UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

KIPP ACADEMY CHARTER SCHOOL

and **Cases: 02-CA-294235**
02-CA-297351
02-CA-314676
02-CA-325414
02-CA-342880

UNITED FEDERATION OF TEACHERS,
LOCAL 2, AFT, AFL-CIO

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for the Charging Party

DECISION

Statement of the Case

MICHAEL P. SILVERSTEIN, Administrative Law Judge. Distinguishing between lawful, hard bargaining and unlawful surface bargaining is the labor law version of a Rorschach Test – all parties may agree on the facts, but the conclusion to draw from these actions is in the eye of the beholder. In this case, I am tasked to decide whether KIPP Academy Charter School and the United Federation of Teachers' inability to reach agreement on a first contract after three and a half years of bargaining is the byproduct of lawful, hard bargaining or proposals purposely designed to prevent the parties from reaching an accord. As will be explained in more detail below, I find that KIPP Academy's refusal to propose a management rights clause while at the same time conditioning agreement on final and binding arbitration and other bargaining subjects on the need for a robust management rights clause reveals KIPP Academy's intent to purposely frustrate agreement on a first contract. Coupled with animus statements confirming

KIPP Academy's aim to negotiate, but never reach agreement on a first contract, I find that KIPP Academy has engaged in bad faith bargaining in violation of Section 8(a)(5) of the Act.[1]

United Federation of Teachers, Local 2, AFT, AFL-CIO (the Union) filed the following unfair labor practice charges:

Case Number	Date Filed/Amended
Case 02-CA-294235	April 14, 2022
Case 02-CA-297351	June 8, 2022
Case 02-CA-314676	March 23, 2023; amended April 18, 2023
Case 02-CA-325414	September 7, 2023
Case 02-CA-342880	May 17, 2023; amended Aug 1, 2024 and Oct 18, 2024

The Amended Consolidated Complaint and Notice of Hearing issued on November 5, 2024, and KIPP Academy Charter School (the Respondent or Employer) filed its Answer to the Amended Consolidated Complaint on November 19, 2024.[2]

The hearing in this case took place in New York City on December 10-13, 2024, December 16-17, 2024, and January 10 and 13, 2025.[3] At trial, all parties were afforded the right to call, examine, and cross-examine witnesses, to present any relevant documentary evidence, and to argue their respective legal positions orally.[4] Counsel for the Acting General Counsel, the Union, and Respondent filed post-hearing briefs.

On the entire record, including my observation of the demeanor of the witnesses, and after carefully considering the briefs filed by all parties, I make the following:

FINDINGS OF FACT

JURISDICTION

Kipp Academy Charter School admits, and I find that at all material times, it has been a domestic corporation with an office and place of business in the Bronx, New York and has been engaged in the operation of an educational institution. (GC Ex. 1(z)). In conducting its business operations, Respondent has annually derived gross revenues in excess of $1,000,000 and purchased and received at its Bronx schools products, goods, and materials valued in excess of $5,000 directly from points located outside the State of New York. Respondent also admits, and

[1] I find merit to some of the complaint allegations and recommend dismissal of others. My specific findings are contained in the Analysis section of this Decision.

[2] At the outset of the hearing, Counsel for the Acting General Counsel moved to withdraw Complaint Paragraphs 13(a)(i) and 15, and moved to amend Complaint Paragraphs 13(a), 13(b)(i), and 13(c)(i). The Employer did not object to the withdrawal of Paragraphs 13(a)(i) and 15 or to the proposed amendments to Paragraph 13 of the amended complaint, and I granted Counsel for the Acting General Counsel's motion. (Tr. 8-9). Additionally, on page 1 of its post-hearing brief, Counsel for the Acting General Counsel withdrew Paragraphs 10(a) and 12(a) through (d) of the Amended Consolidated Complaint.

[3] With the consent of all parties, Sara Harley's testimony on December 18, 2024, was taken remotely via the Zoom for Government platform.

[4] The General Counsel called six witnesses – Jeffrey Leshansky, Fatima Wilson, Miles Trager, Orianna Vigliotti, Jonah Feitelson, and Alejandra Palomino – while the Respondent called seven witnesses – Alicia Johnson, Dana Willis, Anissa Jones, Kerry Mullins, Sara Harley, Ray Pascucci, and Fatima Wilson.

I find, that it has been an employer engaged in commerce within the meaning of Sections 2(2), (6), and (7) of the Act. (GC Ex. 1(z)).

Respondent also admits and I find that at all material times, United Federation of Teachers, Local 2, AFT, AFL-CIO (the Union) has been a labor organization within the meaning of Section 2(5) of the Act. (GC Ex. 1(z)).

Based on the foregoing, I find that this dispute affects commerce and that the National Labor Relations Board (the Board) has jurisdiction over this case pursuant to Section 10(a) of the Act.

ALLEGED UNFAIR LABOR PRACTICES

KIPP Academy's origin story is unique. Founded in 1995 as a program within a traditional New York City public school, it later morphed into a conversion charter school upon the passage of New York State's charter school law. As part of this conversion, KIPP Academy retained its program director, teachers, and students, and operated going forward as a charter school. In return, KIPP Academy's teachers kept their public-school retirement and health benefits and continued to pay union dues to the United Federation of Teachers (UFT), the union that represents New York City's public-school teachers.[5] (Tr. 497, 713-714, 727).

Over the next 20 years, KIPP[6] expanded to become a nationwide charter school network, and opened over a dozen other charter schools in New York City. (Tr. 707, 727). Even though KIPP Academy teachers continued to pay union dues, KIPP Academy never adhered to the master collective bargaining agreement between the Union and New York City Public Schools (DOE Schools), and the Union had limited interaction with bargaining unit employees. (Tr. 720, 945).

Prior to 2016, the NLRB declined to assert jurisdiction over charter schools. Thus, employees of KIPP Academy were under the auspices of New York State's labor regulating agency, the Public Employee Relations Board (PERB). Then in *Pennsylvania Leadership Charter School,* 364 NLRB 1118 (2016), and *Hyde Leadership Charter School – Brooklyn,* 364 NLRB 1137 (2016), the Board reversed course and asserted jurisdiction over charter schools that satisfy the two-factor test laid out in *NLRB v. Natural Gas Utility of Hawkins County, Tennessee,* 402 U.S. 600 (1971).[7]

Shortly thereafter, the Union filed a grievance with KIPP Academy asserting that the Employer was not following the DOE collective bargaining agreement. The Union subsequently filed for arbitration, where the matter languished for several years. (Tr. 497). During this same period, Region 2 of the Board received and processed a decertification election petition in Case

[5] There were four other conversion charter schools in New York City – Future Leaders Institute Charter School in Harlem; Renaissance Charter School in Jackson Heights, Queens; JVL Wildcat Academy in Lower Manhattan and the Bronx; and Beginning with Children in Williamsburg, Brooklyn. All the above-named schools are still in operation except for Beginning with Children. (Tr. 602, 605).

[6] KIPP stands for Knowledge Is Power Program. (Tr. 727).

[7] Under that test, an entity may be considered a political subdivision if it is either (1) created directly by the state so as to constitute a department or administrative arm of the government, or (2) administered by individuals who are responsible to public officials or to the general electorate. *NLRB v. Hawkins County,* 401 U.S. at 604-605.

02-RD-191670. The Regional Director's Decision and Direction of Election asserted jurisdiction over the Employer and directed an election in the following bargaining unit:

> All full-time and regular part-time teachers, counselors, social workers, team leaders, and specialists employed by Respondent at its facility located in the Bronx, New York; Excluding all other employees, including substitute teachers, clerical, maintenance, supervisors, managers, and guards within the meaning of the Act.

On March 25, 2020, the Board affirmed the Regional Director's assertion of jurisdiction over this Respondent. *KIPP Academy Charter School,* 369 NLRB No. 48 (2020). A mail ballot election held in March 2021 yielded a resounding victory for the Union, and on May 3, 2021, a certification of representative confirmed the Union's status as the exclusive collective-bargaining representative of Respondent's employees. The parties' first bargaining session took place on October 12, 2021. (Resp. Ex. 4).

KIPP Academy Operations

KIPP Academy Elementary School is located in the Bronx, New York and serves children from kindergarten through 4th grade. KIPP Academy leases its 5-story building from New York City for a nominal fee, and KIPP Academy is responsible for building upkeep and payment of insurance premiums. (Tr. 75-76, 864-865). Current enrollment is 485 students and there are between 40 and 50 bargaining unit teachers, social workers, and counselors working at the elementary school. (Tr. 26, 77, 267, 760). Anissa Jones is the elementary school principal. (Tr. 28, 888).

KIPP Academy Middle School is located about a block away from the elementary school, serving students in 5th through 8th grades. The middle school is in a co-located building, meaning it shares the space with a DOE school, and this building is owned by the City of New York. (Tr. 864). Middle school enrollment is roughly 400 students, with about 30 bargaining unit employees working at the middle school. (Tr. 75-76, 760). Antoine Lewis served as the interim middle school principal and KIPP Academy Head of Schools from the summer of 2023 through December 10, 2024. As Respondent's Head of Schools, Lewis supervised Principal Jones. (Tr. 167).

KIPP Academy receives a large part of its funding from the State of New York. The State Legislature allocates a per pupil amount to reimburse KIPP Academy for every student that enrolls in the schools, and KIPP Academy engages in fundraising to cover any additional expenses.[8] (Tr. 501, 707-708). To enroll at KIPP Academy, families enter a lottery. Everybody who lives in New York State is technically eligible to participate in the lottery, but preferences are given to students who live in the South Bronx and siblings of already-enrolled students. The lottery is conducted in April each year, with the bulk of accepted students filling the kindergarten classes.[9] (Tr. 757-758, 781). There is a 3:1 application/seat ratio and KIPP Academy maintains a waitlist for interested families who do not win the lottery. (Tr. 757, 781).

[8] This public money comes from the State of New York, New York City, and other sources of public funding. (Tr. 781).

[9] Limited spots in grades 1 through 8 are available in the lottery, depending on when seats become available.

KIPP Academy's Board of Trustees oversees all activities of the schools. The Board manages KIPP Academy's budget, but delegates certain responsibilities to KIPP NYC, LLC[10] via a shared services agreement. KIPP NYC, LLC is a charter management organization (CMO) that provides all services that support a school that aren't directly delivered by the principal and teachers. To this end, KIPP NYC, LLC provides financial[11] and legal services, human resources, and academic support for KIPP Academy and the other 17 schools operating under the KIPP banner in New York City.[12] (Tr. 707, 774, 856-857, 867). Under this arrangement, the KIPP Academy principals currently report to Natalie Webb, Chief Schools Officer for KIPP NYC. Alicia Johnson serves as KIPP NYC's CEO.[13] (Tr. 705, 834, 859).

Collective Bargaining Negotiations

Overview

Bargaining for a first contract began on October 12, 2021. Miles Trager serves as the Union's lead negotiator and Ray Pascucci is the Employer's spokesperson. Federal mediator Scott Sommer joined negotiations on September 14, 2023. Bargaining takes place over Zoom and sessions last from 1-3 hours. (Tr. 284-286, 419, 1022-1023). The parties did not formalize ground rules at the outset of negotiations but generally agreed to present non-economic proposals before turning to economic issues. (Tr. 1026).

Three and a half years later, the parties have not reached a contract. The parties held 2 bargaining sessions in 2021, 19 sessions in 2022, 15 sessions in 2023, and 9 sessions in 2024. (Resp. Exs. 3, 4, and 47; GC Ex. 152). Their last bargaining session took place on November 14, 2024.[14] (Resp. Ex. 3; GC Ex. 110).

The parties have only reached tentative agreements (TAs) on the following subjects[15]:

- Nondiscrimination
- Labor-Management Committee
- Conformity to Law
- Work Day Schedule
- Health and Safety
- Intellectual Property and Sharing

[10] Technically, the shared services agreement is between KIPP Academy and KIPP New York, Inc. But underneath KIPP New York, Inc. is KIPP NYC, LLC, which is a single member LLC that is the charter management organization. (GC Ex. 153; Tr. 858).

[11] KIPP Academy's finances are reviewed by the New York City DOE, which makes a recommendation to the State of New York Board of Regents as to whether to renew KIPP Academy's charter. This charter was recently renewed for another five years. (Tr. 597).

[12] There are currently 234 KIPP-affiliated schools across the United States. The schools operate independently because they are governed by their local Boards, but they work together on big initiatives that support student learning. (Tr. 727).

[13] When bargaining with the Union began in October 2021, Johnson served as KIPP NYC's president and Jim Manly served as KIPP NYC's superintendent. (Tr. 705-706, 725-726).

[14] There is no allegation that the Employer failed to timely schedule bargaining sessions or that the frequency of bargaining sessions is a contributing factor to the General Counsel's bad faith bargaining allegation.

[15] See GC Ex. 87; Tr. 334, 1174, 1214.

- Recognition

Certain contract proposals have been more divisive than others. I will address two of these proposals below.

A. Due Process and Grievance Procedure

At the parties' first bargaining session on October 12, 2021, the Union tendered a proposal on Due Process that featured the following Just Cause language:

> "No employees shall be disciplined without just cause. Discipline shall include verbal warnings, written reprimands, suspensions with or without pay, and terminations. An Employee shall not be fined." (GC Ex. 50).

Coupled with its Due Process proposal was a proposed Grievance Process defining a grievance as "a complaint by the Grievant that there has been a violation, misinterpretation or misapplication of one or more express provisions of this Agreement, KIPP's Handbook, or disparate application of any KIPP policy. The Union's Grievance Process proposal concluded with final and binding arbitration. (GC Ex. 50).

At the November 15, 2021, bargaining session, the Employer tendered a Discipline and Discharge proposal whereby "Employment at KIPP Academy is on an at-will basis. As such, both employees and KIPP Academy retain the right to terminate the employer/employee relationship at any time." (GC Ex. 51). And at the January 18, 2022, bargaining session, the Employer proposed a Grievance Process with a final step of non-binding mediation with an FMCS-appointed mediator.[16] (GC Ex. 53).

The parties' proposals on these subjects remained substantially unchanged until August 4, 2022, when the Employer tacked on the following note to its Grievance Process proposal:

> "In the end KIPP expects to agree to arbitration but will not do so until we are assured that the other provisions in the contract allow the School to operate in accordance with our mission." (GC Ex. 65).

On April 18, 2023, the Employer removed the at-will employment language from its Discipline and Discharge proposal but held fast to non-binding mediation as the last step of the grievance procedure, coupled with the above-referenced expectation to ultimately agree to arbitration. (GC Ex. 81). And on January 8, 2024, the Employer added the following language to its Discipline and Discharge proposal:

> "It is understood that the School has the exclusive right to determine which employees will be invited back for the next school year based on employee performance and a range of other factors, including but not limited to the School's financial condition, enrollment, and school needs. Such determinations shall not be considered disciplinary in nature." (GC Ex. 90).

[16] Pascucci testified that mediation is with a neutral third party who does not have binding authority but can help the parties try to come to a resolution. (Tr. 1061). Thus, mediation does not compel any party to agree to a resolution of the grievance. (Tr. 1283).

The Employer removed the "exclusive right to determine who will be invited back" language from its February 28, 2024 contract proposal, but reinserted this language in its May 23, 2024, proposal. (GC Exs. 95 and 97).

In its most recent contract proposal from October 17, 2024, the Employer adopted the Union's just cause language as follows:

> "No Employees shall be disciplined without just cause. Discipline shall include verbal warnings, written reprimands, suspensions with or without pay, and terminations. An employee shall not be fined. The parties agree that just cause for imposing discipline is defined to mean that the employee knew or reasonably should have known that the conduct in question (including continued poor performance) could result in discipline or discharge; reasonable discipline must account for the employee's work history; discipline must be nondiscriminatory and non-disparate; the preponderance of evidence establishes that the employee engaged in such conduct; the School conducted a fair and impartial investigation; and the standard rule, work order, or policy in which the infraction was based was reasonable. Employees will be considered to have the requisite notice that their conduct could result in discipline or discharge if the conduct violates any provision of the Collective Bargaining Agreement and/or any reasonable rule, work order, or policy distributed by the School in writing to employees." (GC Ex. 114; Tr. 405).

Even as the Employer adopted the Union's proposed just cause language, the Employer maintained its proposal granting it the exclusive right to determine which teachers will be invited back year-to-year, and more than two years after it indicated its expectation to agree to arbitration, the Employer has not actually tendered a contract proposal with a grievance procedure ending in final and binding arbitration. Instead, the Employer's most recent contract proposal clings to non-binding mediation as the last step in its proposed grievance procedure. (GC Ex. 114; Tr. 1284-1285).

The Union's Perspective on the Employer's Due Process and Grievance Procedure Proposals

Miles Trager testified that from the Union's perspective, the Employer's movement on just cause language is meaningless without arbitration as the last step of the parties' grievance procedure. Trager asserts that if a neutral third-party cannot determine whether the just cause standard has been satisfied, discipline effectively remains at the total discretion of the Employer. (Tr. 405).

Trager testified that he challenged Pascucci on this point on multiple occasions at the bargaining table. To this end, in late 2023 and early 2024, the Employer's expectation that it would ultimately agree to arbitration was premised on its desire to negotiate a collective bargaining agreement compatible with its mission. Trager asked Pascucci to explain the Employer's mission. Pascucci replied that the school's mission was putting students first. Trager then pressed for an explanation as to how the Union's proposals did not put students first, but Pascucci averred, stating only that the Employer would need a strong management rights clause and strong language on teacher evaluations before agreeing to arbitration.[17] Trager then questioned whether the Employer's proposals were focused on the school's mission or on

[17] Trager testified that in 3-plus years of bargaining, the Employer has never pointed to a specific proposal from the Union that was not in alignment with the school's mission and philosophy. (Tr. 459).

exercising leverage at the bargaining table. (Tr. 395-397). Trager told Pascucci that the parties could agree on arbitration as the last step of the grievance procedure and the Employer could carve out items that would not be subject to arbitration. Pascucci said that the parties were not close to such a point, citing the Employer's need for a strong management rights clause as part of any agreement.[18] (Tr. 455-456).

On cross-examination, Trager acknowledged that final and binding arbitration is a must-have for the Union, and he has never agreed to a collective bargaining agreement that did not contain final and binding arbitration as the mechanism to resolve grievances. Trager posited that there is no other practical way to enforce the parties' agreement. (Tr. 540-541). And Trager rightly observed that a written assurance from the Employer that it expects to agree to arbitration is meaningless – "You either agree to it or you don't agree…the representation that we expect to get there is of no importance." (Tr. 554).

The Employer's Perspective on Due Process and Grievance Procedure Proposals

Pascucci testified that KIPP Academy is committed to putting students first, which means adapting to changing student needs, adjusting the curriculum and assignments, rearranging schedules, and doing whatever is necessary to meet those needs. Pascucci also explained that flexibility and putting students first includes the ability to remove teachers who are not performing at the standard that the school thinks is necessary to ensure that kids are getting the best education possible. (Tr. 1027-1028, 1051-1052).

Regarding just cause, Pascucci testified that the Employer's primary concerns were ensuring that their teachers are performing at a high level and having the ability to remove teachers who are not doing so. (Tr. 1033-1034). Pascucci says that he and Trager had extensive discussions at the bargaining table regarding the Employer's just cause concerns and why the Employer was initially proposing alternative language. (Tr. 1034). Pascucci also told Trager from the outset that one of the Employer's primary goals was to have a concise, simplified, and streamlined CBA written in plain English that anybody could understand. (Tr. 1041). Yet the Employer was frustrated when the Union failed to acknowledge its movement on such a key point when the Employer adopted the Union's just cause language in October 2024. (Tr. 1123).

Regarding final and binding arbitration, Pascucci confirmed that Trager stated that the contract would be meaningless unless it had arbitration. The Employer knew it would eventually agree to arbitration and wanted to signal this fact to the Union to get Trager to move forward on other issues, but the Employer viewed final and binding arbitration as a big giveaway. (Tr. 1120). And when Trager asked Pascucci in early 2023 what contract items were necessities to preserve the Employer's identity, Pascucci said "a strong management rights clause, zipper clause, language on assignments that afforded us flexibility, discipline and discharge language that would allow us to remove bad teachers, language that would allow us to conduct performance evaluations and to use performance evaluations as a basis for making decisions about teachers remaining or not remaining." (Resp. Ex. 6; Tr. 1152-1153).

[18] To date, the Employer has not proposed any management rights clause language. (Tr. 419). Pascucci testified that based on his previous negotiating experience with Trager (bargaining the Elm Community Charter School CBA), Trager would not even entertain management rights language until they were close to a final deal. (Tr. 1276-1277).

Then in March 2024, Trager asked Pascucci how the parties could move forward with the Employer proposing a wage freeze and refusing to offer final and binding arbitration. Pascucci reminded Trager that the Employer was going to agree to arbitration, but it wasn't ready to do so yet – it's a big give. Pascucci testified that the Employer wasn't prepared to formally offer final and binding arbitration until it received more of what it needed in the contract, partly attributing the lack of progress on this front to the lack of written agendas yielding unfocused bargaining sessions. (Tr. 1202-1203, 1284-1285).

B. Workday and Work Schedule

KIPP Academy (and KIPP NYC) distinguishes itself from New York City DOE schools with a longer instructional day for students and a longer school year for teachers. Prior to the 2022-2023 school year, KIPP Academy teachers enjoyed a 6-week summer break and returned to work around August 7th for 2 weeks of professional development. (Tr. 720, 797). Students returned to school in about late August for a series of half days (coupled with professional development for the teachers) until full school days launched after Labor Day. With a week-long Thanksgiving break, and a 2-week-long Christmas break, school does not end until the last week of June. (Tr. GC Ex. 36; Tr. 718).

KIPP Academy's doors opened for students at 7:25am and on four days of the week, students departed around 4:00pm and staff was permitted to leave at 4:15pm. (Tr. 902). On Wednesdays, students received a half day of instruction and teachers remained in the building for 3.5 hours of professional development. (Tr. 49-51, 729-730). Although KIPP NYC (and KIPP Academy) prided itself on paying its teachers higher salaries than DOE schools, these long days yielded an annual teacher turnover rate of 17%. (Tr. 711, 825). The Employer instituted Wellness Days[19] to try to address post-pandemic burnout, but bargaining unit teachers highlighted the length of the school calendar and the length of the school days as priorities during contract negotiations. (Tr. 899).

Focus groups consisting of KIPP NYC staff, students, and families led KIPP NYC to alter its daily schedule at the start of the 2022-2023 school year. To this end, KIPP NYC eliminated the Wednesday half day for students, moved to a consistent Monday through Friday schedule, and reduced the instructional day to 7 hours and 30 minutes. (GC Ex. 25; Tr. 895). But since KIPP Academy and the Union were engaged in first contract bargaining at this time, the schedule changes were not applied at KIPP Academy at the beginning of the 2022-2023 school year.

Direct Dealing Allegation

Jeffrey Leshansky, a theatre teacher at KIPP Academy Elementary and a Union bargaining committee member, testified that in the Spring of 2022, rumors began circulating that the rest of KIPP NYC was adjusting school hours to shorten the day for students and teachers. (Tr. 25, 42, 92). By April 8, 2022, neither the Union nor the Employer had tabled a proposal regarding the school workday. (Tr. 92). But on that morning, during a 10-minute Zoom huddle, principal Anissa Jones screenshared with the 50 staff members on the call a document titled "School Design Proposal." (GC Ex. 140; Tr. 44, 47). The proposal laid out the following bullet points:

[19] Every 6 weeks, teachers would leave school at 1:30pm on Wednesdays. (Tr. 899).

- Moving to a consistent Monday – Friday school day, removing the Wednesday half-day, and reducing the overall instructional day to 7h and 30m for students.
- Reserving one day a week for afterschool staff professional learning (ranging from 45-120 minutes), that will be scheduled and communicated in advance by school leaders.
- Maintaining a school year of 180 days to allow for the continuation of a 1-week Thanksgiving Break, 2-week Winter Break, 1-week mid-Winter break, and 1 week Spring break.
- Continuing to offer our Wellness Day early dismissal benefit on Regional Professional Development Days.

The bottom of the slide listed a start time for staff of 7:30am and a start time for students of 7:45am. The slide also noted that students would end their days at 3:30pm and staff would end their days at 3:45pm (for four days of the week). (GC Ex. 140).

Leshansky testified that Jones labelled the proposal to align KIPP Academy's school hours with the rest of KIPP NYC as exciting and positive news. Jones, however, said that it was incumbent upon the Union to accept this proposal. (Tr. 47-48).

Jones testified that the information contained in GC Ex. 140 came to her via the "Region," which Jones identified as KIPP NYC. (Tr. 894, 923). She viewed the information shared at this meeting as an improvement in employees' working conditions and was trying to relay to her staff that the school day would potentially be shorter and that Wednesday half-days would no longer exist. (Tr. 898, 928). Jones, however, denied that she was making a bargaining proposal. Instead, Jones posited that she was simply sharing the proposals and ideas that were on the table regarding potentially changing the school day schedule. (Tr. 898, 900).

The first bargaining proposal regarding the school calendar and work schedule was made by the Employer at the June 13, 2022, bargaining session. Regarding the workday, the Employer proposed the following language:

> "The work day consists of 7.5 hours with starting and ending times designated by the Principal for each school year. The starting time will be no earlier than 7:45 a.m. and no later than 8:15 a.m., resulting in an ending time of no earlier than 3:15 p.m. and no later than 3:45 p.m. Any extracurricular assignments will entail additional hours as designated by School leadership.
>
> The work day will include a 30-minute uninterrupted lunch period, and a prep period of no less than 45 minutes." (GC Ex. 61).

The Employer's bargaining proposal regarding the school calendar featured a work year of at least 185 instructional days (inclusive of 6 PD Days) and up to 20 days or 4 weeks of professional development during the Summer (25 days or 5 weeks for newly hired employees). The proposal listed the holidays and breaks when school would be out of session and noted that the Employer reserved the right to increase the number of instructional days based on academic data and student need. (GC Ex. 61).

The Union presented its counterproposal at the parties' June 29, 2022 bargaining session. Regarding the workday, the Union proposed a starting time of 8:20am and an end time of

3:00pm, and that any extracurricular assignments were voluntary and would be paid at the employee's pro rata hourly rate. The Union also proposed a 60-minute duty-free lunch and two prep periods of no less than 45 minutes each. (GC Ex. 62).

Regarding the school calendar, the Union proposed a work year consisting of 180 instructional days (inclusive of 6 PD Days) and summer PD consisting of up to 3 days prior to the start of the regular school year (with new hires working 5 days). The Union also proposed summer PD hours of 10:00am to 2:00pm and set forth a slightly different set of school holidays and breaks. (GC Ex. 62).

The 2022-2023 school year began for KIPP Academy teachers in early August 2022, but the Union and the Employer still had not reached an agreement on the workday and school calendar issues. Then on August 30, the Union bargaining committee emailed the Employer the following petition signed by 36 teachers:

> "…We are frustrated with your handling of the subject of our "Work Day and Year." Through our UFT Representatives and Bargaining Committee (sic) have issued our demands for an interim proposal to address the needs of both staff and students and their families for the 2022-2023 school year as the work year has already begun (KIPP NYC has previously communicated to parents for the potential School day and year), while still maintaining our right to bargain for future years.
>
> We demand the following:
>
> - 7.5-hour employee work day
> - No more than 90 minutes of PD one day a week
> - Adhering to the 2022-2023 SCHOOL CALENDAR FOR KIPP ACADEMY
> - Adhering to the holidays and breaks in the 2022-2023 SCHOOL CALENDAR FOR KIPP ACADEMY
> - At least 45-minute daily lunch period
> - At least 45-minute daily prep period
> - Teacher choice of virtual or in person Report Card conferences with canceled instruction, and a 45-minute lunch break embedded." (GC Ex. 24)

The Union asked the Employer if it would be willing to separate the workday schedule from the school year schedule, but at the September 13, 2022, bargaining session, Pascucci informed the Union that the Employer was not interested in bifurcating the workday schedule from the school year schedule. (Resp. Ex. 18; Tr. 1134-1135).

KIPP Academy Teachers Unfurl Union Banner at September 27, 2022 Regional Professional Development Day

Professional development for KIPP Academy (and KIPP NYC) teachers consists of regional professional development days and in-school days. Regional PD invites teachers from all KIPP NYC schools (including KIPP Academy) to join together for about a week in the summer and on scattered days throughout the school year.[20] At these Regional PD days, teachers

[20] Teachers receive email invitations from KIPP NYC leadership informing them of the date, time, and location of the Regional PD. (Tr. 144).

workshop new ideas, brainstorm new curriculum teaching methods, and engage in morale boosting activities.[21] For theatre teacher Jeffrey Leshansky, Regional PD days allowed him to interact with the half dozen other theatre teachers in the KIPP NYC network who share a similar vocabulary and understand the craft of theatre and acting. (Tr. 38, 41, 136-137).

KIPP Academy teachers attended a Regional PD day on September 27, 2022, wearing blue buttons on their lapels that said "UFT Charter and Proud." (Tr. 60). Just after lunch, about 25 KIPP Academy teachers posed for a picture featuring a large blue banner that said "KIPP NYC – We Deserve a Fair Contract." (GC Ex. 40; Tr. 54-57, 142-143). Leshansky testified that KIPP Academy teachers were hoping to get a sense of solidarity from the rest of KIPP NYC knowing that the Employer's bargaining team would be present at this event. (Tr. 55). Fatima Wilson testified that teachers came up to her and asked about the banner. Wilson told them that KIPP Academy was a conversion school and because of that, a union school. Wilson said that KIPP NYC was bargaining with the Union, and the banner was a way for their team to come together and make it known that they were fighting for a fair contract. (Tr. 144).

Alicia Johnson Emails KIPP Academy Staff a Bargaining Update on October 27, 2022

The parties continued to exchange proposals on the workday and school calendar throughout September and October 2022 with little movement. Then on October 27, 2022, Employer President Alicia Johnson emailed the following "Calendar/School Year Bargaining Update" to KIPP Academy staffers:

> "…As you know, last year we conducted a series of focus groups with staff, students, and families that led us to make changes to our schedule, including moving to a consistent Monday – Friday school day schedule, removing the Wednesday half-day, and reducing the overall instructional day to 7 hours and 30 minutes for students, while ensuring we were able to keep a 1 week Thanksgiving Break and a longer Winter Break which we know distinguishes us from other schools and programs. We have also adjusted our curriculum and increased support to kids and families by increasing our after-school programming.
>
> Earlier this year, we proposed moving to this schedule for Academy. During recent bargaining sessions (since August), the union's bargaining committee (which is composed of both UFT representatives and a number of teacher representatives) proposed shortening August PD. As we shared in our previous email, we believe that the deep and focused professional development we provide our staff is important and core to our mission. The time we spend learning and preparing, together, makes us better. The summer PD survey data also tells us that Academy staff rated the overall summer PD either Good (23%) or Excellent (77%).
>
> While there are points related to calendar and schedule on which we were able to compromise and come to terms with the UFT bargaining committee, this one outstanding issue remains. We simply do not believe shortening the time we spend preparing together before kids return to school will allow us to fulfill our commitment to providing

[21] KIPP Academy Elementary School principal Anissa Jones has worked at KIPP Academy since 2014. Jones testified that KIPP Academy teachers had not been excluded from a Regional PD day since she started working for the Employer. (Tr. 932).

high value, high impact professional development for our teachers. It also allows us to get ready and kick-off the new year for kids and families by having time to set up classrooms, engage in beginning of year planning and data analysis, and host welcome events for kids and families. Additionally, we know that this time provides opportunities for school communities to integrate new staff members into the school culture and build a strong foundation for how all staff members will work together effectively as a team when students arrive. KIPP is not a place where staff can arrive from summer break a few days before classes begin and be ready to excel with students in the way teachers and students deserve.

Earlier today we sent our proposal back to the bargaining committee. Given the time of the school year, we have provided a deadline for coming to an agreement on the calendar, which continues to include our traditional summer PD days, that would allow us to make this change for the current school year. If we are unable to come to an agreement by the deadline, we will continue to bargain toward a long-term solution and operate on the status quo schedule.

It is our continued belief that we can create a collective bargaining agreement that both meets the needs of Academy teachers while maintaining the core tenets upon which KIPP Academy was built and continues to thrive.

To ensure we are continuing an open dialogue, Jim and I will again come to the middle and elementary schools to make ourselves available to share our thoughts and answer your questions. We will be at Academy Middle School and Elementary School on Monday, Oct 28, 2022, and will be available to meet with any interested staff…" (GC Ex. 25).

The next day, Johnson sent the following clarifying email to the KIPP Academy staff:

"As you know, KIPP Academy is legally obligated to bargain with the UFT as the exclusive bargaining representative. In a unionized environment, we are not permitted to engage directly with one or more staff members over bargaining issues. However, we are allowed to share information in an effort to promote transparency and understanding, and that was the purpose of yesterday's email. We understand that you may disagree on certain points, but we will continue to bargain in good faith with the UFT based on our sincerely held beliefs in what is best for our school…" (GC Ex. 25).

On October 30, 2022, the Union bargaining committee emailed the following response to Johnson and the KIPP Academy staff:

"…Thank you for acknowledging that as a collective K-8 cohort, we have detailed questions and feedback about your message dated Thursday 10/27/22.

We as a collective are concerned about why there is a change in how you will communicate with us about our concerns…You (KIPP) speak of the UFT as if it is a third party entity. We the members (both teachers and social workers collectively) are the United Federation of Teachers. The role of our district UFT rep is to ensure that the decisions we, the members make, stay within the parameters of the law. So please understand that the bargaining/decisions made is done by the members and no one else.

…We ask that you do not have meetings in regard to negotiations or proposals that are on the table unless proper Union representatives (chapter leadership, full bargaining committee, and collective bargaining agent) are present. Otherwise, at the very least it shall be perceived as an employer using their power to control and influence opinion, and at very worst may constitute an unfair labor practice." (GC Ex. 25).

KIPP Academy and the Union Reach Agreement on an Interim Workday Schedule

By November 1, 2022, the Employer had moved off its insistence that the workday and school year calendar stay connected. (GC Ex. 74; Tr. 1135-1136). This breakthrough allowed the parties to reach agreement on the following interim workday schedule on November 3, 2022, with implementation slated for November 29:

1. The work day consists of 7.5 hours with starting and ending times designated by the Principal for each school year. The starting time will be no earlier than 7:45a.m. and no later than 8:15am, resulting in an ending time of no earlier than 3:15pm and no later than 3:45pm. Once a week, employees shall be required to stay after school for no longer than ninety (90) minutes for professional development. In August the Principal will inform staff of the day of the week that professional development will occur on for the school year.

2. The work day shall include a forty-five (45) minute duty free lunch, and one (1) unassigned preparation period of no less than forty-five (45) minutes.

3. There will be two (2) evening Report Card Conferences held on dates identified in the School calendar (however, such dates are subject to change). On these days, instruction will end at 1:30pm, after which employees will have (sic) 45-minute duty-free lunch period from 1:45pm-2:30pm. Conferences will be scheduled between the hours of 2:30-4:30pm and 5:00-7:30pm. Unless excused due to personal hardship or illness by the Principal, Employees are required to attend all such conferences." (GC Ex. 75).

Later on November 3, KIPP NYC superintendent Jim Manly sent the following email to KIPP Academy Elementary and Middle School staff:

"We are very pleased to share, and you may have already heard, that we have come to an agreement with the UFT Bargaining Committee regarding the school work day for KIPP Academy. The Academy school day will now align to the school day already in place across all other KIPP NYC schools. This change will go into effect Tuesday November 29, 2022 and will be the basis of our multi-year collective bargaining agreement.

We appreciate that the UFT Bargaining Committee agreed to segregate this school work hours discussion from the entire work days and calendar discussion. Our number of days in school and August professional development remain pillars of KIPP and we will continue to work that through the contract.

We will begin planning immediately to ensure that we are able to implement the switch to the regional school day schedule by Tuesday November 29, 2022. To support the

> transition to the new schedule, Academy ES and MS will have in-school planning and prep time on Monday November 28, 2022. Anissa or Tristan[22] will discuss specific details with each school independently, but once the new schedule is in place, in-school professional development will take place on Tuesdays…
>
> …It is our continued belief that we can create a collective bargaining agreement that both meets the needs of Academy teachers while maintaining the core tenets upon which KIPP Academy was built and continues to thrive." (GC Ex. 26).

Conflict Arises When KIPP Academy Leaders Learn That the Interim Workday Agreement Does Not Address Arrival and Dismissal Times

Ray Pascucci testified that the KIPP bargaining team viewed the interim workday agreement as a "major sign of good faith and something that they (the Union) would really appreciate." (Tr. 1136-1137). Pascucci noted that this was a significant concession on the Employer's part, and it would lay the groundwork for further progress on other bargaining topics. (Tr. 1136-1138).

The good vibes were short-lived, however, as a dispute over teacher coverage of arrival and dismissal times under the new workday agreement created a firestorm. Historically, teachers at KIPP Academy Elementary supervised students' arrival in the building and their departure at the end of the day. (Tr. 213). Each of these tasks required about 10-15 minutes of teachers' time.[23] But there was no discussion regarding the handling of arrival and dismissal procedures during negotiations of the interim workday agreement, and this subject is not addressed in the agreement itself. (Tr. 1139). Pascucci testified that his team believed the fact that teachers had always assisted with arrival and dismissal meant they would continue to do so under the interim agreement. (Tr. 1139). The Employer also believed that because the interim reduction in the workday was a demonstration of good faith by the Employer towards the Union, it was hopeful that the Union would reciprocate by covering arrival and dismissal even though the interim agreement did not explicitly address this subject. (Tr. 1142). Fatima Wilson, however, testified that the Union's understanding was that arrival and dismissal duties were not covered under the Union's new work hours and the Employer's leadership would figure out how to handle the matter. (Tr. 228).

No KIPP Academy Elementary School staff member told Anissa Jones that they would not handle arrival and dismissal duties, yet Jones sensed a significant problem on the horizon. (Tr. 909). Therefore, on November 9, just six days after the interim workday agreement had been signed, Jones stood before her staff in the school's conference room and pleaded for help.[24] (Tr. 65, 907). Jones testified that nobody pressured her to initiate this conversation with her

[22] Tristan refers to former KIPP Academy Middle School principal Tristan Fields.

[23] In years past, students would arrive at school and go directly to their classrooms to have breakfast. Specials teachers were assigned to posts throughout the building to ensure that children arrived at their classrooms safely. An operations team member would distribute bagged breakfasts to each student at their classroom door, students would eat and then begin their instructional day. For dismissal, teachers would take their children outside to their specific dismissal location at 4:00pm, and at 4:05pm, would take the remaining children to the cafeteria for late pickup. (Tr. 217, 909-910, 937).

[24] The arrival and dismissal issue in the workday agreement only applied to KIPP Academy Elementary School because middle school students do not require the same level of supervision for arrival and departure. (GC Ex. 22; Tr. 487, 963-964).

teachers, but she had this concern and leaned on her staff because they have always worked as a community. (Tr. 904). Jones told her teachers certain facts – the school was going to make sure they had coverage in the morning and afternoons, but Jones only had 9 people to manage all of the students arriving between 7:25am and 7:45am, and the same number of helpers available in the afternoon. Jones then asked if anybody would volunteer to support these efforts. (Tr. 903-904). Jones testified that she did not recall any teachers responding to her, but a few team members later assisted with arrival and dismissal.[25] (Tr. 907-908).

Fatima Wilson testified that KIPP Academy Elementary is built on love and understanding and the staff would not be disrespectful to Jones. (Tr. 226-227). Wilson said that because KIPP did not understand the agreement they signed, it was breaking the agreement within days and putting the onus on the teachers to fix the problem by staying past the agreed-upon end to their workday. (Tr. 227). Therefore, the teachers did not agree to voluntarily perform arrival and dismissal duties as requested by Principal Jones. (Tr. 229).

Jeffrey Leshansky testified that the November 9th meeting with Principal Jones was both uncomfortable and tense because it felt like the Employer was twisting teachers' arms and reneging on their deal even though the language in the interim agreement, from the teachers' perspective, was clear. (Tr. 98-99). Leshansky also testified that when some teachers brought up the specifics in the interim workday agreement, Jones' tone of voice and body language made him feel like Jones was guilting employees into staying. Jones said that they were in a bind, KIPP NYC was not going to help, and she asked the teachers to stay and help with arrivals and dismissals. But Leshansky made clear in his testimony that Jones did not mandate the teachers to stay. (Tr. 66, 99-100).[26]

Later in the day on November 9, 2022, Fatima Wilson, on behalf of the Union's bargaining committee, sent the following email to Alicia Johnson, Jim Manly, and the staff at KIPP Academy:

> "…On behalf of membership, the Bargaining Committee is appreciative of the recent resolution agreed to in regards to the 'Work Day Schedule.' In that regard, we are writing because after speaking to many members, we are upset and disappointed because we have reason to believe that parts of this agreement will not be faithfully executed.
>
> Earlier today, a meeting at KIPP Academy was held to discuss a preliminary understanding of how the new work day plan will be instituted beginning November 29th…We were told that while our Work Day begins at 7:45AM, dismissal will be 3:15PM. This equates to 7.5 hours. We were then told that we would be 'asked' to stay 10 additional minutes until 3:25 for four days a week for a total of 40 additional minutes

[25] Kerry Mullins, the Employer's chief people officer in 2022 and the Employer's signatory on the executed workday agreement, testified that the Employer thought they had reached an agreement with the UFT, and they felt good about it. The Employer then realized that it had a different understanding of what it was agreeing to. Mullins testified that the Employer didn't account for or think about the transitions before and after school. "Our understanding and the understanding of the teachers and the UFT was just different. And so it began to unravel." (GC Ex. 75; Tr. 955-956).

[26] Fatima Wilson testified that teachers who did not serve on the bargaining committee spoke up at this meeting and asked Jones why she called this meeting just to ask them to break their agreement. (Tr. 156).

per week to ensure our students' 'safety' and that they are picked up during dismissal. What you propose is outside the scope of our (KIPP and UFT) agreement.

While we certainly want our students to be safe, we are frustrated with the power dynamics you are employing in this situation, and the fact that you are weaponizing our guilt for our students by making us stay longer in breach of the contract we (KIPP and UFT) agreed to. How can we say 'No" to our Principal 'asking us' to stay for this 40 additional minutes per week previously noted without feeling a sense of shame and guilt…Furthermore, we are upset that you are essentially gambling with our children's safety here by hoping that we – as a staff- cave in to the aforementioned and forego what we agreed to, knowing our good-natured conscience as educators won't want to let us leave our children unattended.

The purpose of this email is not to be tit-for-tat. It is to ensure that our agreement does not slowly erode away, and to ensure that we are not 'guilted' or 'shamed' into something because of our roles as educators. Again, while we appreciate that you have agreed to our proposal, this is appearing to again be your continued effort to paint your own employees who are participating in the process in a negative way, and again it is counterproductive (in this case, alluding to being resistant in coming to an agreement) and contrary to this process, and quite frankly, how the organization presents themselves publicly.

We look forward to our time to be respected and for this agreement to be faithfully executed in accordance with the good faith we have been bringing to the bargaining table." (GC Ex. 26).

As the parties continued to spar over arrival and dismissal coverage, KIPP Academy emailed its families on November 14, 2022, to let them know about the schedule change taking effect on November 29th. The email noted that families could drop off students as early as 7:30am and the instructional day would begin at 7:45am. The email asked families to pick up their students by 3:15pm, and that KIPP NYC would be adding additional staff members to help supervise dismissal and stay with children whose families need more time to adjust to the earlier pick-up times. (GC Ex. 27).

That same day, Pascucci emailed Trager the following to try to resolve the arrival/dismissal confusion:

"Our recent MOA did not explicitly account for staff spending a few minutes before and after instruction ends to assist with arrival/dismissal, although this has always been the expectation and practice. Now we understand that this is not how the MOA is being interpreted by some at Academy Elementary. With this in mind, we are now proposing the following alternative options for resolving this issue. Please let us know which option the Union prefers as soon as possible and no later than close of business this Thursday (Nov. 17) so we can finish planning with families and staff.

Option A:

- Staff arrive 7:40 to pick up their students
- Instruction begins at 7:45

- Instruction ends at 3:15
- 10 minutes for Transition/Dismissal
- Staff leave 3:25

This provides for 7.5 hours of instruction per day as KIPP intended and has promised to our parents.

Option B:

- Staff arrive 7:45
- Instruction begins 7:50
- Instruction ends 3:05
- 10 minutes for Transition/Dismissal
- Staff leave 3:15

To make up for the 15 minutes of lost instruction per day, 4 PD days currently listed on the calendar would be converted to instructional days for Academy Elementary (Nov. 28, Jan. 4, March 13, May 5)." (GC Ex. 76).

Union counsel Orianna Vigliotti replied to Pascucci's email less than an hour later on November 14. Vigliotti informed Pascucci that neither of his proposed options were acceptable to the KIPP Academy bargaining unit. Vigliotti pointed out that the parties' MOA specified that the teachers' workday was 7.5 hours, but Option 1 would require teachers to work 7.75 hours/day. Vigliotti further noted that changing professional development days to instructional days would require the Employer to bargain with the Union. Vigliotti concluded her email by noting that the Union was open to engaging in such bargaining in good faith. (GC Ex. 76).

The next day, Pascucci emailed Vigliotti indicating that the Employer intends to move forward with Option B and was providing the Union with notice and an opportunity to bargain over the conversion of PD days to instructional days. Pascucci offered the next three days for bargaining on this subject and said that time was of the essence because the Employer needed to inform students' families about the change to the schedule. (GC Ex. 76).

About 30 minutes later, Trager emailed the following response to Pascucci decrying the Employer's proposed changes to the recently executed workday agreement:

"To be clear, the Union has not agreed to any terms except for the executed agreement. We expect the school to follow the terms of that agreement whether we reach agreement on any other conditions. We would suggest that the school provide some transition time in the schedule as per the agreement, the bargaining unit's workday is a maximum 7.5 hours, not a minute more. If the agreement is breached, the Union shall take appropriate steps to enforce.

The UFT is not available to bargain until our next scheduled date."[27] (GC Ex. 76).

[27] The parties' next scheduled bargaining session was November 28, 2022. (Resp. Ex. 47).

The Employer's Reaction to Trager's "Not a Minute More" Declaration

Ray Pascucci testified that Trager's declaration that teachers will not work a minute more was a shock and very disappointing because these were salaried professionals. (Tr. 1143-1144). Pascucci added that KIPP felt that it had been "stabbed in the back" and burned after a major move and a significant showing of goodwill. Pascucci testified that going forward, the Employer was going to be a lot more cautious about every potential interpretation of every word and would be extremely reluctant to entertain any more interim agreements. (Tr. 1145).

Kerry Mullins testified that the Employer was disappointed in Trager's representation that the Union was not available to bargain for several weeks because the Union knew that the Employer was operating under a significant time restraint to set the new daily schedule, and the Employer had made themselves available to resolve this issue. (Tr. 962). Mullins also testified that Trager's "not a minute more" declaration ran counter to KIPP's operations and how the Employer thought about time. She labeled Trager's response "surprising" and "disappointing." (Tr. 962).

Anissa Jones also commented on the practical implications of this arrival/dismissal dispute. She testified that it was really nerve wracking at the beginning because although students previously ate breakfast in their classrooms, she had to redirect all children to the cafeteria because she didn't have enough adults to stay in the classrooms with the kids. Jones offered that it took everybody a little while to get acclimated to the new reality, but they eventually settled into a routine to manage the situation. (Tr. 908).

Fatima Wilson Promotes the Union's New Workday Agreement to Non-Union KIPP NYC Staffers

In early November 2022, Eileen Lambert, KIPP NYC's managing director of the employee experience team, emailed KIPP NYC employees to invite them to a virtual make-up session for mandatory "appropriate boundaries" training concerning staff-to-student and staff-to-staff interactions. (GC Ex. 20; Tr. 767-768). The training was scheduled for 4:00pm on November 30, 2022, and a reminder email was forwarded to the same list of recipients on November 15th.

On the evening of November 15th, Fatima Wilson, on behalf of the Union bargaining committee, "replied all" to Lambert's email message, sending the following response to over 300 KIPP NYC employees, including Alicia Johnson, and cc'ing Trager, Vigliotti, and Union business representative Alejandra Palomino:

> "…Due to our new UFT/KIPP agreements, our work hours are from 7:45am – 3:15pm on Mondays, Wednesdays, Thursdays, and Fridays and 7:45am to 4:45pm on Tuesdays beginning on November 29, 2022. While we understand that this is mandatory, please reschedule this meeting within the hours in our agreement. If you have any questions, please feel free to reach out to Jim Manly, Alicia Johnson, or Kerry Mullins as they are aware of any questions folks may have. I have also attached a copy of the TA for your reference." (GC Ex. 20; Tr. 158).

KIPP Academy Teachers are Excluded from the November 28, 2022 Regional PD Session and Alicia Johnson Emails All KIPP NYC Staffers Except for KIPP Academy to Tell Them That KIPP NYC Cannot Grow or Get Better with the UFT Serving as KIPP Academy's Bargaining Representative

November 28, 2022, was built into the 2022-2023 KIPP NYC school calendar as a Regional PD day.[28] In the chaos surrounding KIPP Academy's transition to a shorter instructional day, KIPP Academy teachers spent this day at KIPP Academy. But the Regional PD day went forward for all other KIPP NYC staffers. And to kick off the morning, Alicia Johnson sent the entire KIPP NYC network, excluding KIPP Academy, an email called "Update Regarding KIPP Academy." This email, as noted below, was a scathing indictment of the Union:

> "We hope you have had a restful break and are looking forward to engaging in PD with many of you today.
>
> As an organization, KIPP NYC consistently demonstrates continuous learning, growth, and flexibility with our students, staff, families, and our alumni…
>
> Those who know me understand that it is impossible for me to be a leader who operates in a way that is less than genuine. For each of the 15 years I have been with KIPP, my commitment and dedication to our mission and community have only deepened as we have grown. It is also hard for me to imagine KIPP NYC as a place that strays from the core of HOW we have chosen to work together – with direct communication, respect, creativity and best interests of our students and fellow educators in mind.
> This approach is being challenged deeply for all the leaders of KIPP NYC, including me. Last year, Academy staff told us that after 25 years of KIPP Academy being a conversion charter school, they wanted to negotiate a written contract through the UFT bargaining committee. This staff group had always been unique in that they have paid union dues since the school's inception. We primarily understood this desire for a bargained contract as an opportunity to better document how we already work together towards our shared mission. We were unprepared for the extent to which this decision would deeply impact the way that some of us speak to and about one another and how we work together.
>
> …We bargained with the UFT bargaining committee for several months and shortly before Thanksgiving break we came to terms that match what has been happening at all other KIPP schools since the start of the school year – a 7.5 hour day for kids with consistent end times and Tuesday PD. (We also documented a handful of our other standard KIPP NYC practices like a prep period and lunch on report card days).
>
> In good-faith, we negotiated the day around instructional time and weekly PD. Standard expectations around arrival and dismissal were never discussed; as those things are always a little variable year-to-year, by grade level, and depending on what is happening in a school community. It never occurred to us that Academy Elementary school teachers would not perform standard arrival and dismissal duties outside of the school day.

[28] The parties bargained on this date, but Respondent's bargaining notes do not reflect that there was any discussion regarding arrival and dismissal procedures at this meeting. (Resp. Ex. 22).

A group of Academy Elementary teachers expressed that they are unwilling to do dismissal after the 7.5 hour school day. We are concerned that those who spoke up and volunteered to do it may have been publicly pressured not to do so. These common yet divisive tactics have forced us to restructure the day at Academy Elementary to include less instructional time for students. The impact is clear – this means less intervention support and enrichment for students and limiting the freedom of teachers who want to make a different choice. We are also monitoring enrollment impact as we have heard from families who are concerned that it puts an additional burden on an already disruptive mid-year shift that they may not be able to accommodate.

…As we continue bargaining at KIPP Academy, many future initiatives, opportunities and improvements under consideration for the rest of KIPP NYC will not and cannot be extended to include KIPP Academy in similar fashion and timing. Tremendous time, effort and resources were expended to try to implement this agreement so the Academy staff could be on the new schedule, which they wanted, and ultimately it has created more issues, at the expense of time and resources for our other schools and programs.

In the future we will likely stick to more traditional bargaining and will not make changes at KIPP Academy until we have a final Collective Bargaining Agreement. We do not know how long this will take. We will also be careful not to engage in what the UFT Bargaining Committee calls 'direct dealing' and talking or writing directly about anything related to 'working conditions' with Academy staff in the future.

Ultimately what makes KIPP *KIPP* is the opportunity to live our mission and core values by being nimble and directly communicating with each other and not through a third party. It has made us successful for almost three decades, and I believe that it will continue to allow our organization to thrive and our students to succeed in the decades to come.

Yes, as leaders and as schools, we have many areas to grow and get better. From what we have experienced over these past few months with the UFT collective bargaining committee, the way to get there is absolutely NOT through the UFT. The way to get there and the way to attract, develop and retain talented educators and leaders is to continue to grow and evolve together as a community working toward a mission that we all believe in…" (GC Ex. 21).

At the hearing, Johnson explained her mindset in sending the above email. Johnson testified that she sent this email, in part, because Fatima Wilson's earlier email to KIPP NYC staffers confused a lot of people and Johnson wanted to explain what was going on. Johnson confirmed that her email was sent to everybody attending that day's Regional professional development, but the email was not sent to KIPP Academy staff. (Tr. 762). At the hearing, I asked Johnson why she sent a lengthy bargaining update email to teachers at schools that were unrepresented. Johnson answered that the KIPP NYC schools are all connected, and her staff tries to be transparent in sharing information across the schools whenever something big or different is happening. Johnson also said she shared this information so people received it directly from leadership. To this end, Johnson said that it was going to be obvious that KIPP Academy was not at the Regional PD day and she wanted to explain what was going on. And since the Union shared the workday agreement with a massive number of staff across all schools, Johnson had to give context to what was happening and why. (Tr. 762-765).

In her trial testimony, Johnson also confirmed that she was very frustrated when writing the email in General Counsel Exhibit 21. Johnson testified that the Employer was trying to bargain in good faith, and it felt like this was being held against them, leading Johnson to feel disheartened. Johnson also noted that the extended dialogue with the Union over the workday schedule had not been productive and had slowed down the Employer's ability to make effective change. (Tr. 831-832).

The Union's Bargaining Team Emails a Rebuttal to the Entire KIPP NYC Network

Fatima Wilson testified that she first learned about Alicia Johnson's November 28 email from a colleague at a different KIPP NYC school. The colleague forwarded the message to Wilson and Wilson conferred with the rest of the Union bargaining committee to draft a rebuttal. Wilson testified that she found the email addresses for the entire KIPP NYC Public Charter School network on the KIPP Go server[29] and she blind copied the entire KIPP NYC network. (GC Ex. 20; Tr. 159-166). While Wilson's December 2nd email was formatted as a point/counterpoint, copying and pasting Johnson's words and then offering a response, the below excerpts are presented in a more streamlined, digestible format:

> "The reason for this letter (email) is to express our extreme disappointment on behalf of KIPP Academy toward leadership at KIPPNYC…
>
> The other KIPP schools were not aware that KIPP Academy did, in fact, report to work on Monday, 11/28/22. We did not have the day off. Academy staff members were directed to go to our respective schools (for PD there instead of at the KIPP HS) in order to discuss our new daily schedules. All other schools changed their school hours in time for the beginning of the school year, but since KIPP NYC didn't agree to all of the proposals at the bargaining table, they did not change the hours for Academy.
>
> KIPP NYC staff were put into meetings regarding KIPP Academy but no one from Academy was there to present our side on the matter.
>
> …We want to bargain a contract so that our expectations are documented. No, we do not want to recreate a new mission, but we do want KIPP to honor their promises and adhere to the law, including but not limited to, bargaining in good faith. For far too long, working conditions have been a strain and at times unsustainable for both the adults and the children. This can be seen through the massive turnover rate that KIPP NYC has always had historically. This is part of why the school day has been changed to make it shorter. We are not the only KIPP school that feels this way, as many of you have expressed to us privately. Furthermore, our colleagues in St. Louis and Columbus, Ohio have just petitioned to form Unions at their schools for the same reasons (please see attached testimonials).
>
> We are not trying to keep KIPPNYC leaders from their mission of helping children. But it seems that way to them because from the beginning, KIPPNYC leaders have had all the decision-making power, and teachers have had none. Now, KIPPNYC leaders feel as if

[29] There are three separate servers – one for KIPP elementary schools, another for KIPP middle schools, and the third for KIPP high schools. Wilson testified that she sent the email in GC Ex. 21 to all three servers. (Tr. 166).

their mission is being undermined, as if their power is being diminished…but actually, we are just trying to make the balance of power more equal for both parties.

…For the first time, since its inception, KIPP Academy teachers have a guaranteed lunch and prep period that cannot be taken away.

…Any agreement made between US and KIPPNYC have NOT changed the way we speak with one another, nor has it changed how we work together. We still come to work every day, love our children and their families every day, show respect and pride for where we work and with whom we work with every day and as a result, we teach like our hair is on fire every day.

…Since the law was clearly on our side, Academy teachers are instead being portrayed as either being too lazy, or do not care about the well-being of the children enough to take a 'few extra minutes' to look after their students. But this is just another example of weaponizing teachers' guilt to make them comply with unfair practices (especially when in this case, both parties agreed to a teacher work day of 7:45am – 3:15pm). This is the same reasoning we got whenever we asked for a guaranteed lunch break before we were fully unionized.

As stated previously, we are only asking that KIPPNYC holds up to what they already agreed to, by law. In no way are we using divisive tactics. If KIPP NYC signed a legal document saying that our work day is from 7:45am – 3:15pm, then KIPPNYC should have made accommodations for extra staff (or non-teacher staff) to look after the kids outside of those times. Or they should have offered to pay teachers extra to work outside of their agreement. Otherwise, what was the purpose of the legally binding agreement?

The only divisive tactics that are being used are those outside of our schools who are not part of our immediate team and family. It has been done over and over again, and this time it has been done in the way of keeping KIPP Academy out of KIPPNYC day in order to spew anti-union rhetoric and lies about us. To make it seem as though being part of a union is poison when in fact…WE ARE THE UNION. We are the frontline workers – Teachers and Social Workers. We are the ones that love, nurture, educate, accommodate, mediate, and advocate for our babies from the age of 4 through college. Every decision that we make has been made with them not only in our minds but in our hearts.

We are working to build a sustainable future so that our KIPPsters will ALWAYS know that we stand for them now and always…as opposed to looking for new opportunities at other schools in hopes that their working conditions are just a little more sustainable than what has been KIPPNYC for over 20 years. Keep in mind that because of the working conditions at KIPPNYC, there are very few, if any, original staff members still employed here as either teachers or social workers. What does that tell you? Feel free to reach out to us at KIPP Academy as you always have."[30] (GC Ex. 21).

[30] Shortly after sending out this email, Wilson received notification that she is no longer permitted to use her KIPP Academy email address to email more than 30 people at a time. (Tr. 276).

The Parties' December 13, 2022 Bargaining Session

At the parties' December 13, 2022, bargaining session, Ray Pascucci formally notified the Union that January 4, 2023, March 13, 2023, and May 5, 2023, would be switched from professional development days to regular instructional days if the parties are unable to reach agreement to make up for the 15 minutes of lost instruction time resulting from the interim workday agreement. The formal notice also indicated that June 22, 2023, would now be a full day of instruction and June 23rd would be a half day. (GC Ex. 77). Attached to this email was a proposed modified workday schedule, which added the following language:

> "Staff are required to arrive 5 minutes prior to the instruction starting time to assist with student arrival, and to remain for 10 minutes after the instruction end time to assist with student dismissal. The normal work day includes the instruction day as well as arrival/dismissal duties…" (GC Ex. 77).

Respondent's bargaining notes from the December 13th meeting indicate that the Employer focused on the arrival/dismissal issue, noting that it had always been the case that teachers had been willing to assist during these times, the Employer understood the workday language to mean the instructional day, and was surprised to discover that the Union did not interpret arrival and dismissal as part of the needed hours. In response, Trager noted that KIPP (NYC) had sent a communication "trashing" KIPP Academy teachers. Pascucci set Trager's comments aside and presented the proposal referenced above, stating that this misunderstanding had resulted in a loss of instructional time and the Employer, as an organization, was unwilling to allow this to continue as is. Trager then stated that this would be a "breach of contract." (Resp. Ex. 23).

Trager testified that the Union reviewed the Employer's modified workday proposal, but the bargaining unit rejected it. (Tr. 486). A week later, at the parties' next bargaining session, the Union presented a counterproposal. The counterproposal adopted some of the Employer's ask, but conditioned acceptance on the Employer consenting to a grievance procedure with final and binding arbitration.[31] (GC Ex. 78; Tr. 486).

The Employer did not respond to the Union's proposal and did not make any further proposals regarding arrival/dismissal protocols. (Tr. 487, 1257). The parties did not bargain again until February 2, 2023. Respondent's bargaining notes from this date do not reflect any discussion regarding this issue and the proposals tendered by Respondent at this meeting simply referenced the parties' TA of the workday schedule from early November 2022. (GC Ex. 79; Resp. Ex's. 25 and 47).

Then on February 7, 2023, Kerry Mullins emailed Miles Trager the following message:

> "This email is to inform the UFT and bargaining committee that, as we shared with you in December, to make up for the lost instruction time for students for the remainder of this school year caused by the misunderstanding over the instructional day versus the work day (15 minutes per day of lost instruction time) the following work days that had been set aside for professional development will instead be used as regular instructional

[31] The Union proposed two shifts of employees responsible for student arrival and dismissal each day with half of the employees arriving 5 minutes earlier than the starting time and the other half concluding their day 5 minutes past the end of the instructional day. (GC Ex. 78).

days for KIPP Academy Elementary School: March 13, 2023 and May 5, 2023. In addition, June 22, 2023, will be a full day of regular instruction and June 23, 2023, will be a half day of instruction. This ensures students at Academy Elementary School receive instructional time consistent with students across KIPP NYC and in keeping with the promises we have made to our Academy ES families.

Academy ES teacher professional development will continue to be provided on Tuesdays during the regularly scheduled time." (GC Ex. 22).

KIPP Academy Teachers Are No Longer Permitted to Attend Regional Professional Development Days

The day KIPP Academy teachers unfurled the pro-union banner at Regional professional development turned out to be the last time that KIPP Academy teachers were invited to Regional professional development. After colleagues from other schools asked Fatima Wilson why she wasn't at Regional PD, Wilson said that she was not aware of it. Wilson then asked her principal why KIPP Academy teachers were no longer invited to Regional PD days. Anissa Jones told Wilson that for now, KIPP Academy's Regional PDs are in-school professional developments. (Tr. 147).

Anissa Jones testified that pre-Labor Day professional development is traditionally a mix of school-based and regional PD. Jones said that in her experience, summer Regional PD ranges from either a few days to a full week, while during the school year, there were 1-2 Regional PD days sprinkled in. (Tr. 912, 929). Jones also confirmed that Regional PD still exists for all other KIPP NYC schools except for KIPP Academy. (Tr. 930). Documentary evidence submitted by the General Counsel confirmed this fact. To this end, KIPP NYC held a Regional Professional Development week from August 14, 2023, through August 18, 2023, at locations in Manhattan and the Bronx. (GC Ex. 156). Jones testified that KIPP Academy teachers received in-school professional development that week even though students had not yet returned from summer break. (Tr. 934-935). Jones testified that Chief Schools Officer Natalie Webb[32] decided that KIPP Academy teachers would no longer attend Regional professional development, Jones did not participate in this decision, and her role was simply to disseminate this information to her staff.[33] (Tr. 931-932).

Continued Discussions Regarding School Year Yield No Progress

The parties continued discussing the work year issue, but to date, no agreement has been reached. The following chart tracks the parties' proposals and movement in 2022 and 2023:

Proposing Party	Date of Proposal	Exhibit #	Proposal
Employer	June 13, 2022	GC 61	At least 185 instructional days (inclusive of 6 PD days) and up to 20 days or 4 weeks during the summer (25 days or 5 weeks for newly

[32] The Chief Schools Officer role essentially replaced Jim Manly's superintendent role when he left for another position outside of KIPP NYC. (Tr. 859).

[33] Additional Regional professional development days took place on October 31, 2023, March 4, 2024, and August 15, 2024. (GC Exs. 157-159). Alicia Johnson testified that there has been 1 Regional PD day so far in the 2024-2025 academic year and that none of the above Regional PD programs was offered to KIPP Academy teachers. (Tr. 724, 805, 811).

			hired employees). KIPP Academy reserves the right to increase the number of instructional days based on academic data and student need.
Union	**June 29, 2022**	**GC 62**	**180 instructional days (inclusive of 6 PD days) and up to 3 days prior to the start of the regular school year and 5 days for newly hired employees. Summer PD hours from 10:00am to 2:00pm.**
Union	**September 8, 2022**	**GC 69**	**Up to 10 days or 2 weeks during the Summer to commence no earlier than 8/15 or up to 15 days or 3 weeks for newly hired employees to commence no earlier than 8/7.**
Union	**February 28, 2023**	**GC 80**	**No more than 180 instructional days (inclusive of 6 PD days) and up to 3 days prior to the start of the regular school year and 5 days for newly hired employees. The work year shall begin no earlier than August 20th and end no later than June 30th.**
Employer	May 2, 2023	GC 82	The School Year consists of 185 instructional days and 3 PD days beginning the week before Labor Day and ending no later than June 30th. KIPP Academy reserves the right to increase the number of instructional days based on academic data and student need. In addition, employees are required to attend 10 days of Summer PD in August prior to the start of the School Year. Newly hired employees must attend 5 additional days for orientation and PD. The hours for summer PD are 8:00am to 4:00pm.
Union	**May 23, 2023**	**GC 83**	**No more than 190 work days that include instructional and PD days (Summer and during the school year). Newly hired employees may be required to attend an additional 5 days of PD immediately prior to the start of the work year. Work year begins no earlier than August 20th and summer PD hours are 10:00am to 2:00pm.**
Union	**July 17, 2023**	**GC 86**	**The work year consists of 180 instructional days and 3 PD days beginning no earlier than August 20. In addition, employees are required to attend 7 days of Summer PD in August prior to the start of the School Year. Newly hired employees must attend 5 additional days for orientation and PD. The summer PD days are 8:00am to 3:30pm.**

Union Members Sign a Petition Seeking a Reduction in the Work Year

On May 22, 2023, 50 KIPP Academy teachers signed and submitted the following petition to the Employer:

> "…We look forward to this final stretch to make sure that our students are getting what they need before a much-needed Summer break.
>
> Likewise, many of us are tired and exhausted. With the stressors of State Testing, Spring Art Showcases, Science Projects, the administrative and logistical responsibilities of communicating with families, on top of curricula demands, and all the other minutiae that we gladly encounter as educators – we are 'running on fumes.' With that being said, we are respectfully asking you to reconsider revisiting our School Year Length with the UFT bargaining committee, and that you seriously consider not having us report back to work no earlier than Monday, August 21st.
>
> Teacher turnover is real, especially at KIPP. We believe that if you care about doing what is best for our students, then you should also be doing what is best for your teachers – who are on the frontlines and making a difference in the lives of their students. Doing what is best for students means stopping the annual, revolving teacher turnover door in our schools to help ensure that our kids are receiving consistency from the same educators for their duration at KIPP. To help stop teacher attrition here, we respectfully ask that you give us the rest and recuperation that we need to be with our families, so we can properly show up and show out for our student families in the new academic year.
>
> We are not asking you to become like the DOE, and to report back after Labor Day. Rather, we are kindly asking that you have us report back to work with what is in line with many other charter schools – Mid August. We believe that this is a great compromise for both parties that will not adversely affect student outcomes. We can still have our 2 weeks of "half day Summer School" (which many of our families still do not attend because they are away) when we report in Mid-August and then use the time after the students leave for Professional Development. Likewise, we believe that it is not about the quantity (and the amount of Professional Development we receive) but the quality – also illustrated by its dispensable nature in that two of our PD Days were removed recently (March 13th and May 5th)…" (GC Ex. 33).

Jeffrey Leshansky testified that the teachers had success with the previous workday petition, and they created this petition because teacher turnover and attrition were real, and they were hoping to come together on an agreement covering the work year. (Tr. 67). Leshansky noted that the petition called for teachers to return to school later in August than past practice and requested the same quality professional development – just less of it. (Tr. 107-108).

During an afternoon professional development session on about June 12, 2023, Jim Manly came to KIPP Academy Elementary to speak to employees. According to Leshansky, Manly acknowledged receiving the petition and sounded agreeable to the teachers' concerns. (Tr. 68-69). But about 10 days after Manly spoke to the KIPP Academy teachers, Manly sent out an email to KIPP Academy staff announcing that teachers would return to work on August 7th to

begin the 2023-2024 academic year with 2 weeks of school-based summer professional development. (GC Ex. 34).

The Employer's Perspective Regarding the School Year Calendar

Ray Pascucci testified that New York State requires a minimum of 175 instructional days each school year and KIPP Academy's charter requires a minimum of 179 days. (Tr. 1110, 1129-1130). Pascucci also noted that KIPP pays more than DOE schools, the Union has acknowledged this fact, but the Union wants to be paid more while proposing to work less – fewer summer professional development days and fewer instructional days. (Tr. 1158, 1163, 1294-1295). On June 27, 2023, in response to Trager's suggestion that a shortening of the work year could be incrementally phased into the contract, Pascucci said that the Employer was not interested in shortening the work year. (Tr. 1169). Then on August 3, Pascucci told the Union that the Employer had already moved as far as it could go on the work year issue. (Resp. Ex. 35, Tr. 1176).[34]

Wage Proposals Over Three Years of Bargaining Yield No Agreement

Negotiations over wages started out on a hopeful note. In January 2022, the Employer proposed a memorandum of agreement whereby KIPP Academy would provide the same $500 holiday bonus to its staff that other KIPP NYC school staffers received at the end of 2021. (GC Ex. 53). Pascucci testified that KIPP NYC handed out these bonuses in the past, although the amount and frequency of the bonus changed. Pascucci labeled this act as discretionary, and not part of the dynamic status quo, so the Employer tendered a proposal and waited for the Union's acceptance before distributing the $500 bonus. (Tr. 1055-1056).

Then on March 29, 2022, Pascucci emailed Trager to let him know that KIPP NYC was rolling out a 3% raise system-wide for the 2022-2023 school year, and KIPP Academy was proposing that bargaining unit staffers receive this 3% increase as an interim wage adjustment. In his email, Pascucci stated that if the Union did not accept this proposal before July 1, the 3% raise would not be applied retroactively. Pascucci also noted that if the Union chose not to participate in this 3% wage increase, the Employer would maintain current salaries for the bargaining unit until the parties reached a new collective bargaining agreement. (GC Ex. 57; Tr. 422, 1078). The Union agreed to the interim wage increase - the last wage increase KIPP Academy bargaining unit employees received. (Tr. 423, 1082).

During the parties' September 14, 2023, bargaining session[35], Trager asked if the Employer had a response to the Union's most recent work year proposal. Trager said that if the parties had an agreement on the work year, it would be easier for the Union to make a salary proposal because the Union would know exactly how many days the employees worked.[36] Pascucci said that there would be no further movement from the Employer on the competing

[34] In his testimony, Pascucci recognized the importance of this issue to the bargaining unit. Trager told Pascucci that teachers are exhausted, especially after COVID, the Employer is working them too hard, and they wanted to reduce the work year. But Pascucci said that the Union's comments were often coupled with statements that the amount of professional development they received was not necessary or meaningful. (Tr. 1163-1164).

[35] This was the first session that federal mediator Scott Sommer attended. (Tr. 1180).

[36] Trager noted that under the Employer's work year proposals, the Employer had unlimited discretion to add working days to the work year. (Tr. 421).

work year proposals. (Tr. 420-422). At this same meeting, Trager told the Employer that teachers have reported significant changes in instructional time and changes to the work year. Pascucci replied that the Employer has maintained the status quo. (GC Ex. 100 and Resp. Ex. 36).

At the parties' December 5, 2023, bargaining session, Pascucci asked the Union whether it had responses to the Employer's economic proposals and said that he was expecting an economic proposal from the Union – one that included salaries. Trager noted that Pascucci had not previously asked for a salary proposal from the Union. (Tr. 434).

The Union tendered its first full-bodied wage proposal at the parties' January 8, 2024, bargaining session. (GC Exs. 91 and 102; Resp. Ex. 40). The proposal called for an immediate 3% wage increase and another 3% increase in January 2025. The proposal also requested a 3.25% wage increase in September 2025. At this session, Trager noted that the Union's proposal was almost identical to the new contract reached between the DOE and the Union. (Tr. 442). As for the Union's rationale, Trager explained that the Employer had long said that it had paid a percentage above the DOE scale and so when the DOE made increases, the Employer would make similar increases to keep their salaries above the DOE. Trager testified that the Union thought it would be easier to reach an agreement if their wage proposal followed the existing pattern. (Tr. 443). In addition to wages, the Union also formally proposed that the Employer maintain the same health and retirement benefits KIPP Academy teachers currently receive. (Tr. 1191).

At the parties' January 18, 2024, bargaining session, Trager asked Pascucci if the Employer had a response to the Union's wage proposal. Pascucci simply responded that the Employer did not have time to analyze the proposal. (GC Ex. 103; Resp. Ex. 41; Tr. 447-448). But by the February 28th session, the Employer offered a counterproposal – one that Pascucci prefaced by saying it would not be popular. The Employer proposed a wage freeze for the 2024-2025 school year, no wage proposal for any other year, and indicated that it was still reviewing the benefits issue and was not yet prepared to tender a proposal on this subject. (GC Exs. 94-95 and 104; Tr. 449-451).

Pascucci testified about the Employer's rationale for its wage proposal. He said that the Employer waited a long time to receive the Union's first wage proposal, and it seemed clear that the Union was first waiting for a resolution to its negotiations with the DOE. After reviewing the DOE contract, the Employer determined that KIPP Academy's wages were ahead of the DOE in both the first and second years of the DOE contract. Thus, the Employer would remain competitive with the DOE even while proposing a wage freeze. (Tr. 1199). Pascucci also testified that KIPP Academy loses money and has been losing money badly for a long time.[37] According to Pascucci, the Employer has big loans because it inherited an incredibly expensive benefit structure from New York City when KIPP Academy became a conversion charter school. The Employer was deciding whether it could propose other benefit options to address these high costs but ultimately decided against modifying current benefits, and memorialized the status quo regarding benefits in its May 23, 2024, contract proposal. (GC Ex. 97; Tr. 1199-1201).

Other than clarifying that its wage freeze proposal was for two years, there has been no further movement on the subject of wages. (Tr. 1209-1210). KIPP NYC teachers received

[37] It does not appear that the Employer raised this issue at the bargaining table.

somewhere between a 1.5-3.0% wage increase for the 2024-2025 school year, but KIPP Academy teachers did not receive this increase.[38] (GC Ex. 155; Tr. 787, 827-828).

Status Quo Economic Proposals from the Employer

Although the Union sought increases in other forms of compensation besides wages, the Employer simply offered the status quo. The following economic bargaining subjects illustrate this pattern:

Subject	Date of Union's First Proposal	Date of Employer's First Proposal
Tuition Reimbursement	July 14, 2022 (GC Ex. 64)	June 27, 2023 (GC Ex. 85)
Home Visits and Weekend Work	March 1, 2022 (GC Ex. 56)	May 16, 2022 (GC Ex. 59)
PTO Days	October 12, 2021 (GC Ex. 50)	May 16, 2022 (GC Ex. 59)

KIPP Academy Middle School Principal Antoine Lewis Encourages Fatima Wilson to "Turn the Switch Off of Bargaining and Put the Union to Sleep"

Fatima Wilson provided detailed, uncontroverted testimony about conversations she had with KIPP Academy Middle School principal Antoine Lewis[39] in late April and early May 2024.[40] Wilson testified that in early 2024, Lewis came into her classroom about once a week during her prep period to inquire about science instruction and the robotics club. (Tr. 167-168).

On April 17, 2024, Lewis arrived in Wilson's classroom as before. Wilson showed him the robots her club had built for the upcoming robotics competition and Lewis asked if she needed anything. Wilson replied that she needed judges for the competition. Lewis then steered the conversation in a completely different direction. Lewis said that he wanted to ask Wilson a serious question and they both sat down. Lewis wanted to know if KIPP Academy was going to close, and Wilson said that he would know better than she would. Lewis asserted that he had a lot of political capital, Wilson said she did too and wanted to know where this conversation was going. Lewis said that he would like to go to the Board as Academy's representative. He said that KIPP NYC was willing to bend, but they would never agree to a contract with the Union because there was a lot of fear. Wilson said they could go to the Board together, but Lewis said that if they see her coming, they will never talk to her – that was why it was important that he serve as the representative for Academy. (Tr. 168-170).

[38] At one point in her testimony, Alicia Johnson testified that the raise was about 3%, but later in her testimony, Johnson said that the raise was between 1.5% and 2%. Regardless of the exact number, it is undisputed that all KIPP NYC teachers received this increase in the 2024-2025 school year except for the KIPP Academy bargaining unit.

[39] Lewis also served as the KIPP Academy Head of Schools at this time, meaning that Elementary School principal Anissa Jones reported to him. (Tr. 859).

[40] In its Amended Answer, the Employer admitted that Lewis was a supervisor within the meaning of Section 2(11) of the Act. Lewis did not testify at the hearing.

Wilson asked if this was the reason why the middle school was able to afford lavish end of year trips while the elementary school was broke, with no money for supplies or day trips. Lewis said that all he had to do was go to the Board and ask and they will give him whatever he wants. Wilson said that if you can get us everything we want, can you put it in writing. Lewis said yes – all the employees have to do is "turn the switch off on bargaining" and he can get us everything we want. Lewis said that if KIPP doesn't keep its end of the bargain, they could just turn the light switch back on and return to the bargaining table. (Tr. 170-171). Wilson said that there is no way we would want to do this because we would have to decertify, and we don't want to give up our job security and benefits. Lewis said that he could work on getting us everything and said that they could keep their benefits. Wilson said that there was no way they could leave the union and keep their benefits because we would no longer be seen as city workers. (Tr. 171).

Lewis said that there was a lot of fear in KIPP NYC amongst the Board. Wilson asked what this fear was, and Lewis said that there is a fear of coming to a contract because if they reached a contract (with the Union), their benefits package and pension would bankrupt KIPP. Lewis also said that there is a fear that if KIPP Academy gets a contract, what is to stop the rest of the region from getting a contract.[41] And this would bankrupt KIPP NYC. Lewis said that if he becomes the employees' representative, then they could put the union to sleep and get everything they wanted because it was getting close to June and KIPP NYC was working on schedules for the upcoming school year as well as initiatives. Lewis said that he would get the employees something comparable in terms of benefits and would ask the Board to contribute to the pricing so that members wouldn't be hit hard with the financial shock of paying for these benefits. Wilson said that she would think about it and get back to him. (Tr. 172-173, 185).

Lewis returned to Wilson's classroom the first Wednesday in May after Spring Break and pointedly asked her if she had thought about what he had said. Wilson said that she thought about it, but she needed more information. Lewis said that they needed to decide because time was running out and KIPP NYC wants him to make changes quickly or they would withdraw their money and resources from KIPP Academy. Lewis said that if that happened, KIPP Academy would not be able to stay afloat and to save money, they would have to get rid of their highest paid teachers. Wilson asked if KIPP Academy would get rid of her, given her long tenure and high salary. Lewis said that he was sure that he could protect her job, but there were no guarantees. Wilson asked him to get this in writing and Lewis said that he would try. (Tr. 176-179).

Wilson said that guarantees needed to be in writing. Lewis replied that if she gave him the green light as the employees' representative, then he could get them everything they needed. Lewis said that he just had a meeting with the Board and the only way he could get the employees everything they wanted was if they decertified from the Union. Lewis also said that during bargaining sessions, when the parties go into a caucus, nothing happens on the KIPP side, and they are just staring at each other.[42] (Tr. 179-180).

Wilson told Lewis that the employees would not decertify from the Union. She said there was no way they would want to give up their job security without everything in writing. Lewis

[41] Wilson testified that "the region" refers to KIPP NYC. (Tr. 186).

[42] Wilson testified that she saw Lewis at a few bargaining sessions. (Tr. 258). The Employer's bargaining records indicate that Lewis attended the January 8, 2024 and January 18, 2024, bargaining sessions. (GC Ex. 152, Tr. 280). The Employer's records do not indicate who attended the two bargaining sessions immediately after January 18, 2024.

then asked her who she was fighting for – why was she doing this. Lewis ended the conversation by telling Wilson that later that afternoon, he was going to have a staff meeting at the middle school to let them know about his meeting with the Board. (Tr. 181-182).

On May 9, 2024, Lewis returned to Wilson's classroom while she was teaching robotics to a class of 4th graders. Lewis asked to speak to Wilson, but she said that she was in the classroom with her children, and she was not going to leave them alone to have a conversation with him. Lewis then leaned over her table and said that he sent an email to the entire KIPP Academy staff informing them that a decertification petition had been filed. Wilson opened her email, saw what he was talking about, and said that they had nothing else to talk about.[43] Wilson said that if he was not coming in to formally observe her or coach and give feedback, then they had nothing else to talk about. Lewis said that he did what had to be done and left the classroom. (GC Ex. 39; Tr. 182-184).

The following week, Lewis returned to Wilson's classroom. In this conversation, Wilson accused Lewis of manipulating her and not being open and honest about why he was coming to her classroom every week during her prep time. Wilson said that she thought that Lewis cared about the robotics program and her students, but he was just trying to pull information out of her regarding collective bargaining, while urging her to decertify from the Union. (Tr. 261, 1301). Wilson recorded this conversation. The recording is in the record as Resp. Exhibit 49 and the transcript for this recorded conversation is Resp. Ex. 48.[44]

Bargaining Regarding Job Assignments

On May 16, 2022, the Union tendered its first proposal regarding job assignments. (GC Ex. 60). In this proposal, the Union sought the following:

- Providing employees a list of open positions for the upcoming school year with job descriptions and qualifications necessary to meet the requirements of the position.
- When reasonably possible, notifying internal candidates at least two weeks prior to making open positions available to external candidates.
- Emailing teachers regarding open or vacant positions during summer vacation.
- All things being equal, make length of service at KIPP Academy the determining factor in awarding open positions.
- Employees can fill out a preference sheet form no later than April 15th indicating their preference for assignment for the next school year.
- Where advisable and possible, honor the preferences listed on the form.

[43] Lewis' May 9, 2024, email to KIPP Academy Middle School staff forwarded a Notice of Petition for Election issued by the NLRB concerning a decertification petition filed by Uriel Barrera. Lewis wrote, in part: "…Please read the attached notice for more details. Now's it up to the National Labor Relations Board to schedule an election, and it's up to the Union to respect your right to choose…" (GC Ex. 39).

[44] Portions of the recording corroborate Wilson's testimony about the late April and early May conversations she had with Lewis. See e.g. page 3 of Resp. Ex. 48 ("You told me that the Board and the powers that be said to you that they're gonna bow out. They're gonna bow out, they will, they will never fold to a contract. And, and you could make things change, and they said make it happen. And you said that put the union to sleep…").

- Employees shall be given an opportunity to discuss their assignment requests with the Principal.
- Employees shall be notified of their final assignments for the next school year no later than May 15th. (GC Ex. 60).

About a year and a half later, the Employer made its first counterproposal regarding assignments. (GC Ex. 90). In its January 8, 2024, proposal, the Employer sought the following:

- The school shall post a list of open positions for the current or upcoming school year on its internal job board and on a public website.
- In evaluating candidates for new or open positions or vacancies, the school shall consider a candidate's qualifications and credentials, including a candidate's ability to satisfy any legal requirements of the position and expertise and relevant experience.
- Employees shall fill out the preference sheet forms and the school will indicate the due date to submit these forms.
- Employee preferences will be considered by the school. While the school will consider each request, the final decision regarding employee teaching assignments rests with the school.
- Employees shall be notified of their final assignments for the next school year no later than August 15th.
- The school has the discretion to move an employee's assignment (by grade level or subject, if applicable) as needed to best support the needs of the school and students. (GC Ex. 90).

On January 18, 2024, Pascucci emailed Trager to confirm that the Employer was modifying its proposal regarding assignments to add the following language:

- Employees shall be notified of their tentative assignments for the next school year on or about May 15.
- The School reserves the right to change such assignments based on changing School needs.
- Employees shall be notified of their final assignments for the next school year by no later than August 15.[45] (GC Ex. 92).

The Employer's proposal regarding assignments has not changed since January 18, 2024. (GC Ex. 114).

KIPP Academy Elementary Modifies Teaching Duties of Specials Teachers in August 2023

Jeffrey Leshansky has taught theatre at KIPP Academy Elementary School since 2017. (Tr. 25). His theatre classes are 45-minutes long. With 30-33 students in each class, and 3 classes per grade, each student received theatre instruction about 2 times/week. (Tr. 117-118). A

[45] Pascucci testified that the Employer offered May 15th because it knew that teachers wanted to find out their assignments for the next school year as early as possible. Pascucci also noted that enrollment changes can occur between May and August and the Employer cannot commit to an assignment until the new school year begins. (Tr. 1193).

review of the 1st trimester schedule for the 2022-2023 school year shows that Leshansky taught 23 theatre blocks each week as well as daily guided reading blocks ranging from 40 to 60 minutes.[46] (ALJ Ex. 1). For the 2nd and 3rd trimesters, Leshansky taught the same 23 theatre classes, but the morning guided reading blocks were reduced to a uniform 50 minutes/day. (GC Ex's. 132-133). In the first trimester of the 2023-2024 school year, Leshansky's theatre teaching blocks dipped to 19 and sank to 17 in each of the last two trimesters of the school year. (GC Ex's. 134-136).

Principal Jones testified that enrichment offerings have fluctuated between 4 and 6 per year during her time at KIPP Academy Elementary (music, theatre, science, dance, PE, and art). (Tr. 914). But exigent circumstances sometimes drive these decisions. Jones testified that at the beginning of the last school year (presumably referring to 2023-2024), 8 teachers quit and some of the 8 were classroom teachers.[47] Jones says it has been difficult to replace teachers, and her priority is making sure the core instructional blocks are covered. (Tr. 914, 916). Jones also testified that with only four enrichment teachers for the 2023-2024 school year, she had to reduce the number of special enrichment classes each class received to one/day.[48] Jones testified that if each class received two specials/day, and with only four enrichment teachers in the rotation, there would be no way to honor the lunch/prep guarantees built into the interim workday agreement. (Tr. 915-916).

Thus, on August 11, 2023, Jones emailed her specials teachers to inform them that their schedules would be modified during the 9:15am to 9:50am block to teach as follows:

Massey	Art	→	Co-teach Wheatley[49] to 3rd grade class
Kennedy	Dance	→	Co-teach Wheatley to 4th grade class
Leshansky	Theatre	→	Guided Reading for Kindergarten
Wilson	Science	→	Co-teach Eureka[50] to 4th grade class

Jones' email also informed these teachers about the expectations associated with these modified roles, including attendance at Tuesday content team meetings, collaboration with the classroom teacher, and receiving coaching and support from the grade team manager. (GC Ex. 38).

[46] Principal Jones testified that all of the teachers in the elementary school are considered reading teachers. In years past, this meant that specials teachers facilitated with guided reading. That block has transitioned into Literacy Acceleration Blocks (LABS), which provides small group instruction for literary acceleration. (Tr. 913).

[47] Leshansky testified that for the 2023-2024 school year, the art teacher, Ms. Massey, taught 4th grade due to a staffing issue, and Anissa Jones testified that she had to take one of her PE teachers and place her in a 1st grade classroom for the same reasons. (Tr. 70, 914).

[48] One class per grade received an extra enrichment block each trimester. For example, in the second trimester of the 2023-2024 school year, the 1st grade Binghamton University class enjoyed 6 specials blocks per week, while the other two 1st grade classes received five blocks. Jackson State (2nd grade), Columbia University (3rd grade), and Bates College (4th grade) also enjoyed 6 enrichment blocks per week. (GC Ex. 135).

[49] Wheatley is the English/Language Arts (ELA) curriculum used by the homeroom teachers. (Tr. 70).

[50] Eureka is the math curriculum used by homeroom teachers. (Tr. 71).

In her testimony, Jones described her August 11, 2023, email as a "proposal" that never went anywhere. Jones believed that since students were only going to receive enrichment instruction 1 time/day in the 2023-2024 school year, the specials teachers had more time in their schedules to assume these new duties. But Jones said that the specials teachers told her that the proposed changes were not sustainable or feasible for them and Jones dropped the idea. (Tr. 918-920).

Counsel for the Acting General Counsel also alleges that the Employer, as of August 2023, assigned specials teachers to increased recess and lunch duties. A review of the specials teachers' schedules for the 1st trimester in 2022-2023 reveals that the specials teachers' lunch coverage duties were not uniform. For example, Leshansky had 50 minutes of lunch duty on Mondays, Tuesdays, and Fridays, with 55 minutes of lunch duty on Wednesdays, and 25 minutes on Thursdays. (ALJ Ex. 1). The dance teacher had 50 minutes of lunch duty on Tuesdays, Thursdays, and Fridays, with 80 minutes on Wednesdays, and 25 minutes on Mondays. And the music teacher had 50 minutes of lunch duty on Mondays and Thursdays, 25 minutes on Tuesdays and Fridays, and no lunch duty on Wednesdays.

But when the new workday schedule went into effect for the 2nd trimester, theatre, art, and music teachers saw their lunch duties disappear, and dance and science teachers saw their lunch duties dramatically reduced. (GC Ex. 132). These schedules remained the same for the 3rd trimester of the 2022-2023 school year.[51] (GC Ex. 133).

For the 1st trimester of the 2023-2024 school year, lunch and recess duties returned for three of the four specials teachers. To this end, the theatre, dance, and music teachers each had 50 minutes of lunch and recess coverage per day, but the science teacher had no lunch or recess responsibilities. (GC Ex. 134). These schedules did not change for the last two trimesters of the academic year.[52] (GC Exs. 135 and 136).

Comparison of Instructional Minutes for Homeroom Teachers for School Years 2022-2023 and 2023-2024

Counsel for the Acting General Counsel's Complaint Paragraph 13(b)(i) alleges that on or about August 3, 2023, the Employer unilaterally increased daily instructional time for homeroom teachers by up to 45 minutes. The following table summarizes the change in

[51] There was no testimony explaining why specials teachers had their lunch and recess duties significantly reduced midway through the school year.

[52] An extra recess block was added to some classes' daily schedules during the 2nd trimester of the 2023-2024 school year, ostensibly to compensate for the loss of a formal physical education class. For example, all kindergarteners enjoyed a 35-minute recess block from 2:10pm to 2:45pm on Thursdays. First graders received an extra 25-minutes of recess from 10:25am to 10:50am every Friday while 3rd graders in the Fayetteville State and UCLA cohorts enjoyed an extra 30-minutes of recess from 1:30pm to 2:00pm on Fridays. All 4th graders received 25-minutes of extra recess from 2:25pm to 2:50pm on Fridays. (GC Ex. 135). There was no specific record testimony regarding which teachers supervised the extra recess periods, but a review of the master schedules shows that the dance teacher had a prep period during the Thursday 2:10pm to 2:45pm recess block and the Friday 1:30pm to 2:00pm recess block, the music teacher had a prep period during the Friday 10:25am to 10:50am recess block, and the theatre teacher had a prep period during the 2:25pm to 2:50pm Friday recess block. (GC Ex. 135). Even if these teachers covered these extra recess sessions, these teachers still received their lunch and prep periods guaranteed under the parties' interim workday agreement.

instructional minutes as culled from the master schedules in the record as ALJ 1 and GC Exhibits 132-136[53]:

Kindergarten

2022-2023 T1	22-23 T2	22-23 T3	2023-2024 T1	23-24 T2	23-24 T3
1,440	**1,180**	**1,205**	**1,330**	**1,290**[54]	**1,290**

1st Grade

2022-2023 T1	22-23 T2	22-23 T3	2023-2024 T1	23-24 T2	23-24 T3
1,455	**1,205**	**1,205**	**1,425**	**1,400**[55] **1,355**	**1,395**

2nd Grade

2022-2023 T1	22-23 T2	22-23 T3	2023-2024 T1	23-24 T2	23-24 T3
1,425	**1,230**	**1,230**	**1,270 (TSU)**[56]	**1,325 (TSU)**	**1,325 (TSU)**
			1,255 (JSU)	**1,260 (JSU)**	**1,255 (JSU)**
			1,305(NCAT)[57]	**1,305(NCAT)**	**1,305(NCAT)**

3rd Grade

2022-2023 T1	22-23 T2	22-23 T3	2023-2024 T1	23-24 T2	23-24 T3
1,445	**1,210**	**1,210**	**1,400 (COL)**	**1,360 (COL)**	**1,370 (COL)**
			1,400 (FAY)	**1,370 (FAY)**	**1,370 (FAY)**
			1,355 (UCLA)	**1,370(UCLA)**	**1,370(UCLA)**

4th Grade

2022-2023 T1	22-23 T2	22-23 T3	2023-2024 T1	23-24 T2	23-24 T3
1,385	**1,205**	**1,205**	**1,335 (Bates)**	**1,310 (Bates)**	**1,305 (Bates)**
			1,350 (UCF)	**1,350 (UCF)**	**1,345 (UCF)**
			1,330 (CalT)	**1,325 (CalT)**	**1,345 (CalT)**

[53] My numbers are similar, but not identical, to the chart supplied by the Charging Party on pages 99 and 100 of its post-hearing briefs.

[54] In the 3rd trimester, a "Fun Friday time" block ranging from 20-35 minutes was added to every class's schedule. There was no extra recess block during the 3rd trimester. (GC Ex. 136).

[55] There are two different versions of the 1st grade master schedule for the 2nd trimester of 2023-2024.

[56] Each of the three classes per grade takes on the name of a college or university. For example, the 2nd grade classes are named Tennessee State University, Jackson State University, and North Carolina A&T.

[57] Instructional minutes are not standard across the grade because JSU has an extra dance block, TSU has an extra theatre block, and NC A&T has an extra 15-minute block for SEL (socio-emotional learning). (GC Ex. 134).

Analysis

Complaint Paragraph 9(a) – The Employer's November 28, 2022 Email to KIPP NYC Staffers Violated Section 8(a)(1) of the Act Because the Employer's Intemperate Words Regarding the Union Were Coupled with Threats to Withhold Resources from KIPP Academy

Section 8(a)(1) of the National Labor Relations Act makes it an unfair labor practice for employers to "interfere with, restrain, or coerce employees in the exercise of the rights guaranteed by the Act." 29 U.S.C. §158. However, under Section 8(c), "the expressing of any views, argument, or opinion…shall not constitute or be evidence of an unfair labor practice…if such expression contains no threat of reprisal or force or promise of benefit." *Id.* Consistent with Section 8(c), neither "words of disparagement," nor false and misleading statements, nor "unfair" or "nasty" statements violate the Act absent evidence of a threat or promise. *Nexstar Broadcasting, Inc., d/b/a KOIN-TV,* 371 NLRB No. 118, slip op. at fn. 3 (2022); *North Star Steel Co.,* 347 NLRB 1364, 1367 fn. 13 (2006); *Sears, Roebuck and Co.,* 305 NLRB 193, 193 (1991) ("Words of disparagement alone concerning a union or its officials are insufficient for finding a violation of Section 8(a)(1)"); See also *ExxonMobil Research & Engineering Co., Inc.,* 372 NLRB No. 138, slip op. at 13 (2023). The employer's freedom under Section 8(c) to disparage, criticize, or denigrate the union stops when the comments threaten employees or otherwise impinge upon Section 7 rights. *Children's Center for Behavioral Development,* 347 NLRB 35 (2006).

On November 28, 2022, the Employer was still reeling from Miles Trager's "not a minute more" declaration concerning arrival and dismissal coverage under the interim workday agreement. Alicia Johnson testified that she was very frustrated by the Union's intransigence and Ray Pascucci testified that the Employer believed that the Union had stabbed them in the back. Further annoyed by the Union bargaining committee attaching a copy of the workday agreement to an email sent to all of KIPP NYC, the Employer decided to play offense. Johnson and Jim Manly emailed all Regional PD attendees lamenting the Union's influence on the Employer's mission and declaring that the Employer cannot grow or get better with the UFT involved. If the Employer only insulted the Union, there would be no violation of the Act. But the Employer took it one step further – it specifically linked the Union's presence to potential negative consequences for KIPP Academy employees – restructuring the workday to eliminate a prep period and refusing to extend "future initiatives, opportunities, and resources" to KIPP Academy. Such threats of reprisals place the Employer's derogatory comments about the Union beyond the safe haven of Section 8(c). Thus, I find the Employer's intemperate and disparaging remarks about the Union in its November 28th email violate Section 8(a)(1) of the Act.[58]

[58] Although the Employer did not send the November 28, 2022, email to bargaining unit employees, Fatima Wilson testified that the message was forwarded to her, and she and the bargaining committee, who were bargaining unit employees, drafted the reply that was forwarded to KIPP Academy staffers and the rest of KIPP NYC. Board law permits a finding of a denigration violation even if the original message was not directed to the bargaining unit represented by the union. See *Regency House of Wallingford, Inc.,* 356 NLRB 563, 567 (2011).

Complaint Paragraph 9(b) – The Employer's November 28, 2022 Email Impliedly Threatened Employees with a Loss of Benefits in Violation of Section 8(a)(1) of the Act

In evaluating an allegedly coercive statement about the consequences of unionization, the Board looks at whether an employer's statements are "carefully phrased on the basis of objective fact to convey an employer's belief as to demonstrably probable consequences beyond its control." *Starbucks Corp.*, 374 NLRB No. 9, slip op. at 3 (2024), quoting *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 618 (1969). Framing a reprisal against employees for exercising their Section 7 rights in voting for the Union violates Section 8(a)(1) of the Act. *Starbucks Corp.*, 374 NLRB No. 9, slip op. at 3 (2024); *Somerset Welding & Steel,* 314 NLRB 829, 832 (1994).

In this case, the Employer's November 28, 2022, email essentially blamed the Union for the loss of instructional time under the workday agreement and accused the Union of limiting the freedom of teachers who wanted to make a different choice. While the Employer asserted that it would work with the Union to try to make up for this lost instructional time, the Employer boldly asserted that the lack of an agreement would potentially result in a reduction of prep periods. The Employer, however, provided no objective basis justifying such a dramatic alteration of working conditions. Similarly, the Employer remarked that "many future initiatives, opportunities and improvements under consideration for the rest of KIPP NYC will not and cannot be extended to include KIPP Academy in similar fashion and timing." This broad proclamation was not couched in objective fact and strikingly linked KIPP Academy employees' selection of the Union as their bargaining representative with the potential consequences outlined above. It also delivered a message to non-Union represented KIPP NYC staffers that if they select the Union as their bargaining representative, similar consequences will befall them. Such a reprisal for exercising Section 7 rights violates Section 8(a)(1) of the Act.

Complaint Paragraph 10(b) – The Employer Violated Section 8(a)(3) of the Act by Refusing to Invite KIPP Academy Teachers to Regional Professional Development Programs in Retaliation for Their Union Activities

Significant record evidence supports a finding that the Employer purposely excluded KIPP Academy teachers from Regional Professional Development programs in retaliation for unfurling the union banner at the September 2022 Regional PD session, and other protected union activities.

Under *Wright Line*, 251 NLRB 1083, 1089 (1980), the General Counsel bears the burden of making an initial showing sufficient to support the inference that employees' union or other protected concerted activity was a motivating factor for the employer's adverse employment action. This is commonly done by showing that the employees engaged in union or protected activity, the employer knew of that activity, and the employer harbored animus against that union or protected activity. See, e.g., *Consolidated Bus Transit*, 350 NLRB 1064, 1065-1066 (2007), enfd. 577 F.3d 467 (2d Cir. 2009). Once the General Counsel has satisfied their initial showing, the respondent can still prevail under *Wright Line* if it establishes that the same action would have taken place even in the absence of the union or protected activity. *Spike Enterprise, Inc.*, 373 NLRB No. 41 (2024).

KIPP Academy teachers always joined their KIPP NYC brethren at Regional professional development. As Alicia Johnson explained, all KIPP NYC schools are connected, and Regional

PD serves as a platform to discuss the rollout of different region-wide initiatives. (Tr. 764-765, 836-837). But at the September 2022 Regional PD, KIPP Academy teachers publicized their bargaining dispute with the Employer, unfurling a banner that read "We Deserve a Fair Contract." And this was the last time that KIPP Academy teachers were invited to Regional PD.

The record evidence confirms that Regional PD continues to be offered to all KIPP NYC educators except for those employed at KIPP Academy. And I find the Employer's explanations for the continued exclusion of KIPP Academy teachers to be contrived and unworthy of credit. To this end, Alicia Johnson testified that KIPP Academy teachers did not attend KIPP NYC's summer Regional PD, which was offered from August 14-18, 2023, because "at this point, KIPP Academy was on a different calendar so they wouldn't have been participating in this." (Tr. 800). In the next breath, Johnson offered a different, yet equally incredible, explanation. Johnson testified that the students at KIPP Academy came back to school earlier than other KIPP NYC schools so that they would have enough instructional time. (Tr. 801). But the KIPP Academy school calendar for 2023-2024 makes clear that the first day for students was August 21, the week after Regional PD. And when asked why KIPP Academy teachers did not attend a Regional PD program on March 4, 2024, Johnson said that school leadership wanted to do their professional development separately. (Tr. 805). Yet KIPP Academy Elementary School Principal Anissa Jones specifically testified that she did not decide to keep PD in-house that day – that those decisions came from KIPP NYC Chief of Schools Natalie Webb. Thus, I reject Johnson's shifting explanations and tortured logic to justify the continued exclusion of KIPP Academy teachers from Regional professional development.[59]

The connection between KIPP Academy teachers' union activities and their exclusion from Regional PD is unmistakable. By unfurling their banner at Regional PD, KIPP Academy teachers shared their union activism with their non-union colleagues. Antoine Lewis told Fatima Wilson in April 2024 that KIPP NYC was fearful of the Union getting a contract at KIPP Academy because that would open the doors to other schools in the region getting a contract. And since Regional PDs were the opportunities for the Union-represented KIPP Academy teachers to connect in-person with their non-Union brethren, excluding the KIPP Academy teachers from Regional PD going forward could alleviate much of KIPP NYC's fear. But the unfurling of the banner wasn't the only union activity that incurred the Employer's ire. To this end, Fatima Wilson and the Union bargaining committee emailed the entire KIPP NYC network to let them know that KIPP Academy teachers had reached agreement with the Employer on an interim workday agreement, and Wilson attached the actual agreement for good measure. With the Employer frustrated, reeling, and feeling like the Union stabbed them in the back over the workday agreement, excluding KIPP Academy staffers from Regional PDs allowed KIPP NYC to counterprogram any Union messaging without real-time pushback.

[59] While I generally found Anissa Jones to be a very credible witness, Jones' testimony preceding her admission that Natalie Webb ordered the exclusion of KIPP Academy teachers from Regional PD cannot be credited. In this regard, I asked Jones why KIPP Academy teachers were no longer going to Regional PD. She stated that KIPP Academy had more in-school PD because its program was different than some of the other schools in the region and there were a lot of nuances to her lessons to her staff versus what other schools were teaching. (Tr. 930). In listening to Jones' answers and observing her body language, it appeared that Jones was struggling to tow the company line. The conviction so apparent in other areas of her testimony dissipated here, leaving Jones unable to forthrightly answer my simple question. Then Jones admitted that she was "not at the table" when Natalie Webb made the decision to exclude her teachers from Region PD and she was simply acting as the messenger.

The Employer's exclusion of KIPP Academy staffers from Regional PD is especially galling given the importance the Employer has ascribed to professional development in its contract negotiations. In this regard, Ray Pascucci testified that KIPP "works hard to provide really high-quality PD" and Alicia Johnson told Academy educators in an October 2022 email that "we believe that the deep and focused professional development we provide our staff is important and core to our mission." (GC Ex. 25; Tr. 1134). Alicia Johnson also testified that KIPP is obsessive about getting feedback from its staff on everything, including professional development, and KIPP NYC is constantly striving to find a better balance in days and subject matter. (Tr. 743-744). This begs the question – if summer Regional PD is well regarded, and every school in the KIPP NYC network participates and benefits from this Regional PD, why is KIPP Academy excluded? If Regional PD had little to no value, KIPP NYC would not offer it – and all PD would be conducted in-house. And if Regional PD was expendable, other schools would not participate. But only KIPP Academy is excluded. The only school whose staff is represented by a union. And the exclusion of KIPP Academy began after the unfurling of the Union banner. There is no logical or truthful explanation for the Employer's actions here other than it is punishing KIPP Academy employees for their union activities and striving to keep the union and non-union sides apart. Based on the above, the Acting General Counsel has established the requisite activity, knowledge, and animus to satisfy the GC's prima facie case, and there is ample evidence supporting a finding that the employees' union and protected, concerted activities were the motivating factor for Respondent's exclusion of these employees from future regional professional development. Because the Respondent has failed to establish that it would have taken the same action in the absence of the employees' protected activities, I find that the Respondent has violated Section 8(a)(3) of the Act as alleged in complaint paragraph 10(b).[60]

Complaint Paragraph 10(c) – Respondent's Conversion of Two Days from Professional Development to Instructional Days Did Not Violate Section 8(a)(5) of the Act Because This Action Did Not Constitute a Material, Substantial, or Significant Change to Bargaining Unit Employees' Terms and Conditions of Employment

Section 8(a)(5) of the Act requires an employer to provide its employees' representative with notice and an opportunity to bargain before instituting changes in any matter that constitutes a mandatory subject of bargaining, such as wages, hours, and other terms and conditions of employment. *NLRB v. Katz*, 369 U.S. 736 (1962). A unilateral change regarding a mandatory subject of bargaining violates Section 8(a)(5) only if the change is a "material, substantial, and significant one." *Berkshire Nursing Home, LLC*, 345 NLRB 220 (2005); *Crittendon Hospital*, 342 NLRB 686, 686 (2004). The mere fact that an employee is disadvantaged by the change, although perhaps relevant to the test, is not by itself sufficient to satisfy the test. *Berkshire Nursing Home, LLC*, 345 NLRB at 221.

The Employer's switch from two professional development days to instructional days had minimal impact on elementary school employees' terms and conditions of employment. In this regard, their work hours and pay did not change, nor did their commute time or parking

[60] Having found that the Employer's exclusion of the KIPP Academy bargaining unit from regional professional development programs violates Section 8(a)(3) of the Act, based on the remedy for this violation, it is unnecessary, and I therefore decline, to reach the Acting General Counsel's related allegation in Complaint Paragraph 10(b) that the Employer violated Section 8(a)(5) of the Act by the same conduct. See *Napleton Cadillac of Libertyville*, 367 NLRB No. 6, slip op. at 1 fn. 2 (2018).

expenses. They were planning to be in the building for a full day of professional development and instead, they were in the building for a full day of instruction. The temporary inconvenience suffered by the unit employees was the performance of their regular work duties on two days originally reserved for PD. Perhaps the mental approach to a professional development day differs from the need to be on your game in front of a classroom of 30 children. But the Union and Acting General Counsel do not suggest there is a bargaining obligation when the script is switched – and regular instructional days are substituted for winter and spring concerts, or field trips. Based on the above, I recommend dismissal of complaint paragraph 10(c) because the switch from professional development to instructional days did not constitute a material, substantial, or significant change to employees' terms and conditions of employment.

Complaint Paragraph 10(c) – The Employer Did Not Violate Section 8(a)(3) of the Act Because There is Insufficient Evidence of Animus Motivating the Employer's Decision to Convert Certain Professional Development Days to Instructional Days

In my analysis regarding paragraph 10(b) of the Amended Consolidated Complaint, I noted the Employer's displeasure with unit employees unfurling the union banner at the September 2022 regional professional development day, and its desire to keep its unionized employees away from non-unionized educators drove the Employer's decision to permanently exclude KIPP Academy educators from regional professional development. But I do not believe that this animus was a motivating factor in the Employer's decision to convert certain professional development days to regular instruction days. Therefore, the Acting General Counsel has failed to establish a violation of Section 8(a)(3).

On page 11 of its post-hearing brief, the Employer acknowledges that the failure to explicitly incorporate elementary school arrival and dismissal protocols into the workday agreement was an oversight on KIPP Academy's part. The Employer genuinely believed that this oversight would decrease the amount of daily instruction available to KIPP Academy Elementary students. It is through this lens that Pascucci sent his November 14, 2022, email to the Union proposing two possible resolutions to the problem – only one of which involved the conversion of PD days to instruction days. In her November 15 reply, Orianna Vigliotti rejected both options, but indicated that the Union was open to engaging in bargaining over this subject. Pascucci quickly proposed bargaining for any of the next three days. Although the week-long Thanksgiving recess had not yet begun, the Union inexplicably rejected the Employer's bargaining overture, indicating that it was not available to bargain until the end of November.

Perhaps in delaying bargaining, the Union was trying to parlay the Employer's desperation into leverage – as evidenced in the Union's December 2022 proposal linking agreement on a revised workday policy to the Union's proposal for final and binding arbitration. But the focus for my 8(a)(3) analysis is what motivated the Employer to convert certain professional development days into instructional days. And my review of the evidence and observation of the witnesses' demeanor leads me to believe that the motivating factor for the Employer's action here stemmed from a desire to maximize student instruction time and not from the union animus that permeated the Employer's decision to exclude KIPP Academy teachers from regional professional development. Therefore, I recommend dismissing the 8(a)(3) allegation related to paragraph 10(c) of the Amended Consolidated Complaint.[61]

[61] For the same reasons, I also recommend dismissal of the 8(a)(3) allegation related to paragraph 10(d) of the Amended Consolidated Complaint.

Complaint Paragraph 10(d) – There is Insufficient Record Evidence Demonstrating That Changing June 22, 2023 to a Full Day of Instruction and June 23, 2023 to a Half-Day of Instruction Constituted a Substantial, Material, or Significant Change to KIPP Academy Elementary School Employees' Terms and Conditions of Employment

Counsel for the Acting General Counsel asserts that by changing June 22nd from a half day of instruction to a full day of instruction, and by adding a half-day of instruction on June 23rd, the Employer has engaged in an unlawful unilateral change. I disagree. To this end, the only record evidence addressing this allegation is Kerry Mullins' February 7, 2023, email to Miles Trager announcing this change, and the 2022-2023 KIPP Academy school calendar. The school calendar indicates that June 22nd was the last day for students and June 23rd was the last day for staff. Thus, KIPP Academy teachers were originally scheduled to be at the building and working on June 23rd – whether the students were in the building or not. And there is no indication in the record that teachers were originally scheduled to only work a half day on June 22nd after the dismissal of their students. Thus, there is no record evidence that the teachers' hours, wages, or other relevant terms and conditions of employment were modified by Mullins' directive reallocating learning time to June 22 and 23. Consequently, I recommend dismissal of complaint paragraph 10(d) due to lack of evidence of a substantial, material, or significant change to unit employees' terms and conditions of employment.

Complaint Paragraph 11(a) – The Employer Engaged in Unlawful Direct Dealing When Principal Anissa Jones Shared an April 2022 Proposal with the Bargaining Unit to the Exclusion of the Union

The Act "requires an employer to meet and bargain exclusively with the bargaining representative of its employees," and an employer "who deals directly with its unionized employees" violates Section 8(a)(5) of the Act. *Southern Ocean Medical Center,* 371 NLRB No. 147, slip op. at 3 (2022), quoting *Armored Transport, Inc.,* 339 NLRB 374, 376 (2003). "Direct dealing will be found where the employer has chosen 'to deal with the Union through the employees, rather than with the employees through the Union.'" *Armored Transport, Inc.,* 339 NLRB at 376, quoting *NLRB v. General Electric Co.,* 418 F.2d 736, 759 (2nd Cir. 1969).

The Board applies the following three-factor test to determine if unlawful direct dealing has occurred: 1) an employer communicates directly with union-represented employees; 2) the discussion was for the purpose of establishing or changing wages, hours, and terms and conditions of employment or undercutting the union's role in bargaining; and 3) such communication was made to the exclusion of the union. *Permanente Medical Group,* 332 NLRB 1143, 1144 (2000).

On April 8, 2022, Principal Anissa Jones convened a Zoom huddle for KIPP Academy Elementary School staffers. During this online meeting, Jones displayed a document called a "School Design Proposal," which envisioned removing the Wednesday half-day, changing school hours for staff, and reducing the instructional day to 7 hours and 30 minutes. Jones testified that the "proposal" was an improvement in employees' working conditions and during her presentation, she relayed to her staff that the school day would potentially be shorter and that Wednesday half-days would no longer exist. (Tr. 898, 928). In her testimony, Jones denied that she was making a "bargaining proposal" to the unit. Wordsmithing aside, the record evidence is clear that Jones communicated directly with union-represented employees and the sole purpose

of this discussion was to share information about "proposals" to change employees' work hours and other terms and conditions of employment. Since no Union officials were invited to this meeting nor were they given a heads up about the contents of Jones' slideshow, the third factor of the *Permanente* test has been satisfied. And because Jones' Zoom huddle predated the parties' initial bargaining proposals regarding workday hours by about two months, the record evidence establishes a direct dealing violation.

Complaint Paragraph 11(b) – The Employer Engaged in Unlawful Direct Dealing When KIPP Academy Elementary School Principal Anissa Jones Solicited Unit Employees to Change Their Work Hours Shortly After the Union and Employer Reached Agreement on a New Workday Schedule

The Union and the Employer bargained over changes to employees' workday for almost five months prior to reaching agreement on November 3, 2022. But just six days later, KIPP Academy Elementary School Principal Anissa Jones, after sensing that negotiators failed to account for arrival and dismissal times in their construct of her teachers' new workday, took her pleas for assistance directly to the bargaining unit. Jones testified that she asked for volunteers amongst her staff to cover the 10-15 minutes before teachers' 7:45am start time and 10-15 minutes after their end time of 3:15pm.

The *Permanente* factors make clear that a direct dealing violation has been established here. To this end, Jones communicated directly with bargaining unit employees on November 9th, the sole purpose of her communication was to convince unit employees to change their recently negotiated working hours, and Jones did not share her proposal with the Union prior to this November 9th meeting. My finding of a violation here is not predicated on a rejection of Jones' testimony. In fact, I found Jones to be a genuine, knowledgeable, and eminently credible witness. And I sympathize with her plight – due to the Employer's bargaining oversight, she faced the unsavory prospect of shepherding over four hundred young children into and out of the building without her regular flotilla of adults standing by to direct and safeguard these students. But my sympathy does not alter the undisputed facts here. The parties collectively bargained an interim agreement that spelled out employees' work hours, Jones realized the Employer had a significant problem, but initially chose to bypass the Union and directly solicited unit employees to modify their terms and conditions of employment. The Employer, however, was required to take its concerns directly to the Union, the exclusive collective-bargaining representative of the unit employees. The Employer did eventually reach out to the Union to negotiate modifications to the newly christened workday agreement – but it first did so five days after Jones' direct entreaty to unit employees. Based on the above, I find that Counsel for the Acting General Counsel has established a violation of Section 8(a)(5) of the Act.

Complaint Paragraphs 13(a)(ii) and (iii) – KIPP Academy Elementary School Violated Section 8(a)(5) of the Act by Unilaterally Adding Four Working Days to the 2023-2024 School Calendar

Counsel for the General Counsel asserts that KIPP Academy Elementary School was not privileged to unilaterally add four working days (6 instructional days) to the 2023-2024 school year calendar. For the following reasons, I agree that the Employer violated Section 8(a)(5) of the Act.

In *NLRB v. Katz,* 369 U.S. 736, 746 (1962), the Supreme Court held that an employer cannot unilaterally change conditions of employment during the course of negotiations with a union; if the company decides to alter a preexisting practice, it must give the union an opportunity to bargain over the change. Changes in terms and conditions of employment that are "informed by a large measure of discretion" cannot be unilaterally implemented even if they might be characterized as consistent with past practice. *Id.* Under *Katz,* a past practice is "long-standing" only if it has been regular and frequent. *Wendt Corp.,* 372 NLRB No. 135, slip op. at 4 (2023). A past practice must occur with such regularity and frequency that employees could reasonably expect the 'practice' to continue or reoccur on a regular and consistent basis." *Sunoco, Inc.,* 349 NLRB 240, 244 (2007). Employers may act unilaterally pursuant to an established practice only if the changes do not involve the exercise of significant managerial discretion. *Wendt Corp.,* 372 NLRB at slip op. 4.

The record evidence concerning this allegation is flimsy, at best. The Union was certified on May 3, 2021, but neither the 2020-2021 nor the 2021-2022 school year calendars were placed into evidence. Thus, we are missing a baseline for examining the alleged unilateral changes.

Ray Pascucci testified that KIPP Academy's charter requires a minimum of 179 instructional days, Alicia Johnson testified that New York State mandates 180 days of instruction, and that year-to-year, KIPP Academy's schedule ranges from 180 to 184 instructional days. (Tr. 717, 1129-1130). Johnson testified that putting a school year calendar together requires looking at where holidays fall, trying to align with the DOE schedule, and setting the length of breaks (e.g. 2-week break in December) based on staff feedback. (Tr. 718-719).

The General Counsel's evidence was no more detailed. When asked if the number of school days changed year to year, Jeffrey Leshansky testified that he couldn't recall one way or the other. (Tr. 88). Thus, the General Counsel is primarily relying on the two calendars in evidence, for the 2022-2023 and 2023-2024 school years, to establish that the Employer increased instructional days from 180 in 2022-2023 to 186 in the 2023-2024 school year. (GC Ex. 37 and 67).

In reviewing the transcripts, documentary evidence, and caselaw, my initial thought was that the construction of the school calendar involved limited managerial discretion. To this end, each year the Employer would see how the holidays lined up (e.g. Rosh Hashanah fell on a weekday in September 2022, but fell on a weekend in the Fall of 2023), and construct a calendar with roughly the same opening and ending dates and only a slight vacillation in instructional days year-to-year. This annual exercise would privilege the Employer to act unilaterally while not running afoul of *Katz* and *Wendt.*[62]

But my review of the Employer's post-hearing brief convinces me that the increase in instructional days in the 2023-2024 school year was of a different kind than in years past. On pages 42-43 of its post-hearing brief, the Employer acknowledged that it altered the 2023-2024 school calendar to begin instruction five days earlier than the previous year and to add four additional instructional days to compensate for the missed instructional time following the

[62] If Rosh Hashanah, Yom Kippur, and Eid-al-Fitr all fell on a weekend in the calendar year when the Union was certified, I can't imagine that adherence to the status quo under *Wendt* would deny the Employer the flexibility to give these days off as holidays if they fell during the week in future school years (before the parties reached agreement on a first contract).

adoption of the interim workday schedule. This decision required a degree of managerial discretion wholly unrelated to just looking at a calendar to see where holidays fall each year, yielding a total number of instructional days that went beyond the range that Alicia Johnson testified was the norm. Such a deviation from the Employer's past practice required bargaining with the Union. Based on the above, I recommend finding that KIPP Academy Elementary School violated Section 8(a)(5) of the Act as alleged in complaint paragraphs 13(a)(ii) and (iii).[63]

Complaint Paragraph 13(a)(iv) – The Employer Did Not Violate the Act in Its Allocation of Professional Development Days for the 2023-2024 School Year

In its post-hearing brief, Counsel for the Acting General Counsel asserts that the Employer reduced by two the number of professional development days slated for the 2023-2024 school year, and that this unilateral action violated Section 8(a)(5) of the Act. I disagree. In this regard, the 2022-2023 school year calendar originally allocated 16 days of professional development (10 in August and 6 scattered throughout the remainder of the school year). But due to the workday skirmish, the Employer later converted the March 2023 and May 2023 professional development days to instructional days. Consequently, there were a total of 14 professional development days for the entire 2022-2023 school year. In my analysis for Complaint paragraph 11(c), I determined that the Employer had not violated Section 8(a)(5) of the Act by converting the two professional development days to instruction days. Thus, the revised number of professional development days for the 2022-2023 school year was exactly the same (14) as the number of professional development days set aside in the 2023-2024 school year. As such, no violation of the Act has been established, and I recommend dismissal of Complaint Paragraph 13(a)(iv).

Complaint Paragraph 13(b)(i) – The Employer Violated Section 8(a)(5) of the Act by Unilaterally Increasing Daily Class Instructional Time for KIPP Academy Elementary School Homeroom Teachers Without First Bargaining to Impasse with the Union

The very point of the Act and the union's certification is to interpose a legal obligation on the employer to bargain changes over terms and conditions of employment. *Wendt Corp.,* 372 NLRB No. 135, slip op. at 15 (2023). "The Act is undermined by the claim that the employer's unilateral changes made when the right to make unilateral changes was unlimited, privileges the exemption of that practice from bargaining once a union is certified." *Id.* Thus, the Board has consistently held that an employer's pre-union past practice of making unilateral changes cannot privilege the employer to continue to make such changes after employees select a union to represent them in collective bargaining with the employer. See *Amsterdam Printing & Litho Corp.,* 223 NLRB 370, 372 (1976). Furthermore, *Katz* permits unilateral conduct only when the employer has shown the conduct is consistent with a longstanding past practice and is not informed by a large measure of discretion. See *Eugene Iovine, Inc.*, 328 NLRB 294 (1999). Such a showing usually involves an annually recurring event over a significant period of years. See *E.I. DuPont De Nemours, Louisville Works,* 367 NLRB No. 12, slip op. at 2 (2018). By failing to specify the number of changes or their frequency, the employer failed to meet its burden of showing regularity and frequency. *Mission Foods,* 350 NLRB 336, 337 (2007); *Rural/Metro Medical Services,* 327 NLRB 49, 51 (1998). The party asserting the existence of a

[63] In its post-hearing brief, the Employer urges the Board to overturn *Wendt* and return to the unilateral change standard outlined in *Raytheon Corp*., 365 NLRB 1722 (2017). My responsibility is to apply extant law, which is *Wendt*. It is up to the Board to decide which standard to apply.

past practice bears the burden of proving that employees could reasonably expect the practice to reoccur on a consistent basis. See *Endurance Environmental Solutions, LLC*, 373 NLRB No. 141 (2024).

In this case, the record evidence contains master schedules for calendar years 2022-2023 and 2023-2024, but the Union was certified in May 2021. Thus, the record lacks the number of instructional minutes for homeroom teachers as of the status quo school year of 2020-2021, and there are no records showing the number of daily instructional minutes for homeroom teachers for the 2021-2022 school year. On page 44 of its post-hearing brief, the Respondent asserts that the 2023-2024 change in instructional minutes fits a long-established past practice of modifying schedules based on student needs and is of a similar kind and degree as past changes. There, however, is no specific record testimony or documentary evidence to support this claim. The glaring omission of the records needed to support a claim of regularity and frequency means that Respondent has failed to carry its burden to establish the existence of a past practice outside of *Katz's* bargaining requirement.

The record evidence from the trimester immediately preceding the implementation of the interim workday agreement (T1 from the 2022-2023 school year) shows kindergarten to 4th grade teachers logging weekly instructional minutes between 1,385 and 1,455. These numbers sank by roughly 200 minutes per week (about 40 minutes/day) after the new workday schedule was adopted. Thus, by the third trimester of 2022-2023, homeroom teachers logged weekly instructional minutes ranging from 1,205 to 1,230 minutes.[64]

The Acting General Counsel asserts that the relevant unilateral change began in August 2023 when the Employer adjusted homeroom teachers' schedules to increase weekly instructional minutes anywhere from 125 (kindergarten) to 220 (1st grade) minutes each week. This translates to roughly 25 to 54 extra instructional minutes per day, a number that clearly constitutes a substantial, material, and significant increase.[65] Since the Employer cannot show that this increase follows a pattern of regular and similar types of changes involving limited managerial discretion, the Employer's unilateral increase in daily instructional time violates Section 8(a)(5) of the Act.

Complaint Paragraph 13(b)(ii) – The Employer Did Not Violate Section 8(a)(5) of the Act by Reducing the Number of Specials Classes Taught by Specials Teachers

Before implementation of the interim workday agreement, theatre and other specials teachers taught roughly 23 specials blocks each week. With the shortening of the school day and the loss of two enrichment offerings in the 2023-2024 school year, the number of specials blocks per week dipped to between 17 and 19. For the following reasons, I do not believe that reduction constitutes an unlawful unilateral change. Principal Jones credibly testified that she could not

[64] The interim workday agreement addressed only the start and end times of each day as well as the minimum number and length of prep periods each day. With no specific reference to homeroom teachers' daily instructional minutes in the interim workday agreement, and no management rights language permitting the Employer discretion to make adjustments to these hours, the Union did not clearly and unmistakably waive its right to bargain over any unilateral changes to homeroom teachers' daily instructional time.

[65] The 2nd grade teacher in the Jackson State cohort had their weekly instructional minutes only rise by 25 (from 1,230 to 1,255). This 5 minute/day increase arguably does not satisfy the Board's requirement that the changes be substantial or significant.

engineer a schedule whereby students received 2 specials/day while honoring the prep and lunch guarantees contained in the interim workday agreement. Therefore, the number of specials offerings for each class dropped to one per day. This gave the specials teachers longer prep times than the minimum guarantees set forth in the interim workday agreement, and most specials teachers resumed the lunch/recess duties that they covered at the start of the 2022-2023 school year. These "changes" yielded the same work hours and rates of pay for specials teachers, longer prep times, and no evidence that the resumed lunch/recess duties impacted teachers' performance evaluations.[66] Therefore, I find that Counsel for the Acting General Counsel has failed to establish a violation of Section 8(a)(5) of the Act.

Complaint Paragraphs 13(b)(iii) and 13(c)(i and ii) – The Employer Did Not Violate the Act by Assigning Specials Teachers Increased Lunch and Recess Duties, but Violated Section 8(a)(5) by Informing Specials Teachers That They Would be Co-Teaching Additional Subjects

Absent an overall impasse, an employer is obligated to refrain from making unilateral changes to employees' terms and conditions of employment during negotiations for a collective-bargaining agreement. *Bottom Line Enterprises,* 302 NLRB 373, 374 (1991). To find an unlawful unilateral change, the Act requires that the change in question be substantial, significant, and material to employees' terms and conditions of employment.

At the start of the 2023-2024 school year, the theatre, dance, and music teachers learned that they would be covering lunch and recess more frequently than in the past, while the science teacher had her lunch and recess duties zeroed out.[67] This change did not impact teachers' pay, benefits, or guaranteed lunch and prep times. There is also no record evidence that these lunch/recess duties were referenced, either positively or negatively, in teachers' performance evaluations. Thus, the Acting General Counsel has failed to establish that the assignment of increased lunch and recess duties constituted a substantial, material, or significant change to the specials' teachers' terms and conditions of employment, and I recommend dismissal of Complaint Paragraph 13(b)(iii).[68] See *Berkshire Nursing Home, LLC,* 345 NLRB 220, 221 (2005) (The mere fact that an employee is "disadvantaged" by the change, although perhaps relevant to the test, is not alone sufficient to satisfy the test).

In contrast, the Employer's assignment of specials teachers to co-teach new classes and/or teach additional subjects does violate Section 8(a)(5) of the Act. In this regard, Principal Jones' August 2023 email informed the specials teachers that their new teaching assignments required attendance at Tuesday content team meetings, collaboration with the classroom teacher, and receiving coaching and support from the grade team manager. Given the increase in supervision and support, it is likely that the Employer will be evaluating specials teachers based on their performance in these new roles, roles for which they were not originally hired to teach. Since these evaluations play a large role in the Employer's decision whether to retain the teacher for the following school year, the assignment of specials teachers to co-teach new classes and/or teach additional subjects has a direct impact on these teachers' terms and conditions of

[66] The schedules in evidence show that specials teachers assisted with guided reading prior to the interim workday agreement as well as after the implementation of this agreement.

[67] Neither the Union nor the General Counsel complained that the significant reduction in the science teacher's lunch and recess responsibilities constituted an unlawful unilateral change.

[68] The theatre, music, and dance teachers covered a similar amount of lunch and recess blocks in the 1st trimester of the 2022-2023 school year.

employment. Thus, having failed to bargain with the Union prior to effectuating these unilateral changes, the Employer has violated Section 8(a)(5) of the Act as alleged in Complaint Paragraphs 13(c)(i) and (ii).[69]

I note that the Employer failed to produce specific evidence showing that the permanent assignment of teachers to classes beyond their specialties was in accordance with an established past practice, and therefore, there is no evidence that these changes were of the kind or degree to any prior scheduling changes. See *PPG Industries Ohio, Inc.,* 372 NLRB No. 78, slip op. at 3 (2023).

Principal Jones compellingly testified that eight teachers resigned at the start of the previous school year, leaving her to triage the situation. Consequently, the physical education teacher transitioned to teach first grade. The Act recognizes a limited exception to the obligation to refrain from unilateral changes when "economic exigencies compel prompt action." *RBE Electronics of S.D., Inc.,* 320 NLRB 80, 81 (1995). To be excused from its initial bargaining obligation, the employer must show "a need that the particular action proposed be implemented promptly, the exigency was caused by external events, and was beyond the employer's control, or was not reasonably foreseeable."[70] *Id.* at 82. In these circumstances, an employer will "satisfy its statutory obligation by providing the union with adequate notice and an opportunity to bargain over the changes it proposes to respond to the exigency and by bargaining to an impasse over the particular matter." *Id.*

An argument can certainly be made that losing eight teachers without notice on the eve of a school year constitutes an exigent situation. This crisis was caused by external events, was beyond the Employer's control, and was not reasonably foreseeable. Thus, the Employer placing the PE teacher in the first-grade classroom where there would otherwise be no teacher, satisfies the Board's exigency standard. But although the Board may temporarily excuse a bargaining obligation at the time of the emergency, the Board has made clear that the Employer is under a continuing obligation to bargain over the effects of this decision. In this case, effects bargaining would certainly address how the PE teacher would be evaluated for teaching a subject that they had not taught before, coaching and mentorship, and extra compensation for performing this work. But no such effects bargaining took place here. Therefore, the Employer violated Section 8(a)(5) of the Act by assigning specials teachers to serve as co-teachers, substitute teachers, and to teach additional subjects as pled in Complaint Paragraphs 13(c)(i) and (ii).

[69] Even crediting Principal Jones' testimony that she never implemented the changes announced in the August 11th email, Board law permits a finding of a violation based on the announcement alone. *ABC Automotive Products Corp.*, 307 NLRB 248, 250 (1992). The Board explained that "the damage to the bargaining relationship had been accomplished simply by the message to the employees that the Respondent was taking it on itself to set this important term and condition of employment, thereby emphasizing to the employees that there is no necessity for a collective bargaining agent." *Id.* at 250, quoting *Famous-Barr Co. v. NLRB,* 326 U.S. 376, 384-386 (1945).

[70] Examples include Covid ravaging a nursing home – *Metro Man IV d/b/a Fountain Bleu Health and Rehab Center, Inc.,* 372 NLRB No. 37 (2022) – Hurricane Rita striking a commercial printing facility, *Seaport Printing & Ad Specialties, Inc., d/b/a Port Printing Ad and Specialties,* 351 NLRB 1269 (2007) – IT servers crashing at a business providing work/life training to developmentally disabled individuals. *Kankakee County Training Center for the Disabled, Inc.,* 366 NLRB No. 181 (2018).

Complaint Paragraph 14(a) – The Employer Did Not Engage in Unlawful Direct Dealing When Antoine Lewis Told Fatima Wilson That He Could Get the Employees Everything They Wanted If They Decertified from the Union

As noted above, the Board applies a three-factor test to determine if unlawful direct dealing has occurred. This test evaluates whether: 1) an employer communicates directly with union-represented employees; 2) the discussion was for the purpose of establishing or changing wages, hours, and terms and conditions of employment or undercutting the union's role in bargaining; and 3) such communication was made to the exclusion of the union. *Permanente Medical Group,* 332 NLRB 1143, 1144 (2000).

In our case, the Acting General Counsel alleges that Antoine Lewis's promise to Fatima Wilson to obtain benefits for unit employees in exchange for decertifying from the Union constituted unlawful direct dealing. I do not agree because the credited record testimony does not reflect that Lewis' conversations with Wilson were for the purpose of establishing or changing terms and conditions of employment. To this end, I have credited Wilson's uncontroverted and incredibly detailed accounting of her late April and early May 2024 conversations with Antoine Lewis. But although Lewis repeatedly promised to get employees everything they wanted; the record reflects that Lewis was essentially promising to maintain the status quo. Specifically, Wilson said that employees did not want to give up their job security and benefits. While Wilson testified that Lewis said that employees could keep their benefits if they followed his lead and decertified, no specific terms and conditions of employment were ever identified during these conversations as something Lewis could obtain for the employees beyond what they already enjoyed, and the record is bereft of specific details as to how Lewis' efforts would establish or change wages, hours, or other terms and conditions of employment.[71] Thus, I cannot conclude that the Employer engaged in unlawful direct dealing here.

Complaint Paragraph 14(b) – Antoine Lewis Impliedly Promised to Independently Secure Benefits for Employees in Exchange for Decertifying from the Union

Although Antoine Lewis' general promises to Fatima Wilson do not constitute unlawful direct dealing, I conclude that Lewis impliedly promised to secure benefits and other terms and conditions of employment in violation of Section 8(a)(1) of the Act. In this regard, an employer violates Section 8(a)(1) when it promises, either explicitly or impliedly, improved benefits contingent on employees giving up union representation. *Unifirst Corp.*, 346 NLRB 591, 593 (2006); *Bakersfield Memorial Hospital,* 315 NLRB 596, 600 (1994). And the Board has blessed a finding of an implied promise of improved benefits when the employer makes generic statements referencing managerial "power to do stuff," and things "would be better around here." *Bentonite Performance Minerals, LLC,* 355 NLRB 582 (2010), reaffirmed and incorporated by reference from 353 NLRB 668, fn. 2 (2008). These statements are similar in tone to Lewis' comments that he could get the employees everything that they wanted and all he had to do was go to the Board with his requests. Based on the above, Lewis' comments to Wilson were an enticement to give up her efforts on behalf of the Union in violation of Section 8(a)(1) of the Act. See *Grouse Mountain Associates II,* 333 NLRB 1322, 1325 (2001) (supervisor telling union

[71] Wilson initially commented about the lavish middle school trips that Lewis was able to secure for his own school, and Lewis then stated that he could get everything he wanted from the Board – but it was never specified what "everything" meant. Additionally, there is no record evidence that the parties bargained over the quantity or quality of school field trips during their three plus years of contract negotiations.

supporter "the union thing wasn't happening and you know, I can get these things for you," violated Section 8(a)(1) because nothing more than an inference of a promise of benefits to give up unionization efforts is required to find a violation).

Complaint Paragraph 14(c) – Antoine Lewis Threatened to Withhold Money, Resources, and Continued Employment from Bargaining Unit Employees Unless They Decertified from the Union

In his early May 2024 conversation with Fatima Wilson, Antoine Lewis asked if she had thought about his earlier offer to go to the KIPP Academy Board on behalf of the employees once they put the Union to sleep. Wilson told Lewis that she and the other employees needed more information. Lewis then said that time was running out and KIPP NYC wanted him to make changes quickly or else they would withdraw their money and resources from KIPP Academy. In the same breath, Lewis said that if KIPP NYC pulled their money and resources from KIPP Academy, KIPP Academy would have to get rid of its highest paid teachers to save money and stay afloat. Lewis said that he could try to save Wilson's job, and repeated that the only way for employees to get everything they wanted was to decertify from the Union and allow Lewis to serve as the employees' representative. By linking the threat of job losses and funding shortfalls to decertifying from the Union, Lewis' statements violated Section 8(a)(1) of the Act.

Complaint Paragraph 16 – KIPP Academy Bargained in Bad Faith in Violation of Section 8(a)(5) of the Act

Section 8(d) of the Act defines the duty to bargain collectively as "the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment…but such obligation does not compel either party to agree to a proposal or require the making of a concession." *Garden Ridge Management, Inc.,* 347 NLRB 131, 132 (2006). The duty to bargain in good faith under Section 8(d) of the Act requires the employer and the union to negotiate with a "sincere purpose to find a basis of agreement." *Atlanta Hilton & Tower,* 271 NLRB 1600, 1603 (1984), quoting *NLRB v. Herman Sausage Co.*, 275 F.2d 229, 231 (5th Cir. 1960). In determining whether a party has violated its statutory duty to bargain in good faith, the Board examines the totality of the party's conduct, both at and away from the bargaining table. From the context of an employer's total conduct, it must be decided whether the employer is engaging in hard but lawful bargaining to achieve a contract that it considers desirable or is unlawfully endeavoring to frustrate the possibility of arriving at any agreement. Although the Board does not evaluate whether particular proposals are acceptable or unacceptable, the Board will examine proposals when appropriate and consider whether, on the basis of objective factors, bargaining demands constitute evidence of bad-faith bargaining. *District Hospital Partners, L.P. d/b/a The George Washington University Hospital,* 373 NLRB No. 55, slip op. at 1-2 (2024); *Public Service Co. of Oklahoma (PSO),* 334 NLRB 487 (2001).

The statutory duty to bargain in good faith encompasses the entire bargaining process, from beginning to end (whether agreement or lawful impasse). *District Hospital Partners, L.P.,* 373 NLRB at slip op. 7. Additionally, a union cannot fairly be expected to bargain indefinitely while waiting for the employer to begin bargaining in good faith. *Id.* Furthermore, the Board should be especially sensitive to claims that bargaining for a first contract has not been in good faith. Thus, the fact that the bargaining is for a first contract, especially after a contentious election campaign, would be one of the circumstances to consider in evaluating the bona fides of

the bargaining. *APT Medical Transportation, Inc.*, 333 NLRB 760, fn. 4 (2001). In this same vein, negotiations for a first contract usually involve special problems, such as in the formulation of contract language, which are not present if a bargaining relationship has been established over a period of years and one or more contracts have been previously executed. *N.J. MacDonald & Sons, Inc.*, 115 NLRB 67, 71 (1965).

I rely on two specific actions to support my finding that the Employer bargained with no intent to reach an agreement – 1) the Employer's refusal to tender a management rights proposal for over three years despite signifying the need for one as the basis for fulfilling the Employer's mission; and 2) the Employer hinting at its willingness to offer final and binding arbitration as the last step of a negotiated grievance procedure, but refusing to do so more than two years after first communicating this concept. Coupled with the unbridled animus towards the Union revealed in Alicia Johnson's November 28, 2022 email, Antoine Lewis' frank assessment that the Employer would never agree to a contract, and Ray Pascucci's testimony that the Employer felt the Union had stabbed them in the back by refusing to work beyond the workday agreement's stated hours, the totality of the record evidence yields a finding of bad faith bargaining.

For Two and a Half Years, the Employer Teased Final and Binding Arbitration as the Last Step of a Negotiated Grievance Procedure, But Never Actually Made a Concrete Proposal Containing Final and Binding Arbitration

In the first few months of bargaining, the Union proposed a robust grievance procedure and just cause language. The Employer initially countered with a proposal that labeled unit employees "at-will," and on January 18, 2022, the Employer proposed a grievance procedure that ended with non-binding mediation.

Then on August 4, 2022, the Employer added the following note to the tail end of its grievance procedure proposal: "In the end KIPP expects to agree to arbitration but will not do so until we are assured that the other provisions in the contract allow the School to operate in accordance with our mission." (GC Ex. 65). Every Employer proposal over the next two years contained this same "expectation," but the Employer never offered final and binding arbitration at any point in negotiations.

At the parties' February 2, 2023, bargaining session, Miles Trager challenged Ray Pascucci's representation that the Employer intended to agree to arbitration. Trager asked what that meant in real terms – questioning Pascucci about the Employer's mission and how the proposed contract could align with the Employer's mission. Pascucci responded that the Employer was putting the concept of arbitration on hold to see what the rest of the contract looked like and to maintain flexibility to meet student needs. Trager then asked under what scenario the Employer would agree to arbitration and what was the point of not doing so now. Pascucci said that this was a big decision as both parties would be bound to a third-party decision maker.

Trager continued to press these same points at the parties' next bargaining session on February 28, 2023. The Employer's bargaining notes reflect that Trager asked what the Employer felt was necessary to keep in the contract to preserve KIPP's identity. The notes, however, do not reflect that Pascucci answered this question.

The Employer's obfuscation continued throughout 2023. At the parties' June 6, 2023, bargaining session, Trager asserted that the Union was prepared to make a counterproposal regarding just cause and the grievance procedure, saying "there is a possibility for us to get to an agreement if we had more candid conversations about what it would take to get there." (Resp. Ex. 32). Pascucci, however, just repeated the same company line in place for ten months – that the Employer was prepared to agree to arbitration in concept, but it wanted to outline the rest of the contract first.

Trager again pressed Pascucci for some clarity on the Employer's grievance procedure proposal at the parties' August 3, 2023, bargaining session. The Employer's bargaining notes indicate that Trager said it would be helpful for the Union to know whether the Employer would agree to arbitration, and Trager noted that, in his opinion, the Employer had not identified how the Union's proposals either aligned or didn't align with the Employer's mission. Pascucci replied that his client needed flexibility to respond to students' needs and specifically cited the need for a management rights clause to maintain this flexibility. But the Employer had not tendered a management rights clause proposal before August 3, 2023, and still has not tendered a management rights proposal to this day. Thus, as of August 3, 2023, the Employer laid out a marker impossible for the Union to meet – conditioning the offering of final and binding arbitration on a management rights clause that the Employer refuses to propose.

Seven months later, the Employer's position remained unchanged. At the parties' March 13, 2024, bargaining session, Trager asked the Employer why it would not agree to arbitration from the beginning. According to the Employer's notes, Pascucci said that the Employer was signaling its intent to agree to arbitration, but it wanted to be sure other issues were in place before the Employer "officially agreed" to arbitration. Pascucci then cited management's need for flexibility to adapt to the changing needs of students, and repeated that a strong management rights clause was central to the Employer's ability to fulfill its mission.

The Union's bargaining notes from this session were far more detailed than the Employer's, but the essence of Pascucci's representations remained the same. In this regard, in the Union's notes, Trager told Pascucci that the Employer said that it would agree to arbitration, but it wanted to be sure the contract is consistent with the Employer's mission. Trager said that the Union had almost all of its proposals on the table, and he wanted to know what the Employer was looking for. Trager specifically asked why the Employer couldn't just agree to arbitration at that moment. Pascucci said that before they get to a contract, they would need to close on other issues. He said that the Employer was signaling it would agree (to arbitration), but they needed to first close on management rights and evaluations, and they were not at a point in negotiations where the Employer was confident that it could agree to arbitration. Trager asked Pascucci what the Employer needed discretion on and Pascucci said the Employer needed, among other things, a strong management rights clause. Trager then observed that the Employer's "mission" appeared to be total discretion. (GC Ex. 105). To summarize, the Employer said it needed proposals that align with its mission before it agreed to arbitration. And the most mission-centric proposal identified was a strong management rights clause. Following this logic, if the Employer refuses to make a management rights proposal, the proposed contract cannot align with the Employer's mission, arbitration will never be offered, and no matter what the Union offers, the parties can never get to yes on a first contract. This reeks of bad faith.

Even the late movement the Employer made on just cause language is only an illusion of progress. To this end, after three years of bargaining, the Employer agreed to include just cause

language in the proposed CBA in October 2024. But by refusing to pair just cause language with final and binding arbitration, the Employer has retained full discretion over personnel decisions, thereby rendering the words "just cause" meaningless, as no third-party neutral is empowered to resolve disputes over alleged violations of the collective bargaining agreement.

To be clear, proposing non-binding mediation as the last step of a grievance procedure is not by itself evidence of bad-faith bargaining. And neither is the failure to propose just cause language. Similarly, it is not per se unlawful for an employer to propose a draconian management rights clause. Had the Employer here proposed non-binding mediation paired with a robust management rights clause and never hinted at agreeing to final and binding arbitration, I would find that this was lawful, hard bargaining. But the Employer never proposed a management rights clause and for over two years, teased final and binding arbitration as the end game so long as its amorphous flexibility and mission-based contract goals were satisfied. It is the ephemeral conditioning of final and binding arbitration on a management rights clause it knew it would never offer, that places the Employer's actions squarely in the realm of conduct purposely designed to frustrate agreement.

This begs the question as to why the Employer employed this strategy. The answer lies in the animus adduced at the hearing. In early November 2022, the Employer's communications regarding the Union struck an optimistic tone. In this regard, Jim Manly's November 3rd email heralding the workday agreement noted that the Employer "appreciated" the Union bargaining committee's willingness to separate the workday discussions from the school year discussions. Manly wrote that "it is our continued belief that we can create a collective bargaining agreement that both meets the needs of Academy teachers while maintaining the core tenets upon which KIPP Academy was built and continues to thrive."

This positivity faded as the Union parsed every word of the Employer's communications seeking to find a contradiction or ulterior motive. Such emails frustrated the Employer, but the Union's refusal to assist with arrival and dismissal duties at the dawn of the new workday agreement brought the Employer's frustrations to another level – feeling that the Union had stabbed them in the back.[72] Positivity gave way to outright disdain in the Employer's written communications regarding the Union. Thus, by the end of November 2022, Johnson and Manly bluntly stated that in an email to the entire KIPP NYC network, save for KIPP Academy staffers, that the way to grow and get better "is absolutely NOT through the UFT." (GC Ex. 21).

As to how this rancor translated to bargaining proposals, Antoine Lewis filled in the blanks. Lewis told Fatima Wilson that the Employer and KIPP NYC would never agree to a contract because the Employer was fearful of the domino effect of reaching a contract with the Union and then the Union extending these contractual gains to the other KIPP NYC schools. Wilson also testified that Lewis encouraged her to help decertify from the Union and end collective bargaining in exchange for the preservation of health insurance and retirement benefits, and other items from the employees' wish list. Thus, the Employer's dogged determination to rid itself of the Union contextualizes the Employer's intentional attempts to stymy progress at the bargaining table.

[72] The "stabbed in the back" comment came from Ray Pascucci's direct testimony and no such remark was made by the Employer's principals in the presence of unit employees. But the Board has interpreted accusations of employees being "backstabbers" as a characterization that all supporters of the union are disloyal and is an implied threat of unspecified reprisals. *Corliss Resources, Inc.,* 362 NLRB 195, 196 (2015); *Hialeah Hospital,* 343 NLRB 391, 391 (2004).

The Employer argues in its post-hearing brief that the most reliable evidence of the Wilson/Lewis conversations is the recording of the 4th conversation in the record as Resp. Exhibits 48 and 49. I disagree. I found Fatima Wilson to be a compellingly genuine witness whose recall of her conversations with Lewis left me with no doubt that these conversations occurred as described by Wilson. And the Employer provided no explanation for why Lewis was no longer employed by KIPP Academy nor did the Employer attempt to call Lewis as a witness or attempt to subpoena Lewis to appear. And even though Wilson did not record the first three conversations she testified about, this fact does not make her accounting of these conversations any less truthful. There is no evidentiary rule requiring a rank-and-file employee to record conversations with supervisors to confirm the veracity of their testimony. Plus, Wilson first perceived Lewis to be an empathetic ear interested in her robotics and science classes. And during the third conversation, Wilson was in the middle of teaching a class when Lewis appeared. Wilson recorded only their fourth and final conversation, which followed Lewis showing Wilson the email concerning the decertification petition. Based on the above, I adopt as uncontroverted fact Fatima Wilson's detailed, forthright trial testimony concerning her initial three conversations with Antoine Lewis.[73]

At the hearing, Ray Pascucci testified about the school's unwillingness to lay out a specific arbitration proposal containing final and binding arbitration language. Pascucci referenced his past bargaining experience with Miles Trager negotiating the Elm Community Charter School CBA, and said that from this experience, he knew that Trager wouldn't even entertain a management rights clause until the very end of negotiations when they were close to a final deal. Pascucci also said that no specific arbitration proposal containing final and binding arbitration was tendered because the parties were trying to TA as many other issues as possible and even attributed the lack of progress to the lack of written agendas ahead of each bargaining session.

While I found Pascucci to be a generally credible witness, I specifically reject this portion of his testimony. To this end, in three years of bargaining, the parties have only TA'ed seven articles, reaching agreement on only one article since July 2023. This glacial pace has yielded no agreements on economic items – something that the lack of written agendas is not responsible for. And since February 2023, Trager has repeatedly challenged the Employer to explain what contract articles it needs to maintain flexibility and fulfill its mission. As it asked for clarity from the Employer on these subjects, the Union tendered its entire economic proposal – putting

[73] I do agree with the Employer that Fatima Wilson's testimony regarding the funding source for KIPP Academy was misinformed and inaccurate. (Tr. 173, 210, Resp. post-hearing brief, page 25 fn. 9). But Wilson acknowledged on cross-examination that nobody from KIPP Academy provided her with this information and it was based on internet research conducted earlier in her teaching career. (Tr. 209-210). Wilson also wrongly asserted that Antoine Lewis emailing notice of the decertification petition to the bargaining unit contravened the NLRA. Wilson acknowledged on cross-examination that she was mistaken, revealing a witness more interested in candor than one rigidly adhering to a preconceived worldview – which in my mind further bolsters Wilson's testimony about the conversations and work experiences to which she has first-hand knowledge. As noted in earlier Board decisions, credibility determinations consider the witness' testimony in context, including, among other things, their demeanor, the weight of the respective evidence, established or admitted facts, inherent probabilities, and reasonable inferences drawn from the record as a whole. *Double D Construction Group, Inc.,* 339 NLRB 303, 305 (2003); *Daikichi Sushi,* 335 NLRB 622, 623 (2001). In making credibility resolutions, the trier of fact may believe some, but not all, of a witness's testimony. *Daikichi Sushi,* 335 NLRB at 622; *NLRB v. Universal Camera Corp.*, 179 F.2d 749 (2d Cir. 1950).

all of its cards on the table. Yet, the Employer never budged on arbitration or management rights. This inaction was purposely scripted to forestall any possibility of reaching an agreement on a first contract – just like Antoine Lewis described to Fatima Wilson.

Pascucci also cited his one previous time negotiating a contract with Miles Trager to justify failing to tender a management rights clause. The employer in the other negotiation was Elm Community Charter School, a school with a similar mission to the Employer's. (Tr. 1233). Yet Elm was able to reach agreement on a first contract with the Union that features annual wage increases, a robust management rights clause, just cause language, and final and binding arbitration.[74] (GC Ex. 160).

So why have two schools represented by the same negotiators carved such divergent paths. The answer stems from another of Antoine Lewis' insights. Elm is a standalone school that is not part of a larger charter network. (Tr. 1233). But Lewis spoke of the fear permeating through KIPP NYC over the prospect of KIPP Academy reaching a first contract. Lewis opined that KIPP NYC's fear was grounded in the possible domino effect of other KIPP NYC schools reaching out to the Union for representation and ultimately, the same types of contracts. Thus, the true source of the Employer's obfuscations and purposeful stalling is not the lack of written agendas, bargaining history with Trager, or the desire to wrap up other contract provisions first. The end game here was to tender proposals specifically designed to frustrate reaching a first contract.

I note that several factors militate against a finding of bad faith bargaining here. First, the Employer proposed keeping insurance and retirement benefits the same, which was the alleged source of stress on the Employer's finances. And even though the Employer's non-economic proposals sparked deep dissatisfaction amongst bargaining unit employees, none of the Employer's proposals would have left employees with substantially fewer rights and less protection than provided by law without a contract. See e.g. *Public Service Co. of Oklahoma (PSO)*, 334 NLRB at 489.

Next, the parties reached agreement on a few contract articles, most notably the interim workday schedule. Although the Employer essentially just agreed to extend the schedule changes it implemented at other KIPP NYC schools at the beginning of the 2022-2023 academic year, unit employees viewed these changes as a significant improvement – yielding a shorter instructional day and defined prep periods.

Furthermore, there is no allegation in this case that the Employer failed to provide requested information or that the Employer refused to meet and bargain at regular intervals with the Union. To this end, the Employer agreed to adjust the start time of the bargaining sessions to allow bargaining unit teachers to attend without inconveniencing their professional and personal lives. And although each bargaining session was relatively short, between 1 and 2 hours long, the Union never pushed back on the length and only requested a longer session one time - in November 2024. Additionally, there is no record evidence that the Union asked to meet more often, or that such overtures were rebuffed by the Employer. Therefore, the Employer cannot be held responsible for the short, relatively infrequent bargaining sessions, and these factors certainly do not contribute to a bad faith bargaining finding here.

[74] Three other conversion charter schools have negotiated contracts with the Union that apply the terms of the NYC DOE contract – containing final and binding arbitration, just cause language, etc. (Tr. 602-604).

Although I acknowledge these mitigating factors, my charge is to consider the totality of the parties' conduct, both at and away from the bargaining table. In this context, I conclude that the Employer has purposely frustrated bargaining progress because it has no intention of reaching a first contract with the Union. And the primary vehicle for achieving this objective was the Employer's decision to withhold proposing a management rights clause while at the same time, citing agreement on a management rights clause as a condition precedent for movement towards final and binding arbitration. With this pattern enduring for three years now, the Employer's conditioning of progress on a management rights clause it knows it will never propose has left the Union unable to offer anything to satisfy the Employer's cryptic demands and as Antoine Lewis sagely predicted, no first contract will ever be reached. Based on the above, I find that the Employer has engaged in bad faith bargaining in violation of Section 8(a)(5) of the Act.

CONCLUSIONS OF LAW

1. Respondent, KIPP Academy Charter School, is an employer engaged in commerce within the meaning of Sections 2(2), (6), and (7) of the Act.

2. United Federation of Teachers, Local 2, AFL-CIO, AFT is a labor organization within the meaning of Section 2(5) of the Act.

3. Respondent violated Section 8(a)(1) of the Act by Alicia Johnson and Jim Manly's November 28, 2022 email disparaging and denigrating the Union.

4. Respondent violated Section 8(a)(1) of the Act by Alicia Johnson and Jim Manly's November 28, 2022 email impliedly threatening a loss of benefits for selecting the Union as the employees' collective-bargaining representative.

5. Respondent violated Section 8(a)(3) of the Act by excluding KIPP Academy bargaining unit employees from Regional professional development programs in retaliation for their union and other protected activities.

6. Respondent violated Section 8(a)(5) of the Act when KIPP Academy Elementary School Principal Anissa Jones bypassed the Union to deal directly with unit employees regarding their terms and conditions of employment.

7. Respondent violated Section 8(a)(5) of the Act by unilaterally adding a substantial number of instructional days to the 2023-2024 academic year calendar.

8. Respondent violated Section 8(a)(5) of the Act by unilaterally extending daily class instructional time for KIPP Academy Elementary homeroom teachers.

9. Respondent violated Section 8(a)(5) of the Act by unilaterally changing specials teachers' responsibilities to include serving as co-teachers and substitute teachers, and to teach additional subjects.

10. Respondent violated Section 8(a)(1) of the Act when former KIPP Academy Middle School Principal Antoine Lewis impliedly promised unspecified benefits in exchange for employees decertifying from the Union.

11. Respondent violated Section 8(a)(1) of the Act when former KIPP Academy Middle School Principal Antoine Lewis threatened employees with job losses and reductions in funding and resources if they did not decertify from the Union.

12. Respondent violated Section 8(a)(5) of the Act by bargaining with no intent to reach agreement on a first contract.

13. The unfair labor practices stated above affect commerce within the meaning of Sections 2(6) and (7) of the Act.

ORDER

The National Labor Relations Board orders that the Respondent, KIPP Academy Charter School, its officers, agents, and representatives, shall

1. Cease and desist from

(a) Disparaging or denigrating the Union by linking Respondent's dissatisfaction with the Union to the possibility of negative changes to terms and conditions of employment or a reduction in resources available to bargaining unit employees.

(b) Impliedly threatening employees with a loss of benefits in retaliation for selecting the Union as their collective-bargaining representative.

(c) Excluding KIPP Academy teachers from Regional professional development programs in retaliation for their union and other protected activities.

(d) Bypassing the Union and dealing directly with unit employees regarding their terms and conditions of employment.

(e) Unilaterally changing bargaining unit employees' terms and conditions of employment by adding a substantial number of instructional days to the academic year calendar.

(f) Unilaterally changing bargaining unite employees' terms and conditions of employment by extending class instructional time for KIPP Academy elementary homeroom teachers.

(g) Unilaterally changing bargaining unit employees' terms and conditions of employment by adding to specials teachers' responsibilities to include serving as co-teachers and substitute teachers, and to teach additional subjects.

(h) Impliedly promising unspecified benefits in exchange for decertifying from the Union.

(i) Threatening job losses and reductions in funding and resources for failing to decertify from the Union.

(j) Failing and refusing to bargain in good faith with the Union as the exclusive collective-bargaining representative of the employees in the bargaining unit.

(k) Bargaining in bad faith with the Union by making bargaining proposals that are purposely designed to frustrate reaching agreement.

(l) In any like or related manner restraining or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

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

(a) On request by the Union, rescind the following changes to bargaining unit employees' terms and conditions of employment - the unilateral increase in instructional days, the unilateral increase in daily instructional minutes for homeroom teachers, and the unilateral addition of co-teaching, substitute teaching, and teaching of additional subjects to enrichment teachers' responsibilities.

(b) Invite all KIPP Academy bargaining unit staffers to all future regional professional development programs held in August prior to the start of the new school year, as well as all regional professional development programs held during the school year.

(c) On request, bargain with the Union as the exclusive collective-bargaining representative of the employees in the following appropriate unit concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement:

> All full-time and regular part-time teachers, counselors, social workers, team leaders, and specialists employed by Respondent at its facility located in the Bronx, New York; Excluding all other employees, including substitute teachers, clerical, maintenance, supervisors, managers, and guards within the meaning of the Act.

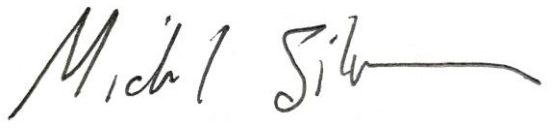
(d) Post at KIPP Academy Elementary School and KIPP Academy Middle School copies of the attached notice marked "Appendix." Copies of the notice, on forms provided by the Regional Director for Region 2, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees and members are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on the KIPP GO intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its members by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(e) Within 14 days after service by the Region, deliver to the Regional Director for Region 2 signed copies of the Respondent's notice to employees for posting by KIPP Academy Charter School at both KIPP Academy Elementary School and KIPP Academy Middle School in all places where notices to employees are customarily posted.

(f) Within 21 days after service by the Region, file with the Regional Director for Region 2 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

Dated, Washington, D.C. June 6, 2025



Michael P. Silverstein
Administrative Law Judge

APPENDIX

NOTICE TO EMPLOYEES

POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD

An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT fail and refuse to bargain in good faith with United Federation of Teachers, Local 2 (the Union) as the exclusive collective-bargaining representative of our employees in the bargaining unit.

WE WILL NOT bargain in bad faith by making bargaining proposals that are purposely designed to frustrate reaching agreement on a first contract.

WE WILL NOT disparage or denigrate the Union by linking our dissatisfaction with the Union to the possibility of negative changes to your terms and conditions of employment or a reduction in resources available to you as bargaining unit employees.

WE WILL NOT impliedly threaten that you will lose benefits for selecting the Union as your bargaining representative.

WE WILL NOT exclude you from Regional professional development programs because of your union and other protected activities.

WE WILL NOT bypass the Union and deal directly with you regarding your terms and conditions of employment.

WE WILL NOT impliedly promise you benefits in exchange for decertifying from the Union.

WE WILL NOT threaten you with job losses and funding reductions if you do not decertify from the Union.

WE WILL NOT change your terms and conditions of employment by unilaterally adding a substantial number of instructional days to the academic year calendar.

WE WILL NOT change your terms and conditions of employment by unilaterally extending daily class instructional time for our elementary school homeroom teachers.

WE WILL NOT change the terms and conditions of employment of specials teachers by unilaterally requiring them to serve as co-teachers and substitute teachers, and to teach additional subjects.

WE WILL NOT in any like or related manner restrain or coerce you in the exercise of the rights listed above.

WE WILL invite you to all future regional professional development programs held in August prior to the start of the new school year, as well as all regional professional development programs held during the school year.

WE WILL, on the Union's request, bargain in good faith with the Union as the exclusive collective-bargaining representative of the employees in the following appropriate unit concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement:

> All full-time and regular part-time teachers, counselors, social workers, team leaders, and specialists employed by Respondent at its facility located in the Bronx, New York; Excluding all other employees, including substitute teachers, clerical, maintenance, supervisors, managers, and guards within the meaning of the Act.

WE WILL, on the Union's request, rescind the changes to your terms and conditions of employment that were unilaterally implemented, such as the unilateral increase in instructional days, the unilateral increase in daily instructional minutes for homeroom teachers, and the unilateral addition of co-teaching, substitute teaching, and teaching of additional subjects to enrichment teachers' workload.

KIPP Academy Charter School
(**Respondent**)

Dated: _____ By: _____
(**Representative**) (**Title**)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation, and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge

or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.

National Labor Relations Board Region 2
26 Federal Plaza, Suite 41-120
New York, New York 10278-0104
Hours of Operation: 8:45 a.m. to 5:15 p.m.
212-264-0300

The Administrative Law Judge's decision can be found at www.nlrb.gov/case/**02-CA-294235** or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 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 ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, 212-264-0300.