

COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF LABOR RELATIONS

In the Matter of

BOSTON SCHOOL COMMITTEE

and

BOSTON TEACHERS UNION

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Case No. MUP-13-3055

Date Issued: June 9, 2014

Hearing Officer:

Kerry Bonner, Esq.

Appearances:

Eamonn Gill, Esq.: Representing Boston School Committee

Mark Esposito, Esq.: Representing Boston Teachers Union

HEARING OFFICER'S DECISION

Summary

1 The issues are whether the Boston School Committee (School Committee or
2 Committee) violated Sections 10(a)(3), (4), (5) and, derivatively, Section 10(a)(1) of
3 Massachusetts General Laws Chapter 150E (the Law) by: 1) retaliating against three
4 unit members for their protected, concerted activity; 2) requiring ABA Specialists at the
5 Haynes School to perform classroom paraprofessional duties without providing the
6 Boston Teachers Union (Union) with prior notice and an opportunity to bargain over the
7 decision and the impacts of the decision on employees' terms and conditions of
8 employment; and 3) failing to provide information that is relevant and reasonably
9 necessary for the Union to execute its duties as collective bargaining representative.

1 Based on the record and for the reasons explained below, I conclude that the School
2 Committee did not violate Sections 10(a)(3) or 10(a)(4) of the Law as alleged. I also
3 conclude that the School Committee did violate Section 10(a)(5) of the Law by: 1)
4 unilaterally assigning ABA Specialists to perform classroom paraprofessional duties at
5 the Haynes School in the Summer of 2013; and 2) failing to provide certain information,
6 and failing to timely provide other information, that is relevant and reasonably necessary
7 for the Union to execute its duties as collective bargaining representative.

Statement of the Case

8 On August 14, 2013, the Union filed a Charge of Prohibited Practice (Charge)
9 with the Department of Labor Relations (DLR) alleging that the School Committee had
10 engaged in prohibited practices within the meaning of Sections 10(a)(3), (4), and (5) of
11 the Law. On October 22, 2013, a DLR investigator issued a six-count Complaint of
12 Prohibited Practice. On October 28, 2013, the Union filed a Motion to Amend the
13 Complaint. On December 12, 2013, the DLR investigator issued a six-count Amended
14 Complaint (Complaint) alleging that the School Committee violated Sections 10(a)(3),
15 (4), (5) and, derivatively, (1) of the Law by: 1) issuing Cicely Payne (Payne) two written
16 warnings and a "Does Not Meet Expectations" rating on her performance evaluation in
17 retaliation for her protected, concerted activity; 2) issuing Maude Auborg (Auborg) a
18 written warning and transferring her to a different school in retaliation for her concerted,
19 protected activity; 3) transferring Mary Bell (Bell) to a different school in retaliation for
20 her protected, concerted activity; 4) unilaterally requiring ABA Specialists at the Haynes

1 School to perform classroom paraprofessional duties without providing the Union with
2 prior notice and an opportunity to bargain to resolution or impasse; and 5) failing to
3 provide relevant and reasonably necessary information to the Union. The School
4 Committee filed its Answer to the Amended Complaint on January 21, 2014.

5 Pursuant to the Notice of Hearing, I conducted a hearing on January 22 and 23,
6 2014. I conducted an additional day of hearing on February 24, 2014. The parties were
7 afforded a full opportunity to be heard, to examine and cross-examine witnesses and to
8 introduce evidence. Following the hearing, the Union and School Committee each filed
9 post-hearing briefs. On the entire record, including my observation of the demeanor of
10 witnesses, I make the following findings:

11 Stipulations of Fact

- 12 1. The City of Boston (City) is a public employer within the meaning of Section 1 of
13 the Law.
- 14 2. The School Committee is the City's collective bargaining representative for the
15 purpose of dealing with school employees.
- 16 3. The Union is an employee organization within the meaning of Section 1 of the
17 Law.
- 18 4. The Union is the exclusive bargaining representative for Applied Behavior
19 Analysis Specialists (ABA Specialists) employed by the City and the Boston
20 Public Schools. Payne, Auborg, and Bell are ABA Specialists and members of
21 the bargaining unit.
- 22 5. On October 9, 2012, the Union filed Case Number CAS-12-2309 seeking to
23 accrete the ABA Specialists into the paraprofessionals unit. On December 6,
24 2012, the School Committee filed a motion to dismiss CAS-12-2309 arguing that
25 it was contract-barred. On December 11, 2012, the DLR held an informal
26 conference on CAS-12-2309. The DLR dismissed the matter on January 4,
27 2013.
- 28
- 29
- 30
- 31

- 1 6. The Union instead filed MCR-12-2476 on December 10, 2012. The DLR certified
2 the unit referred to in paragraph 4 on March 13, 2013.
- 3
- 4 7. On November 14, 2012, Payne's supervisors met with her to discuss her work
5 performance.
- 6
- 7 8. On December 11, 2012, Payne attended the DLR conference on case number
8 CAS-12-2309.
- 9
- 10 9. On January 9, 2013, the Committee issued Payne a written warning.
- 11
- 12 10. The Committee knew of Payne's attendance at the DLR conference referred to in
13 Paragraph 8.
- 14
- 15 11. Since at least June 2013, the Union and the Committee have been negotiating
16 the unit's first collective bargaining agreement. Bargaining sessions were held
17 on June 25th and July 5th of 2013.
- 18
- 19 12. Payne, Auborg, and Bell are the three ABA Specialists on the Union's negotiating
20 team. They participated in the bargaining sessions held on June 25th and July 5th
21 of 2013.
- 22
- 23 13. On May 8, 2013, the Committee issued Payne another written warning.
- 24
- 25 14. On July 16, 2013, the Committee issued Payne a "Does Not Meet Expectations"
26 rating on her performance evaluation resulting in her not receiving a step
27 increase.
- 28
- 29 15. The conduct described in paragraphs 8 and 12 constitutes concerted, protected
30 activity under Section 2 of the Law.
- 31
- 32 16. The Committee knew of Payne's concerted, protected activity described in
33 paragraphs 8 and 12.
- 34
- 35 17. On July 5, 2013, the Committee transferred Auborg from the Lee School to the
36 Condon School for the remainder of the summer.
- 37
- 38 18. On July 15, 2013, the Committee issued Auborg a written warning.
- 39
- 40 19. On July 5, 2013, Bell informed her supervisor that she would seek assistance
41 from the Union if a co-worker was assigned to perform as a one-to-one

1 paraprofessional for the summer rather than her normal job duties as an ABA
2 Specialist.

3
4 20. On July 5, 2013, the Committee transferred Bell from the Lee School to the
5 Tynan School for the remainder of the summer.

6
7 21. The Committee knew of Bell's concerted, protected activity described in
8 paragraphs 12 and 19.

9
10 22. Prior to the Summer of 2013, ABA Specialists assigned to the Haynes School
11 were not assigned to exclusively perform classroom paraprofessional work as
12 part of their duties. Prior to the Summer of 2013, only paraprofessionals
13 exclusively performed the duties of assisting classroom teachers.

14
15 23. During the Summer of 2013, the Committee required ABA Specialists at the
16 Haynes School to perform classroom paraprofessional duties assisting
17 classroom teachers.

18
19 24. The Committee took the action described in paragraph 23 without giving the
20 Union prior notice and an opportunity to bargain to resolution or impasse over the
21 decision to require ABA Specialists at the Haynes School to perform classroom
22 paraprofessional duties and the impacts of that decision on employees' terms
23 and conditions of employment.

24
25 25. Work duties are a mandatory subject of bargaining.

26
27 26. By letter dated June 27, 2013, the Union requested the following information:

28
29 a. Copies of all contracts between the Boston School Committee, the City of
30 Boston, and/or the [Boston Public Schools] with any provider of applied
31 behavior analysis or ABA therapy services.

32
33 b. The names, rate of pay, and job duties of any individuals who are not
34 [Boston Public Schools] employees but who provide ABA therapy services
35 within the Boston Public Schools.

36
37 27. By letter dated July 30, 2013, the Union reiterated the June 27, 2013 request
38 and additionally requested the following information:

39 a. A list of 2013 summer school assignments for all ABA Specialists
40 employed in the Boston Public Schools.

41

Findings of Fact1 ABA Specialist Position

2 The primary function of the ABA Specialist within Boston Public Schools is to
3 deliver and implement specialized instruction as developed by a Program Director for
4 ABA, who is the ABA Specialist's supervisor. Most of their work is with students with
5 autism, but they may at times work with students with other disabilities. ABA Specialists
6 each provide thirty service hours per week to students, and the number of hours
7 received by each student is determined by his or her Individualized Education Plan
8 (IEP).³

9 Before a student receives ABA services, he or she is initially evaluated to
10 determine the student's areas of weakness. Once those areas are identified and
11 prioritized, specific programs are selected for the student. At times relevant to this
12 case, the programs were selected from a database provided by The New England
13 Center for Children (NECC), an organization with which the School Committee
14 contracted to provide curriculum and professional development services.

15 For any particular program selected, an ABA Specialist performs a series of trials
16 with the student. This is a structured teaching method in which the student has the

³ A student's IEP also sets forth any other specialized services the student may receive, and is mandated and governed by Massachusetts Special Education laws.

1 opportunity to be exposed to a certain skill.⁴ A trial begins with the ABA Specialist
2 gaining the student's attention, and then giving an instruction. Depending on the
3 student, the ABA Specialist may also give a student a prompt, to assist with the task.⁵
4 Once the student responds correctly to the instruction, there is a consequence, such as
5 an excitable response or a toy. A trial may be run five or ten times, depending on the
6 student and the skill. When a student answers correctly 80% of the time over three
7 consecutive sessions, the student would be considered to have mastered the skill, and
8 a new skill would be selected for the student.⁶ To track students' progress, the ABA
9 Specialist collects data by recording the student's correct and incorrect responses, and
10 whether a prompt was required, during trials.

11 Originally, ABA Specialists at Boston Public Schools collected data on students
12 only on paper data sheets. However, during the 2012 – 2013 school year, ABA
13 Specialists at the Warren Prescott School (Warren Prescott) were expected to enter
14 student data into the Autism Curriculum Encyclopedia (ACE) online program. ACE
15 includes a mobile application that is available for iPads and iPhones, in which ABA

⁴ Examples of skills that an ABA Specialist could teach are handing a toy to a peer, mastering five nouns, or identifying the color red. In the color example, the color red is referred to as the "target."

⁵ An example of a full prompt could be hand over hand, while an ABA Specialist giving a partial prompt would provide less assistance. Overprompting is providing more support than what the student needs.

⁶ With the example of the skill of handing a toy to a peer, as mentioned above, the next skill for the student may be taking turns with the toy with another student. Or, if the student has mastered five nouns, the ABA Specialist could change the target by pulling five new nouns for the student to learn.

1 Specialists can identify which program they are working on, and then the application
2 would indicate the number of trials that the ABA Specialist was expected to run. The
3 ABA Specialist could then enter data, such as whether the student responded correctly
4 or incorrectly, directly into ACE in real-time as they were running the trials with the
5 student. If the ABA Specialist did not enter data into ACE in real-time, they were
6 expected to follow up by inputting the data from the physical data sheets, and then
7 follow-up by inputting the data into ACE from any device that has an internet connection
8 and a browser, such as a computer or iPad.⁷ Once the data is uploaded into ACE,
9 Program Directors for ABA are able to generate graphs to track a student's performance
10 and progress. Data that is entered onto the physical data sheets, but not into ACE, is
11 not generated into graphs and is, therefore, a less efficient tool for tracking student
12 progress. The School Committee provided the ABA Specialists at the Warren Prescott
13 with their iPads and laptop computers.

14 Consultants from NECC, who are board-certified behavior analysts (BCBA),
15 helped roll out the ACE program and trained staff. During the 2012 – 2013 school year,
16 the NECC consultants were at the schools four days per week. Erin King (King) was a
17 NECC consultant assigned to the Warren Prescott. At the beginning of the school year,

⁷ Although Payne testified that data could be input into ACE from an iPad in real-time only, and a computer was required to go back and input data that had already been collected, I credit Joseph Bartholomew (Bartholomew), Supervisor of Autism Settings and Services, and Laraine Zanatta (Zanatta), Program Director for ABA and Payne's direct supervisor, that the iPad also could be used to input data after it had been collected.

1 Zanatta and King set up training on use of the ACE application on the iPad. In addition,
2 Zanatta and King also conducted weekly training sessions.⁸

3 Events Prior to Union Certification

4 In 2010, a group of ABA Technicians,⁹ including Payne, brought concerns
5 regarding their then-supervisor to the Equity Office.¹⁰ In Spring 2011, all of the ABA
6 Technicians received layoff notices. In response, Payne wrote a letter to the
7 Superintendent requesting that she rescind the layoff notices. After the Deputy
8 Superintendent met with the ABA Technicians, they were subsequently laid off, but
9 permitted to apply for the newly-titled ABA Specialist position. Approximately 15
10 technicians applied, and 10 were hired as ABA Specialists, including Payne.

11 Around the same time period, Program Directors became unionized,¹¹ resulting
12 in changes to their hours and benefits. Payne and other ABA Specialists met with the
13 Special Education Director to raise concerns about how this change would affect the
14 ABA Specialists' working conditions. They also met with John Verre (Verre), the

⁸ It is not clear from the record if every weekly session included training on the ACE technology.

⁹ As described below, some ABA Specialists were formerly in the position of ABA Technician.

¹⁰ Although the Union argues that the supervisor was terminated shortly thereafter, there is no reliable record evidence as to the reason for the supervisor's departure.

¹¹ Program Directors are members of the BASAS union.

1 Superintendent of Special Education,¹² to ask if they could join the Union. Verre
2 responded that the Superintendent of Human Resources could not figure out how to put
3 them in the Union because of the range in their salaries.

4 In June 2012, another ABA Specialist arranged a meeting with Bartholomew to
5 discuss working conditions. At this meeting, three or four ABA Specialists presented
6 their concerns. Payne was in the audience and made comments, but was not one of
7 the presenters.¹³ After this meeting, Payne contacted the Union in June 2012 and, in
8 September 2012, began assisting with the Union's organizing effort.¹⁴

9 Prior to the Union's certification, ABA Specialists were considered managerial
10 employees and thus were governed by the School Committee's "Managerial Conditions
11 of Employment." As of the date of the Complaint, the Union and School Committee had
12 not yet negotiated a collective bargaining agreement.

13 Payne's Work History

14 Payne has worked for the School Committee as an ABA Technician, and then
15 ABA Specialist, for eight years. She has a graduate certificate in ABA, and became a
16 BCBA in September 2013, after meeting educational and experience requirements, and

¹² Payne testified that she believed Bartholomew was at this meeting, but also stated, "don't quote me on that." Therefore, I do not credit this testimony.

¹³ Although Payne did not know how many of the 15 ABA Specialists attended the meeting, there were a "good many."

¹⁴ The parties stipulated to additional facts surrounding the eventual certification of the bargaining unit, as set forth above.

1 passing the certification exam. During the relevant time period, she worked at the
2 Warren Prescott School.

3 Kim Klemek (Klemek), Program Director for ABA and Payne's supervisor at the
4 time, rated Payne a "Meets Expectations" on her overall performance, and in each
5 individual category, on her 2011-2012 performance evaluation.¹⁵ Payne also received a
6 "Meets Expectations" for overall performance on her evaluations for school years 2010
7 – 2011, 2008 – 2009,¹⁶ 2007 – 2008, and 2005 – 2006¹⁷ by various evaluators, none of
8 which were Zanatta.

¹⁵ In the "Additional Comments" section of the Overall Performance category in Payne's 2011 – 2012 evaluation, Klemek wrote, "Discussed tardiness, multiple days last few weeks, making sure to contact teacher, supervisor, Janet – only temporary issue." Payne also added comments on the tardiness issue, noting, "I wish to make note that the tardiness mentioned in Part III of the evaluation was first mentioned on 5/30, the day of my evaluation. This tardiness refers to four days in the 3rd week of May and is not a representation of my performance throughout this evaluation period."

¹⁶ Although Payne received an overall "Meets Expectations" on her 2008 – 2009 evaluation, her supervisor rated her "Does Not Meet Expectations" in two of nine categories, i.e., "Decision-Making and Problem Solving" and "Communications." Although the Union attempted to connect this evaluation to complaints that Payne and others brought to the Equity Office about this supervisor and her eventual departure from employment, I decline to make such an inference as there is no evidence that the evaluation was incorrect or tied to Payne's complaints.

¹⁷ The parties did not provide any evidence regarding Payne's 2009 – 2010 performance evaluation. In June 2007, Payne was not scheduled to receive a performance evaluation for the 2006 – 2007 school year, but was approved for a raise because the Director of Special Education Services and Unified Operations notified Human Resources that Payne continued to "Meet Expectations."

1 On August 6, 2012, Klemek issued Payne a "Meeting Summary Regarding Work
2 Performance."¹⁸ It states, in relevant part:

3 ...Specifically, we discussed the lack of implementation of new programs,
4 the lack of immediate communication when there are questions or next
5 steps needed for current programs, and the lack of using the curriculum
6 sheets to specifically inform instruction and note all pertinent information
7 on summary sheets. [Paragraph 1]

8
9 We discussed that you are expected to implement new programs within
10 the week they are given and ask for clarification or assistance immediately
11 as needed. You are also expected to follow programs as written, including
12 moving through the prompting hierarchy and targets as written. If
13 questions arise about how to run the program, about targets that seem
14 unnecessary, or targets that may need to be added, you are expected to
15 contact the supervisor within the week. [Paragraph 2]

16
17 In order to meet these expectations, we agreed to the following support:

18
19 There will be weekly emails initiated by you based on the program list on
20 the daily session notes to determine any questions or updates that may
21 need to be addressed. New programs will first be modeled by me, then
22 attempted by you, and follow up will occur by the end of the week to
23 determine if further support or adjustment is necessary. We discussed a
24 review by you this week of all programs and summary sheets to ensure
25 that all updated information is present and easy to understand and
26 programs are matching with the instruction as given. We agreed that you
27 will email on Wednesday with an update and I will make any necessary
28 adjustments or add further support to updating the sum sheets.
29 [Paragraph 3]

30

¹⁸ There is no evidence that Klemek was aware of any union organizing activities, or Payne's role in them, when she discussed these performance issues with Payne. In fact, Payne testified that she did not tell anyone in management about her role in the Union certification process, but that Verre and Bartholomew saw her at the December 11, 2012 conference at the DLR. Bartholomew and Zanatta corroborated that this was the time when they first became aware of Payne's involvement in the Union certification efforts.

1 In response to the above, Payne handwrote, "I do not agree with content in
2 paragraphs 1 and 2 based on our meeting on 8/5. Paragraph 3 I'm in agreement with
3 content based on our meeting on 8/5."

4 Payne's Performance Issues

5 During the 2012 – 2013 school year, Zanatta was a Program Director for ABA
6 and Payne's supervisor. In addition to supervising seven ABA Specialists in three
7 schools during the 2012 – 2013 school year,¹⁹ Zanatta also assessed children entering,
8 and already part of, the school system to determine if ABA services were required.
9 Prior to this position, Zanatta worked in the field of autism for approximately 20 years,
10 working in management, program design and development, and consulting for non-
11 profits and public schools. She has a Masters Degree in Behavior Analysis.

12 On November 14, 2012, Zanatta and Bartholomew²⁰ met with Payne to discuss
13 several issues with Payne's performance, including: tardiness to work and student
14 sessions;²¹ talking on a cell phone while in the classroom; eating in the classroom;

¹⁹ Zanatta supervised ABA Specialists Mark and Marissa, along with Payne, at the Warren Prescott School. The parties did not identify Mark and Marissa's last names.

²⁰ Bartholomew's job duties as the Supervisor of Autism Settings and Services included overseeing the entire ABA work force, including ABA Specialists and Program Directors for ABA.

²¹ Payne testified that they only discussed tardiness to sessions, but not to work. Both Zanatta and Bartholomew testified that they talked about Payne's tardiness to work. Additionally, Zanatta's memo described in the next section of this decision references their discussion about tardiness to work. I therefore conclude that they did address Payne's tardiness to work, as well as to student sessions.

1 doing paperwork during session time; sitting next to the wrong student;²² levels of
2 engagement during sessions; prompting styles;²³ and absences, including vacation
3 days and sick days.

4 With regard to tardiness to sessions, Payne explained that she was sharing a
5 student with Mark who was arriving late to the classroom to pick the student up after
6 Payne's session concluded. Because the classroom teacher did not like this student to
7 be unattended, Payne would wait for Mark to arrive, which would cause her to be late
8 for her next session. At the meeting, Payne agreed to be at her sessions within five
9 minutes of the start time, and began bringing the student to the Special Education
10 classroom if Mark did not arrive on time.²⁴

²² Although Payne did not recall discussing sitting next to the wrong student at this specific meeting, she did recall the actual incident. She explained that when she entered the classroom, her student was engaged in a free choice exercise with a peer. At the same time, another student in the class asked her to read to him. Payne read to the second student, while her own student was within arm's reach, and she continued to observe his peer interaction.

²³ Payne did not recall discussing her levels of engagement with students or prompting styles. However, Bartholomew and Zanatta credibly recalled discussing each of these topics and Bartholomew's notes also reference them.

²⁴ Payne testified that Mark was not reprimanded for being late. Because Payne did not testify as to how she knew this, I decline to credit this testimony.

1 At the meeting, Payne did not recall eating in the classroom. She also did not
2 recall talking on her cell phone, but told Zanatta and Bartholomew that it may have been
3 a time when she needed to take a call.²⁵

4 On January 7, 2013, Zanatta again met with Payne to address issues with her
5 work performance. She summarized the meeting by memo dated January 9, 2013,
6 which states in relevant part:

7 ...Specifically, on January 3, 2013 you showed up at 8:20 for a training
8 that started at 7:30am. Your regular start time is 7:30, and you did not
9 notify a supervisor that you would be late. You were also 40 minutes late
10 for the previous scheduled training on December 20, 2012 and you did not
11 notify me. Additionally, [Bartholomew] and I met with you on November
12 14, 2012 and verbally addressed the issue of your tardiness for your day
13 and individual sessions. At that time, we explained that you were
14 expected to be at work on time, start your scheduled sessions on time and
15 notify your supervisor and school of any tardiness. You stated you
16 understood and would notify a supervisor if [you would be] more than 5
17 minutes late.

18
19 On 1/7/13 we discussed that you are expected to keep your student's ABA
20 data up to date in the ACE online program. Time is allotted to complete
21 this task during each session as well as during your one-hour daily
22 planning period. You have been trained by a NECC BCBA on the skills
23 required to carry out your position as an ABA Specialist at the Warren
24 Prescott School: Core Skills Assessment, activation of student programs
25 in ACE, ABA teaching procedures, behavior management techniques and
26 reinforcement programs, inclusion strategies and data collection,
27 reviewing IEP objectives, and data entry/troubleshooting in the ACE online
28 program.

29 In order to meet these expectations, we agreed to the following support –
30

²⁵ Neither Zanatta nor Bartholomew had observed Payne eating or taking on her cell phone during class, but Zanatta testified that Allison, a classroom teacher, had notified Zanatta of these incidents. After discussing them with Payne, these issues did not come up again.

- 1 ▪ You have my cell phone and email to contact me for any issues or
2 tardiness.
3 ▪ Attend and participate in weekly trainings set up to increase ABA
4 specialists' skills taught by BCBAs at the Warren Prescott.
5 ▪ It is expected that if you have a programmatic questions about a case
6 you are working on – you will direct them to myself or Erin King, BCBA.
7

8 In summary, please contact me prior to being late for your day and
9 complete your assigned duties of keeping student data up to date in the
10 ACE online program during your daily planning time.
11

12 Payne's regular hours are 7:30 A.M. – 2:30 P.M., and her student sessions begin
13 at 8:30 A.M. With regard to Payne arriving late for the January 3, 2013 training session,
14 she had problems starting her car and, once she did get it started, she ran into traffic.
15 In addition, Payne forgot that there had been a training session scheduled for that day,
16 as it was right after school vacation.²⁶

²⁶ With regard to the December 20, 2012 training, the Union argues that if Payne did miss it, she had not been notified of it. This was not Payne's testimony. Rather, in response to the question on direct, "So is it fair to say that you were not aware of any commitment that you were missing on December 20, 2012?", Payne responded, "It's fair to say that I – yes, yes, I do not remember that I missed a commitment on that day." I do not find this to be evidence that Payne was not notified of the training session, but only that she did not remember missing the session.

1 Payne had difficulty entering her student data into ACE in a timely fashion
2 because of her difficulty with her iPad and computer.²⁷ On approximately two
3 occasions, she contacted the IT department when her computer was frozen. IT told her
4 to reboot, but she continued to have problems.²⁸ This meeting on 1/7/13 was the first
5 time Payne advised Zanatta about her computer problems.²⁹ In addition, Payne also
6 had problems accessing the internet with her iPad, despite receiving training.³⁰

7 On May 8, 2013, Zanatta issued another memo to Payne. It states in pertinent
8 part:

9 On May 7th, 2013, I was informed by Allison D, Autism Strand Teacher at
10 the Warren Prescott, that you had a meeting with [R]'s father at 11:30am.

²⁷ Payne testified that the time allotted for updating data into ACE "was not necessarily sufficient," which is why ABA Specialists were permitted to use school vacations to catch up on the task. Accordingly, she attempted to update the data in ACE for her four students during the 2012 December break, but testified that she was not able to update the data for one of the students because of her computer problems. An ACE report entered into evidence at the hearing shows that Payne did not enter data into ACE for student R from December 5, 2012 through March 12, 2013, the date that the report was generated. Thus, Payne failed to update data for at least one student even after Zanatta notified her of her expectations in this January 2013 meeting.

²⁸ Payne testified that Mark also had problems updating data into ACE. Zanatta testified that one other ABA Specialist initially had problems with ACE, but that he eventually learned the system. There is no evidence as to whether Mark was ever counseled about his problems with ACE, or whether it was an issue in his evaluation.

²⁹ Payne testified that Bartholomew had instructed the ABA Specialists that the data sheets were the most important source for recording data in the event that there was a court case. Although I credit this testimony, I also note that Payne was clearly on notice from Zanatta, her direct supervisor, that she was expected to enter all her data into ACE and keep it up to date.

³⁰ Payne credibly testified that Mark, Marissa, and King told Zanatta that they also had trouble accessing the internet with their iPad.

1 You did not notify me of his request and agreed to meet with him on your
2 own.
3

4 I had just discussed my latest concerns with you about this case on Friday
5 May 3rd, 2013 while you were in session with [R]. You did not alert me
6 that his father had asked to meet about his program – nor did you contact
7 me later in the afternoon.
8

9 It is department policy that ABA Specialists do not meet with parents
10 without the presence of the direct supervisor. The policy has been in
11 place for the past years and is in line with the policy that ABA Specialists
12 do not attend IEP meetings.
13

- 14 ▪ It is expected that you will contact me when a parent requests to
15 meet about their child's program.
- 16 ▪ It is expected that if a parent asks you continued questions about a
17 case you are working on – that you refer them to me – your direct
18 supervisor.
- 19 ▪ It is expected that if you have programmatic questions about a case
20 you are working on – you will direct them to myself or Erin King,
21 BCBA.
22

23 Payne signed the document and added, "signature acknowledges only receipt of this
24 document 5/8/13."³¹ Prior to this, Payne had been informed that ABA Specialists were
25 not to attend IEP meetings, but was not advised that they were not to meet with parents
26 without the presence of a direct supervisor. At the time, there were no written policies
27 that prohibited ABA Specialists from meeting with parents. Not all ABA Specialists were
28 prohibited from speaking to parents about students.³²

³¹ Payne testified that R's father had asked Payne questions about R at a time that was inconvenient for them to talk. She believed that he only had quick questions about how he was doing in class, so she did not feel it was anything about which she needed to notify a supervisor.

³² Bell credibly testified that she spoke with parents all the time prior to the 2013-2014 school year, and that she was encouraged to build a rapport with parents. She also testified that Zanatta asked her to go to IEP meetings for her.

1 Zanatta scheduled another meeting with Payne in Spring 2013 to again discuss
2 performance issues, but Payne requested that a Union representative also attend, and
3 proposed dates on which her representative was available. However, after Zanatta
4 consulted with School Committee legal counsel, she decided that she would address
5 her concerns with Payne in her performance evaluation.

6 Payne's Performance Evaluation³³

7 On July 16, 2013, Zanatta provided Payne with her annual performance
8 evaluation for the 2012 – 2013 school year,³⁴ and rated her overall as “Does Not Meet
9 Expectations.” Zanatta also rated Payne “Does Not Meet Expectations” in several
10 individual categories of the Job Performance section, which are explained in more detail
11 below. Zanatta rated Payne as “Meets Expectations” in “Customer Focus” and
12 “Planning and Priority Setting.”

³³ According to Zanatta, she based Payne's evaluation on her own observations and interactions, including two formal observations, as well as issues that parents, Payne's peers, and a teacher brought to her attention. Payne testified that Zanatta observed her on March 14 and 15, 2013, which were the two formal observations that are referenced in the evaluation, but had not observed her on any other days during the 2012 – 2013 school year. However, Payne also gave an example of another instance in which Zanatta observed her on a day that was not March 14 or 15, 2013, and was at the end of the school year. I therefore conclude that although Zanatta only conducted formal observations on March 14 and 15, 2013, there were other occasions where she observed Payne.

³⁴ During the 2012 – 2013 school year, Payne provided 30 service hours to four students.

1 *Job Knowledge*

2 Zanatta rated Payne "Does Not Meet Expectations" in the Job Knowledge
3 category. Zanatta noted, in relevant part:

- 4 ▪ After 5+ months of ongoing training and support, you continue to
5 display a lack of fluency in verbally explaining basic behavioral
6 procedures.³⁵ Your performance is inconsistent and you have failed to
7 accurately assess the function of problem behavior during sessions.³⁶

8
9 Direct Service to ABA Students: During scheduled observations of your
10 work performance on 3/14/13 and 3/15/13,³⁷ several competencies were
11 not observed during the teaching of targets. Specifically:

12
13
14

Skill ³⁸	Student	Comments
Programs run as written on Curriculum Sheet	-	Did not follow curriculum sheet procedures
Prompting hierarchy followed	-	General unclear use of prompts

³⁵ Zanatta based this comment on her observations of Payne describing programs and ABA principles to parents and teachers. As an example, she explained that when meeting with R's father, Payne did not clearly explain how she was running a token system program or the purpose for the program being in place.

³⁶ At hearing, Payne testified that she did not know what this statement pertains to, but did not agree that her performance was inconsistent because all of her students made progress in their programs.

³⁷ March 14, 2013 was the date that Zanatta had originally scheduled a meeting with Payne to discuss her performance, as described above. Prior to this written evaluation, Zanatta did not provide Payne with any feedback from these observations. On these dates, Zanatta also conducted observations of Mark and Marissa.

³⁸ The first column in the table indicates the skill that the program director is looking for when observing ABA Specialists. The "+" or "-" in the "Student" column indicates whether the ABA Specialist performed the skill correctly (+) or incorrectly (-).

Preference Assessments completed to identify SR+ ³⁹	-	Did not identify effective SR+ to use after each trial
Reinforcement delivered after correct responses	-	The continued use of monotone "good" ⁴⁰
Corrections implemented after incorrect responses	-	Confusing student by running mass trials
Student break time kept to a minimum	+	Breaks for ipad at end of a series of targets
BIPs followed as written	-	Very low energy and monotone in presence of student ⁴¹
Response to additional behaviors using ABA techniques	N/A	

³⁹ A preference assessment is included in a student's program book to identify reinforcements, or what the child is willing to work for, which are also referred to as an "SR+." Examples are candy or access to the iPad.

⁴⁰ Zanatta testified that with one of the students she was observing, Payne continued to use the verbal phrase "good," despite the fact that the student did not typically respond to verbal praise and preferred tangible items, such as putty.

⁴¹ Payne explained that Zanatta observed her with students D and L on March 14 and 15th. She spoke in a monotone with student D because he was crying, so it would not have been appropriate for her to speak in an excited voice. Rather, she would speak in a calm voice to control his behavior. She also spoke in a monotone voice with student L during her observation because he was distracted by Zanatta being there, and he gets easily excited. Bartholomew testified that it is important to be enthusiastic so as to differentiate the educator response when a student gets a correct answer versus an incorrect answer, which is how a student ultimately makes progress. Zanatta testified that enthusiasm is a positive reinforcement, and there should be a difference in the way the instruction is given from the way positive feedback is given after a correct answer. Zanatta did concede that with one of Payne's students, who did not respond to social praise, a more enthusiastic response would not have been beneficial. However, she also explained that a tangible item would have been more appropriate, which is also referenced above.

1 Additional skills not present during your delivery of discrete tr[ia]l teaching:
2

- 3 ▪ Elicit eye contact from student before delivering SD⁴² – You delivered
4 several SDs before gaining eye contact.⁴³
- 5 ▪ Deliver SD – clearly, one time – On certain trials, you repeated the SD
6 several times.⁴⁴

7
8 In observing your session – I noticed a general lack of interest with the
9 student. Instructions were presented in a monotone voice and there was
10 a lack of enthusiastic praise delivered. The student was crying during the
11 session (one of his target behaviors) and there was a lack of empathy on
12 your part. You did not implement any behavioral procedures to decrease
13 his crying or ask for assistance.⁴⁵

14
15 Running/Updating Student Programs: Your students' programs are not
16 being run consistently during the allotted session time. This is an ongoing
17 performance issue that was documented with you last year on 8/6/12 by
18 your supervisor Kim Klemek. A check of student data sheets in the
19 program book indicates that student programs have not been run in a
20 consistent manner during sessions you have delivered. I also observed
21 your 3/15/13 session and 4 programs were completed from the student's
22 AB program during a 90-minute session. Erin King provides ongoing
23 support on student programs and has shown you how to update targets in
24 the ACE program in order to keep programs moving forward as a student

⁴² An "SD" is a discriminative stimulus, which is something in the environment that alerts the student that something is going to happen.

⁴³ Payne believes that it can be appropriate to deliver an SD without gaining eye contact because the goal of ABA is to have the child respond in a natural environment. She explained that the student who she was working with was already attended to the materials and, therefore, did not need to make eye contact with her first. Zanatta testified that all staff are trained that the student must make eye contact before the instructor delivers the SD to ensure that the child is attending.

⁴⁴ In certain circumstances, Payne will deliver an SD more than once if the student does not respond to the first SD.

⁴⁵ Payne testified that the student who was crying had a program with options to respond to his crying, one of which was to ignore it. On this occasion, Payne chose to ignore the crying and continue with his instruction. She explained that the student only cried for a short time and then "continued on."

1 masters targets or sets of stimuli. A spot check determined that all
2 student programs are not current with up to date targets. Therefore
3 programs are sitting on the datasheet not being run.⁴⁶
4

- 5 ▪ It is expected that you run all programs on each student's data sheet
6 during every session. If a program is not run for some reason, then
7 you need to document that on your session notes and make it a priority
8 to be completed for the next scheduled training session.
- 9 ▪ It is expected that you make the best use of your session time with
10 each student. You have the skills and abilities to make arrangements
11 with teachers in order to make the most of your session time and
12 complete all required ABA programs as well as work on classroom
13 assignments.
14

15 Fluency and Familiarity with Technology: You have had ongoing
16 performance issues with operating your BPS provided computer and ipad
17 as well as basic computer and web based programs.⁴⁷ Training and
18 support has been provided since the beginning of the school year on all
19 NECC related computer programs. I have assisted you in using Microsoft
20 Office programs – excel spreadsheets, saving and renaming documents to
21 your computer, attaching documents to email as well as basic email use.
22 You continue to go to peers for assistance during their ABA sessions or
23 during down time.⁴⁸
24

⁴⁶ Payne testified that she could not speak to this issue specifically because she did not know exactly what Zanatta was referring to with this critique. She did, however, provide examples of reasons why she may not always be able to run all of a student's programs, including: the classroom teacher is using the Smart Board and, therefore, the room is too loud; there is a party in the classroom; she is absent; the student is absent; and other specialists, such as the OT or PT, come in to provide services. During times such as this, Payne explained that she could still be providing ABA services since she was with the student and assisting him or her in the classroom, but she would not be running programs from the IEP. Prior to this evaluation, Zanatta had not given Payne any feedback about running an insufficient number of programs.

⁴⁷ Zanatta personally observed Payne having difficulty with technology during many of the 7:30 AM weekly meetings.

⁴⁸ Payne confirmed that she does at times request computer help from the other ABA Specialists, and they in turn would request help with program content and how to work with students.

- 1 ▪ You were unprepared for team training set up to increase your ipad
2 skills. You did not have the correct password and were not able to
3 access the program and begin the training with your peers.⁴⁹
4 ▪ You are expected to be able to use the technology tools provided to
5 you (computer, varied programs and ipad) in order to successfully
6 complete your job duties.
7

8 *Accountability*

9 Zanatta rated Payne “Does Not Meet Expectations” in the Accountability
10 category. Specifically, Zanatta noted in relevant part:

11 Missed Service Hours: Parents, teachers and building administrators
12 have expressed concerns about your high rate of absence from work.
13 You have been absent 33 “in session” school days since the beginning of
14 the 2012/2013 school year, resulting in approximately 198 missed service
15 hours to students. This continued disruption to student ABA service
16 delivery not only affects student rate of learning it also affects classroom
17 dynamics.⁵⁰

- 18 • You were removed from a high profile case due to parent concerns
19 about your high rate of absence during the school year.⁵¹

20 Variability in Daily Performance: Across my observations over this school
21 year, there has been much variability in your overall daily work
22 performance.

23 1. You receive a great deal of supervision and ongoing feedback from
24 BCBA's on your technical skills.

⁴⁹ Payne denied that she forgot her password, but claimed that at times she enters it incorrectly. However, Zanatta credibly testified that she recalled one Thursday morning training session when Payne did not have her password for ACE and had to request a new password through the ACE help desk, which delayed the training.

⁵⁰ Payne did not have any unapproved absences for the 2012-2013 school year, nor did she exceed her allotted time off. Because ABA Specialists work year-round, they are eligible for vacation any time during the calendar year.

⁵¹ At an IEP meeting, a parent requested that Payne be removed from her son's case because he was missing too many ABA hours. Zanatta testified that teachers also expressed their frustration with Payne not being at sessions to their principals, who would relay the concern to Zanatta.

- 1 • There have been times when you do not have your data sheet
2 present during sessions – essentially missing out on opportunities
3 for incidental and behavior data.⁵²
4 • You have not mastered data collection during incidental/naturalistic
5 teaching and have been observed sitting watching your student and
6 not taking data during group activities.⁵³
7
8 2. You do not consistently implement directives that are verbally
9 presented to you and therefore you typically do not run programs
10 correctly.
11 • When working with your students, you often seem disconnected
12 (looking away from student, missed opportunities for instruction,
13 missing key student responses and lost opportunities for key
14 student instruction and data collection). Students on your caseload
15 require 100% of your attention.⁵⁴
16 • You have left the room during your set time with a student without
17 reporting to teachers and they do not know when you will return to
18 your student.⁵⁵

⁵² Payne testified that she could only recall one instance where Zanatta asked her for her data sheet and she did not have it. At hearing, Zanatta did not specify the times when she observed Payne without her data sheet, but did testify that it is never appropriate for an ABA Specialist to not have her data sheet. I credit Payne's testimony that there was only one instance where Zanatta observed Payne without her data sheet.

⁵³ Payne does not agree with this critique.

⁵⁴ Payne testified that her students have made great progress as a result of her being tuned into their needs. As examples, she explained that one student progressed from not liking to work, to loving to work; another student progressed from being very reserved and non-verbal to outgoing and verbal; and a third student decreased his destructive behavior in the classroom.

⁵⁵ Payne denied that she has left a classroom without informing a teacher, instead explaining that if she needs to leave to use the bathroom or retrieve something for a student, she would inform the teacher, and that she would also never leave a student alone without an adult.

1 *Decision-Making and Problem Solving*

2 Zanatta also rated Payne "Does Not Meet Expectations" in Decision-Making and
3 Problem Solving. Specifically, Zanatta stated in relevant part:

4 You do not use student data to make decisions about making changes to
5 programming and/or adding programs.

- 6 • You continue to request "academic" and "hand writing" programs
7 that are not of top priority for a particular student's learning profile.⁵⁶
8 • You incorrectly reported that a student had mastered play skills in
9 the inclusion environment and did not need support.⁵⁷

⁵⁶ Payne explained that she requested additional programs for two students that were near mastery with the programs that were required by their IEPs. Zanatta initially permitted Payne to teach one student how to read and write, but then rescinded the permission, and Payne stopped the program. Payne also requested that Zanatta permit her to do a handwriting program with another student, but Zanatta denied her permission to do so. Zanatta testified that it was inappropriate for Payne to request handwriting programs because student programming is based on an assessment, and not on staff preference.

⁵⁷ Zanatta explained that Payne reported that a student whom she had taken out of an autism classroom to an inclusion classroom did not have anything to work on. When Zanatta questioned whether the student had mastered specific skills such as responding to peers' requests to play and greetings, and engaging in turn taking activities, Payne's responses showed that he had not mastered all of these skills. I credit Zanatta's testimony because, while Payne could not recall this conversation, she did not deny that it occurred.

- 1 • You continue to infer functions for your student's behaviors that are
2 not data based as well as state that a student has emotional
3 problems – as a reason for their crying episodes.⁵⁸
4 • You are not aware of how a behavior episode started during direct
5 sessions with students.

6
7 *Teamwork*

8 Zanatta rated Payne "Does Not Meet Expectations" in the Teamwork category.

9 Specifically, in relevant part:

10 Failure to develop lasting rapport and mutual respect from co-workers:⁵⁹
11 Throughout the year, you have had difficulty in relating to your ABA
12 colleagues and school-based staff. It has been reported that when you try
13 to explain principles of ABA to school based staff, they feel as if you are
14 talking down to them, i.e. in a condescending manner. You do not listen
15 and process their concerns when they bring them to you and tend to push
16 forward with your explanation. You put pressure on your colleagues to
17 assist you (in and out of student sessions) when you did not have the
18 required skills to use technology to enter data or run specific programs.

⁵⁸ Payne provided details on the crying student to which Zanatta was referring, explaining that an ABA Specialist looks for physical changes in the environment that may be causing a behavior to see if there is a pattern. With this student, Payne determined that she could not identify a pattern which was causing the crying. Therefore, in accordance with ABA principles, she concluded that the behavior may be occurring for a reason "undetectable by the eye," such as a biological, emotional, or mental reason. Zanatta testified that an ABA Specialist should take data to determine what may be causing the crying, but Payne had nothing on her data sheets to indicate what happened before the crying began or how long the crying had lasted.

⁵⁹ Zanatta testified that she began advising Payne during their November meeting that her co-workers were reporting that Payne was not responsive and was speaking in a condescending manner to them. She did not identify to Payne who the teachers were, but at hearing she testified that Allison and Jen told her this. I decline to credit Zanatta's testimony that she spoke about this to Payne during their November meeting, as it was not reflected on Bartholomew's contemporaneous notes of the meeting.

1 You have not displayed teamwork skills while working at the Warren
2 Prescott thus making for a rocky year for the school staff and ABA team.⁶⁰
3

4 Receiving Feedback: You have received regular consultation from Erin
5 King, NECC BCBA to address the difficulties you were having with some
6 of your students.

- 7 • When she gave you feedback and modeled the correct procedures
8 with one of your students – you were disinterested and looked
9 away to write notes in the program book.⁶¹ This behavior is
10 unacceptable. You have a history of not taking feedback well and
11 this hinders your performance across your job responsibilities.

12
13 *Communications*

14 Payne received a “Does Not Meet Expectations” in the Communications
15 category. Specifically, Zanatta noted in relevant part:

16 You have communicated with me on several occasions when you will be
17 absent or if you are having technical difficulties related to your job
18 responsibilities.

19
20 You have failed to communicate with me clearly about parent concerns or
21 contact with you.

- 22 • I intervened on a meeting you planned with a parent and did not
23 notify me he had concerns.⁶²

⁶⁰ Payne denies that she had any problems with other ABA Specialists or that she spoke condescendingly to school-based staff. With regard to asking for assistance with technology, Payne confirms that she did that, but that the other ABA Specialists expressed appreciation for the assistance she gave them in ABA techniques.

⁶¹ Payne credibly testified that she was taking notes on what King telling her so that she could refer to them at a later date and time, and that she has never treated King disrespectfully because King has been very helpful to her.

⁶² This is the meeting with R's parent detailed above. According to Zanatta, it is not common for an ABA Specialist to set up independent meetings with parents, and this was the only time she had seen it happen during her two year tenure at the Boston Public Schools.

- 1 • We met and documented that you were not to meet with parents
2 w/out a BPS supervisor present and you were to notify your
3 supervisor of any parent communication directed to you.
4 • You discussed behavioral concerns with another parent a week
5 later and did not notify me of her concerns or your communication
6 with her.⁶³

7
8 *Professional Development*

9 Zanatta also rated Payne as “Does Not Meet Expectations” in the Professional
10 Development category. Specifically, Zanatta stated in pertinent part:

11 Participation in Staff Training or Informational Sharing Sessions: During
12 February break, as in past breaks, we set up an ipad share session where
13 staff get together and report back on ipad apps. These sessions are for
14 the benefit of staff to learn from their peers about ipad use and what apps
15 have been useful for students on the spectrum. Staff use the district

⁶³ By email dated May 20, 2013, King advised Zanatta that “An issue came up with [D’s] mother today; apparently she was upset about [D’s] behavior at home and came in with him this morning. She approached [Payne] with concerns about [D]; [Payne] unfortunately did say that he has been much more aggressive over the past few months, said she really didn’t know why [D] cried so much, and then asked his mother why [D] cried so much. This led [D’s] mother to complain to John McCoy that [Payne] (she refers to her as “the woman ABA”) does not have enough training and is “just a body put in a role.” Payne testified that she saw the mother of student D in the parking lot, where she asked Payne how D was doing. Payne responded that he was doing fine. She did not believe that she was prohibited from speaking to this mother about D because it was a brief exchange, and she did not tell Zanatta that the conversation had occurred. Payne later learned at her evaluation that the parent had complained about the conversation. On cross-examination, Payne further testified that she did not recall telling the parent that D had become more aggressive; that she did not understand why he cried so much, because she would never tell a parent that she did not understand why a student was doing something; or that D had emotional problems, because she did not believe he had emotional problems.

The Union argues that I should not consider this email because it contains layers of hearsay, and nobody at hearing identified John McCoy. However, my inquiry does not go to the truth of the matter asserted, i.e., whether Payne made these statements to D’s mother. Rather, as explained in the opinion section below, I must only consider it in the context of Zanatta’s reasons for evaluating Payne as she did.

1 provided technology to teach IEP objectives as well as for student
2 reinforcement. During this same break, we offered a two-day training for
3 new and existing staff on ABA and Autism. On February 20th, I requested
4 that you attend the two-day training on Thursday and Friday as a refresher
5 to your current skills. On February 20th, I also asked why you were not
6 attending the ipad Share Session. You stated that you did not have your
7 ipad with you and do not regularly use the ipad with your students. During
8 my time supervising at Warren Prescott I have observed that you are not
9 fluent in using the ipad during ABA instruction or student reinforcement.
10 On February 21st, you attended the morning (9a – 11a) training session
11 held. You did notify me that you would be late. During the intermission
12 (11a – 12p) – Cailen McCormick followed up and requested that you
13 attend the noon training session on reinforcement and preference
14 assessments. In summary, both Cailen and myself requested that you
15 attend the noon training session and you did not show up. You were here
16 at CRC on 2/21/13 for a paid workday from 9:20 to 2:30. It was also
17 reported that you did not attend the Friday, February 22nd training session
18 on data collection held by Bryan Blair when you were on site from 9:30a –
19 12:30p.⁶⁴

- 20 • You are directed to attend all trainings or informational sessions
21 offered by the ABA department during school breaks or regular
22 work hours to increase your current skill level in using technology
23 and providing direct instruction to students.
- 24 • It is expected that you bring all BPS technology provided to you
25 during school breaks for updating or using during ongoing training.

⁶⁴ With regard to the afternoon training session on February 21 that Payne did not attend, she testified that Zanatta asked her to attend the morning training session for new hires because her computer was down and IT took her computer to fix it. After the morning training, Payne's computer was ready so she asked Zanatta if she could finish data collection, and Zanatta agreed. According to Payne, Zanatta did not tell her to attend the afternoon training, and she never heard that she had missed a training. Payne did not address Zanatta's comment that Cailen McCormick also asked her to attend the afternoon training. Because Payne's testimony did not completely address the points brought up in the evaluation, I credit Zanatta's version of events as reported in the performance evaluation.

1 *Specific Job Responsibilities*

2 Zanatta rated Payne “Does Not Meet Expectations” in the Specific Job
3 Responsibilities category, stating in relevant part:

4 Time off Requests: On 1/15/13 you sent me a time off request for a two-
5 week vacation from 2/4/13 – 2/15/13. This was two weeks prior to the
6 February break for students resulting in approximately 60 missed ABA
7 hours. Your full vacation request was denied from the Manager of
8 Compliance with the request that you shift your time one week forward to
9 include the week over February Break. When I spoke with you about this
10 you stated that you had already booked your travel.⁶⁵

- 11 • In the future, please submit Vacation requests prior to making travel
12 arrangements to ensure approval by the management of the
13 Special Education Department.
- 14 • The ABA Specialist position provides an IEP given service. The
15 expectation is that services are delivered during times school’s “in –
16 session.”
- 17 • Failure to do so will be considered insubordination and may result
18 in further disciplinary actions.

19
20 In the second section of Payne’s evaluation, “Performance Against Past Year’s
21 Goals,” Zanatta rated Payne “Does Not Meet Expectations” for her first goal, “Utilize
22 Data to inform programming, follow prompt hierarchy and contact supervisor if progress

⁶⁵ Payne explained that she booked her flight prior to receiving vacation approval because she had not received a response to her vacation request for at least a week, and there is no stated turnaround time for receiving a response. The “Managerial Employees Conditions of Employment” provides that, “The employee’s Responsibility Center Manager must approve vacations in advance.” There is no rule that ABA Specialists may not take vacation during school session. Although Payne testified that prior to this, no supervisor had ever questioned her about her vacation time, Zanatta had addressed Payne’s vacation and sick time usage at their November 2012 performance meeting.

1 is not made.” Zanatta noted, “You make assumptions about functions of behavior
2 without taking ABC data.”⁶⁶

3 With regard to Payne’s second goal, “Suggest modifications to programs based
4 on data, Zanatta rated her a “Meets Expectations,” commenting, “You have a better
5 understanding of how to move a student through a program using the ACE program and
6 with training from the NECC BCBA.”

7 Payne’s third goal was “Create and utilize programs for incidental teaching in
8 classroom settings.” Zanatta rated her “Does Not Meet Expectations,” and noted that
9 “This is an area of need – Continue to receive training and practice your incidental
10 teaching/data skills.”

11 Zanatta rated Payne “Does Not Meet Expectations” in her overall performance.
12 Zanatta’s additional comments state, “The above reviewed technical and interpersonal
13 skills need improvement in order to receive a satisfactory performance evaluation.”
14 Payne signed the evaluation, but did not add any comments in the space provided.

15 Zanatta never advised Payne that any of her students had failed to make
16 progress, either in the meetings to discuss her performance, or in her performance
17 evaluation.

⁶⁶ In response, Payne again testified that her students mastered a lot of the programs, e.g., an introverted student became extroverted, and a student who did not want to work became engrossed in his work.

1 Auborg's Written Warning⁶⁷

2 Auborg is an ABA Specialist who was involved in an incident with a co-worker,
3 Jan Bielot (Bielot) on June 26, 2013, where Bielot⁶⁸ told Auborg that her open-toed
4 shoes were inappropriate for work. Marie Mullen (Mullen),⁶⁹ the school principal, spoke
5 to Auborg and Bielot about the incident. Both Auborg and Bielot also provided Mullen
6 with written statements, which Mullen then forwarded to Zanatta. Mullen denied
7 Auborg's request to read Bielot's statement. Auborg's statement provides, in relevant
8 part:

9 ...I was getting breakfast when Jan left her student and followed to harass
10 me. There were other teachers and students present in the area. Jan
11 stated, 'it bothered her that I am wearing open toe[d] sandals.' I was
12 confused because it was not her business and she did not have the right
13 to follow me and question me. I was not endangering any student,
14 therefore Jan could have wait[ed] to speak to me at a later time when
15 there was nobody around if she really fe[lt] like that [was] her place. I
16 turned around to walk away because her concern was not work related
17 and Jan said, 'you don't follow the rules that is why Laraine gave me [S]
18 who is in Jessica's class instead of you.' I felt like there is more to what
19 her issue is and I did not see the correlation between me wearing open
20 toe[d] shoes and me not getting the student. Then Jan said, 'Laraine
21 would love to hear that you are wearing sandals and being
22 unprofessional.' She ran upstairs to speak to the principal and called
23 Laraine. ... She was being unprofessional and could have waited to
24 approach me. My priorit[ies] are my students and making sure they are
25 safe and learning[,] not paying attention [to] what other staff [are] doing.
26 Jan's priority is watching me. I really do not understand who gave her the

⁶⁷ Zanatta issued Auborg a "Meets Expectations" on her 2012 – 2013 performance evaluation.

⁶⁸ Bielot did not testify.

⁶⁹ Auborg credibly testified that she does not know if Mullen was aware that she was involved in collective bargaining negotiations. Mullen did not testify.

1 right to question and harass me at work. Also I saw other teachers
2 wearing open toe[d] sandals as well. ... I would like Jan to leave me alone
3 and not speak to me if [it is] not concerning a student.
4

5 Bielot's statement provides, in pertinent part:

6 While in the cafeteria this morning this reporter noticed another ABA,
7 Maude, was not following the dress code. I waited until Maude was out of
8 the cafeteria and asked if I could talk to her. I went around the corner by
9 the down stairs bathroom so it was private. I said, "I have to say this. You
10 know we are not supposed to wear sandals or shorts. You do whatever
11 you want, you don't follow the rules, and that's probably why I was
12 assigned [S], a specific ABA student [] instead of you." Then, I walked
13 back to the cafeteria to my table where Miss Jess was sitting. Maude
14 followed me over to my table and yelled to a para (Miss Nye) at her table,
15 "She told me I can't wear sandals!" Maude then called me a "BITCH" in
16 front of the student while flailing her arms and yelling, "You're not my
17 boss." When I got up to leave the cafeteria, as I was not going to be
18 unprofessional and fight verbally or physically, Maude yelled, "Don't come
19 near me!" I said "You are being so unprofessional, I'm going to call
20 Laraine" [our supervisor]. Ms. Jess told me that Maude and teachers at
21 her table were mocking me when I left. A para in my class told me I
22 should let Ms. Mullen, the Principal know that Maude swore in front of the
23 students. I did and was asked to write a report.
24

25 Zanatta issued a written warning to Auborg, which stated in relevant part:

26 On 6/27/13 Principal Marie Mullen notified me that you were involved in an
27 incident with a co-worker.
28

29 The morning of 6/26/13, your co-worker Jan pulled you aside in the
30 cafeteria and expressed her opinion to you about your work attire. Your
31 extreme reaction to Jan's comments in the middle of the cafeteria was
32 very inappropriate.
33

- 34 • Marie reported that you:
 - 35 ○ Approached Jan in the café during the arrival of students,
36 parents and staff.
 - 37 ○ You spoke in a raised voice flailing your arms at Jan –
38 stating: "You are not my boss," "It's none of your business,"
39 "shut the hell up" and called her a "bitch."

- 1 • As a BPS employee, it is expected that you maintain a professional
2 demeanor at all times and show that you are able to control your
3 emotions.
4 • It is expected that if a co-worker or school personnel says
5 something that you do not agree with, that you will calmly express
6 your opinion and/or ask for a meeting with your supervisor.
7 • It is expected that you will report any negative interactions with co-
8 workers/school personnel to your supervisor.
9 • It is expected that you will come to work daily with a positive
10 attitude, get along with all of your co-workers and facilitate a team
11 atmosphere in any school you are assigned.

12
13 We have previously discussed your elevated responses to feedback or
14 directives from me on the date of your staff evaluation.⁷⁰

15
16 This type of inappropriate behavior will not be tolerated. Any further
17 outbursts will result in suspension or termination.

18
19 Zanatta gave Auborg this letter at a meeting with Auborg and Bartholomew. Auborg
20 informed Zanatta that she did not agree with some of the information in the letter,⁷¹ but
21 Zanatta advised her that she had to sign it and it would go in her file.

22 By memo dated July 10, 2013, Zanatta advised Bielot of the following:

23
24 On 6/27/13 Principal Marie Mullen notified me that you were involved in an
25 incident with a co-worker.

26 The previous morning on 6/26/13, you pulled aside Maude in the cafeteria
27 and expressed your opinion to her about her work attire.
28

⁷⁰ Zanatta testified that at Auborg's performance evaluation meeting, Zanatta told her that she was making a change to her case load, and Auborg had a very negative reaction. According to Zanatta, "she was aggressive in nature toward me and said that she wasn't going to do it." Zanatta did not document the incident, but verbally addressed it during the performance evaluation. Auborg did not rebut this testimony and, therefore, I credit it.

⁷¹ Auborg testified that she did not flail her arms, tell Bielot to "shut the hell up" or call her a bitch. She testified that she did tell Bielot that she was not her supervisor and tried to walk away.

1 As per our discussion on 6/27/13 please use the following guidelines when
2 dealing with staff issues:

- 3 • It is expected that you notify a supervisor of any staff issues or
4 concerns and not address them directly yourself.
- 5 • Do not discuss personal opinions during school hours.
- 6 • Continue to come to work with a positive attitude and be a team
7 player.⁷²

8
9 Auborg was originally assigned to the Lee School for the 2013 summer session,
10 but was transferred to the Condon School, as further detailed below. Bielot was
11 assigned to the Haynes School for the summer session. Both Auborg and Bielot are
12 assigned to the same school for the 2013 – 2014 school year.

13 Transfer of Auborg and Bell⁷³

14 At the beginning of the 2013 summer session, Verre instructed Bartholomew to
15 provide ABA staffing services at the Tynan and Condon schools due to staff shortages.
16 Bartholomew decided that one ABA staff member was required at each site, and
17 transferred Auborg and Bell from their summer assignments. After the transfers,

⁷² Zanatta testified that she first learned of the incident from Bielot, and then she had a telephone conversation with Mullen, who also faxed her Auborg and Bielot's written statements. She believes that Mullen did not witness the incident, but talked to staff that did. Payne also testified that she decided to advise only Auborg that she would be subject to possible discipline moving forward because she was "the one that was engaged in more aggressive verbal behavior" and that the incident was based on Auborg's reaction to Bielot's criticism of her attire. She concluded that Auborg was more aggressive because "it was reported by staff as well as the people that the principal had also spoken to."

⁷³ Zanatta testified that she issued Bell an "Exceeds Expectations" on her 2012 – 2013 performance evaluation. Bell testified that Zanatta issued her a "Meets Expectations" on her evaluation, but that she did not remember everything about it. She also agreed that her evaluation was "very good." For the purpose of my analysis, I do not have to determine whether Bell received an "Exceeds" or "Meets" specifically, but rather find that she had a favorable evaluation.

1 Auborg and Bell were the only ABA Specialists at their respective schools for the
2 summer session.

3 Bartholomew selected Auborg for transfer because she had been an ABA
4 Specialist for a long time and he believed that she works well independently.⁷⁴ When
5 Bartholomew told Auborg of the transfer, he asked her how she felt about it and insisted
6 that she did not have to take it. Auborg did not object to the transfer.⁷⁵

7 Bartholomew also selected Bell for the transfer because a few weeks earlier
8 Kathleen Ferguson (Ferguson), the site coordinator for the extended school year
9 program at the Tynan School, had requested that he assign Bell there. Specifically, in
10 an email to Bartholomew dated June 14, 2013, Ferguson stated,

11 HUGE FAVOR which makes a lot of sense...can I PLEASE have Mary
12 Bell assigned as the ABA Therapist at the Tynan School. I do not know
13 ANY of my staff at the Tynan (they were hired by a previous
14 coordinator)...I need someone I can rely on with knowledgeable [sic] and
15 experience...Mary knows these students and would be an invaluable
16 asset to me and the program. Begging (lol)!!"⁷⁶

⁷⁴ Bartholomew testified that he also chose Auborg for transfer because of her conflict with Bielot, described above. Zanatta testified that she gave input into the transfer decision, but that Auborg's problem with Bielot was not a reason that she recommended Auborg for transfer. Because Auborg and Bielot were not working at the same school for the summer session, transferring Auborg would not have helped their conflict. Therefore, I decline to credit Bartholomew that this was a reason for the transfer.

⁷⁵ Auborg testified that although Bartholomew "insisted" she did not have to transfer, she felt like he was her supervisor and it was her job, so she had to go.

⁷⁶ Bartholomew did not immediately send Bell to the Tynan School after this request because he had not originally planned to assign any ABA Specialists to the Tynan or Condon schools.

1 When Bartholomew told Bell about the transfer, Bell did not express any concerns to
2 him, although her one unexpressed concern was that she was the only ABA at the
3 school with no supervision. Bartholomew did not advise Bell that Ferguson had
4 requested that he assign her to the Tynan.

5 Paraprofessional Work Duties

6 In or around the summer of 2013, Verre directed Bartholomew to assign a certain
7 number of ABA Specialists to perform as classroom paraprofessionals at the Haynes
8 School.⁷⁷ The role of a paraprofessional is to assist the classroom teachers with
9 implementing lessons, and assisting students in activities such as toileting or coloring.
10 While paraprofessionals report to the administrators and principals, they also take
11 directives from the classroom teachers. In general, the qualifications for hire are a high
12 school diploma, 48 college credits, or passing a required exam.

13 Aside from being specifically assigned classroom paraprofessional duties at the
14 Haynes School during Summer 2013, ABA Specialists' duties at times overlap with
15 paraprofessionals' duties if a certain skill is required by a student's IEP. For instance, a
16 student's IEP may provide that he receive ABA services to help the student learn how to
17 hold a spoon, drink from a cup, or use the toilet. Also, an ABA Specialist may assist
18 with walking his or her assigned student from room to room if the student was required
19 to go to an activity. However, ABA Specialists do not receive their directives from
20 classroom teachers or the principal, as paraprofessionals do, but rather from the

⁷⁷ Daily schedules submitted into evidence show that "Para Time" was scheduled for ABA Specialists for a portion of each day.

1 Program Director for ABA. Prior to Summer 2013, ABA Specialists were never
2 assigned to perform paraprofessional duties exclusively. While ABA Specialists were
3 performing paraprofessional duties during the summer of 2013, they were not
4 performing their ABA duties, as described in detail above, such as running programs
5 with students and collecting data on their progress.

6 Information Request

7 There is no dispute that the Union requested certain information on June 27 and
8 July 30, 2013, and that the School Committee provided some of the requested
9 information on August 15, 2013 and January 17, 2014,⁷⁸ but did not provide the
10 requested information as described in Stipulation 26(b).⁷⁹ There is also no dispute that
11 the information requested by the Union is relevant and reasonably necessary in the
12 performance of its duties as the exclusive collective bargaining representative.

13 In its January 17, 2014 response to the Union's information request as described
14 in Stipulation 26(b), the School Committee states that "[t]he information regarding
15 names, rates of pay, and job duties of any individuals who are not [School Committee]

⁷⁸ The information requested in Stipulation 26(a) includes, "copies of all contracts between the Boston School Committee, the City of Boston, and/or the BPS with any provider of applied behavior analysis or ABA therapy services." The information requested in Stipulations 27(a) and (b) is "a list of 2013 summer school assignments for all ABA Specialists employed in the Boston Public Schools," and "an hourly 2013 summer school schedule for all ABA Specialists employed in the Boston Public Schools," respectively.

⁷⁹ The Union requested "[t]he names, rate of pay, and job duties of any individuals who are not [School Committee] employees but who provided ABA therapy services within the Boston Public Schools" in Stipulation 26(b).

1 employees but who provide ABA therapy services within the [Boston Public Schools] is
2 information this department is not privy to because [Boston Public Schools] works with
3 outside contractors to fill those roles.” According to the parties’ stipulations, the School
4 Committee’s counsel reached out only to Bartholomew for this requested information.
5 Bartholomew has access to some information regarding contractors who provide ABA
6 services.⁸⁰

Opinion

Sections 10(a)(3) and 10(a)(4) Allegations

8 The Union alleges that the School Committee violated Sections 10(a)(3) and/or
9 10(a)(4) of the Law by: 1) issuing Payne two written warnings; 2) rating Payne a “Below
10 Expectations” on her annual performance evaluation; 3) issuing Auborg a written
11 warning; and 4) transferring Auborg and Bell in the summer of 2013.⁸¹ Since unlawful
12 retaliation is the essence of a charge under Section 10(a)(3) and 10(a)(4), similar
13 elements of proof apply to both kinds of cases. Commonwealth of Massachusetts, 6
14 MLC 1397, 1400, SUP-2190 (August 27, 1979). To establish a prima facie case of a
15 violation under Section 10(a)(3), a charging party must show that: 1) the employee

⁸⁰ Bartholomew testified that he could not provide a list of the names of individual people working as contractors within the Boston Public Schools providing ABA services, and that he did not believe there was anyone within Boston Public Schools who could do that. Although Bartholomew himself may not have access to the information to respond to the information request, I decline to credit his testimony that he does not believe anyone else has the information, as it is simply not plausible that the School Committee would have no way to identify the individuals that come into the schools and work with students.

⁸¹ The Section 10(a)(4) allegations involve Payne only.

1 engaged in concerted activity protected by Section 2 of the Law; 2) the employer knew
2 of the concerted, protected activity; 3) the employer took adverse action against the
3 employee; and 4) the employer's conduct was motivated by a desire to penalize or
4 discourage the protected activity. Town of Carver, 35 MLC 29, 47, MUP-03-3894 (June
5 30, 2008) (citing Quincy School Committee, 27 MLC 83, 92, MUP-1986 (December 29,
6 2000)); Commonwealth of Massachusetts, 25 MLC 44, SUP-4128 (August 24, 1998).
7 To satisfy the first prong of a Section 10(a)(4) case, the union must establish that the
8 employee signed or filed an affidavit, petition or complaint or gave information or
9 testimony as part of a DLR proceeding. Id.

10 Once the charging party has established a prima facie case, the employer may
11 rebut it by producing evidence that the action was motivated by a legitimate reason.
12 Suffolk County Sheriff's Department, 27 MLC 155, 159, MUP-1498 (June 4, 2001).
13 Finally, if the employer produces one or more lawful reasons for taking the adverse
14 action against the employee, the charging party must establish that "but for" the
15 protected activity, the employer would not have taken the adverse action. Id.

16 The School Committee does not dispute that Payne, Auborg, and Bell engaged
17 in protected, concerted activity or that it knew of their protected activity. Therefore, the
18 focus of my inquiry will be on the remaining elements of a prima facie case of retaliation
19 for each allegation.

1 *Zanatta's Memos to Payne Regarding Her Work Performance*

2 The Union alleges that Zanatta issued Payne two written warnings on January 7
3 and May 8, 2013 in retaliation for her protected activity. However, the memoranda do
4 not constitute adverse actions.⁸² An adverse personnel action is one that negatively
5 affects a person's employment, such as a suspension, discharge, or an involuntary
6 transfer. Town of Dracut, 25 MLC 131, 133, MUP-1397 (February 17, 1999). Further,
7 an employer's action that is punitive may fall within the parameters of adverse action.
8 Suffolk County Sheriff's Department, 27 MLC at 159. In the two memos, Zanatta
9 counsels Payne about her duties and responsibilities as an ABA Specialist. She also
10 addresses areas that need improvement, and provides a plan to assist Payne in making
11 the improvements. Neither memo was punitive, warned Payne of future adverse action,
12 or negatively impacted her wages, hours, or other terms or conditions of employment.⁸³
13 See City of Peabody, 28 MLC 281, 284, MUP-2162 (March 6, 2002). Consequently, I
14 find that the Union has not established a prima facie case of retaliation and dismiss this
15 allegation.

⁸²Although the parties described these two memoranda as "written warnings" in their stipulations, I will not rely on the parties' characterization of the memos in determining whether they constitute adverse actions. Further, the School Committee argues in its brief that they were not "disciplinary written warnings," but rather "employee feedback," and do not qualify as adverse action.

⁸³ In contrast, Zanatta's warning to Auborg regarding her incident with Bielot states that "this type of inappropriate behavior will not be tolerated. Any further outbursts will result in suspension or termination."

1 *Payne's Performance Evaluation*

2 The School Committee contends that Payne's evaluation was not an adverse
3 action because it did not result in her receiving a lower salary. However, the fact that
4 Payne did not receive a step increase as a result of her performance evaluation
5 constitutes an adverse action. See, Town of Dennis, MUP-01-2976, 29 MLC 79, MUP-
6 01-2976 (October 10, 2002) (lowering scores on a performance evaluation, particularly
7 where those scores are directly tied to merit pay increases, constitutes adverse
8 employment action). Therefore, the Union has established the first three elements of its
9 prima facie case under Sections 10(a)(3) and 10(a)(4).

10 To support a claim of unlawful motivation, the last element of the Union's prima
11 facie case, a charging party may proffer direct or indirect evidence of
12 discrimination. Lawrence School Committee, 33 MLC 90, 97, MUP-02-3631 (December
13 13, 2006) (citing Town of Brookfield, 28 MLC 320, 327-328, MUP-2538 (May 1, 2002),
14 aff'd sub nom., Town of Brookfield v. Labor Relations Commission, 443 Mass. 315
15 (2005)). Direct evidence is evidence that, "if believed, results in an inescapable, or at
16 least a highly probable inference that a forbidden bias was present in the workplace."
17 Wynn & Wynn, P.C. v. Massachusetts Commission Against Discrimination, 431 Mass.
18 655, 667 (2000) (quoting, Johansen v. NCR Comten, Inc., 30 Mass. App. Ct. 294, 300
19 (1991)). "Unlawful motivation also may be established through circumstantial evidence
20 and reasonable inferences drawn from that evidence." Town of Carver, 35 MLC at 48
21 (citing, Town of Brookfield, 28 MLC at 327-328. Several factors may suggest unlawful

1 motivation, including the timing of the alleged discriminatory act in relation to the
2 protected activity, triviality of reasons given by the employer, disparate treatment, an
3 employer's deviation from past practices, or expressions of animus or hostility towards a
4 union or the protected activity. Town of Carver, 35 MLC at 48 (citing Melrose School
5 Committee, 33 MLC 61, 69, MUP-02-3549 (September 27, 2006)); Cape Cod Regional
6 Technical High School District Committee, 28 MLC 332, 335, MUP-2541 (May 15,
7 2002); Bristol County, 26 MLC 105, 109, MUP-2100 (January 28, 2000). Because there
8 is no direct evidence of unlawful motivation here, I will consider whether there is indirect
9 evidence.

10 In support of a finding of improper motivation, the Union argues that the timing of
11 the School Committee's actions "raises red flags." Specifically, after consistently
12 receiving positive evaluations throughout her career, Payne received a written warning
13 on January 9, 2013, less than a month after the DLR conference. After that, Zanatta
14 gave her another warning and then a negative evaluation. The Union further argues
15 that the vast majority of Payne's supervisors' criticisms were misleading, misplaced, or
16 both, and the real reason for the School Committee's actions is because Payne was a
17 "squeaky wheel."

18 First, the timing of the performance evaluation in relation to Payne's protected
19 activity supports a finding of improper motivation. Although I have concluded that the
20 "written warnings" were not adverse actions, Payne began attending contract
21 negotiations on June 25 and July 5, 2013, and received her performance evaluation on

1 July 16, 2014.⁸⁴ However, as recognized by the Union, timing alone is not sufficient to
2 establish improper employer motivation. City of Malden, 5 MLC 1752, 1764, MUP-3017
3 (March 20, 1979).

4 Although there is some evidence of the School Committee's deviation from past
5 practices, in that Payne received "Meets Expectations" on all her previous evaluations
6 that were entered into evidence, I also note that this was the first time that Zanatta
7 evaluated her. It is difficult to compare Zanatta's evaluations to those of past
8 evaluators, as Zanatta may simply have higher standards for the employees she
9 supervises, and/or there may have been different expectations for the position, such as
10 the use of the ACE online program and associated technology. The only evidence of
11 Zanatta's other evaluations were for Auborg and Bell, who were notably also involved in
12 contract negotiations, and they both received satisfactory evaluations. Further, Klemek,
13 Payne's most recent supervisor prior to Zanatta, met with Payne to discuss
14 performance issues in August 2012.⁸⁵ Zanatta then cited some of the same issues
15 during Payne's performance meetings and evaluation, including the assessment that
16 Payne was not following programs as written, and not following the prompting hierarchy.

⁸⁴ Because there is no evidence as to whether Zanatta specifically knew that Payne was involved in contract negotiations, I will rely on the parties' stipulations that the School Committee was aware of Payne's concerted, protected activity, which includes the contract negotiations.

⁸⁵ Although the Union attempts to connect Klemek's critique of Payne's performance to Payne's complaints to management about working conditions prior to the Union certification efforts, there is no evidence that Klemek was aware of Payne's complaints.

1 Moreover, Zanatta's first meeting with Payne to discuss concerns with her
2 performance was in November 2012. Zanatta credibly testified that she was not aware
3 of Payne's protected activity until Payne attended the DLR conference in December
4 2012, and even Payne admitted that she did not inform any School Committee
5 managers of her Union certification efforts prior to the DLR conference.⁸⁶ Some of the
6 topics Zanatta addressed in Payne's evaluation were first noted at this November 2012
7 performance meeting, including levels of engagement, prompting styles, and absences.
8 Accordingly, the evidence shows that Zanatta's negative evaluation of Payne was not
9 inconsistent from her actions prior to any knowledge of Payne's concerted, protected
10 activity. There is also no evidence of disparate treatment, as noted above, or any
11 expressions of union animus or hostility.

12 The Union's primary argument in support of improper employer motivation, other
13 than the timing of the evaluation, concerns Zanatta's reasons for the poor evaluation.
14 While there are some areas of the evaluation that seem to be picky,⁸⁷ when combined
15 with all of the areas in which Zanatta had significant concerns about Payne's

⁸⁶ Although Bartholomew attended the June 2012 meeting in which ABAs expressed their concerns about working conditions, Payne was not one of the unit members who presented at the meeting, but only one of "a good many" attendees. There is no evidence that Bartholomew was aware of any of Payne's other activities involving complaints to management prior to the Union certification efforts.

⁸⁷ For example, Zanatta's criticisms of Payne for not always having her data sheets, when the evidence shows that there was only one instance; requesting handwriting programs for students; and taking notes while King was explaining a concept to her.

1 performance, I must conclude that Zanatta's reasons for the evaluation were not trivial,
2 and do not support a finding of improper motivation.

3 In many cases, Payne does not deny that Zanatta reported Payne's actions
4 accurately, but instead attempts to explain why she did things the way she did. For
5 example, in response to Zanatta's critique that Payne was not running programs
6 consistently, Payne offered several possible reasons that this may occur, including that
7 the classroom can be too loud, there is a party in the classroom, she or the student are
8 absent, and other specialists come in to provide their services. However, there is
9 nothing to indicate that these issues would not occur with every ABA Specialist, or that it
10 would not be reasonable for Zanatta to expect that Payne would find a way to address
11 these concerns if they were interfering with her ability to deliver IEP-required services.
12 Indeed, Zanatta notes in this section of the evaluation that, "[y]ou have the skills and
13 abilities to make arrangements with teachers in order to make the most of your session
14 time and complete all required ABA programs as well as work on classroom
15 assignments." The Union also complains that Zanatta never informed Payne that this
16 was an issue prior to her performance evaluations. This ignores the fact that Klemek
17 addressed Payne's implementation of programs in their November 2012 meeting.

18 In addition, Payne admits that: she spoke in a monotone to students during
19 Zanatta's formal observations; she does not always elicit eye contact before delivering
20 an SD; she sometimes delivers an SD more than once; she ignored a student's crying
21 during Zanatta's formal evaluation; she inferred a biological or emotional reason for a

1 student's behavior; she scheduled a meeting with R's parent and did not notify Zanatta;
2 and she spoke with D's parent about D and did not notify Zanatta.⁸⁸ Although Payne
3 offered painstaking detail about why she should not have been evaluated negatively for
4 any of these issues, the fact that Payne may disagree with Zanatta's methods and
5 requirements for her staff does not persuade me that Zanatta's reasons were trivial,
6 misleading, and/or misplaced.

7 It is also not trivial for Zanatta to expect that Payne not miss an excessive
8 amount of "in session" school days, which Payne also does not deny, especially since a
9 parent requested that Payne be removed from her son's case because he was missing
10 too many ABA service hours. While Zanatta did not discipline Payne for her absences,
11 she counseled her about vacation and sick days at their November 2012 performance
12 meeting. Following that, on January 15, 2013, Payne requested a two-week vacation
13 during the school session, and then booked her trip before receiving approval as
14 required by the Managerial Employees Conditions of Employment. Payne's attempt to
15 justify her actions by claiming that no supervisor ever had an issue with her vacation,
16 and she had not received a response on her request in a week, ignores the fact that
17 Zanatta had already expressed concerns about her absences approximately two
18 months prior, and that there is nothing in the Managerial Conditions of Employment that

⁸⁸ Although Bell testified that she was encouraged to talk with parents, the fact remains that Zanatta specifically told Payne that she was not to answer questions from parents without a supervisor present after Payne did so with R's parent.

1 indicates that an employee can assume that their request has been approved if they do
2 not receive a response in a week.

3 There are also areas where Payne did not attempt to refute Zanatta's critique,
4 such as her lack of fluency in explaining basic behavioral procedures, not running
5 programs as written, and not mastering data collection during incidental/naturalistic
6 teaching. Further, the evidence overwhelmingly shows that Payne continued to have
7 frequent difficulty with technology, including use of the iPad, computer, and ACE online
8 program. Despite Payne's explanations, I do not find it credible that all of her
9 technology problems were out of her control. Significantly, she had no explanation for
10 her failure to update one student's ACE data from December 2012 through March 2013,
11 even after Zanatta told her at their January 2013 meeting that she was expected to
12 keep ACE data up to date during her daily planning time.⁸⁹ Moreover, she
13 demonstrated at the hearing her lack of familiarity with the technology when she
14 testified that student data can only be entered into ACE from the iPad in real-time while
15 running a program, and that it must be entered from a computer if updating the data at a
16 later time. Both Zanatta and Bartholomew credibly testified that data can be entered
17 into ACE at any time from any device with an internet connection and a browser, which
18 would include an iPad.

⁸⁹ Although Payne explained that she was not able to update the ACE data for one of her four students during the December 2012 break because of computer problems, she offered no explanation as to why she still did not update it as of March 2013.

1 The Union attempts to refute Zanatta's assessment that Payne had difficulty
2 relating to colleagues and school-based staff by highlighting the fact that Payne was the
3 foremost advocate for unionization of the ABA Specialists, concluding that because the
4 unit did organize, she could not have had difficulty relating to her ABA colleagues.
5 However, the fact that the ABA Specialists voted in favor of unionization is a different
6 issue from how they felt about Payne as a colleague. Further, with regard to Zanatta's
7 criticism that Payne does not take feedback well, Payne demonstrated her difficulty
8 accepting criticism at hearing. Notably, rather than acknowledging that there were at
9 least certain areas in which she could improve or do things differently, she instead
10 offered lengthy explanations as to why her way of doing things was the correct way
11 and/or why she was not at fault when she did not meet certain expectations of the
12 position. This difficulty with feedback is also evident from her handwritten response to
13 Klemek's August 2012 meeting summary, in which Payne did not agree with Klemek's
14 areas of concern.

15 The Union also argues that Payne's students flourished, and cites as examples
16 the fact that one student became extroverted and another, who did not like to work,
17 learned to love working. It concedes that while these are not objective, data-based
18 measures of progress, such objective measures are not capable of succinct
19 summarization during testimony at a hearing. It also contends that the School
20 Committee did not offer any objective measures to controvert Payne's assessment of
21 her student's progress. It is not for me to decide which party is correct about Payne's

1 students' progress, however. I must instead determine whether the Union has
2 presented sufficient evidence to establish that Zanatta was improperly motivated when
3 she evaluated Payne. While not all of Zanatta's reasons are capable of being
4 objectively measured, they were reasonable to include in a performance evaluation and
5 do not indicate improper motivation. Further, the fact that Payne's students may have
6 flourished does not mean that Zanatta's issues with Payne's performance are not
7 significant.

8 The Union further contends that some of the evidence presented at hearing as to
9 why Zanatta evaluated Payne poorly was not reliable, as it was offered as hearsay from
10 other individuals, such as classroom teachers and King.⁹⁰ However, I focus my review
11 on whether Zanatta was improperly motivated in relying on these reports as part of the
12 basis for her evaluation. In so considering, I find it reasonable that a supervisor in
13 Zanatta's position would rely on reports from school staff that Payne worked closely
14 with, such as classroom teachers and the NECC consultant, when evaluating Payne. It
15 is also reasonable for Zanatta to consider the issues raised by the parents of Payne's
16 assigned students when evaluating Payne. Especially where Zanatta also has other job
17 duties on which to focus, and is not able to always observe Payne, it would be
18 impractical, or even unwise, for her to ignore the concerns of these other individuals
19 when evaluating Payne's performance.

⁹⁰ For example, the Union takes issue with King's email about Payne's conversation with D's parent, and a classroom teacher's reports that Payne left the room without reporting her absence to the teacher.

1 For the reasons set forth above, the Union has not persuaded me that the School
2 Committee was improperly motivated when it issued Payne a "Below Expectations" on
3 her performance evaluation. Accordingly, the Union has not established a prima facie
4 case of Section 10(a)(3) or 10(a)(4) retaliation, and these allegations are dismissed.

5 *Auborg's Written Warning*

6 The first two elements of the Union's prima facie case with regard to Auborg's
7 written warning are not disputed, i.e., 1) she engaged in protected, concerted activity;
8 and 2) the School Committee knew of this activity. I am not persuaded by the School
9 Committee's contention that the written warning was not an adverse action because it
10 did not comport with its established disciplinary procedure. Instead, I find that the
11 written warning was an adverse action as it reprimanded her for her conduct and
12 warned her of future adverse action. Cf. City of Peabody, 28 MLC at 284 (letter that did
13 not warn of future adverse action or did not negatively impact wages, hours, or
14 conditions of employment is not adverse action). Therefore, the Union must establish
15 that the School Committee issued the written warning in retaliation for Auborg's
16 protected activity.

17 As there is no direct evidence of unlawful motivation, I will consider whether there
18 is indirect evidence. First, the School Committee issued the written warning on July 15,
19 2013, shortly after Auborg attended the first bargaining sessions on June 25 and July 5,
20 2013. Although this timing supports a finding of improper motivation, timing alone is
21 insufficient to establish unlawful employer motivation. City of Malden, 5 MLC at 1764.

1 Zanatta's reasons for the warning were not trivial, as there is no dispute that there was
2 a verbal incident between Auborg and Bielot, which was reported to Zanatta by a school
3 principal. There was no evidence that this warning deviated from past practices, nor
4 was there any evidence of expressions of animus or hostility toward the Union by
5 Zanatta, Bartholomew, or Mullen. However, Zanatta treated Auborg and Bielot
6 disparately in the discipline issued to each of them, with Auborg being warned of future
7 discipline, while Bielot was not. Therefore, between the close timing of Auborg's
8 protected activity and the disparate treatment of Auborg and Bielot, I conclude that the
9 Union has established a Section 10(a)(3) prima facie case.

10 Accordingly, I next must consider whether Zanatta had a legitimate reason for
11 issuing Auborg the warning. Zanatta's reason for disciplining Auborg, as set forth in the
12 warning letter, included the fact that Auborg behaved unprofessionally while students
13 and parents were arriving to school. Zanatta also noted that she had already spoken to
14 Auborg about an elevated response at her performance evaluation meeting, which
15 Auborg did not dispute. The Union argues that Zanatta's investigation prior to issuing
16 the discipline "fell somewhere between cursory and nonexistent, and no credible reason
17 was offered to explain the disparate discipline imposed upon the two women."
18 However, Zanatta explained that she treated Auborg more harshly because she was the
19 one that was engaged in more aggressive verbal behavior and that the incident was
20 based on Auborg's reaction to Bielot's criticism of her attire. Zanatta reached this
21 conclusion because "it was reported by staff as well as the people that the principal had

1 also spoken to.” While it is true that Zanatta did not conduct her own investigation,
2 other than speaking to the two individuals involved, she relied on Mullen’s report of the
3 incident. Zanatta also had personally experienced Auborg’s elevated response to her
4 during Auborg’s performance evaluation, and had addressed it with Auborg. I need not
5 determine if Zanatta was correct in relying on Mullen’s report, or whether she issued the
6 proper discipline⁹¹ because my analysis focuses on whether she had a legitimate
7 reason for the discipline. Based on the above, I conclude she did. Further, there is
8 nothing to suggest that Zanatta would not have issued the same discipline but for
9 Auborg’s protected activity. I therefore dismiss this allegation.

10 *Auborg’s Transfer*

11 The Union alleges that the School Committee transferred Auborg from the Lee
12 School to the Condon School for the Summer 2013 session in retaliation for her
13 protected activity. As stated above, the School Committee does not dispute that Auborg
14 was engaged in protected activity or that it knew of the protected activity. With regard to
15 the third element of a Section 10(a)(3) prima facie case, the Board has determined that
16 an involuntary transfer to a less preferable position constitutes adverse action. City of
17 Holyoke, 35 MLC 153, 156, MUP-05-4503 (January 9, 2009). Here, I am not persuaded
18 that Auborg’s transfer was involuntary as she testified that Bartholomew “insisted” that
19 she did not have to take it, but she agreed to it anyway. There is no evidence that she

⁹¹ I also need not determine whether the multiple levels of hearsay offered by the School Committee to explain its reasons for the discipline are reliable in analyzing whether Zanatta had a legitimate reason for disciplining Auborg.

1 expressed any concerns about the transfer, or even had any unexpressed concerns.
2 Cf. Town of Holbrook, 15 MLC 1221, 1225, MUP-6344 (November 3, 1988) (evidence of
3 adverse action included the fact that the unit member told his supervisor he would not
4 like the assignment, but would do it anyway). Further, even if the transfer was
5 involuntary, there is no evidence that it was an objectively less preferable position, or
6 that Auborg considered it less preferable or punitive. See, id. (unit member regarded
7 his new assignment as punitive). Although Auborg was the only ABA Specialist at the
8 school following the transfer, she did not testify that she found this less preferable than
9 working at a school with other ABA Specialists. For these reasons, I conclude that the
10 Union has not established a prima facie case of retaliation and dismiss this allegation.

11 *Bell's Transfer*

12 The Union also alleges that the School Committee transferred Bell for retaliatory
13 reasons. Here also, the School Committee admits that Bell was engaged in protected
14 activity, and that it knew of the protected activity. Because neither Bell nor
15 Bartholomew testified that Bartholomew told her that she did not have to take the
16 transfer (as he told Auborg), I do find that this transfer was involuntary. Bell also
17 testified that her concern was that she would be the only ABA Specialist at the school,
18 and would not have supervision. Assuming that this constitutes a less preferable
19 position, I next consider whether the Union satisfied the last prong of a prima facie
20 retaliation case, i.e., improper motivation.

1 There is no direct evidence of improper motivation here, but there is indirect
2 evidence. First, Bell was transferred very close in time to her protected activity of
3 bargaining for a first contract and informing Zanatta that she would seek Union
4 assistance if another ABA Specialist was assigned to one-on-one paraprofessional
5 duties for the summer. Second, the School Committee treated Bell differently than
6 other ABA Specialists who were not transferred, with the exception of Auborg, who also
7 engaged in protected activity. I conclude that this is sufficient evidence to establish
8 improper employer motivation.

9 I next must consider whether the School Committee had a legitimate reason for
10 transferring Bell. Significantly, Ferguson requested that Bartholomew transfer Bell to
11 the Tynan School because she was very concerned about the behaviors of the children
12 at the school and needed someone she could rely on with knowledge and experience.
13 She also stated that Bell would be an "invaluable asset." It is therefore reasonable that
14 Bartholomew would select Bell to work at the school as an independent ABA Specialist
15 after receiving Verre's instruction to assign an ABA Specialist to the Tynan School.
16 Although the Union suggests that Bartholomew never told Bell that he was transferring
17 her due to Ferguson's request because it was not the true reason, and Bartholomew
18 wanted to send the message to Bell that the actual reason was because of her
19 protected activity, I decline to make this inference. I also am not persuaded that but for
20 Bell's protected activity, she would not have been assigned to the Tynan School, given

1 Ferguson's emphatic request that Bell be assigned to her school. Accordingly, I dismiss
2 this allegation.

3 Section 10(a)(5) Allegation: Paraprofessional Work Duties

4 A public employer violates Section 10(a)(5) and, derivatively, Section 10(a)(1) of
5 the Law when it unilaterally changes an existing condition of employment or implements
6 a new condition of employment involving a mandatory subject of bargaining without first
7 giving its employees' exclusive collective bargaining representative notice and an
8 opportunity to bargain to resolution or impasse. Commonwealth of Massachusetts v.
9 Labor Relations Commission, 404 Mass. 124 (1989). To establish a violation of the
10 Law, an actual change in the existing condition of employment must have occurred.
11 City of Peabody, 9 MLC 1447, MUP-4750 and MUP-4767 (November 17, 1982). An
12 employer is required to provide notice and an opportunity to bargain to impasse or
13 resolution over any changes to mandatory subjects of bargaining even if the parties
14 have not yet negotiated their first contract. See generally, Worcester County Sheriff's
15 Department, 28 MLC 1, SUP-4531 (June 13, 2001) (employer violated the Law when it
16 unilaterally changed payroll system while in negotiations for first collective bargaining
17 agreement).

18 It is undisputed that in the summer of 2013, the School Committee required ABA
19 Specialists assigned to the Haynes School to perform classroom paraprofessional
20 duties for part of the school day. It is also undisputed that the School Committee had
21 not previously required ABA Specialists to exclusively perform paraprofessional duties,

1 that work duties are a mandatory subject of bargaining, and that it did not provide notice
2 and an opportunity to bargain about the decision and impacts to the Union. The School
3 Committee instead contends that the Managerial Conditions of Employment, which
4 govern the ABA Specialists until the parties negotiate a collective bargaining
5 agreement, provides that they may be directed to perform other duties and assignments
6 as requested by the Supervisor, Assistant Director, and/or Executive Director. The
7 School Committee also argues that “[p]araprofessional work is part and parcel of ABA
8 job duties” and that “the change was a formality and one of nomenclature.”

9 I am not persuaded by the School Committee’s argument that no substantive
10 change occurred because ABA Specialists already performed paraprofessional duties,
11 and that the assignment of paraprofessional duties to ABA Specialists was a formality
12 only. The parties’ stipulations, and the evidence entered at hearing, show that while
13 there may have been an overlap in duties when a student’s IEP required certain skills to
14 be taught as part of ABA services, the ABA Specialists had never before been assigned
15 to perform paraprofessional work exclusively. Teaching a skill as part of ABA services
16 differs significantly from being assigned only paraprofessional duties for part of the day,
17 as ABA services involve a structured teaching method of running trials, which includes
18 prompting, instruction, and consequences, and then collecting and reporting data, while
19 a paraprofessional assists the classroom teacher in implementing the teacher’s lessons.

1 While they were assigned to paraprofessional duties in the summer of 2013, the ABA
2 Specialists were not performing ABA duties.⁹²

3 I am also not persuaded by the School Committee's contention that the language
4 of the Managerial Conditions of Employment providing that employees may be directed
5 to perform other duties permits it to assign paraprofessional duties to ABA Specialists
6 without notice and the opportunity to bargain. The School Committee was required to
7 maintain the status quo until the parties negotiated their first contract, but it altered the
8 status quo by assigning ABA Specialists to perform paraprofessional duties exclusively
9 for a portion of the day, which they had never done before. Although ABA Specialists
10 had performed some of the same duties as paraprofessionals in the past, it was only if
11 the duty was required as part of a particular student's IEP and not as an assignment to
12 exclusively perform paraprofessional work. Accordingly, I conclude that the School
13 Committee violated Section 10(a)(5) of the Law when it unilaterally required ABA
14 Specialists at the Haynes School to perform classroom paraprofessional duties during
15 the summer of 2013.

16 Section 10(a)(5) Allegation: Failure to Provide Information

17 If a public employer possesses information that is relevant and reasonably
18 necessary to an employee organization in the performance of its duties as the exclusive
19 collective bargaining representative, the employer is generally obligated to provide the

⁹² Both parties introduced evidence and made arguments regarding whether paraprofessionals perform ABA duties. I do not find this information relevant to my inquiry as to whether ABA Specialists could be assigned to perform paraprofessional duties without notice and bargaining, and will not address it further.

1 information upon the employee organization's request. City of Boston, 32 MLC 1, MUP-
2 1687 (June 23, 2005) (citing Higher Education Coordinating Council, 23 MLC 266, 268,
3 SUP-4142 (June 6, 1997)). The employee organization's right to receive relevant
4 information is derived from the statutory obligation to engage in good faith collective
5 bargaining, including both grievance processing and contract administration.
6 Id.

7 There is no dispute that the Union requested certain information on June 27 and
8 July 30, 2013, and that the School Committee provided some of the requested
9 information on August 15, 2013 and January 17, 2014, but did not provide the
10 requested information as described in Stipulation 26(b). There is also no dispute that
11 the information requested by the Union is relevant and reasonably necessary in the
12 performance of its duties as the exclusive collective bargaining representative.

13 According to the parties' stipulations, the School Committee's counsel reached
14 out only to Bartholomew for the information requested in Stipulation 26(b). Although
15 Bartholomew may not have possessed the information himself, there is no credible
16 evidence that the information was not in the School Committee's possession.
17 Commonwealth of Massachusetts, 34 MLC 148, 152, SUP-03-4565 (June 6, 2008)
18 (citing Board of Regents, 19 MLC 1248, 1271, SUP-3267 – 3272 (August 24, 1982)). It
19 is simply not plausible that the School Committee does not possess documentation
20 about individuals who are coming into the schools to provide ABA services to its
21 students with autism, and limiting its search for this information to one individual (i.e.,

1 Bartholomew) does not establish that it does not have such information. Further, even if
2 the School Committee does not possess the information itself, it has not presented any
3 evidence that it is not in its control or that it does not exist. See, Bristol County Sheriff's
4 Department, 32 MLC 76, 81, MUP-01-3086 (August 3, 2005) (where employer failed to
5 establish that it did not possess or control certain requested information, or that the
6 information did not exist, the Board could not conclude that it acted lawfully by failing to
7 respond to the union's information request). Accordingly, I find that that School
8 Committee violated Section 10(a)(5) of the Law when it failed to provide the information
9 described in Stipulation 26(b).

10 With regard to the information the School Committee provided on August 15,
11 2013, as described in Stipulation 26(a), the School Committee does not explain its delay
12 of a month and a half in responding to the request. Further, the School Committee does
13 not explain why it did not respond to the requests described in Stipulations 27(a) and (b)
14 until January 17, 2014, only a few days before this hearing, other than stating that
15 efforts were made to comply with the request as early as August 15, 2013. Therefore, I
16 conclude that the School Committee also violated Section 10(a)(5) of the Law by its
17 unreasonable delay in responding to the Union's information requests as described in
18 Stipulations 26(a) and 27(a) and (b). See, Higher Education Coordinating Council, 25
19 MLC 37, SUP-4225 (August 24, 1998) (an employer's belated providing of information
20 does not bring it into compliance with the Law).

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Order

Based on the foregoing, IT IS HEREBY ORDERED THAT the School Committee shall:

1. Cease and desist from:
 - a. Failing and refusing to bargain in good faith with the Union by assigning ABA Specialists to perform classroom paraprofessional duties without first providing notice and the opportunity to bargain to resolution or impasse over the decision and impacts of the decision;
 - b. Failing and refusing to bargain collectively in good faith with the Union by refusing to provide relevant and reasonably necessary information when requested by the Union;
 - c. Failing and refusing to bargain collectively in good faith with the Union by refusing to timely provide relevant and reasonably necessary information when requested by the Union;
 - d. In any like or similar manner interfering with, restraining or coercing employees in the exercise of their rights protected under the Law.
2. Take the following affirmative action that will effectuate the purpose of the Law:
 - a. Upon request, bargain with the Union in good faith to resolution or impasse before assigning ABA Specialists to perform classroom paraprofessional duties;
 - b. Provide the Union with the names, rate of pay, and job duties of any individuals who are not School Committee employees but who provide ABA therapy services within the Boston Public Schools;
 - c. Sign and post immediately in conspicuous places employees usually congregate or where notices to employees are usually posted, including electronically, if the School Committee customarily communicates to its employees via intranet or email, and maintain for a period of thirty (30) consecutive days thereafter signed copies of the attached Notice to Employees;

- 1 d. Notify the DLR within thirty (30) days after the date of service of this
2 decision and order of the steps taken to comply with its terms.

SO ORDERED.

COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF LABOR RELATIONS



KERRY BONNER, ESQ.

APPEAL RIGHTS

The parties are advised of their right, pursuant to M.G.L. c. 150E, Section 11, 456 CMR 13.02(1)(j), and 456 CMR 13.15, to request a review of this decision by the Commonwealth Employment Relations Board by filing a Notice of Appeal with the Executive Secretary of 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 the ten days, this decision shall become final and binding on the parties.



**POSTED BY ORDER OF A HEARING OFFICER OF THE
MASSACHUSETTS DEPARTMENT OF LABOR RELATIONS
AN AGENCY OF THE COMMONWEALTH OF MASSACHUSETTS**

A Hearing Officer of the Massachusetts Department of Labor Relations (DLR) has held that the Boston School Committee (School Committee) violated Sections 10(a)(5) and, derivatively, Section 10(a)(1) of Massachusetts General Laws, Chapter 150E by 1) failing to bargain in good faith to resolution or impasse with the Boston Teachers Union (Union) before assigning ABA Specialists to perform paraprofessional duties at the Haynes School during the summer of 2013 and 2) refusing to provide, and refusing to timely provide, relevant and reasonably necessary information when requested by the Union.

Chapter 150E gives public employees the right to form, join or assist a union; to participate in proceedings at the DLR; to act together with other employees for the purpose of collective bargaining or other mutual aid or protection; and, to choose not to engage in any of these protected activities.

The City assures its employees that:

- WE WILL NOT fail or refuse to bargain in good faith with the Union to resolution or impasse before assigning ABA Specialists to perform paraprofessional duties.
- WE WILL NOT fail or refuse to bargain in good faith with the Union by refusing to provide relevant and reasonably necessary information when requested by the Union.
- WE WILL NOT in any like or similar manner interfere with, restrain, or coerce employees in the exercise of their rights protected under the Law.
- WE WILL take the following affirmative action that will effectuate the purpose of the Law:
 - Upon request, bargain collectively in good faith with the Union to resolution or impasse before assigning ABA Specialists to perform paraprofessional duties;
 - Provide the Union with the names, rate of pay, and job duties of any individuals who are not School Committee employees but who provide ABA therapy services within the Boston Public Schools.

For the School Committee

Date

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED OR REMOVED

This notice must remain posted for 30 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Department of Labor Relations, Charles F. Hurley Building, 1st Floor, 19 Staniford Street, Boston, MA 02114 (Telephone: (617) 626-7132).