STATE OF CONNECTICUT
LABOR DEPARTMENT

CONNECTICUT STATE BOARD OF LABOR RELATIONS

IN THE MATTER OF

MILFORD BOARD OF EDUCATION

DECISION NO. 4574

-AND-

FEBRUARY 1, 2012

MILFORD EDUCATION ASSOCIATION

Case No. TPP-28,575

A P P E A R A N C E S:

Attorney Floyd J. Dugas
for the School Board

Attorney Ronald Cordilico
for the Union

## DECISION AND DISMISSAL OF COMPLAINT

On June 4, 2010 the Milford Education Association (the Union) filed a complaint with the Connecticut State Board of Labor Relations (the Labor Board) alleging that the Milford Board of Education (the School Board) violated the School Board Teachers Negotiation Act (TNA or the Act) by unilaterally requiring special education teachers to use certain computer software without negotiating the resulting impacts on working conditions.

After the requisite preliminary steps had been taken the parties came before the Labor Board for a hearing on October 7, 2010, November 10, 2010, December 10, 2010, March 21, 2011, and March 24, 2011. Both parties appeared, were represented and allowed to present evidence, examine and cross-examine witnesses, and make argument. Both parties filed post-hearing briefs on June 3, 2011. Based on the entire record before us, we make the following findings of fact and conclusions of law and we dismiss the complaint.

## FINDINGS OF FACT

1. The School Board is an employer within the meaning of the Act.

2. The Union is an employee organization within the meaning of the Act and at all material times has been the exclusive bargaining representative of certain employees of the School Board including certified special education professionals such as teachers, speech pathologists and social workers.

3. At all relevant times the School Board and the Union have been parties to a collective bargaining agreement (Ex. 4) with effective dates of September 2, 2008 through August 31, 2011 which states, in relevant part:

> **ARTICLE 22**
> **SCHOOL DAY**
>
> The starting and dismissal times of all schools shall be as set forth in the administrative regulations as established by the Superintendent and published for any succeeding year by no later than August 1 each school year. .. . Effective September 1, 2006, the teacher workday shall be seven (7) hours and ten (10) minutes. If the school day is lengthened beyond the length of the student day in effect in 2007-08 the parties shall enter into bargaining regarding the impact thereof.
>
> A. Elementary and Middle school teachers will report to their buildings at least twenty (20) minutes prior to the time the start of each student school day; they shall also remain available in their buildings at least twenty (20) minutes at the close of the school day . . .
>
> B. Effective with the 2008-09 school year, high school teachers will report to work at least ten (10) minutes before the start of homeroom. . . . This shall be in addition to the twenty (20) minutes beyond the school day teachers are required to remain available in the building.
>
> . . .
>
> D. . . . The Board will provide elementary classroom teachers with (5) preparation periods a week.
>
> The following will be the guidelines for preparation periods:
>
> Grades K-5 – preparation periods shall be at least 40 minutes.
>
> Grades 6-8 preparation periods shall be at least 44 minutes. . . .

E. The Superintendent may . . . convert the existing seven (7) period schedule at the high schools to an eight (8) period schedule . . . [except] no high school teacher shall be assigned more than five (5) teaching periods per day . . . [and] a preparation period shall be equal in length to a teaching period. . . .
. . .

**ARTICLE 25**

**UNASSIGNED, PLANNING AND CLASS PERIODS**

A. All high school teachers shall have, in addition to their lunch period, at least one planning period per day. . . .

4. Federal law[1] and Connecticut law[2] establish an extensive statutory and regulatory framework to provide special education for children with disabilities or special needs enrolled in public schools. Since 1976 a fundamental component of this framework has been the "individualized education program" (IEP) which is "a written statement for each child with a disability that is developed, reviewed, and revised"[3] in accordance with state and federal law.

5. Certain IEP information must be timely reported on an annual basis to the State Department of Education (SDE) to avoid forfeiture of grant funding.[4] Reporting is effected by posting data on the SDE website and SDE format and data requirements have changed over the years.

6. All IEPs are generated after a parent placement team (PPT) meeting has been conducted to address a student's disability, goals and objectives, and available resources. The statutory framework requires all IEPs to be updated annually. An initial IEP generally takes substantially more time to complete than an IEP update, however, the majority of IEPs are annual updates. Parents must be provided with a full copy of a child's IEP within five days of the PPT meeting.[5]

7. Special education professionals in the bargaining unit attend PPT meetings and participate in the IEP process. Each student is assigned a "case manager" who is responsible for completing the student's IEP. While the bulk of case managers are in the Union's bargaining unit, some case managers are supervisors or administrators outside the bargaining unit.

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[1] The Individuals with Disabilities Education Act. 20 U.S.C. §1400 *et seq*.

[2] General Statutes § 10-76a *et seq*.

[3] *See* 20 U.S.C. § 1414(d); 34 C.F.R. § 300.320.

[4] *See* General Statutes §10-227.

[5] *See* Regs., Conn. State Agencies § 10-76d-13(a)(6).

8. Prior to the 2001-2002 school year case managers completed IEPs by entering the necessary information on pre-printed forms which were then copied and distributed to the necessary recipients. Case managers ordinarily completed IEPs during their daily preparation /planning periods or before and after students are at school.

9. Several computer programs have been designed to generate IEPs and to facilitate annual electronic reporting of IEP data to other agencies such as the SDE. During the 2001-2002 academic year the School Board participated in a pilot study to test a program entitled "Tranquility." Tranquility was deemed unsatisfactory due to insufficient development and in the 2005-2006 academic year the School Board attempted to implement a program entitled "Encore!" Encore! was also discontinued after it was found to be unsatisfactory. (Ex. 22).

10. During the Fall of 2006 a seventeen member Software Review Committee was convened. After contacting a number of Connecticut school districts, the School Board selected "IEP Direct" (Direct), an internet-based computer program for completing IEPs.[6] In Direct the user is confronted with a series of screens that require the user to make decisions and enter information. Reoccurring information need not be re-entered as on the manual form. Direct incorporates a "validation" process which prohibits a user from bypassing unanswered questions and directs the user's attention to potential errors. Direct is a data-based design rather than an electronic template design and as such, the various screens in Direct do not match, duplicate, or coincide with the pages of a completed IEP. A user seeking to edit or to change a completed IEP may, however, access a particular IEP section or heading by clicking on a tab or drop-down menu.

11. On January 15, 2007 the vendor for Direct conducted training for two and one half days of a core group consisting of designated special education "coaches" from each school building. Between January 22, 2007 and January 26, 2007 all special education staff attended a half day of training in Direct in a computer lab in groups of twenty-five. Commencing one week after implementation of Direct in January 2007 and through March of 2011, Assistive Technology Resource Teacher Charlene Beers (Beers) conducted monthly support sessions in Direct after school from 2:30 p.m. to 5:00 p.m. The sessions were well attended in the first year of implementation, two to three persons would attend sessions in the second year, and a total of three persons have attended in the past year. In addition, Beers and Assistive Resource Teacher Cheryl Woodmansee (Woodmansee) would meet during school hours with staff having problems or would attempt to troubleshoot problems by telephone.

12. On July 5, 2007 the parties met for contract negotiations and the Union's proposals (Ex. 8) included the addition of a new section to Article 22 as follows:

> All staff members who have case management responsibilities shall be granted an additional preparation period per week of not less than 45 continuous minutes.

[6] As of March 21, 2011 Direct is used by over one-half of the school districts in Connecticut. (Ex. 21).

13. On November 14, 2007 an interest arbitration award was issued that implemented the 2008-2011 (Ex. 4) collective bargaining agreement. The agreement did not include the Union's proposed new Section to Article 22.

14. By letter dated June 2, 2008 (Ex. 1) Union representative Jeffrey H. Mockler (Mockler) wrote School Board Superintendant Harvey B. Polansky (Polansky) stating, in relevant part:

> This letter constitutes a formal demand to bargain the workload impacts of the IEP Direct computer program. It is our understanding that the Pupil Personnel staff have been told to work on the IEP Direct computer program during the evening hours because the program becomes severely overburdened due to the demands of many districts using it during working hours.

15. By letter dated June 24, 2008 (Ex. 1) Polansky responded to Mockler stating, in relevant part:

> . . . We have looked into your claim, and frankly it is just not accurate.
>
> In particular, Administrators have not directed staff to work on IEP Direct at night time. We have apparently been experiencing problems with staff being bumped off IEP Direct due to volume related problems. We are looking into the problem from a technical standpoint but suggested to staff that they not wait until the last minute due to the problems we are experiencing. While some staff may have taken it upon themselves to use the program in the evening that was never required (see attached e-mails to staff).
>
> Based upon the foregoing, we presume there is no need to bargain. . . .

16. During the subsequent months there were seven to eight informal meetings between Union and School Board representatives regarding Direct. In response to Union concerns, the School Board provided laptop computers and additional training. Functional issues were addressed either by School Board technology staff or through Direct's vendor. The Union proposed that the School Board hire additional paraprofessional staff to input IEP data. The School Board rejected the proposal, citing budgetary concerns.

17. By letter dated January 6, 2009 (Ex. 1) Union representative John D'Amato wrote Polansky stating, in relevant part:

> Please be advised that I am the new UniServ representative for the Milford Education Association. I am writing you regarding a IEP Direct demand for impact bargaining regarding a unilateral change in working conditions and a scheduled meeting on January 13, 2009.
> . . .

> Please advise me . . . as to whether the Board recognizes the MEA's demand to bargain. If in fact, there has not been a change in the position you articulated on June 24, 2008, a reply will not be necessary. Consequently, this matter will need to be referred to the State Department of Labor for further consideration.

18. By letter dated January 12, 2009 (Ex. 1) School Board Attorney Floyd J. Dugas wrote D'Amato, in relevant part:

> . . . unless the CEA has more to offer, it would be the School District's position that there does not appear to be substantial impact, therefore, no duty to bargain. If based upon that there is no desire to continue our informal dialogue, in favor of more formal, adversarial means, that is certainly your right. I will assume the meeting is cancelled unless I hear otherwise.

19. Pamela Silva Kimberly (Kimberly), Lauri Dougherty (Dougherty), Joy Zvaigzne (Zvaigzne), Christopher Johnston (Johnston), Mary Lavery (Lavery), and Mary Lee Dellavolpe (Dellavolpe) are special education professionals in the Union's bargaining unit and each is a case manager responsible for six to fifteen students. For each, completion of an IEP using Direct takes from one to two hours or twice as long as the prior handwritten method, primarily because the screens in Direct do not "match" the pages of a completed IEP.[7] Each also experienced frequent computer "glitches" upon implementation of Direct in 2007 including slow processing and loss of information although these problems have become rare to nonexistent in recent years.

20. While Kimberly, Dougherty, Zvaignze, Johnston, always performed some School Board work at home, use of Direct has forced each to work additional time at home.

21. Kimberly, Dougherty, Zvaignze, and Johnston, have never attended Beers' monthly support sessions in Direct. Lavery, and Dellavolpe attended several sessions in the initial years after Direct was implemented. None has requested assistance from Beers or Woodmansee as to use of or problems with Direct. None has requested additional training.

22. Susan Kelleher (Kelleher) is Director of Special Education and Pupil Personnel Services and used Direct when it was implemented in 2007. Christine Kennedy (Kennedy), Kimberly Planas (Planas), and Sharon Kluchnick (Kluchnick) are special education supervisors outside the Union's bargaining unit and are case managers for thirteen to twenty-two students. Mary Ellen Magura (Magura), Sarah Gallipoli (Gallipoli), and Andrea Giannattasio (Giannattasio) are current or former special education teachers in the Union's bargaining unit and case managers for nine to fifteen students. These individuals find Direct substantially quicker and easier to use than the prior handwritten method of generating IEPs and more protective of student confidentiality.

[7] These witnesses testified that in order to complete an IEP using Direct they must input the necessary data, print a rough draft, and then search/scroll through a multitude of screens to address errors and to effect changes.

## CONCLUSIONS OF LAW

1. The School Board did not violate the Act by unilaterally requiring special education teachers to use Direct to generate student IEPs during the 2007-2008 and subsequent school years.

2. There was no substantial impact to the workload of special education teachers requiring bargaining under the Act.

## DISCUSSION

The parties' claims in this case mirror those raised in ***Bridgeport Board of Education***, Decision No. 4556 (2011). The Union claims that by unilaterally requiring special education case managers to complete IEPs using Direct software the School Board unilaterally imposed a substantial workload increase on members of the bargaining unit. The School Board contends that digital IEP reporting is not only safer and necessary given the current regulatory framework but that it also reduces the time required to complete IEPs. The School Board argues that the Union has failed to establish a substantial workload increase under our unilateral change doctrine and that in any event, the Union has waived its rights under the Act by filing its complaint several years after implementation of Direct. Since we agree that the Union has failed to establish its *prima facie* case, we need not address the School Board's claim of waiver.

It is by now well established that an employer's unilateral change in an existing condition of employment involving a mandatory subject of bargaining will constitute a refusal to bargain in good faith and a prohibited practice unless the employer proves an adequate defense. ***Norwalk Third Taxing District***, Decision No. 3695 (1999); ***Bloomfield Board of Education***, Decision No. 2821 (1990); ***Greenwich Board of Education***, Decision No. 1580 (1977).

> A change may be incidental to management decisions which themselves are not subject to bargaining. In [***West Hartford Education Association v. DeCourcy***, 162 Conn. 566 (1972)], our Supreme Court determined that boards of education have the right to determine educational policy and unilaterally implement such policy decisions, but where this implementation impinges in some substantial way upon a major term or condition of employment, there arises a duty to bargain the impact.

***Bloomfield Board of Education,*** Decision No. 2821 p.7 (1990), *see also* ***New Canaan Board of Education***, Decision No. 2400 (1985) (holding length of school day not mandatory topic but additional compensation for increase in school day is subject to negotiation). It is the Union's initial burden to make a *prima facie* case establishing that a change in an existing condition of employment has in fact occurred, for if no change is proven, no further inquiry is warranted. ***Town of Hamden***, Decision No. 2364 (1985). If a change is *de minimus* or insubstantial in its impact upon a major term or condition of

employment, we will decline to find a prohibited practice has occurred. ***Town of Bloomfield***, *supra*.

We have previously determined that workload is a condition of employment and a mandatory subject of bargaining. ***City of Hartford***, Decision No. 4113 (2006); *see* ***West Hartford Education Association, Inc. v. DeCourcy, supra,*** 162 Conn. at 585-586. In addition, we have held that for a change in workload made during the term of a collective bargaining agreement to require bargaining, it must be shown to have a substantial impact. ***Bloomfield Board of Education***, *supra*; ***City of Bridgeport***, Decision No. 1485 (1977). To "establish a unilateral change of workload, the union must present evidence both that the employees' workload after the change was substantially greater than before it and that the preceding workload had 'endured[d] over a reasonable length of time, and [that it was] an accepted practice by both parties.'" ***Board of Education of Region 16 v. State Board of Labor Relations***, 299 Conn. 63, 79 (2010) (*quoting*, ***Honulik v. Greenwich***, 293 Conn. 698, 719 n. 33). This means that the Union must offer evidence not only to establish the change alleged but also evidence to establish a workload "baseline" drawn from the previous school years, as well as proof that other aspects of the work not at issue continue unchanged. ***Board of Education of Region 16 v. State Board of Labor Relations***, *supra*, 299 Conn. at 75-78.

Here, as in ***Bridgeport Board of Education***, *supra*, we find that requiring use of dedicated software to generate IEP reports is within the School Board's power to determine educational policy. Special education and IEPs in public schools are subject to an extensive statutory and regulatory framework. Requiring employees to complete mandatory reports in a digital format not only facilitates delivery of required IEP summaries to the SDE, a primary conduit of special education funding, but also protects student confidentiality and the environment by generating less paper.

The record supports our conclusion that the School Board took every reasonable measure to minimize impacts occasioned by the transition to an electronic reporting format for special education case managers. Two software systems were tested and rejected prior to selection of Direct, a system used by the majority of school districts in Connecticut. Introductory training accompanied implementation and support was offered at the outset and continues to be available on an as needed basis. While the case managers called by the Union testified that Direct has doubled the time they devote to IEP preparation, we note that these persons have largely rejected additional training or support claiming familiarity with the program and no need for assistance. Given the record before us, including the testimony of the case managers called by the School Board that use of Direct requires less time than the earlier handwritten method, we cannot credit the Union's witnesses' claims that they are proficient in Direct. To the extent that workload impacts originate from employee rejection of available training and support, the impacts are self-created, thus relieving the School Board of any obligation to negotiate. In short, a substantial increase in workload that would not exist but for unreasonable employee action or inaction does not constitute a *unilateral* change in violation of the Act. We conclude that where case managers use available training and resources to enhance their ability to use the software, the net effect of the program's various features,

including the difference between Direct's data screens and IEP pages, does not occasion a substantial workload increase.

This case is similar to ***Bridgeport of Education***, *supra*, in two other regards. The record reflects a sharp decrease in requests for training and assistance after implementation of Direct which we find indicative of overall bargaining unit satisfaction with the software. In addition, evidence is lacking as to the specifics of workload past practice from the years immediately preceding introduction of Direct. We will not presume a practice without evidence of such a baseline. *See* ***Board of Education Region 16 v. State Board of Labor Relations***, *supra*, 299 Conn. at 75-76.

Having found that the Union has not established a *prima facie* case of unilateral workload change, we need not address the School Board's claim that the Union waived its right to bargain under the Act.

## ORDER

By virtue of and pursuant to the power vested in the Connecticut State Board of Labor Relations by the School Board Teachers Negotiation Act, it is hereby

**ORDERED** that the complaint filed herein be, and the same hereby is, **DISMISSED**.

CONNECTICUT STATE BOARD OF LABOR RELATIONS

Patricia V. Low
Patricia V. Low
Board Member

Wendella Ault Battey
Wendella Ault Battey
Board Member

Robert A. Dellapina
Robert A. Dellapina
Board Member

## CERTIFICATION

I hereby certify that a copy of the foregoing was mailed postage prepaid this 1st day of February, 2012 to the following:

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