

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss

**SUPERIOR COURT
NO. 2084-2324-C**

BOSTON TEACHERS UNION

Plaintiff

v.

**MAYOR MARTIN J. WALSH, SUPERINTENDENT
BRENDA CASSELLIUS, and THE SCHOOL COMMITTEE
OF THE CITY OF BOSTON**

Defendants

**MEMORANDUM OF DECISION AND ORDER ON
PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION**

The Plaintiff, Boston Teachers Union, Local 66, AFT - Massachusetts ("BTU" or the "Plaintiff"), has brought suit against City of Boston Mayor Martin J. Walsh ("Mayor Walsh"), Boston Superintendent of Schools Brenda Cassellius ("Dr. Cassellius"), and the School Committee of the City of Boston (the "School Committee") (collectively, the "Boston Public Schools" or the "Defendants"). In its action, BTU charges the Boston Public Schools with violating the terms of a collectively bargained Memorandum of Agreement entered into by these parties on September 9, 2020.

Presented for decision is BTU's Motion for Preliminary Injunction.¹ BTU seeks an order of the Court enforcing the parties' Memorandum of Agreement, and enjoining the Boston Public

¹ Although styled as a "Request" and purporting to seek a Temporary Restraining Order, the Defendants have in fact had adequate notice of the preliminary equitable relief being sought. In these circumstances, the Court will address

Schools from requiring bargaining unit teachers and staff to work on-site in school buildings until such time as the citywide COVID-19 positivity rate falls below 4%. After a hearing conducted on the Zoom platform on October 14, 2020, and for the reasons which follow, BTU's Motion for Preliminary Injunction shall be **DENIED**.

FACTUAL BACKGROUND²

BTU is an employee organization within the meaning of G.L. c. 150E, and represents as the exclusive bargaining agent approximately 10,000 teachers, substitute teachers, guidance counselors, psychologists, nurses and other paraprofessionals. The School Committee is charged by law, G.L. c. 71, § 37, with general oversight of the operations of the Boston Public Schools. The Boston Public Schools educate more than 54,000 students, and employ a staff of teachers and aides exceeding 10,000 who are deployed across 125 school buildings throughout the City.

The School Committee and BTU are parties to a Collective Bargaining Agreement in effect from September 1, 2018 through August 31, 2021. This Collective Bargaining Agreement contains grievance and arbitration procedures that govern the resolution of disputes arising under the contract.

On March 12, 2020, the Governor of the Commonwealth declared a state of emergency due to public health concerns arising from the onset of the COVID-19 pandemic. On March 13, 2020, the School Committee responded by closing all in-person operations of the Boston Public Schools. The parties thereafter engaged in impact bargaining over the effect of school closures

the Plaintiff's Request as it customarily would a motion for preliminary injunction brought under Mass. R. Civ. P. 65.

² The facts set forth herein are drawn from the Plaintiff's Complaint and Request for Temporary Restraining Order; from the filed Affidavits of Dr. Cassellius, Chief of the Mayor's Office of Health and Human Services Marty Martinez, Interim Executive Director of the Boston Public Health Commission Rita L. Nieves, R.N., and BTU President Jessica Tang; and from the documentary materials attached as exhibits thereto.

on BTU members' terms and conditions of employment during the remainder of the 2019-20 school year. This bargaining produced a Memorandum of Agreement dated April 17, 2020, specifically addressed to the short-term impacts of the COVID-19 crisis. That contract has since expired.

Following the end of the 2019-20 school year, the Massachusetts Department of Elementary and Secondary Education (the "DESE") issued a series of guidance documents, setting forth DESE's requirements and expectations for public school districts with respect to the anticipated reopening of schools in the Fall of 2020. These documents included, without limitation: Initial Fall Reopening Guidance (June 25, 2020); Comprehensive Special Education Guidance for the 2020-2021 School Year (July 9, 2020); Additional Guidance on Fall Reopening Plans (July 24, 2020); Facilities and Operations Guidance (July 22, 2020); and Protocols for Responding to COVID-19 Scenarios (July 17, 2020 and revised on August 20, 2020). Pursuant to directives promulgated by the DESE, all school districts in Massachusetts were required to prepare three different reopening plans for the 2020-21 school year: a fully remote learning plan, a hybrid plan involving both in-person and remote learning, and a fully in-person plan for on-site learning.

The DESE directed each school district to determine which of its plans best met the educational needs of its students, and then to adopt and implement that plan in accordance with the provisions of the DESE's published guidance. In this connection, the DESE expressly urged that special attention be given by school districts to the distinctive circumstances of high-need students. The DESE thus declared:

"High-needs students should be prioritized for full-time in-person learning when feasible. That is, even if most students are not in school each day, schools should consider

setting up small programs that would run daily for one or more cohorts of high-needs students, including students with disabilities and English learners who are most in need of in-person services.”

The DESE further instructed school districts adopting reopening plans to balance their academic models for on-site and remote learning against prevailing health and safety requirements, and to give focused consideration to high-need students:

“The plan should prioritize getting as many students back to school in person as safely as possible, following a comprehensive set of health and safety requirements. The plan should also describe how the district would implement a remote learning and hybrid school model (a combination of in-person and remote learning). Across each of these models, the district or school also needs to address how special populations, including students with disabilities and English language learners, will receive necessary services and accommodations.”

On August 14, 2020, and in accordance with DESE requirements, the Boston Public Schools filed the second draft of its selected “BPS School Reopening Plan” with the DESE (the “BPS Reopening Plan”). The BPS Reopening Plan adopted a hybrid education model, which program returned students to in-person instruction in four temporally defined phases and pursuant to parent choice.³ Per the terms of the BPS Reopening Plan, students opting for in-person instruction were divided into two discrete groups at each grade level. Group A reported to school buildings on Monday and Tuesday each week; Group B reported to school buildings on Thursday and Friday each week; and all students received remote instruction on Wednesday, so that school buildings could be cleaned and sanitized between the attendance of the two cohorts.

³ Under this Plan, students and their families were initially permitted to choose between either fully remote or in-person instruction; and approximately half (~ 27,000) of the students in the Boston Public Schools elected fully-remote instruction for the 2020-21 school year.

The BPS Reopening Plan is an extensive and ponderous document, months in development and preparation, and addresses in detail such far-ranging matters as off-site and in-person models of education; synchronous and asynchronous learning; expectations for schools' teaching and paraprofessional staff; technology and educational materials; public health and safety; facilities management; and adherence to Center for Disease Control (CDC) guidelines and protocols regarding the cleaning and sanitization of buildings, the use of personal protective equipment, and social distancing within school sites.

BTU demanded impact bargaining over the BPS Reopening Plan, and the parties thereafter engaged in negotiations regarding the effect of mid-pandemic school re-openings on the terms and conditions of bargaining unit members' employment. This bargaining culminated in a September 9, 2020 Memorandum of Agreement between BTU and the School Committee (the "MOA") that is the subject of the present dispute. Regarding disputes, the MOA provides in Section VII(I) that "[t]he terms of this agreement shall be enforced through the grievance and arbitration procedures in the [parties'] Collective Bargaining Agreement."

Consistent with the terms of the BPS Reopening Plan, the MOA provides for a "phased-in hybrid learning model," envisioning both in-person and remote learning to take place within the schools at specified points in time during the calendar year. In Phase 1 of the model, students returning to school at the start of the academic year on September 21, 2020 commenced strictly remote learning. In Phase 2, however, starting on October 1, 2020, students identified as having "high in-person learning needs" (and the teachers and staff who serve them) began reporting to school sites for in-person instruction and learning. Students falling into the category of high-need

learners include students with disabilities,⁴ students qualifying as “English Learners,”⁵ students in the care of the Department of Children and Families, and students experiencing homelessness. In alignment with the DESE’s published directives, Boston Public Schools educators consider in-person instruction for high-need students to be especially critical. Even in the best of circumstances, these students confront a variety of daunting challenges to education related to their specific learning needs, their frequently compromised access to technology and other resources, the commonplace instability of their home environments, the inability of working parents to supervise home-based schooling during the workday, food insecurities, and various barriers to socialization. For many of these at-risk students, remote learning will mean no learning at all.⁶

Regarding the relationship between the health risks posed by COVID-19 and the contractual requirement that (as of October 1, 2020) BTU teachers and staff provide in-person learning to high-need students, the MOA contains the following two-sentence provision:

“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.”

MOA Sec. V (Public Health and Safety), at Para. 3 (“Section V(3)”).

⁴ Such students include those with severe autism, with physical handicaps, who are non-verbal, or who have other significant mental or emotional impairments.

⁵ English Learners include students who have experienced limited or interrupted formal education; students who do not speak English as a primary language and who are unable to perform ordinary classroom work in English; and students who require intensive literacy training in order to access a grade level-appropriate curriculum.

⁶ Tellingly, counsel at hearing acknowledged that only a tiny percentage of high-need students have opted to receive fully remote instruction during the pandemic. Nothing like the roughly 50% of Boston Public Schools students generally.

High-need students reported to schools within their Boston districts starting on October 1, 2020. This was the first time that BTU bargaining unit members had provided in-person services to students since March of 2020. BTU teachers and staff supporting high-need students have continued to provide on-site learning and related services to this population without interruption to the present day. On average, 1300 high-need students are receiving in-person instruction within the Boston Public Schools each day,⁷ and this translates to a daily average of just over nine such students in each school building.

On October 5, 2020, when Boston's citywide COVID-19 positivity rate hit 3.9%, Mayor Walsh met via Zoom with BTU President Jessica Tang ("Tang"). At that time, Mayor Walsh requested that BTU agree to waive its rights under MOA Section V(3), and thereby allow bargaining unit members to continue providing in-person instruction and services to the high-need students currently receiving them. Tang replied that BTU would not agree to do this, but stated that its membership would welcome a proposal for enhancing safety within the Boston schools in light of the increasing spread of COVID-19. Despite suggestions from Dr. Cassellius that such a proposal would be forthcoming, none materialized.

On October 7, 2020, Mayor Walsh announced that, as Boston's citywide COVID-19 positive test rate had reached 4.1%, most Boston Public Schools students would transition to remote-only learning as part of a delayed (but not scuttled) reopening plan. At the same time, however, in-person instruction for the roughly 2,600 high-need students who had commenced

⁷ There are approximately 2600 high-need students attending public school in Boston. In accordance with the BPS Reopening Plan, however, these students are divided into two distinct cohorts of 1300. One group attends school on Mondays and Tuesdays, the other on Thursdays and Fridays, and neither on Wednesdays.

reporting to school facilities in their districts as of October 1, 2020 would continue without suspension.

The Defendants made the foregoing determination in consultation with officials of the Boston Public Health Commission and the Massachusetts Secretary of Health and Human Services.⁸ Both of these agencies opined that, even with a citywide COVID-19 positivity rate of 4.1%, it was still safe for Boston Public Schools to continue providing on-site learning to the limited population of high-need students who had begun receiving in-person instruction in school buildings. Central to this judgment were the following salient factors: (1) the extensive health and safety precautions and mitigation measures that had been implemented within the Boston schools; (2) the small number of students who would actually be occupying school buildings during Phase 2 – just 1300 per day, and not the 13,000 contemplated when the 4% positivity benchmark was initially adopted; and (3) the fact that the City’s positivity rate was set at a conservative level *far* below the Commonwealth’s parallel positivity rate for Boston. Applying the Commonwealth’s statewide metric (which is consistent with World Health Organization guidelines),⁹ Boston’s 1% positivity rate is nowhere near the 5% rate the Commonwealth recommends as the point at which schools should consider moving to a fully-remote schooling model.

⁸ The Department of Health and Human Services appears to qualify as a “State authority” within the meaning of Section V(3) of the MOA, and counsel for BTU registered no disagreement with this inference at hearing.

⁹ The discrepancy sources to Boston’s apparently atypical practice of treating multiple COVID tests performed on a single subject within the preceding two weeks as a *single* test. Thus, for example, if one person takes three different COVID tests during a two-week window, Boston’s methodology will count them as just one test when computing the City’s positivity rate. The Commonwealth’s statewide methodology, by contrast, which accords with the practices of the World Health Organization, would treat this individual’s tests as three *separate* tests. The result is that Boston’s method for computing its rate of positivity will produce significantly higher averages; and, indeed, this has turned out to be the case in October, 2020. The City’s current COVID-positivity rate stands at 4.1%, whereas the Commonwealth’s positivity rate for the identical population in Boston is just 1%.

The Boston Public Health Commission and Secretary of Health and Human Services communicated their recommendations and the reasons for same to the Boston Public Schools on October 7, 2020. Addressing this matter contemporaneously, Dr. Cassellius transmitted the following letter to all Boston Public Schools 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:

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 original in Cassellius letter; emphasis added to Memorandum of Agreement.]

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 Center¹⁰ 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,

¹⁰ This appears to be a reference to the COVID-19 Response Command Center of the Massachusetts Emergency Management Agency, a statewide working group established and operating under the direction of the Secretary of Health and Human Services.

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.
[Emphasis original.]

The City of Boston's COVID-19 positivity rate has remained above 4% since Dr. Cassellius transmitted her October 7 letter to teachers and staff.¹¹ BTU commenced the instant litigation on October 9, 2020, bypassing without explanation the grievance and arbitration procedures provided for in the MOA.

DISCUSSION

I. LEGAL STANDARD

“A preliminary injunction ordinarily is issued to preserve the status quo pending the outcome of litigation.” Doe v. Superintendent of Schs. of Weston, 461 Mass. 159, 164 (2011). In order to prevail on a motion for preliminary injunction, the plaintiff must show (1) a likelihood of success on the merits of its claim, (2) that it will suffer irreparable harm without the requested injunctive relief, and (3) that the harm, without the injunction, outweighs any countervailing harm to the defendant that would result from it being enjoined. Packaging Indus. Grp., Inc. v. Cheney, 380 Mass. 609, 617 (1980). Where a party seeks to enjoin governmental action, as is the case here, it must also show that injunctive relief will either promote or at least not adversely affect the public interest. See Tri-Nel Mgmt., Inc. v. Board of Health of

¹¹ BTU counsel represented at hearing that this positivity rate has since increased to 4.4%, but the documentary record presented to the Court does not so reflect. The undersigned is obviously not intending to question the assertion of counsel, which is in all events immaterial to the legal question under review today.

Barnstable, 433 Mass. 217, 219 (2001). “A preliminary injunction is an extraordinary remedy never awarded as of right[.]” Winter v. Natural Res. Def. Council, Inc., 555 U.S. 7, 24 (2008), and “should not be granted unless the plaintiffs [make] a clear showing of entitlement thereto.” Student No. 9 v. Board of Educ., 440 Mass. 752, 762 (2004).

A. LIKELIHOOD OF SUCCESS¹²

The gravamen of BTU’s claim in this case is the contention that, once the COVID-19 positive test rate in the City of Boston reached 4%, the Boston Public Schools were required to transition to fully remote learning for *all* students, and to afford *all* teachers and staff the option to work remotely as well. Such is the plain meaning of the first sentence of Section V(3) of the MOA, and the Boston Public Schools are now charged by BTU with failing to adhere to this contractual dictate. As for the second sentence of Section V(3), it is argued, the Defendants lacked the authority to determine, based on the evaluation of the Boston Public Health Commission, that school districts could “reopen,” because they never allowed schools to fully close (as required) on October 7, 2020. Having improperly failed to close schools to on-site learning as of that date, BTU insists, and having instead commanded teachers and staff to

¹² As a threshold matter, the Court questions that it has proper jurisdiction over the merits of this dispute. The parties committed in Section VII(I) of the MOA to enforce the terms of that contract in accordance with the grievance and arbitration provisions of Article X of their still operative Collective Bargaining Agreement. Courts are constrained to respect arbitral modes of dispute resolution between parties that have agreed to be bound by the same in their contract. Nowhere is this principle more consistently honored than in contracts between employers and organized labor. See Sheriff of Middlesex Cnty. v. International Bhd. of Corr. Officers, Local RI-193, 62 Mass. App. Ct. 830, 831 (2005) (“When the parties have agreed to submit a dispute to arbitration, the courts will generally enforce that agreement and decline to interfere with the arbitration process.”). This is not the exceptional case where a party has asked the Court to issue injunctive relief to preserve the status quo pending arbitration. See, e.g., Town of Seekonk v. International Ass’n of Fire Fighters, Local No. 1931, 19 Mass. App. Ct. 1037 (1985). BTU has made no mention of the grievance machinery of the Collective Bargaining Agreement; and the union in fact seeks to upend rather than preserve the status quo with an order that calls a halt to in-person learning for high-need students. In the ordinary course, therefore, a deferral to arbitration would be warranted here. See Sheriff of Middlesex Cnty., *supra* at 831. That said, in light of the exigent circumstances that obtain as schools and teachers struggle to cope with the challenges of the pandemic, and in the hope of helping the parties dispel some measure of the uncertainty that currently clouds this important area of public life, the undersigned will address the merits of BTU’s motion.

continue providing in-person services to high-need students, the Boston Public Schools possessed no contractual authority under the second sentence of Section V(3) to either “reopen” the schools or dictate that “bargaining unit members ... return to BPS buildings.” (Emphasis added.) One cannot “reopen” schools that were never closed, and high-need teachers and staff cannot “return to BPS buildings” that they were never allowed to leave in the first place. With the conditions precedent to the authority conferred by the second sentence of MOA Section V(3) not fulfilled, the theory goes, the first sentence of Section V(3) controls and the Defendants must be deemed to have violated the contract.

With respect, the Court does not agree. While BTU’s position does not lack for textual logic, it ultimately proves too much, and asks the Court to impose an outcome that could not reasonably have been intended by these parties. Section V(3) of the MOA unambiguously invests the Boston Public Health Commission (or like municipal and state agencies) with the ultimate authority to determine when school districts can be open to on-site learning. Like all matters collectively bargained between labor and management, this particular provision of the parties’ contract reflects a compromise. BPS leadership would doubtless have preferred to retain the customary management right to determine when teachers will and will not be required to work on-site. BTU teachers, for their part, would undoubtedly have preferred the prerogative to work remotely at their own election during the COVID-19 crisis. What the MOA does in Section V(3), therefore, is strike a balance. Under the first sentence of this provision, when the COVID-19 positivity rate in Boston rises above 4% citywide, Boston Public Schools “will transition to full remote learning for all students and BTU bargaining unit members will have the option to be remote as well.” The 4% positivity rate in the City thus triggers an initial transfer of the normal management right to direct where bargaining unit members work (per Article I(D) of the parties’

Collective Bargaining Agreement) from the School Committee and its designees to the individual teachers. However, in accordance with the second sentence of MOA Section V(3), this transferred right to determine the situs of teacher service lasts *only* until “the Boston Public Health Commission (or other City or State authority) determines that the school district can reopen;” and, at that point, “BTU bargaining unit members will be expected to return to BPS buildings.”

In the final analysis, therefore, and acknowledging that Section V(3) of the MOA embodies a certain internal tension, the parties in this case agreed that, even if the citywide COVID-19 positivity rate reached 4%, the ultimate call as to whether teachers and staff will provide services to students within BPS buildings or remotely from home would be made *not* by the union (or its members) and *not* by the School Committee (or its building leadership). Instead, these parties agreed, in the vocabulary *au courant*, to “follow the science,” and assigned the judgment of whether and when teaching could safely occur within BPS facilities to independent health care professionals at the Boston Public Health Commission.

This is, in substance, what has occurred in the present case. When the City’s COVID-19 positivity rate reached 4%, the Boston Public Health Commission performed an evaluation of the extent to which on-site learning could safely occur within BPS buildings. Its analysis placed greatest emphasis on the following pertinent considerations: (1) the extensive health and safety precautions that had been implemented within the Boston schools; (2) the very modest number of high-need students who would actually be occupying school buildings at any one time in Phase 2 – just 1300, and not the 13,000 initially contemplated when the 4% positivity benchmark was adopted; and (3) the fact that the City’s positivity rate was computed at a conservative level *far* below the Commonwealth’s cognate positivity rate for Boston. Applying the Commonwealth’s

prevailing metric (which is consistent with World Health Organization guidelines), Boston's 1% positivity rate is nowhere near the 5% rate the Commonwealth recommends as the point at which schools should consider moving to a fully-remote schooling model.

There is no suggestion that the Boston Public Health Commission carried out its assigned analysis with anything but the highest fidelity to good science; and the conclusion reached by the Commission was that Boston schools could continue to operate in accordance with a phased-in hybrid learning model. The vast majority of students would transition to remote-only learning; but some in-person classes for the City's 2600 high-need students would continue as they had been. Teachers and staff serving this at-risk population, in turn, would be required to work on-site as they had since the onset of Phase 2 of the BPS Reopening Plan. The Boston Public Schools' determination in this regard rested on the reasonable scientific judgment of the City's Public Health Commission and the Commonwealth's Department of Health and Human Services. That judgment was made by public health professionals – taking into account the particular risk of COVID-19 viral spread, on the one hand, and the distinctive educational requirements of high-need students on the other. This was the task explicitly assigned to these professionals in Section V(3) of the parties' MOA, and BTU presents no sound reason for interfering with it.

To be sure, and as BTU stresses, the scientific determination of the Boston Public Health Commission in this case took place slightly out of sequence from what is contemplated in Section V(3) of the MOA. The contract plainly envisions that, once the citywide COVID-19 positivity rate reaches 4%, teachers would have the option to work remotely; and, after some undefined (and potentially *de minimis*) period of time following their exercise of that option, the Boston Public Health Commission – acting as referee -- would make a decision as to when the

school district could reopen. Here, however, the Boston Public Health Commission did not wait for teachers to exercise that contractual option before rendering its judgment that continued on-site learning for a relatively small high-need student population could continue without undue risk to the health and safety of affected students or staff. The School Committee, in turn, through its Superintendent of Schools, did not wait for teachers to exercise their remote working option before declaring that high-need students would continue to receive their instruction and services on-site – at least until such time as public health officials (monitoring the most current data) determined this was no longer appropriate. Once again, the School Committee arrived at this decision only after learning that the Boston Public Health Commission and the Department of Health and Human Services' Covid-19 Command Center supported such a conclusion. This is undeniably the substance, if not the precise form, of the bargain that was struck in Section V(3) of the MOA.

In these unusual circumstances, it appears that the essential aspirations of the parties' contract have been fulfilled. The Defendants exercised a prerogative accorded to them under the School Committee's MOA with BTU, and did so only after the requisite scientific judgments had been made by the public health officials entrusted with same. The Defendants could have waited for teachers to exercise their right to work remotely when the City's COVID-19 positivity rate first reached 4%, and then immediately ordered them to return to on-site duty when the Boston Public Health Commission declared that this could occur safely. But little good would have been served by this sort of formalistic sequencing. The judgment of the Boston Public Health Commission itself would clearly not have been affected by such a *brevis* deferral. More importantly, families of high-need students and the teachers and staff serving them would have made plans for at-home learning, only to see such arrangements abruptly scrapped as soon as

they took effect. The students themselves, of course, would have been caught in the switches of this about-facing, and would have suffered from the confusion and disruption to their schooling that likely followed in its wake.

The Court sees no material breach of contract in the actions taken by the Boston Public Schools in this case. See Robert & Ardis James Found. v. Meyers, 474 Mass. 181, 188 (2016) (“[A] contract should be construed ... in a manner which will carry out the intent of the parties” (alteration in original) (internal quotations omitted)). BTU has thus demonstrated no likelihood of prevailing on the merits of its claim.

II. RELATIVE IRREPARABLE HARM

Regarding the relative risks of irreparable harm posed by the issuance *vel non* of injunctive relief, the Court finds that BTU has again failed to demonstrate that this balance tilts in favor of the preliminary equitable relief it seeks. It is difficult for the Court to discern how BTU teachers who are not permitted to elect working remotely, and are instead allowed to be called in to provide on-site services to high-need learners, face immediate or irreparable injury of any kind. At most, they are being frustrated in their exercise of a right which, under the plain terms of the MOA, could be supervened almost immediately after it became effective. Nothing in the contract, after all, requires the Boston Public Health Commission to wait any particular period of time before declaring conditions in the schools to allow for in-person teaching/learning by students and staff. The Commission could have done so five minutes after bargaining unit members made their election. It is difficult to conceive of a less substantial injury to teachers.

In its Complaint and Memorandum, BTU insists that denial of its requested injunction will force the schools’ most vulnerable student population and their teachers to face the now heightened risk of death and disability associated with COVID-19. (Plaintiff’s Memorandum, at

pp. 6-8.) The Court is acutely cognizant of the serious health risks posed by the pandemic; but it cannot agree with the contention advanced by BTU that a COVID-19 positivity rate of 4% represents some kind of stipulated acknowledgment by the parties that on-site learning is *per se* unsafe.¹³ If the parties intended 4% positivity to be the bright-line determinant BTU insists it is, they would surely have so stated in their MOA. That is, the contract would have simply provided that a 4% positivity rate activates a transition to fully remote learning, and a concomitant right in bargaining unit members to teach off-site. But the contract says no such thing. To the contrary, the second sentence of Section V(3) of the MOA provides that, even once the 4% positive threshold is cleared, the Boston Public Schools can still compel teachers to work on-site if the Boston Public Health Commission determines that this can be done safely. If 4% positivity were the singularly operative determinant to whether or not schools could teach students in their facilities, then the second sentence of Section V(3) of the MOA would be meaningless and of no effect. To read the contract in this manner is, of course, strongly disfavored. See Lexington Ins. Co. v. All Regions Chemical Labs, Inc., 419 Mass. 712, 713 (1995) (“A contract should be construed in such a way that no word or phrase is made meaningless by interpreting another word or phrase”).

The existence of the second sentence of Section V(3) of the contract signifies that, *notwithstanding* the 4% COVID-19 positivity rate, competent public health authorities may *nonetheless* conclude that in-person learning within schools can occur safely. There is no other

¹³ BTU’s Memorandum thus states: “The Mayor and the School Committee previously agreed with the soundness of that proposal. Why else would it [sic] have agreed that when the citywide COVID-19 rate passed 4% BPS would need to go full remote? The obvious implication is that, after the City hit 4%, it was not safe to provide in-person services.” (Plaintiff’s Memorandum, at pp. 8-9.) BTU presses this position with even greater urgency in its Reply Memorandum.

rational construction that can be accorded to this two-sentence provision of the contract. BTU bargaining unit members and high-need students thus do not face irreparable harm from an unreasonable exposure to COVID-19. By their MOA, rather, the teachers agreed to trust the science and the Boston Public Health Commission officials who apply it. In this case, the best professional scientific judgment that avails, and in all events the one made by the authority assigned to pronounce such judgment per the terms of the MOA, is that on-site teaching of selected high-need learners does not expose students or staff to inordinate health risks. Plaintiff's claim to irreparable harm thus fails.

On the competing side of the balance, entry of the injunction requested by BTU threatens to visit substantial disruption on the operations of the Boston Public Schools. An injunction against on-site teaching for so long as the City's COVID-19 positivity rate remains higher than 4% would mean that high-need and routine-dependent students who have been receiving services at school would be abruptly returned home.¹⁴ It is widely recognized by educators throughout the Commonwealth, no doubt including BTU's own members, that students with special needs and other at-risk children learn much better from teachers who instruct them in person. Such students suffer measurable deficits in both academic and social performance when their learning needs are addressed remotely. This, of course, is why the DESE's promulgated guidance and the Boston Public Schools' own Reopening Plan give special priority to the in-person education of

¹⁴ Family members, in turn, who have begun to structure their own working lives in reliance on these arrangements, would likewise be thrust into uncertainty as they attempt to accommodate in-home instruction for these children.

this vulnerable population, a carefully crafted set of arrangements that would be undermined if BTU were granted the injunction it seeks.¹⁵

Taking all matters fairly into consideration, the Court concludes that the balance of equities and hardships militates against the issuance of such an injunction. See Packaging Indus. Grp., Inc. v. Cheney, supra at 621-22 (“Even if the judge found that the plaintiffs had demonstrated some risk of irreparable harm, the judge could easily have concluded that this risk was offset by the risk [the defendant] would have faced had the plaintiffs been granted their requested relief.”).

III. PUBLIC INTEREST

To the extent that BTU seeks to enjoin government action, as it does, the Court properly considers the public interest. See Garcia v. Department 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.” (internal quotations omitted)).

In the present case, BTU’s entire claim on the public interest rests upon the contention that denial of an injunction in its favor would undermine the important interest in honoring collectively bargained agreements in the public sector. (Plaintiff’s Memorandum, at pp. 9-10.) This is, of course, a salutary interest clearly reflected in Massachusetts law. See G.L. c. 150E, §§ 6-7. As set forth ante, however, entry of the injunction BTU seeks would *disserve* rather than fulfill the most important aspirations of the parties’ contract – to wit, allowing the viability of on-

¹⁵ It is also, no doubt, the reason that so few high-need students have opted to receive their school instruction and services at home.

site learning in the Boston schools to be determined by public health officials as a matter of good science.

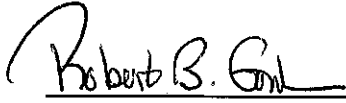
As important, entry of the injunction sought by BTU would subvert the best educational judgment of those organizations entrusted by law to harmonize the competing concerns over learning and safety in the context of the COVID-19 pandemic. These organizations are the Department of Secondary and Elementary Education, The Department of Health and Human Services' COVID-19 Command Center, and the Boston Public Health Commission, all of which support the Defendants' conclusion that in-person instruction of high-need students best serves the educational interests of these children, and can be performed with reasonable safety through adherence to COVID-related mitigation protocols. These are well-supported judgments that the Court will not disturb.

In these circumstances, the Court finds that the injunction sought by BTU is not consonant with the public interest. This further militates against issuance of the requested equitable relief. See Tri-Nel Mgmt., Inc. v. Board of Health of Barnstable, *supra* at 228 (“[I]n light of the scientific support linking [environmental tobacco smoke] to adverse health effects, the Superior Court judge properly determined that the issuance of an injunction would not serve the public interest.”).

CONCLUSION AND ORDER

For all the foregoing reasons, the Plaintiff's Motion for Preliminary Injunction shall be,
and hereby is, **DENIED.**

SO ORDERED.



Robert B. Gordon
Justice of the Superior Court

Dated: October 14, 2020