 Education's time in learning requirements. After determining that the school district was
8 not obligated to bargain over compliance with the time in learning requirement, the CERB
9 held that the school district was obligated to bargain over the decision and the impacts of
10 the decision to implement block scheduling. Id. at 388-389. Here too, the School
11 Committee does not have to bargain over its decision to enable SPED students to have
12 equal access to their academic teachers as their peers in general education, but it does
13 have to bargain over the decision to take away case management time so that the SPED
14 teachers can be available to students during the H2-H5 blocks and the impacts of the
15 decision. Although it may be challenging to find other case management time for SPED
16 teachers during the school days, Conrad showed that it could be done, in part, by giving
17 the SPED teachers professional days to make up for the loss of case management time.
18 Further, the School Committee cannot rely on the complexity of the issue as grounds for
19 failing to satisfy its statutory bargaining obligation.

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REMEDY

The CERB has the discretion to fashion the most appropriate remedy possible under the facts of each case. Town of Dedham, 21 MLC 1014, 1024, MUP-8091 (June 15, 1994). Generally, the CERB fashions remedies for violations of the Law by attempting to place charging parties in the positions that they would have been in but for the unfair labor practice. Natick School Committee, 11 MLC 1387, 1400, MUP-5157 (August 1, 1985).

A traditional status quo remedy in this case would order the School Committee to allow the SPED teachers to use their H2-H5 block time to perform case management duties rather than the School Committee assigning them to perform other duties during those periods. However, here I must balance an order that the School Committee give SPED teachers designated case management time in their schedules with what the School Committee has identified as the need for SPED students to have access to those teachers during the H2-H5 periods. Accordingly, I order the School Committee, if it chooses to preserve the H2-H5 periods for student access, to give the SPED teachers an equivalent amount of time during their workweeks to perform their case management duties at other times rather than the H2-H5 periods. The designated case management time shall not displace any other time that SPED teachers receive or are assigned for a specific purpose.

Further, I recognize that the 7+H schedule was implemented over a protracted period of years, and that a change to student and teacher schedules at this juncture in the school year may disrupt the educational process. Consequently, while I order the School Committee to initiate bargaining as described below upon receipt of the decision

1 and order, the School Committee may delay the implementation of any schedule changes
2 until the beginning of the 2024-2025 school year. See Taunton School Committee, supra
3 at 391 (CERB delayed full implementation of its remedial order until the beginning of the
4 next school year).

5 CONCLUSION

6 Based on the record and for the reasons stated below, I conclude that the School
7 Committee violated Section 10(a)(5), and derivatively, Section 10(a)(1) of the Law in the
8 manner alleged in the Complaint.

9 ORDER

10 WHEREFORE, based on the foregoing, IT IS HEREBY ORDERED that the
11 Employer shall:

12 1. Cease and desist from:

- 13
- 14 a. Failing and refusing to bargain in good faith with the Union by
15 unilaterally ceasing to provide SPED teachers at the High School with
16 designated time during their work weeks to perform case
17 management duties.
 - 18
 - 19 b. In any like or related manner interfering with, restraining or coercing
20 employees in the exercise of their rights guaranteed under the Law.
 - 21

22 2. Take the following affirmative action:

- 23
- 24 a. Provide SPED teachers at the High School specific blocks of time to
25 perform their case management duties during their work weeks that
26 are equal in duration to the time that they previously had to perform
27 those duties during their H2-H5 blocks. That time will be designated
28 as case management time and shall not displace any other time that
29 SPED teachers receive or are assigned for a specific purpose. The
30 School Committee may delay implementation of any schedule
31 changes consistent with this order until the beginning of the 2024-
32 2025 school year.
 - 33

- 1 b. Bargain in good faith to resolution or impasse with the Union about
- 2 ceasing to provide SPED teachers at the High School with
- 3 designated time to perform case management duties.
- 4
- 5 c. Immediately post signed copies of the attached Notice to Employees
- 6 in all conspicuous places where members of the Union's bargaining
- 7 unit usually congregate, or where notices are usually posted,
- 8 including electronically, if the School Committee customarily
- 9 communicates with these unit members via intranet or email and
- 10 display for a period of thirty (30) days thereafter, signed copies of the
- 11 attached Notice to Employees.
- 12
- 13 d. Notify the DLR in writing of the steps taken to comply with this
- 14 decision within ten (10) days of receipt of this decision.

SO ORDERED.

COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF LABOR RELATIONS



MARGARET M. SULLIVAN,
HEARING OFFICER

APPEAL RIGHTS

The parties are advised of their right, pursuant to M.G.L. c.150E, Section 11 and 456 CMR 13.19, to request a review of this decision by the Commonwealth Employment Relations Board by filing a Notice of Appeal with the Department of Labor Relations not later than ten days after receiving notice of this decision. If a Notice of Appeal is not filed within ten days, this decision shall be final and binding on the parties.

