STATE OF ILLINOIS
EDUCATIONAL LABOR RELATIONS BOARD

Chicago Teachers Union, Local No. 1, IFT-AFT, AFL-CIO,	)	
Complainant	)	
and	)	Case No. 2022–CA–0053–C
Chicago Board of Education,	)	
Respondent	)	

OPINION AND ORDER

I. Statement of the Case

On March 7, 2022,[1] Chicago Teachers Union, Local No. 1, IFT-AFT, AFL-CIO (Union) filed a charge with the Illinois Educational Labor Relations Board (IELRB or Board or Respondent) against Chicago Board of Education (CBE). The charge alleged CBE violated Section 14(a)(5) of the Illinois Educational Labor Relations Act (Act or IELRA), 115 ILCS 5/1, *et seq.*, by unilaterally implementing a mask-optional policy in its schools, thereby effectively repudiating the parties' negotiated COVID safety agreements. Following an investigation, the Board's Executive Director issued a Complaint and Notice of Hearing (Complaint).[2] The parties appeared for a hearing before an Administrative Law Judge (ALJ) on April 25. On August 26, the ALJ issued a Recommended Decision and Order (ALJRDO) finding that CBE's unilateral change to its mask policy was a breach of its duty to bargain in good faith in violation of Section 14(a)(5) of the Act. CBE filed exceptions to the ALJRDO, and the Union filed a response to the exceptions. For the reasons discussed below, we affirm the ALJRDO.

[1] All dates occur in 2022, unless otherwise indicated.

[2] On March 16, the Board majority denied the Union's request that the Board petition the circuit court for injunctive relief pursuant to Section 16(d) of the Act.

II. Factual Background

We adopt the ALJ's finding of facts as set forth in the underlying ALJRDO. Because the ALJRDO comprehensively sets forth the factual background for the case, we will not repeat the facts herein except where necessary to assist the reader.

III. Discussion

Section 14(a)(5) of the Act prohibits educational employers from refusing to bargain collectively in good faith. An educational employer violates Section 14(a)(5), and derivatively, Section 14(a)(1) of the Act when it unilaterally changes mandatory subjects without bargaining in good faith to impasse. *Vienna School District No. 55 v. IELRB*, 162 Ill. App. 3d 503, 515 N.E.2d 476 (4th Dist. 1987). It is well-settled that an employer must notify and bargain to impasse with an exclusive representative before implementing any change in employees' wages, hours, terms and conditions of employment that may be a mandatory subject of bargaining. Here, the ALJ found that CBE did not bargain to the extent required by the Act before rescinding the universal mask policy, and, by those actions, repudiated the safety agreement in effect at the time. Employee health and safety is a mandatory subject of bargaining. *Elmhurst CUSD No. 205*, Case Nos. 2021-CA-0049-C & 2021-CA-0050-C (IELRB Opinion and Order, February 18, 2021); *Cicero SD No. 99*, Case No. 2021-CA-0051-C (IELRB Order, January 21, 2021); *Chicago Board of Education*, Case No. 2021-CA-0043-C (IELRB Opinion and Order, January 21, 2021); *Proviso Township High School Dist. 209*, ____ PERI ____, Case No. 2021-CA-0041-C (IELRB Opinion, November 5, 2020); *Chicago Board of Education*, ____ PERI ____, Case No. 2021-CA-0014-C (IELRB Opinion, September 17, 2020); *Western Illinois University*, ____ PERI ____ , Case No. 2021-CA-0009-C (IELRB Opinion, September 17, 2020); *see also, NLRB v. Gulf Power*, 384 F.2d 822 (5th Cir. 1967).

CBE's first exception is that the ALJ erroneously found that it failed to bargain in good faith with the Union prior to changing its masking policy. Its arguments in support of this exception are beside the point and ignore that there was no evidence in the record that the Union waived bargaining over rescission of the mask requirement. CBE claims the parties were engaged in bargaining prior to its announcement of the mask optional policy and the ALJ should have found as much. But even if that were true, absent agreement or a clear waiver to bargain over that issue from the Union, CBE cannot escape a finding of bad faith bargaining.

CBE's second exception is that the ALJ erred in failing to find that Circuit Court Judge Raylene Grischow indicated CBE's mask mandate violated the law, rendering it void. Its third exception is that the ALJ erred in finding that a provision in a collective bargaining agreement that conflicts with a statue is not void. Section 10(b) of the IELRA voids collective bargaining agreement provisions that conflict with any Illinois statute. CBE explains, "Because Judge Grischow has held that mask mandates, without due process, violate the [Illinois Department of Public Health] IDPH Act, it was highly probable that, in March 2022, Judge Grischow would have found the mask mandate in the January 12, 2022 agreement in conflict with the IDPH Act. As such, it was unenforceable under Section 10(b)." CBE's argument that it was "highly probable" that Judge Grischow would find a conflict does not amount to an actual conflict at the time it made the unilateral change that would have rendered what the parties negotiated void.

CBE's fourth exception is that the ALJ erred in finding that it repudiated the parties' agreement. Section 10 of the Act requires the parties to bargain collectively. A party to a collective bargaining agreement violates the duty to bargain collectively by modifying the terms of that agreement, where those terms are of such importance to the agreement their unilateral modification would negate the very statutory duty to bargain collectively. *Chicago Board of Education*, 7 PERI 1114, Case No. 92-CA-0026-C (IELRB Opinion and Order, October 25, 1991). That is, one party repudiates the agreement and violates its statutory duty to bargain collectively when it unilaterally modifies a principal part of the agreement. *Id.* Absent repudiation, this Board cannot address charges solely alleging a breach of a collective bargaining agreement. *West Chicago School District 33*, 5 PERI 1091, Case Nos. 86-CA-0061-C & 87-CA-0002-C (IELRB Opinion and Order, May 2, 1989), aff'd 218 Ill. App. 3d 304, 578 N.E.2d 232 (1st Dist. 1991); see also *City of Loves Park v. Ill. Labor Rel. Bd. State Panel*, 343 Ill. App. 3d 389, 395 (2nd Dist. 2003) (Illinois Labor Relations Board has jurisdiction to adjudicate only contractual breaches involving conduct so sufficiently lacking in good faith that they amount to a repudiation of the collective bargaining process, and constitute a refusal to bargain in good faith). This exception is without merit. As the ALJ recognized, the record indicates that the masking requirement was a key component of the negotiated safety agreements. During negotiations, the Union pushed for universal masking even though there was a mask mandate in effect at that time. The parties bargained over whether CBE would provide masks to

employees and what kinds of masks would be provided. As the ALJ observed, the record indicates that CBE considered universal masking to be a key part of the safety agreements. This is clear from its Chief Labor Relations Officer's communication to the Union showing universal indoor masking as second on a list of Center for Disease Control and Illinois Department of Health strategies for mitigating the spread of COVID-19 in schools and her indication of CBE's intent to continue these strategies, including masking. All of this demonstrates that the masking requirement was a principal component of the safety agreements and thus by CBE's unilateral recission of this component, it repudiated the negotiated agreements.

In CBE's last exception, it argues that the charge should be referred to arbitration. It contends that referral is "compelled" because the conduct at issue, breach of the safety agreement, is dependent on interpretation of the agreement. It is true that where a case raises statutory and contractual issues arising out of the same factual context, the Board may defer the matter to arbitration but retain jurisdiction to ensure that any statutory rights at stake are protected. *West Chicago School District No. 33*, 5 PERI 1091, Case Nos. 86-CA-0061-C, 87-CA-0002-C (IELRB Opinion and Order, May 2, 1989). This is discretionary and the Board is by no means required to do so. Particularly in a case like this, that has wound its way through the entire gamut of the Board's processes and been decided on its merits. It would not further the resolution of this dispute for the parties to rehash it before an arbitrator.

IV. Order

Respondent violated Section 14(a)(5) and, derivatively, (1) of the Act by rescinding its universal mask mandate without prior bargaining to agreement or impasse with Complainant. The ALJRDO is affirmed. For the reasons discussed above, IT IS HEREBY ORDERED that Respondent, Chicago Board of Education, its officers, and its agents shall:

1. Cease and Desist from:
    a. Refusing to bargain collectively and in good faith with Chicago Teachers Union, Local No. 1, IFT-AFT, AFL-CIO.
    b. Making unilateral changes to any term or condition of employment without prior bargaining to agreement or impasse.

c. Otherwise interfering with, restraining, or coercing employees in the exercise of rights guaranteed them in the Illinois Educational Labor Relations Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act:

   a. Reinstate the universal masking policy through expiry of the 2022 Safety Agreement.

   b. Refrain from altering or rescinding any policy contained within the 2022 Safety Agreement until its expiry, and refrain from altering any other term or condition of employment except with prior consent of the Union.

   c. Make all bargaining unit employees whole for any discipline or other adverse employment action taken against employees related to Chicago Board of Education's rescission of its universal masking policy.

   d. Upon request, bargain with Chicago Teachers Union, Local 1, IFT-AFT, AFL-CIO, over the changes to terms and conditions of employment made by rescinding the universal masking policy and the impact of said change.

   e. Post on bulletin boards or other places reserved for notices to employees for 60 consecutive days during which the majority of Respondent's employees are actively engaged in duties they perform for Respondent, signed copies the attached notice. Respondent shall take reasonable steps to ensure that said notice is not altered, defaced, or covered by any other materials.

   f. Notify the Executive Director in writing within thirty-five (35) calendar days after receipt of this Order of the steps taken to comply with it.

V. Right to Appeal

This is a final order of the Illinois Educational Labor Relations Board. Aggrieved parties may seek judicial review of this Order in accordance with the provisions of the Administrative Review Law, except that, pursuant to Section 16(a) of the Act, such review must be taken directly to the Appellate Court of the judicial district in which the IELRB maintains an office (Chicago or Springfield). Petitions for review of this Order must be filed within 35 days from the date that the Order issued, which is set forth below. 115 ILCS 5/16(a). The IELRB does not have a rule requiring any motion or request for reconsideration.

Decided: **January 18, 2023**
Issued: **January 18, 2023**

/s/ Lara D. Shayne
Lara D. Shayne, Chairman

/s/ Steve Grossman
Steve Grossman, Member

/s/ Chad D. Hays
Chad D. Hays, Member

/s/ Michelle Ishmael
Michelle Ishmael, Member

Illinois Educational Labor Relations Board
160 North LaSalle Street, Suite N-400
Chicago, Illinois 60601
312.793.3170 | 312.793.3369 Fax
elrb.mail@illinois.gov

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Charging Party,	)	
and	)	Case No. 2022-CA-0053-C
Chicago Board of Education,	)	
Respondent.	)	

Administrative Law Judge's Recommended Decision and Order

On March 7, 2022, Charging Party Chicago Teachers Union, Local 1, IFT-AFT, AFL-CIO (CTU or the Union), filed an unfair labor practice charge with the Illinois Educational Labor Relations Board (IELRB or Board) in the above-captioned matter pursuant to Section 14 of the Illinois Educational Labor Relations Act (IELRA or Act) alleging that the Respondent, Chicago Board of Education (CBE), violated Section 14(a) of the Act. After an investigation, the Board's Executive Director issued a complaint on March 15, 2022, alleging several violations of Section 14(a)(5) and, derivatively, (1) of the Act. The parties appeared before the undersigned Administrative Law Judge on April 25, 2022. At the hearing, the Charging Party filed a motion to amend the complaint to strike all allegations in the complaint except the one that alleged that the Respondent violated Section 14(a)(5) of the Act by unilaterally implementing a mask-optional policy in Chicago Public Schools (CPS), thereby effectively repudiating safety agreements reached with the Charging Party. Over the Respondent's objection, I granted the Charging Party's motion. At the hearing, both parties had the opportunity to call, examine, and cross-examine witnesses, introduce documentary evidence, and present arguments. Both parties filed post-hearing briefs.

I. Findings of Fact

During the hearing, Jesse Sharkey testified for the Union. (R. 42). Kaitlyn Girard, Dr. Jennifer Seo, and Sally Scott testified for CBE. (R. 125, 177, 196). Ahead of the hearing, the parties stipulated to several material facts as set forth in the Joint Pre-Hearing Memorandum that is signed by representatives of both parties. (ALJ Exhibit 6).

A. Stipulated Facts

CBE is statutorily charged with the governance, maintenance, and financial oversight of CPS, the third-largest school district in the nation, and is an educational employer within the meaning of Section 2(a) of the Act. (ALJ Ex. 6 at 3). The Union is a labor organization within the meaning of Section 2(c) of the Act and the exclusive representative within the meaning of Section 2(d) of the Act of a bargaining unit comprised of teachers, paraprofessionals, and school-related personnel employed by CBE. (ALJ Ex. 6 at 3). CBE and CTU are parties to a collective bargaining agreement that covers the period from July 1, 2019 through June 30, 2024. (ALJ Ex. 6 at 3). On or about February 6, 2021, the parties entered into an agreement entitled Framework for Resumption of In-Person Instruction that remained in effect until August 24, 2021. (ALJ Ex. 6 at 3-4). This agreement included a provision requiring that all persons entering a CPS facility must wear a face mask properly covering their nose and mouth at all times. (ALJ Ex. 6 at 3-4). On January 12, 2022, the parties entered into a COVID-19 Related Safety Protocols Memorandum of Agreement that extended the masking requirement through August 26, 2022. (ALJ Ex. 6 at 4).

1. The Austin and Allen Litigation

On October 20, 2021, CBE was a named defendant in Austin *et al.* v. Board of Education of Community Unit School District #300 *et al.*, Case No. 2021-MR-91 (Austin). (ALJ Ex. 6 at 4). In Austin, the Plaintiffs sued to enjoin Governor J.B. Pritzker, the Illinois Department of Public Health (IDPH), the Illinois State Board of Education (ISBE), and school boards across the state including CBE from requiring students to mask in schools or requiring students who are "close contacts" of individuals diagnosed with COVID-19 to quarantine. (ALJ Ex. 6 at 4). Another lawsuit was filed on December 8, 2021, by a group of teachers. (ALJ Ex. 6 at 4). This case, Allen *et al.* v. Board of Education of North Mac Community Unit School District #34 *et al.*, Case No. 2021-CH-500007 (Allen), sought to enjoin the state and school boards from enforcing mask mandates or submit to COVID-19 testing if they are not fully vaccinated. (ALJ Ex. 6 at 4). Both Austin and Allen are currently pending before Judge Raylene Grischow. (ALJ Ex. 6 at 4).

On February 4, 2022, Judge Grischow entered a Temporary Restraining Order in both Austin and Allen. (ALJ Ex. 6 at 4-5). The Order enjoined the state defendants from ordering that school districts require that students or teachers wear masks, require unvaccinated staff to submit to testing, or to refuse to admit staff or students who are "close contacts" of an individual who has tested positive for COVID-19, unless the Illinois Department of Public

Health has issued a quarantine order under the Department of Public Health Act (IDPH Act), 20 ILCS 2305. (ALJ Ex. 6 at 5). The State appealed on February 7, 2022, as did CBE and several other school districts. (ALJ Ex. 6 at 5).

The Austin plaintiffs filed a Petition for Rule to Show Cause on February 14, 2022, asking the court to hold CBE, CBE's CEO Pedro Martinez, and a CPS school principal in contempt of court for maintaining a masking requirement in CPS schools pursuant to CPS policy. A hearing on that Petition was set for February 25, 2022. (ALJ Ex. 6 at 5). On February 17, 2022, the Appellate Court dismissed the pending appeals filed by CBE and the state as moot because the policies enjoined by the TRO had expired but noted in its ruling that the TRO issued by Judge Grischow "does not appear" to apply to school districts because it does not restrain school districts from acting independently from executive orders or the IDPH in creating provisions to address COVID-19. (ALJ Ex. 6 at 5). Both parties appealed the dismissal to the Illinois Supreme Court. (ALJ Ex. 6 at 5). On February 24, one day ahead of the hearing, Judge Grischow entered an order holding that her court lacked the jurisdiction to consider a contempt petition against the CBE or related parties, but that school districts still had to cooperate with IDPH on health-related issues and that individual policies still had to comply with existing law. (ALJ Ex. 6 at 5). On February 25, the Illinois Supreme Court declined to hear the appeal, but vacated the February 4, 2022 restraining order. (ALJ Ex. 6 at 6).

A new motion for a Temporary Restraining Order against CBE was filed on February 28 that asked Judge Grishow to enjoin CPS from requiring students to wear masks absent a quarantine order from IDPH. (ALJ Ex. 6 at 6). The judge set a deadline of March 7 for CBE's response and set a hearing date of March 10. (ALJ Ex. 6 at 6). In lieu of filing a response on March 7, CBE announced that it would revoke its masking requirement and move to a mask-optional policy effective March 14, 2022. (ALJ Ex. 6 at 6). After this announcement, the Austin and Allen plaintiffs withdrew their motion, and the hearing was cancelled. (ALJ Ex. 6 at 6).

The Plaintiffs filed another motion on March 10, looking to enjoin CBE from enforcing its requirement that unvaccinated employees had to submit to weekly COVID-19 tests. (ALJ Ex. 6 at 6). Vaccination and testing requirements are not part of any safety agreement or memorandum of understanding at issue in this charge. (ALJ Ex. 6 at 6). Judge Grischow entered a TRO against CBE over its vaccination and testing policy on April 8, and CBE appealed on April 11. (ALJ Ex. 6 at 6). Despite the 4th District's finding in Graham v. Pekin

Fire Department, 2022 IL App (4th) 220270, in which the court held that a trial court did not abuse its discretion when it declined to issue a temporary restraining order requiring that employees either get vaccinated for COVID-19 or undergo testing, the 4th District also denied CBE's request for an emergency stay of Judge Grischow's TRO. (ALJ Ex. 6 at 6-7).

2. Local and State Public Health Guidance

Governor Pritzker instituted a masking requirement, regardless of vaccination status, for the beginning of the 2021-22 school year, supported by guidance from IDPH and ISBE. (ALJ Ex. 6 at 7). In August 2021, the Chicago Department of Public Health (CDPH) reinstituted a face mask mandate for all indoor public areas including schools. (ALJ Ex. 6 at 7). On February 25, 2022, the federal Centers for Disease Control and Prevention (CDC) announced that it no longer recommends indoor mask wearing in K-12 or early education settings in areas with low or medium COVID-19 Community Levels. (ALJ Ex. 6 at 7). That same day, Governor Pritzker announced that the state would no longer institute masking requirements for schools effective February 28. (ALJ Ex. 6 at 7). ISBE also announced that, effective February 28, that masks were optional for all schools and school districts. (ALJ Ex. 6 at 7). CDPH also removed its masking requirements on February 28, including for schools. (ALJ Ex. 6 at 7).

On April 1, Governor Pritzker issued Executive Order 2022-10, recognizing CDC guidance supporting the removal of indoor masking requirements, including in K-12 settings, based on a framework for assessing community levels of COVID-19 that was based on hospital admissions for COVID-19, inpatient bed availability, and number of COVID-19 cases. (ALJ Ex. 6 at 7). The Order acknowledges that K-12 schools may choose to require individuals to wear face masks based on community COVID-19 levels and other factors, and that some employers have entered into collective bargaining agreements that continue to require masking. The order encourages public and nonpublic schools that serve Pre-K through 12th grade to follow recommendations on safety measures issued by the CDC, ISBE, and IDPH, including physical distancing, screening, testing, ventilation, handwashing, advising people to stay home if sick and get tested, contact tracing, and cleaning and disinfection. (ALJ Ex. 6 at 7-8).

B. Evidence and Testimony at Hearing

Union President Jesse Sharkey testified first for the Union. He testified that the COVID-19 pandemic forced Chicago Public Schools to shift to remote instruction beginning on or about March 17, 2020. (R. 43). CBE initially intended to return to in-person instruction

in mid-October of 2020. (R. 43). After CBE announced its intention to return to in-person instruction, CTU demanded bargaining over the impact of that decision on its membership and over health and safety conditions connected to the pandemic. (R. 44). Even with the already existing mask mandate, CTU wanted to bargain over safety conditions both to get them into writing and to try to get CBE to agree to other measures not provided for by state guidelines. (R. 44-47). An agreement, the previously mentioned Framework for Resumption of In-Person Instruction (hereinafter, 2021 Agreement), was reached on February 6, 2021. (R. 49, Joint Ex. 1). The 2021 Agreement required all persons entering a CPS facility wear a mask at all times. (R. 49, Joint Ex. 1 at 1(e)). In June 2021, the Union demanded bargaining over a successor agreement. (R. 51).

On August 27, 2021, CBE's Chief Labor Relations Officer, Katelyn Girard, wrote a letter to Sharkey detailing steps that were taken pursuant to the previous safety agreement that CBE was continuing to observe for the 2021-22 school year. (R. 52, Union Ex. 16). Among those items was universal indoor masking. (Union Ex. 16). CBE never proposed discontinuing the universal masking requirement. (R. 53). CBE also never made any proposal linking the masking requirement to changes in state, federal, or city policy on universal masking. (R. 53).

A second agreement, the COVID-19 Related Safety Protocols Memorandum of Agreement (hereinafter, 2022 Agreement), was ratified by the Union on January 12, 2022. (R. 54, Joint Ex. 2). The 2022 Agreement stated, among other items, that the Health and Safety provisions of the 2021 Agreement would be extended through August 26, 2022, when the agreement expired. (R. 55, Joint Ex. 2 at 5). The 2022 Agreement also contained specific provisions concerning the conditions under which schools would go remote, adherence to CDC, IDPH, and CDPH guidelines, and testing and vaccination policy. (R. 55-61). Testing policy was a particular point of concern for the Union. (R. 59-61). The Union wanted opt-out testing, while CBE insisted on an opt-in testing policy. (R. 60). As of February 2022, 19 schools had less than 10% of students signed up for testing, and a majority of the approximately 550 schools in CPS had less than 50% of students opting in to testing. (R. 62-63, Union Ex. 11). Similarly, on the topic of vaccination, about three-quarters of CPS schools had vaccination rates for students below 50%. (R. 65, Union Ex. 10). Because of these deficiencies in testing and vaccination rates, the Union took the position that a universal masking requirement was important. (R. 66-67).

During bargaining over the 2022 Agreement, the Union proposed that the parties should retain the right to negotiate if circumstances related to the pandemic materially change in a way that impacts the health and safety of students and staff. (R. 68, CBE Ex. 24 at 7). Sharkey testified that this proposal was intended to keep a state of "constant bargaining" as issues related to COVID-19 continued to pop up. (R. 68). Sharkey stated that CBE refused to include this item in the final agreement because it had an interest in a final agreement that lasted through the end of the school year. (R. 69).

On February 5, 2022, a day after Judge Grischow issued her first TRO against enforcement of the statewide mask mandate, Girard sent an email to all CPS employees stating that CPS would continue to enforce universal masking, and forwarded a message from Pedro Martinez, the CEO of Chicago Public Schools, explaining that Judge Grischow's order does not prohibit CPS from enforcing its COVID-19 policies and procedures, including the masking requirement. (R. 70-72, Union Ex. 17).

The Union and CPS met to discuss mask policy and related litigation on at least one occasion. In a meeting the Union characterized as off-the-record and informal, on February 28, the Union met with CEO Martinez and Girard. (R. 74). The meeting was originally set for March 2, before being moved up. (R. 109). Sharkey noted that CPS CEOs typically do not get involved in collective bargaining sessions, and CEO Martinez specifically was not involved in any negotiations over either the 2021 Agreement or the 2022 Agreement. (R. 74-75, 155). At the February 28 meeting, the Union stated that it would not be willing to re-open the safety agreement set forth in the 2022 Agreement unless CPS met four requirements. (R. 75). First, the Union wanted to delay the shift to a mask-optional policy until after Spring Break. (R. 75). Second, the Union requested accommodations for students and staff with health concerns. (R. 76). Third, the Union wanted to establish a set of metrics whereupon a universal masking policy might need to be reinstated. (R. 76). Finally, the Union wanted CBE to allow its members to work extra days to make up for missed instructional time and to do outreach for COVID-19 vaccination efforts. (R. 76). Sharkey indicated that, because the Union had fought so hard to reach the initial agreement, that agreement on these four items would be required for the Union to consider re-opening the agreement. (R. 76, 110).

At the meeting, CBE representatives discussed its fear that Judge Grischow would enter a TRO against the mandatory masking policy. (R. 111). The Union did not agree to allow CPS to end the universal masking requirement before the end of the 2022 Agreement but did agree to have a second meeting on the topics of masking and litigation and to survey

its membership on the issue. (R. 77-78). Sharkey testified that the survey revealed that a little less than half of those responding strongly wanted the Union to maintain the universal masking requirement, that about 30% were opposed to it, and that the rest expressed no strong opinion on the matter. (R. 120). The parties also discussed not wanting to be "on an island" in terms of being the last school district with a mandatory masking policy. (R. 119). At some point between February 28 and March 2, Girard indicated that CBE would not be willing to meet the Union's requirements for reopening the safety agreement. (R. 79).

On March 2, 2022, CEO Martinez held a press conference. A news story describing that press conference quoted Martinez saying that CPS was "moving in [a] direction" toward a mask-optional policy. (R. 80, Union Ex. 22). Sharkey testified that he called CEO Martinez following that press conference. (R. 82). In that conversation, CEO Martinez confirmed to Sharkey that he intended to shift to a mask-optional policy. (R. 82). Also on March 2, CEO Martinez sent out an email wherein he stated that, while universal masking would remain in place for the time being, that a move to a mask-optional model for all students and staff would be forthcoming. (R. 83, Union Ex. 21).

The parties held a second conversation on March 6. (R. 118). During this conversation, Sharkey repeated his four requirements for reopening negotiations. (R. 118). Girard apparently told Sharkey that there was "no time" to do that because Judge Grischow was going to enter a TRO against the mandatory masking policy. (R. 118-19).

On March 7, 2022, Girard sent a letter to Sharkey and the Union. (R. 85, Union Ex. 23). In that letter, Girard stated that COVID-19 safety measures that CPS had in place were based on guidance from the CDC, CDPH, IDPH, and ISBE, and that the agreement set forth in the 2022 Agreement was in the context of the Omicron surge. (Union Ex. 23). She noted that, as of the drafting of this letter, daily cases were down 97% from the peak of the Omicron surge, and that cases and hospitalizations were significantly down as well. (Union Ex. 23). Citing CDC guidelines that no longer recommend universal masking in K-12 schools in areas with a low or medium COVID-19 community level, Governor Pritzker's announcement revoking the school mask mandate, and ISBE Superintendent Dr. Carmen Ayala's announcement stating that masks are optional for all schools and school districts effective February 28, 2022, along with the revocation of city mask requirements for indoor spaces, that CPS would implement a mask-optional policy as of March 14, 2022. (Union Ex. 23).

After stating that the policy would be implemented, Girard mentioned the motion for a TRO pending before Judge Grischow that specifically sought to enjoin CPS's universal

masking policy. (Union Ex. 23). She argued that revoking the universal masking policy now was necessary because a TRO entered by Judge Grischow could impact not just the universal masking policy, but other mitigation measures CPS has in place and limit its future choices. (Union Ex. 23).

The Union responded to Girard by email soon after receiving her letter. (R. 86). Through counsel, the Union stated that any change made to the terms of the safety agreement needed to be bargained with the Union before implementation. (R. 86-87, Union Ex. 26). Girard responded that CPS had been in negotiations with CTU about the mask mandate and pending TRO proceedings. (R. 87, Union Ex. 26). She stated further that CBE had tried to arrange to meet with the Union and would remain available to meet. (R. 87, Union Ex. 26). The Union declined to hold further bargaining sessions. (R. 123-24). Sharkey argued that CBE's announcement on March 7 rendered bargaining impossible, especially since CBE continued to express unwillingness to meet CTU's threshold for reopening negotiations. (R. 124). The Union then filed the instant unfair labor practice charge. (R. 87).

Kaitlyn Girard testified first for CBE. (R. 125). She is the Chief Labor Office for CBE. (R. 127). She was involved with negotiations over both the 2021 Agreement and the subsequent Memorandum. (R. 127-129). At no point during negotiations over either agreement did either party raise the possibility of eliminating the universal masking requirement. (R. 130). Girard disputed Sharkey's contention that the discussions held between February 28 and March 6 were not bargaining sessions. (R. 134). She pointed out that the parties were discussing a possible change to an existing policy or program, and that the parties discussed possible contractual provisions that could lead to an agreement. (R. 134). Specifically, she described an objection to one of the Union's demands, that its membership be allowed to perform extra work for pay. (R. 139). She explained that the Board of Education saw that as the Union's attempt to make up for the four days lost during negotiations over the 2022 Agreement. (R. 139-40, 144). She also testified that CBE was concerned about the possible consequences of a delay in implementation of a mask-optional policy given what CBE saw as the inevitable entry of a TRO by Judge Grischow. (R. 145).

At the end of the conversation between Sharkey and Girard on March 6, they discussed meeting again the next morning. (R. 148-49). Sharkey proposed that they meet at noon. (R. 149-50). Girard testified that she said that would be too late, and that CBE would have to make an announcement. (R. 150). The Board's response to the petition for a TRO was due at 2:00 that afternoon, and that the "writing [was] on the wall" in terms of what the judge

was going to do. (R. 150). Later that morning, Girard told Sharkey that CBE would be making an announcement. (R. 150). CBE did in fact announce that day that it would be moving to a mask-optional policy as of March 14. (R. 152).

The next witness for CBE was Dr. Jennifer Seo, the Chief Medical Officer of the Chicago Department of Public Health. (R. 178). She is Board Certified in pediatrics and internal medicine. (R. 178). During the pandemic, she consulted with schools and day cares in the City of Chicago with respect to COVID-19 protocols. (R. 179). She also oversaw the COVID-19 response for the City's governmental departments, including fire, police, and first responders. (R. 179). At the end of February 2022, the CDC released a matrix intended to guide communities and local health departments on their approach to COVID-19, which Dr. Seo argued should be substantially different than before because of immunity due to either vaccination or infection. (R. 181, CBE Ex. 16). She testified that the new approach focused more on hospitalizations and available inpatient hospital beds, rather than on cases and positivity rates. (R. 181-82, CBE Ex. 16).

The new CDC guidance accompanying the matrix indicated that for communities at a low level, there is no recommendation of universal indoor masking. (R. 184, CBE Ex. 16). At a medium level, individuals are encouraged to consult with their physician about whether they need to wear a mask. (R. 184). When a community is at a high level, the CDC recommends universal indoor masking. (R. 184). The community level in Cook County on March 7, immediately following CBE's shift to a mask-optional policy, was low. (R. 186, CBE Ex. 16).

Dr. Seo also aided CPS in reviewing clusters of cases, defined as two or more in the same classroom over a 14-day period. (R. 188). The main point of reviewing clusters is to determine whether there is an outbreak, defined as three or more COVID-19 cases that are linked to one another. (R. 189). Through this study, Dr. Seo testified that schools are not drivers of community transmission of COVID-19. (R. 189). Accordingly, she testified that the revocation of CPS's mask mandate did not pose a health and safety risk to students or to teachers. (R. 190).

Seo also testified about the studies introduced as evidence by the Union. (R. 193). She noted that these studies took place during the Delta wave, in late summer and fall of 2021. (R. 193). For that reason, the studies could not necessarily be generalized to other surges, including the subsequent Omicron surge that began in early 2022. (R. 193). She testified that these studies do not support universal masking, both because they came before the FDA

approval of vaccinations for children from 5 to 11 years old and because of immunity arising out of community infection from the Omicron surge. (R. 193-94). Even for schools that had low rates of vaccination, Dr. Seo testified that masking still was not required because of the low COVID-19 community level. (R. 194).

CBE's final witness was Sally Scott. (R. 196). She has acted as outside labor counsel for CBE on a regular basis since 2012. (R. 197). Scott was the chief negotiator for CBE in bargaining over both the 2021 and 2022 Agreements. (R. 197-98). Scott described the circumstances leading up to approval of the 2022 Agreement, including a point in the negotiations where CTU called for teachers to work remotely from January 5 to January 11, four days of work in total. (R. 204-206). CBE did not approve CTU's membership to work remotely because it did not believe that remote instruction was permitted by statute, any executive order from the Governor in effect at the time, or by CPS. (R. 204-05). Scott also went into the bargaining history concerning COVID-19 testing, stating that CBE could not approve CTU's demand for mandatory testing of students because she did not believe that CBE could do that without parental permission. (R. 205). She also provided insight into CBE's approach to the Union's January 10 counterproposal to CPS in which, in relevant part, it proposed that the parties would retain the right to negotiate if the circumstances of the pandemic materially change. (R. 208, CBE Ex. 24). Scott testified that CBE did not agree to this proposal because it thought the provision might lead to another situation where students were losing instructional time. (R. 209).

She also testified as to CBE's handling of the Austin and Allen litigation. (R. 210-211). Both cases revolved around a theory that IDPH was only allowed to require quarantine, testing, or exclusion if a person is first given an evidentiary hearing in state court and the court finds clear and compelling evidence of danger to the individual being quarantined or required to mask. The Austin case concerned universal masking, where the Allen case involved testing requirements for unvaccinated staff. (R. 211-12). Judge Grischow entered a TRO against the State defendants in the Allen case, but it was initially unclear who was enjoined by the order. (R. 212). CBE appealed so as to not waive any right to do so but took the position that the TRO did not apply to individual school districts. (R. 213). However, CBE also took the reasoning of Judge Grischow's ruling to mean that, if a similar action was taken against an individual school district with a universal masking requirement, that Judge Grischow would almost certainly enter a TRO against the Board of Education as well. (R. 213-215).

The plaintiffs in the Austin litigation took the position that the TRO did apply to CBE and filed a Petition for Rule to Show Cause on February 14, 2022. (R. 217, CBE Ex. 4). On February 17, the 4th District Appellate Court dismissed an appeal of the initial TRO but noted in its opinion that the language of the TRO "in no way restrains school districts from acing independently from the executive orders or the IDPH in creating provisions addressing COVID-19. Thus, it does not appear that the school districts are temporarily restrained from acting by the court's TRO." Austin v. Board of Education of Community Unit School District 300, 2022 IL App (4th) 220090-U at ¶ 3. (R. 218, CBE Ex. 6). Following this order, on February 24, Judge Grischow declined to grant the Rule to Show Cause against CPS but included in her order language that clarified that school districts still had to comply with due process requirements. (R. 220, CBE Ex. 8). Scott testified that CBE's current procedures would not constitute due process as described in the February 24 order. (R. 219-20).

Scott went on to testify that the impact of Judge Grischow's February 4 TRO went beyond the order itself, including many districts that stopped requiring masks soon after the order took effect. (R. 221). While CPS was not facing the level of opposition to masking that other school districts were, CBE anticipated that opposition to universal masking would grow over the rest of the school year. (R. 221). That, coupled with its belief that Judge Grischow would soon issue a TRO against CBE's universal masking policy, the changing guidance from CDC, IDPH, CDPH, and ISBE on masking, and followed by Governor Pritzker's February 28 announcement ending mandatory masking requirements in the state, led to CBE beginning to discuss the end of universal masking with the Union. (R. 221-225).

Scott forwarded an email to CTU on February 28, attached to which was a TRO filed earlier that day by the Plaintiffs in the Austin litigation. (R. 227, CBE Ex. 26). The motion asked for Judge Grischow to enter a TRO enjoining CBE's universal masking policy without a hearing. (R. 227). Judge Grischow declined to do so and established a briefing schedule that required CBE to file a brief by March 7 at 2:00 p.m. (R. 227). Operating under the reasoning that, if CBE filed something in response to the petition for a TRO that one would be entered, CBE instead announced that it was moving to a mask-optional policy on March 7. (R. 232). Following CBE's announcement, the Plaintiffs withdrew their motion for a TRO. (R. 233, CBE's Exhibit 12). However, Judge Grischow did subsequently enter a TRO in the Allen litigation against CBE's requirement that unvaccinated employees be subject to weekly COVID-19 tests. (R. 233-34). CBE appealed that TRO, and it was subsequently overturned by the Appellate Court on April 20. (R. 234, 251, Union Ex. 29). Counsel for the Allen and

Austin Plaintiffs has continued to file motions seeking restraining orders, including against the exclusion of students considered "close contacts" to students who have tested positive for COVID-19. (R. 234). The parties have continued to bargain over masking and safety protocols. (R. 235). No agreement has yet been reached to modify the 2022 Agreement on the universal masking requirement. (R. 242-243). CBE has maintained its mask-optional policy, arguing that because the parties are still before Judge Grischow on matters related to the COVID-19 pandemic, the potential for a future TRO on the matter of universal masking precludes reinstatement of the policy. (R. 255-57).

II. Issues and Contentions

The Union alleges that CBE violated Section 14(a)(5) and, derivatively, (1) of the Act by revoking the universal masking requirement of the 2022 Agreement without prior bargaining to agreement or impasse. CBE denies that the complained-of conduct violates the Act.

III. Discussion

Section 10 of the Illinois Educational Labor Relations Act requires that an educational employer and an exclusive representative of a bargaining unit comprised of that employer's employees have the duty to meet at reasonable times and confer in good faith with respect to wages, hours, and the terms and conditions of employment. 115 ILCS 5/10(a) (2014). Section 14(a)(5) of the Act prohibits educational employers from refusing to bargain in good faith with an exclusive representative. 115 ILCS 5/14(a)(5) (2022). An educational employer breaches the duty to bargain in good faith, thereby violating Section 14(a)(5) of the Act, when it makes a unilateral change to a mandatory subject of bargaining without prior bargaining to agreement or impasse with the exclusive representative of a unit of employees. Central City Education Association v. IELRB, 149 Ill. 2d 496 (1992), Vienna School District v. IELRB, 162 Ill. App. 503, 506-07 (4th Dist. 1987), *citing* NLRB v. Katz, 369 U.S. 736 (1962). Throughout the COVID-19 pandemic, the IELRB has consistently held that health and safety provisions are mandatory subjects of bargaining. *See, e.g.*, Chicago Board of Education, ___ PERI ___ (IELRB Opinion and Order, November 19, 2020) (finding that employee safety is a mandatory subject of bargaining).

A. CBE did not engage in good faith bargaining prior to moving to a mask-optional policy.

There is no dispute in this matter that on March 7, 2022, CBE announced that it would be shifting from a universal masking policy to a mask-optional policy effective March

14. CBE argues that it was engaged in bargaining before it was forced to make the decision to go mask-optional. At hearing, Sharkey testified that the Union acknowledged that it understood that CBE would need to go mask-optional at some point, and that political pressure would begin to mount on CBE to do so. He offered four items that CBE would need to bargain on for CTU to reopen the contract negotiations over the mask-optional policy. The parties did not agree on any of the four items. CBE argues that the items proposed by Sharkey were bargaining proposals offered in exchange for going mask optional.

I credit Sharkey's testimony on this matter. The 2022 Agreement did not contain a reopener clause, at the insistence of CBE. During negotiations over the 2022 Agreement, the Union proposed that the parties be able to reopen negotiations on a particular item as it became necessary to do so. CBE declined to include this provision in the contract because it did not want to engage in perpetual bargaining given the contentious nature of bargaining leading up to both the 2021 and 2022 Agreements. However, because that clause was absent, CBE knew or should have known that convincing the Union to modify the deal to take away what the Union no doubt saw as a valuable piece of the deal was going to require something in exchange. Despite this, CBE made no proposals on the four items Sharkey requested in exchange for reopening negotiations, or counterproposals on any other item.

CBE argues that the Union refused to bargain in good faith when it refused to meet with CBE following its announcement of the mask-optional policy on March 7 through its implementation on March 14. However, CBE cannot shift the burden onto the Union to meet and bargain over a proposed change when that change has already been announced to the public along with a date for implementation. CBE's actions presented the Union with a *fait accompli* that inherently denied the Union the opportunity to bargain. *See, e.g.,* Peoria School District 150, 22 PERI 92 (IELRB Opinion and Order July 31, 2006) (*fait accompli* can be demonstrated by implementing the change prior to announcing to the exclusive representative). Once that occurred, especially when accounting for the political pressure acknowledged by both parties on the issue of universal masking, the decision was always going to be impossible to overturn at the bargaining table. For these reasons, I find that CBE did not bargain in good faith to agreement or impasse before implementing the mask-optional policy.

B. CBE's universal masking policy did not violate the Public Health Act and was therefore not void and unenforceable under Section 10(b) of the IELRA.

CBE's primary argument is that Judge Grischow's entry of TROs against masking mandates means that mask mandates are illegal and therefore unenforceable. Section 10(b) of the IELRA states that a provision in a collective bargaining agreement is not enforceable if "the implementation of that provision is in violation of, or inconsistent with, or in conflict with any statute or statutes enacted by the General Assembly of Illinois." 115 ILCS 5/10(b) (2014). The statute also states that any provision that abridges an employee's legal rights as provided for in any statute or statutes of the State of Illinois are also void and unenforceable. 115 ILCS 5/10(b).

Judge Grischow has entered several temporary restraining orders enjoining mask mandates on the grounds that masking is a form of quarantine pursuant to the IDPH Act. Accordingly, an individual cannot be forced to wear a mask unless that individual is given due process, which means that a hearing before the IDPH or a local health department that finds by clear and convincing evidence that the individual's failure to wear a mask endangers the public's health and welfare. CBE's argument extends Judge Grischow's definition of quarantine under the IDPH Act to apply not just to actions taken by the executive branch or by IDPH, but also to collectively bargained contracts between an educational employer and an exclusive representative, even where those collectively bargained agreements cover mandatory subjects of bargaining under the IELRA and do not invoke the IDPH Act or any related federal, state, or local guidance.

Section 2(d) of the IDPH Act provides that IDPH may order physical examinations or tests as necessary for the diagnosis and treatment of individuals to prevent the probable spread of a dangerously contagious or infectious disease. 20 ILCS 2305/2(d). That section goes on to state that if an individual refuses to consent to testing and if the individual's refusal results in uncertainty regarding whether he or she has been exposed to or is infected with a dangerously contagious or infectious disease, that individual may be subject to isolation or quarantine. 20 ILCS 2305/2(d).

CBE's argument faces two major obstacles. First, the 4th District Court of Appeals has cast significant doubt upon the theory that masking policies constitute a quarantine according to the IDPH Act. On February 4, Judge Grischow entered a TRO enjoining the enforcement of emergency rules requiring masking in schools, holding that masking

requirements were a form of modified quarantine. Austin, 2022 IL App (4th) 220090-U at ¶ 2, CBE Ex. 3. The rules suspended by that TRO were emergency rules enacted on September 17, 2021 and were set to expire on February 13, 2022. 2022 IL App (4th) 220090-U at ¶ 2. Accordingly, by the time the 4th Circuit addressed the entry of the TRO, the rules had already expired, and the TRO was therefore moot. 2022 IL App (4th) 220090-U at ¶ 2, 4.

However, the 4th Circuit's analysis did not stop there. It also noted that nothing in Judge Grischow's February 4 order addressed the right of school districts to act independently from executive orders or the IDPH in creating or implementing COVID-19 mitigation measures. 2022 IL App (4th) 220090-U at ¶ 3. The Court therefore reasoned that school districts were not bound by the February 4 TRO. 2022 IL App (4th) 220090-U at ¶ 3. Prior to the entry of this order, on February 14, the Austin plaintiffs filed a motion for CBE to be held in contempt for its alleged failure to adhere to the terms of Judge Grischow's TRO. (CBE Ex. 4). However, on February 24, following the 4th Circuit's opinion, Judge Grischow conceded that she had no jurisdiction to find CBE in contempt. (CBE Ex. 8). The following day, the Illinois Supreme Court vacated the February 4 TRO. (CBE Ex. 9).

In another, similar, opinion that issued on April 13, 2022, employees of state or local governments in Illinois filed for a TRO seeking to enjoin a policy requiring all employees be vaccinated against COVID-19 or submit to regular testing. Graham v. Pekin Fire Department, 2022 IL App (4th) 220270. Those employees raised an argument, essentially identical to the arguments raised by the Allen plaintiffs, which in turn mirror those raised by the Austin plaintiffs who argue that vaccination and testing policies are forms of quarantine and can only be implemented on an individual basis by IDPH after an individual has had due process. In this case, the trial court rejected the Plaintiff's motion for a TRO, the Plaintiffs appealed, and the court did not find that the trial court abused its discretion in denying the motion for a TRO. 2022 IL App (4th) 220270 at ¶ 1. Notably, the Court rejected the argument that the vaccination or testing requirement constituted a quarantine. 2022 IL App (4th) 220270 at ¶ 26. The Court noted that the term "quarantine" is undefined in the Health Act, and therefore should be interpreted according to its common meaning. 2022 IL App (4th) 220270 at ¶ 26. Working from a definition of quarantine that requires physical isolation from society, the 4th District found that employees subjected to a vaccination or testing requirement by their employers, as opposed to the State government, were not quarantined because the "threatened penalty for noncompliance with the vaccination or testing requirement is merely the loss of employment, not quarantine or isolation." *Id.*

These employees also argued that requiring vaccination or testing violated Section 5 of the Conscience Act. 745 ILCS 70/5 (2020). The Conscience Act states that it is unlawful for any person to be discriminated against because of a person's conscientious refusal to participate in any form of health care services contrary to his or her conscience. 745 ILCS 70/5. Unfortunately for the plaintiffs, the General Assembly has recently amended the Conscience Act to clarify that it is not a violation of the Act for an employer to implement measures intended to prevent contraction or transmission of COVID-19, and that this is a statement of existing law rather than a new legislative enactment. P.A. 102-667 at § 5 (2022). In Graham, the Court found that the employees are not being discriminated against because all other similarly situated employees were being held to the same requirements, and that it therefore did not violate the Conscience Act to maintain a universal vaccination or testing policy. 2022 IL App (4th) 220270 at ¶ 20-23, 31.

Finally, on April 20, the 4th Circuit vacated the TRO previously issued in Allen that enjoined CBE from enforcing a vaccination or testing policy with respect to its employees. Allen v. North Mac Community School Dist. 34, 2022 IL App (4th) 220307-U. The Court held that the due process provisions of the Public Health Act only apply to orders issued from IDPH or a certified local health department. Allen at ¶ 17. The Court pointed out that school districts are not seeking to be the protectors of overall public health, and that the vaccination or testing policy is not necessarily "calculated to maintain the health of the community at large." *Id.* at ¶ 19. Employees subjected to a vaccination or testing policy in the workplace have no effect on the employees' activities, movement, or interactions anywhere but the workplace. *Id.* at ¶ 19. Accordingly, a vaccination or testing policy is not a form of modified quarantine. *Id.* at ¶ 17-20.

The Austin plaintiffs filed a motion seeking another TRO on February 28, this time directly attacking CBE's ability to have a universal masking policy. (CBE Ex. 10). The February 28 motion cites only the IDPH Act and the Conscience Act and does not in any way address CBE's collective bargaining obligations pursuant to the IELRA. Because, on March 7, 2022, Judge Grischow had never ruled on whether a collectively bargained masking requirement that does not arise out of the IDPH Act or issued pursuant to an Executive Order issued by the Governor nevertheless constitutes a quarantine or modified quarantine pursuant to the IDPH Act, we cannot know for certain whether a TRO would have issued. CBE argues that one most certainly would have issued, and that is not an unlikely set of events. However, even if one had issued, the 4th District's analysis in Graham and Allen is

quite clearly applicable to any case arising out of a collectively bargained masking policy, and if any such TRO was entered, it would almost certainly be promptly set aside on appeal.

The second flaw with CBE's argument is that Section 17 of the IELRA makes it clear that, if any other law, executive order, or administrative regulation conflicts, the provisions of the IELRA will prevail and control. 115 ILCS 5/17 (2014). Section 15 of the Act grants the IELRB the authority to issue make-whole remedies to those injured by unfair labor practices, and to place the parties in as close as possible to the position they would have been in if the unfair labor practice had never occurred. Warning v. SPEED District #802, 24 PERI 1 (IELRB Opinion and Order, January 8, 2008), *citing* Paxton-Buckley-Loda Education Association v. IELRB, 314 Ill. App. 3d 343 (4th Dist. 1999). The IELRB has "substantial flexibility and wide discretion" in fashioning remedies to unfair labor practices. Paxton-Buckley-Loda Education Association at 353.

While Sections 10(b) and 17 would seem to be in conflict, the Illinois Supreme Court has provided guidance in deciding which provision controls. In Rockford School Dist. 205 v. IELRB, the Court found that Section 10(b) controls in questions surrounding the validity of contractual terms. 165 Ill. 2d 80, 88 (1995). In Rockford, a union filed a grievance on behalf of an employee who was issued a "notice to remedy", effectively putting the employee on notice that specific elements of their performance must improve or the employee faces termination. Rockford at 83. The grievance went to arbitration. *Id.* at 83. The arbitrator revoked the "notice to remedy", arguing that the notice was invalid because it was issued without "just cause", pursuant to a section of the collective bargaining agreement between the District and the Union that limits the circumstances under which the District may issue discipline. *Id.* at 84. The Illinois Supreme Court held that, because the arbitrator's award conflicted with two provisions of the School Code that provide for the termination of teachers who have committed certain offenses, and which provide for the issuance of a "notice to remedy" as an alternative to termination, that the arbitrator's award was invalid. *Id.* at 89-90.

However, the instant case does not involve contractual interpretation. The parties engaged in collective bargaining and arrived at an agreement that was intended to mitigate an issue of health and safety in the workplace. As mentioned above, health and safety are mandatory subjects of bargaining. In Warning, the IELRB found that an employee was terminated in whole or in part because of her insistence on having a union representative attend a meeting with the potential for disciplinary ramifications. 24 PERI 1. The District

argued that, even if Warning was terminated because of her union or concerted activity, that the IELRB had no authority to order that she be reinstated because the Illinois School Code gave school boards the power to terminate teachers. *Id.* The IELRB held that, even if there is a conflict between the school code and the provision of Section 15 of the IELRA that permits the Board to implement remedies to unfair labor practices, that Section 17 of the Act requires that the IELRA control. *Id.* Accordingly, the IELRB had the authority to overrule the school board's decision to terminate Warning and to order her reinstatement. *Id.*

Similarly, here, CBE revoked a term and condition of employment unilaterally, without prior bargaining to agreement or impasse. Even if the IDPH Act required a finding that requiring members of the public to wear masks required due process hearings before the IDPH, Section 10(b) and 17 of the IELRA make it quite clear that the right of educational employers and exclusive representatives to enter into collective bargaining agreements that both parties intended to enhance the health and safety of educational employees in the workplace would exist independent of the IDPH Act, so long as those protections existed in and for the workplace and were not generally applicable to the public at large.

CBE's apprehension over what Judge Grischow might have done if required to rule on a motion for a TRO was understandable on March 7, 2022, when it made the decision to revoke its universal masking policy. There is no question that the political winds regarding universal masking requirements were shifting. Furthermore, as Dr. Seo testified, evidence was beginning to emerge at the time that indicated that schools may not be the vectors of community spread of COVID-19 that they were previously feared to be. None of this permits CBE to disregard the IELRA and unilaterally modify a term or condition of employment without prior bargaining to agreement or impasse. Furthermore, the 4th District has made it clear that the legal theory giving rise to the TROs issued in Austin and Allen, that masking and vaccination or testing requirements were a form of modified quarantine, was invalid through its decisions in Allen and Graham. Even if CBE had reason to believe, on March 7, that its universal masking policy might have been illegal, no such apprehension could currently exist. Nevertheless, CBE has not moved to reimplement its universal masking policy, nor has it bargained to agreement or impasse with CTU to revoke it.

C. CBE's revocation of its universal masking policy was a repudiation of its duty to bargain and not a mere contractual violation.

CBE argues, in the alternative, that even if it did modify the terms of the 2022 Agreement when it revoked its universal masking policy, that its actions do not rise to the

level of an unfair labor practice because it is merely a violation of the contract, not a repudiation of the Agreement. *See, e.g.,* Moraine Valley Community College, 2 PERI 1050 (IELRB Opinion and Order, March 18, 1986) (holding that a mere contractual violation is not an unfair labor practice under Section 14(a)(5) and that the appropriate remedy is the parties' grievance and arbitration procedure).

A modification of contractual terms constitutes a breach of the duty to bargain in good faith, and thereby a violation of Section 14(a)(5) of the Act, when the modified terms are of such importance to the agreement that their unilateral modification would "negate the very statutory duty to bargain collectively." Chicago Board of Education, 7 PERI 1114 (IELRB Opinion and Order, October 23, 1991). In Chicago Board of Education, changes unilaterally made to the health care plans made available to employees breached an article of the contract that requires all changes that reduce health care benefits be mutually agreed upon between CBE and the Union. 7 PERI 1114. The IELRB found that the employer's actions constituted not merely a breach of the contract, but a repudiation of its statutory duty to collectively bargain because a substantial modification was made to "an integral part" of the contract. *Id.*

The record indicates that a masking requirement is a key part of the collectively bargained 2022 Agreement. The 2022 Agreement carried forth provisions from the 2021 Agreement on masking. Sharkey testified to the negotiations that led to the 2021 Agreement. During negotiations, the Union pushed for universal masking despite a mask mandate already being in effect at the time that negotiations were taking place. (R. 44-47). Bargaining also occurred over whether CBE would provide masks to employees and what kind of masks would be provided. The 2021 Agreement would contain a provision on universal masking. (R. 44-47, Joint Ex. 1 at 1(e)).

Evidence also shows that CBE considered universal masking to be a key part of the safety agreements. On August 27, 2021, Girard provided the Union with an update on bargaining over what would become the 2022 Agreement. The 2021 Agreement expired at the beginning of the 2021-22 school year. In that letter, Girard listed what the CDC and IDPH have indicated are the "most important strategies" for mitigating the spread of COVID-19 in schools. (Union Ex. 16). Universal indoor masking was second on that list, following only the promotion of vaccinations. Her letter would go on to state that CBE would continue to carry these provisions, including the universal masking requirement, forward. (Union Ex. 16).

The 2022 Agreement continued the provisions from the 2021 Agreement listed in Girard's August 27 letter, including the universal masking policy. (Joint Ex. 2 at 9(a)(1)). Because the Union explicitly bargained for universal masking to be included in the 2021 Agreement, even though there already was a statewide indoor mask mandate at the time the 2021 Agreement was being bargained over, the universal masking policy was clearly an important part of the agreement. Because of this, its unilateral modification was not a mere violation of the collectively bargaining agreement, but a repudiation of its duty to bargain over health and safety concerns in the workplace.

D. Conclusion

Based on the foregoing, CBE's revocation of the universal masking mandate without prior bargaining to agreement or impasse was a breach of its duty to bargain in good faith in violation of Section 14(a)(5) and, derivatively, (1) of the Act.

IV. Recommended Order

For the reasons discussed above, I recommend the following:

Respondent, Chicago Board of Education, its officers, and its agents shall:

1. Cease and Desist From:
    a. Refusing to bargain collectively and in good faith with Chicago Teachers Union, Local No. 1, IFT-AFT, AFL-CIO.
    b. Making unilateral changes to any term or condition of employment without prior bargaining to agreement or impasse.
    c. Otherwise interfering with, restraining, or coercing employees in the exercise of rights guaranteed them in the Illinois Educational Labor Relations Act.
2. Take the following affirmative action necessary to effectuate the policies of the Act:
    a. Reinstate the universal masking policy through expiry of the 2022 Safety Agreement.
    b. Refrain from altering or rescinding any policy contained within the 2022 Safety Agreement until its expiry, and refrain from altering any other term or condition of employment except with prior consent of the Union.
    c. Make all Union-represented employees whole for any discipline or other adverse employment action taken against employees related to Chicago Board of Education's rescission of its universal masking policy.

d. Upon request, bargain with Chicago Teachers Union, Local 1, IFT-AFT, AFL-CIO, over the changes to terms and conditions of employment made by rescinding the universal masking policy and the impact of said change.

e. Post on bulletin boards or other places reserved for notices to bargaining unit employees copies of the Notice to Employees attached to this Recommended Decision and Order. Copies of this notice shall be provided by the Executive Director of the Illinois Educational Labor Relations Board and shall be signed by Respondent's authorized representative, posted and maintained for sixty (60) calendar days during which a majority of bargaining unit employees are working. Reasonable steps shall be taken by the District to ensure that the notices are not altered, defaced, or covered by any other materials.

f. Notify the Executive Director in writing within thirty-five (35) calendar days after receipt of this Recommended Decision and Order of the steps taken to comply with it.

V. Right to File Exceptions

Pursuant to Section 1120.50(a)(1) of the Board's Rules and Regulations, Ill. Admin. Code tit. 80 § 1120.50(a)(1) (2017), the parties may file written exceptions to this Recommended Decision and Order no later than 21 days after receipt of this decision. Exceptions and briefs must be filed with the Board's General Counsel. If no exceptions have been filed within the 21-day period, the parties will be deemed to have waived their exceptions. Under Section 1110.20(e) of the Board's Rules, parties must send a copy of any exceptions they choose to file to the other parties and must provide the Board with a certificate of service. A certificate of service is "a written statement, signed by the party effecting service, detailing the name of the party served and the date and manner of service. Ill. Admin. Code tit. 80 § 1100.20(e). If a party fails to send a copy of its exceptions to the other parties or fails to include a certificate of service, that party's appeal rights with the Board will end.

Dated: August 26, 2022
Issued: Chicago, Illinois

/s/ Nick Gutierrez
Nick Gutierrez
Administrative Law Judge

Illinois Educational Labor Relations Board
160 North LaSalle Street, Suite N-400
Chicago, Illinois 60601
(312) 793-3170 / (312) 793-3369 Fax