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Standardized (COVID) Testing? Vaccine Mandates and Teachers' Unions Collective Bargaining Agreements in Urban School Districts

Seamus J. Ronan

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**STANDARDIZED (COVID) TESTING? VACCINE
MANDATES AND TEACHERS’ UNIONS
COLLECTIVE BARGAINING AGREEMENTS
IN URBAN SCHOOL DISTRICTS**

*Seamus J. Ronan**

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INTRODUCTION

With schools set to reopen in August 2021 amid a surge of COVID-19 cases, Los Angeles and New York City, the two largest school districts in the United States, both announced they would require all government workers, including teachers, to get the COVID-19 vaccine or face weekly testing.¹ Immediately, the legal challenges of implementing these vaccine mandates became apparent when several major unions stated that they needed to collectively bargain the specifics of such mandates with school district management.² While then-Mayor Bill de Blasio in New York faced opposition from several of the City’s municipal unions, he initially received

1. See Emma G. Fitzsimmons, Shawn Hubler & Jennifer Steinhauer, *New York City and California to Require Vaccines or Tests for Workers*, N.Y. TIMES (Aug. 30, 2021), <https://www.nytimes.com/2021/07/26/nyregion/covid-vaccine-ny-ca-mandatory.html> [<https://perma.cc/Y8BC-YWJH>].

2. See *id.* (quoting Henry Garrido, the executive director of District Council 37, the largest union representing City municipal employees: “New York City is a union town and that cannot be ignored”). *But cf. id.* (reporting that in California, the policies were welcomed by health care organizations, public employee unions, and teachers’ unions).

support from the United Federation of Teachers, the City teachers' union.³ This would soon change as the City unilaterally changed the details of the policy without negotiations.⁴ The question of which aspect of the vaccine mandates needed to be collectively bargained overshadowed school reopenings in New York,⁵ Los Angeles,⁶ and many major urban school districts across the country.⁷

Employers generally have the right to require vaccination,⁸ and a growing number — either by persuasion or mandate — asked workers to get vaccinated against COVID-19 in August 2021 after the Food and Drug Administration (FDA) formally approved the Pfizer-BioNTech vaccine.⁹ However, teachers' unions would potentially complicate the process of requiring vaccinations for school workers. Some questioned whether local collective bargaining agreements between school district management and teachers' unions would require the details of a mandate to be negotiated.¹⁰

3. *See id.*

4. *See* Emma G. Fitzsimmons & Ashley Wong, *N.Y.C. Union Leaders Say Mayor's Covid Mandate Took Them by Surprise*, N.Y. TIMES (Aug. 3, 2021), <https://www.nytimes.com/2021/07/27/nyregion/vaccine-mandate-nyc-unions.html> [<https://perma.cc/48H3-CFXE>].

5. *See infra* Section III.B.

6. *See infra* Section III.C.

7. *See, e.g.*, Juan Perez, Jr. & Daniel Payne, *Inside the Vaccination Fight That's Dividing Teachers Unions*, POLITICO (Aug. 17, 2021, 1:36 PM), <https://www.politico.com/news/2021/08/17/teachers-unions-coronavirus-vaccine-505610> [<https://perma.cc/VZX3-ZNL2>] (profiling teachers' unions disputes over vaccine mandates in Miami, Chicago, Texas, Mississippi, Washington, and Ohio).

8. *See* Teri Dobbins Baxter, *Employer-Mandated Vaccination Policies: Different Employers, New Vaccines, and Hidden Risks*, 5 UTAH L. REV. 885, 925 (2017).

9. *See* Press Release, Food & Drug Admin., FDA Approves First COVID-19 Vaccine (Aug. 23, 2021), <https://www.fda.gov/news-events/press-announcements/fda-approves-first-covid-19-vaccine> [<https://perma.cc/3J8Q-S2VY>]; *see also* Madeline Will, *With Vaccine Mandates on the Rise, Some Teachers May Face Discipline*, EDUC. WK. (Aug. 23, 2021), <https://www.edweek.org/teaching-learning/with-vaccine-mandates-on-the-rise-some-teachers-may-face-discipline/2021/08> [<https://perma.cc/2G74-DPVE>] (writing that the FDA's approval of the Pfizer vaccine provided legal cover for districts to require their staff to get vaccinated).

10. *See, e.g.*, Sarah Mervosh, *The Head of the Most Powerful U.S. Teachers' Union Signals an Openness to Vaccine Mandates.*, N.Y. TIMES (Aug. 23, 2021), <https://www.nytimes.com/2021/08/05/us/teachers-vaccine-mandate.html> [<https://perma.cc/ETH4-NRN3>]; *New York City, The Country's Largest School System, Mandates Teacher Vaccinations*, NPR (Aug. 23, 2021, 8:43 PM), <https://www.npr.org/sections/back-to-school-live-updates/2021/08/23/1030301726/new-york-city-mandates-vaccinations-for-public-school-teachers-and-staff> [<https://perma.cc/PGM5-RZBK>] (reporting some union's response to the City's new policy response). *But cf.* Howard Blume & Melissa Gomez, *LAUSD Orders All Teachers and Staff to Be Fully Vaccinated by Oct. 15*, L.A. TIMES (Aug. 13, 2021, 6:32 PM), <https://www.latimes.com/california/story/2021-08-13/lausd-orders-teachers-get-covid-19-vaccine> [<https://perma.cc/7KRB-ZVKM>] (stating that the Los Angeles Unified School District's (LAUSD) vaccination mandate was celebrated by their teachers' union).

This scenario set the stage for a question of first impression in the courthouse and at the bargaining table in the late summer of 2021 as districts balanced union power and staffing realities with the need to create a safe school environment.¹¹ Unions varied in their demands, which included how to address religious accommodations and medical exemptions, the frequency of testing for faculty and students regardless of vaccination status, payment for testing, salary increases, and fully remote work opportunities.¹²

This Note will study how two large urban school districts and teachers' unions negotiated school reopenings and health and safety protocols throughout the COVID-19 crisis.¹³ This Note explores how school district management implemented a vaccination mandate in a public health emergency within the scope of their collective bargaining agreement (CBA) with local teachers' unions before the 2021 to 2022 school year.¹⁴ Specifically, this Note examines whether school district management can mandate a no-opt-out vaccine policy for unionized public school workers, thus changing the terms and conditions of employment without bargaining.¹⁵

Unionized teacher CBAs are heavily negotiated¹⁶ and affect a majority of U.S. public school teachers.¹⁷ Negotiated teacher contracts today are

11. See Madeline Will, *Some Teachers Won't Get Vaccinated, Even with a Mandate. What Should Schools Do About It?*, EDUC. WK. (Sept. 27, 2021), <https://www.edweek.org/leadership/some-teachers-wont-get-vaccinated-even-with-a-mandate-what-should-schools-do-about-it/2021/09> [<https://perma.cc/CY39-F7KQ>]. See generally Baxter, *supra* note 8, at 914–37 (featuring an excellent pre-COVID-19 discussion about hypothetical employer vaccination policies for flu, Zika, and Ebola outbreaks, and future vaccinations against unknown diseases).

12. See *infra* Sections III.B, III.C.

13. See *infra* Parts II, III.

14. See *infra* Part III.

15. See *New York City, The Country's Largest School System, Mandates Teacher Vaccinations*, *supra* note 10. Michael Mulgrew, the president of the United Federation of Teachers, responded to the City's new policy that provisions for medical exceptions and other details "must be negotiated with the UFT and other unions, and if necessary, resolved by arbitration." *Id.*; see also Ben Penn & Robert Iafolla, *Unions Test Vaccine Rule in Strategic Liberal Court Filings (3)*, BLOOMBERG L. (Nov. 15, 2021, 1:37 PM), <https://news.bloomberglaw.com/daily-labor-report/unions-target-liberal-circuits-to-test-bidens-vaccine-mandate> [<https://perma.cc/U7T9-M3Z9>] (reporting that the American Federation of Teachers' Pennsylvania affiliate filed a lawsuit in the Third Circuit challenging the Biden Administration's COVID-19 vaccine-or-testing mandate); Eliza Shapiro & Benjamin Weisner, *New York City Can Proceed with Vaccine Mandate for Educators and Staff, Judges Ruled*, N.Y. TIMES (Oct. 20, 2021), <https://www.nytimes.com/2021/09/27/nyregion/new-york-city-schools-vaccine-mandate.html> [<https://perma.cc/T38T-T3A4>].

16. See generally MICHAEL COLASANTI, EDUC. COMM'N OF THE STATES, STATE COLLECTIVE BARGAINING POLICIES FOR TEACHERS (2008), <https://www.ecs.org/clearinghouse/77/27/7727.pdf> [<https://perma.cc/QF3F-B3RG>]; Dana Goldstein & Eliza Shapiro, *Online School Demands More of Teachers. Unions Are Pushing Back.*, N.Y. TIMES

“lengthy agreements that frequently are complex and impenetrable” and are controlled by state labor relations board decisions, arbitration rulings, and memoranda of understanding.¹⁸ Teachers’ unions are among “the most heavily unionized of all professions”¹⁹ and remain political players as an interest group on national, state, and local levels.²⁰ They are more influential, on average, than all other entities in shaping education policy.²¹ The scope of their influence was challenged in the heavily politicized school reopening conversations for both the 2020 to 2021 and 2021 to 2022 school years as education policy tied into politics, public health, and the national economy.²²

In unprecedented moments, collectively bargained teacher contracts can provide clarity for educators and district leaders.²³ But CBAs are designed for long periods of time, and the disruption of COVID-19 forced districts and unions to adjust.²⁴ School districts, as employers, have the authority to

(Apr. 21, 2020), <https://www.nytimes.com/2020/04/21/us/coronavirus-teachers-unions-school-home.html> [<https://perma.cc/UBV4-A587>] (discussing that many teachers “work under meticulously negotiated contracts that detail their work hours and break times, and the rules for how they engage with administrators”).

17. See Stephen Sawchuk, *Teachers’ Unions and Districts Hammer Out New Expectations for Remote Teaching*, EDUC. WK. (Apr. 28, 2020), <https://www.edweek.org/leadership/teachers-unions-and-districts-hammer-out-new-expectations-for-remote-teaching/2020/04> [<https://perma.cc/NRV3-C4SN>] (“About 70 percent of public-school teachers report belonging to unions, according to U.S. Department of Education data, while stats from the Bureau of Labor Statistics for all teachers, public and private, put the figure lower, at around 50 percent; both of those tallies show the figures have been declining for years.”).

18. STEPHEN B. THOMAS, NELDA H. CAMBRON-McCABE & MARTHA M. MCCARTHY, *PUBLIC SCHOOL LAW: TEACHERS’ AND STUDENTS’ RIGHTS* 438 (6th ed. 1994).

19. Sawchuk, *supra* note 17.

20. See AMBER M. WINKLER, JANIE SCULL & DARA ZEEHANDELAAR, THOMAS FORDHAM INST. & EDUC. REFORM NOW, *HOW STRONG ARE U.S. TEACHER UNIONS? A STATE-BY-STATE COMPARISON* 5 (2012). In the 2010 state election cycle, teachers’ unions in 22 states were among the top ten overall donors to candidates for governor and other executive positions, legislature, high court, and elected education positions. *See id.* In 21 states, they were among the top five highest-giving interest groups (including Colorado and Indiana, where they were ranked first). *See id.*

21. *See id.* In Pennsylvania and New Jersey, a 2012 survey deemed teachers’ unions to be the most influential entity. *See id.* In 20 states, teachers’ unions were generally more influential, on average, than state school boards, state superintendents, governors, legislators, business interests, and advocacy groups. *See id.*; *see also* Bradley D. Marianno, *Teachers’ Unions: Scapegoats or Bad-faith Actors in COVID-19 School Reopening Decisions?*, BROOKINGS INST. (Mar. 25, 2021), <https://www.brookings.edu/blog/brown-center-chalkboard/2021/03/25/teachers-unions-scapegoats-or-bad-faith-actors-in-covid-19-school-reopening-decisions/> [<https://perma.cc/SN6U-UTWK>].

22. *See* discussion *infra* Part II and Sections III.A, III.C.

23. *See* Sawchuk, *supra* note 17.

24. *See id.* (reporting that in the early days of the COVID-19 pandemic, Professor Jon Shelton said: “A [CBA] is important because it spells out the rules and makes the

act unilaterally, especially in exigencies.²⁵ But the overarching question is how can school district management balance teachers' unions CBAs with the unique challenges of schooling in a pandemic?

This Note primarily addresses the problem through the New York City and Los Angeles school districts for several reasons. First, urban public school districts have powerful teachers' unions with some of the strongest CBAs in the nation.²⁶ Second, such districts affect the greatest number of students²⁷ and employ a massive number of unionized teachers.²⁸ Finally, vaccine mandates were rarely implemented in several rural, typically Republican-led states.²⁹ In fact, many state legislatures proactively banned vaccine mandates, mask mandates, and other health protocols in the summer of 2021.³⁰

Part I of this Note addresses the landscape for teachers' unions in 2021, including the law governing CBAs, management rights clauses, and how unions have bargained over health and safety policies, including vaccination mandates, in the past.³¹ Next, Part II explores (1) how COVID-19 rapidly changed teachers' unions' expectations and CBAs from

expectations really clear, both for teachers and for administrators . . . [s]o when you have a huge disruption in what the expectations are, you have to adjust them").

25. See generally Annie A. Hemphill & Bradley D. Marianno, *Teachers' Unions, Collective Bargaining, and the Response to COVID-19*, 16 EDUC. FIN. & POL'Y 170 (2021); Bradley D. Marianno et al., *Power in a Pandemic: Teachers' Unions and Their Responses to School Reopening*, 8 AERA OPEN 1 (2022).

26. See Hemphill & Marianno, *supra* note 25, at 171; see also Marianno et al., *supra* note 25, at 10; Bradley D. Marianno et al., *Cut From the Same Cloth? Comparing Urban District CBAs Within States and Across the United States*, 32 EDUC. POL'Y 334 (2018).

27. See *Number of Students Enrolled in Public Elementary and Secondary Schools, by School Urban-Centric 12-Category Locale and State or Jurisdiction: Fall 2013*, NAT'L CTR. FOR EDUC. STAT. (Fall 2013), <https://nces.ed.gov/surveys/ruraled/tables/a.1.a.-3.asp?refer=urban> [<https://perma.cc/5KKK-BR47>]. Statistics show that almost 50,000,000 students are enrolled in public urban elementary and secondary schools, as opposed to just under 20,000,000 students in suburban schools. See *id.*

28. See *Contact Us*, UNITED TCHRS. L.A. (Aug. 8, 2019), <https://www.utla.net/contact-us> [<https://perma.cc/2CGW-4D28>] (reporting that the Los Angeles teachers' union is the nation's second largest teachers' union local and represents over 33,000 teachers); see also *About UFT*, UNITED FED'N TCHRS., <https://www.uft.org/your-union/about-uft> [<https://perma.cc/2VGA-K7GG>] (last visited Jan. 12, 2022) (reporting that New York City's teachers' union represents nearly 200,000 members).

29. See Juan Perez, Jr., *Red States Resist School Vaccine Mandates*, POLITICO (Oct. 4, 2021, 10:00 AM), <https://www.politico.com/newsletters/weekly-education/2021/10/04/red-states-resist-school-vaccine-mandates-797995> [<https://perma.cc/G774-2UQT>].

30. See *id.* This type of legislation is outside the scope of this Note, although raises some significant issues in light of President Biden's vaccine mandate for employers over 100 per emergency OSHA rulings. See COVID-19 Vaccination and Testing; Emergency Temporary Standard, 86 Fed. Reg. 61,402 (Nov. 5, 2021) (to be codified at 29 C.F.R. pts. 1910, 1917, 1918, 1926, 1928); see also Penn & Iafolla, *supra* note 15.

31. See *infra* Part I.

March 2020 to the beginning of the 2021 to 2022 school year as vaccines became readily available to the teachers in January 2021; (2) how different school districts acted; (3) the differing responses from teachers' unions; and (4) the points of contentions in the school reopening process at the bargaining table.³² Finally, Part III provides the two main case studies: the disputed arbitration between the New York City Department of Education and the United Federation of Teachers over the City's vaccine mandate, and the collaborative negotiations between the Los Angeles Unified School District and United Teachers Los Angeles over their vaccination policy, with a comparative analysis of the different outcomes. Part III will conclude with what lessons can be learned for school district leaders and teachers' unions in future negotiations over COVID-19 health and safety policies, such as required boosters, student vaccinations, and other unanticipated health emergencies.³³

I. THE LANDSCAPE OF TEACHERS' UNION CONTRACTS

Part I addresses the statutory and legal landscape of teachers' unions contracts, including the laws on collective bargaining for teachers in the United States, the construction of CBAs, and management rights clauses. It describes how teachers' unions may file grievances against unfair labor practices and how some unions have previously reacted to vaccination policies and unilateral changes to the terms and conditions of their employment. Finally, it explains that the novelty of COVID-19 created an open legal question on whether a school district could unilaterally implement a vaccination mandate for teachers and staff.

A. Federal and State Laws Regulating Teachers' Unions' Rights

The laws that govern school decision-making during COVID-19 are predominantly local statutes and laws.³⁴ Unlike unionization activities in many industries, which are governed by comprehensive federal laws,³⁵ states separately establish collective bargaining rules for teachers.³⁶ State labor laws, state employment relations board rulings, and court rulings

32. *See infra* Part II.

33. *See infra* Part III.

34. *See* Keyonna Summers, *COVID-19 and the Future of Education*, U. NEV. LAS VEGAS (Sept. 1, 2020), <https://www.unlv.edu/news/release/covid-19-and-future-education> [<https://perma.cc/6HBE-LJXY>] (interviewing Bradley Marianno on the role of teachers' unions in school reopening plans).

35. *See, e.g.*, National Labor Relations Act, 29 U.S.C. §§ 151–166 (comprising the federal statute governing private labor issues).

36. *See, e.g.*, CAL. GOV'T CODE § 3540 (West 2019); N.C. GEN. STAT. §§ 95–98 (2022); TEX. GOV'T CODE §§ 617.001–617.005 (West 2022).

govern because there is no federal labor law covering public school employees.³⁷

There is no federal law giving public sector employees the right to bargain collectively.³⁸ Each state regulates the rights of both public and private sector employees to unionize and bargain collectively through state law passed by the legislature or court decisions.³⁹ Thirty-two states require local school districts to bargain collectively with their teachers; 14 states permit collective bargaining; and five states prohibit collective bargaining altogether.⁴⁰ States define the obligation of district management to bargain and what issues are negotiated.⁴¹

Despite the differences from state to state, there are some common provisions found in state labor statutes.⁴² Statutes include a section recognizing the rights of teachers to organize and collectively bargain.⁴³ A provision in these statutes describes a list of unfair labor practices by both the employer and employee.⁴⁴ An employer is engaging in unfair labor practices if they interfere with, restrain, or coerce teachers in the exercise of the teachers' statutorily granted rights.⁴⁵ Many statutes include the duty to bargain in good faith.⁴⁶ Finally, the statute may dictate a grievance and

37. See THOMAS ET AL., *supra* note 18, at 438.

38. See *Collective Bargaining Laws*, NAT'L COUNCIL ON TCHR. QUALITY (Jan. 2019), <https://www.nctq.org/contract-database/collectiveBargaining> [https://perma.cc/F7UY-3KV F]. However, the individualized laws that some states developed for teachers' unions and the collective bargaining process is similar to federal labor laws. See VICTORIA J. DODD, *PRACTICAL EDUCATION LAW FOR THE TWENTY-FIRST CENTURY* 333 (2d ed. 2010). The National Labor Relations Act (NLRA) can serve as a useful gap-filler in teacher labor issues in states where precedents are uncertain. See *id.* In California, courts have held that the state teacher labor law, the Education Employment Relations Act (EERA) is similar in fundamental ways to the NLRA. See *San Diego Tchrs. Ass'n v. Superior Ct.*, 593 P.2d 838, 845 (Cal. 1979) (finding "marked similarities between EERA and NLRA").

39. See *Collective Bargaining Laws*, *supra* note 38; see also, e.g., CAL. GOV'T CODE § 3512 (West 2019); N.Y. CIV. SERV. LAW § 200 (McKinney 2022).

40. See WINKLER ET AL., *supra* note 20, at 5. The states that prohibit collective bargaining altogether are Georgia, North Carolina, South Carolina, Texas, and Virginia. See *id.*

41. See DODD, *supra* note 38, at 337–51.

42. See *id.* at 336.

43. See *id.*

44. See *id.* at 336 nn.21–22.

45. See, e.g., 115 ILL. COMP. STAT. 5/14 (2022).

46. See, e.g., CAL. GOV'T CODE § 3543.7 (West 2019). A cornerstone of collective bargaining law is that both employer and employee have a duty to bargain in good faith. See DODD, *supra* note 38, at 341. This duty is often stated specifically in state collective bargaining statutes and further defined by the case law. See *id.*; see also, e.g., 115 ILL. COMP. STAT. 5/10 (2022); MICH. COMP. LAWS § 423.30 (2022).

appeals procedure for teachers,⁴⁷ and a provision describing the ability of teachers to strike.⁴⁸

The majority of states do not allow teachers to strike due to concerns about the societal disruption and students receiving an undisturbed education.⁴⁹ Some states do authorize teachers to strike, but the right is not absolute.⁵⁰ For example, the Illinois Educational Labor Relations Act permits teachers to strike if a CBA has expired, mediation has been futile, and there is no danger present to the safety or health of the public.⁵¹ While the inability to strike seems like a significant cap on teachers' unions' power, courts tend to interpret the collective bargaining rights of teachers broadly.⁵² While national and local union leaders threatened teacher strikes amid the school reopening debate in the 2020 to 2021 school year, there were no reported strikes or walkouts.⁵³

B. The Contract Itself: The Collective Bargaining Agreement

CBAs are “binding contract[s] between a union and a school district or other employing entity.”⁵⁴ Only unions can negotiate CBAs.⁵⁵ State law regulates which terms can be bargained for in the CBA, and the CBA is typically renegotiated every three years.⁵⁶ The CBA usually names the outside arbitrator who will settle any contract disputes.⁵⁷ The working conditions topics typically found in teacher CBAs include health benefits, layoff procedures, class sizes, evaluation processes, grievance procedures, and association rights.⁵⁸

47. See DODD, *supra* note 38, at 336 (citing to FLA. STAT. §§ 447.401, 447.504 (2021) as an example).

48. See, e.g., 115 ILL. COMP. STAT. 5/13 (2022).

49. See DODD, *supra* note 38, at 365. For an excellent visual graphic and database, see *Collective Bargaining Laws*, *supra* note 38.

50. See *Collective Bargaining Laws*, *supra* note 38.

51. See COMP. STAT. 5/13.

52. See DODD, *supra* note 38, at 365.

53. See discussion *infra* Section II.C.iii.

54. WINKLER ET AL., *supra* note 20, at 18.

55. See *id.*

56. See *id.*

57. See *id.* For example, the UFT's contract with the Department of Education names Martin F. Scheinman, Esq. as the arbitrator for any future mediations and arbitrators. See UFT Contract, 2019–2022 (on file with author). Scheinman would eventually mediate and arbitrate the dispute over New York City's vaccine mandate. See *infra* Section III.B.iv.

58. See generally WINKLER ET AL., *supra* note 20 (stating that such CBAs also include compensation, retirement, workload, transfers, and time off).

Successful collective bargaining results in an agreement which orders the parties' relationship for some defined period.⁵⁹ A typical agreement covers the full range of issues that are important to both parties.⁶⁰ However, even when the agreement is comprehensive, questions may arise during the term of the agreement regarding the application of its provisions to specific situations.⁶¹ In addition, because it is impossible to predict every possible issue that might arise during the term, school districts and teachers' unions may need to deal with issues unaddressed contractually that emerge.⁶²

District management and teachers' unions can negotiate temporary agreements to address items not negotiated in CBAs.⁶³ A meet-and-confer agreement, often referred to as a Memorandum of Understanding (MOU) or Memorandum of Agreement (MOA), is a non-binding, non-precedential memo between an employee organization and a school district.⁶⁴ Under the meet-and-confer agreement's terms, a dispute will get resolved locally, and the district can override the agreement in the event of a conflict.⁶⁵ The agreement can be discussed and altered at any time, and the contents are not limited to certain provisions.⁶⁶

Temporary MOUs and MOAs were used by school districts and teachers' unions at the outset of the COVID-19 pandemic in March 2020, in the school reopening agreements in 2020 to 2021, and again in the 2021 to 2022 school year.⁶⁷ Thus, local CBAs were generally disregarded in favor of MOUs or arbitrations on issues such as remote learning requirements, safety measures in 2020 to 2021 school year, and in the vaccination policies and protocols for 2021 to 2022.⁶⁸

59. See DOUGLAS E. RAY, CALVIN WILLIAM SHARPE & ROBERT N. STRASSFELD, UNDERSTANDING LABOR LAW 189 (4th ed. 2014).

60. See *id.*

61. See *id.*

62. See *id.*

63. See, e.g., Sawchuk, *supra* note 17.

64. See WINKLER ET AL., *supra* note 20.

65. See *id.*

66. See *id.*

67. See *infra* Parts II, III; see also Kalyn Belsha, *Teacher Anxiety Is on the Rise. Will Their Unions Emerge as a Force in the School Reopening Debate?*, CHALKBEAT (July 20, 2020, 5:46 PM), <https://www.chalkbeat.org/2020/7/20/21331858/will-teachers-unions-emerge-as-force-in-the-school-reopening-debate> [<https://perma.cc/LZ36-KGKJ>]; Sawchuk, *supra* note 17 (discussing the temporary MOUs negotiated in the spring of 2020 which offered "more flexible arrangements" for teachers); Stephen Sawchuk, *7 Big Issues for Unions and Districts in Remote Teaching Agreements*, EDUC. WK. (Apr. 28, 2020), <https://www.edweek.org/leadership/7-big-issues-for-unions-and-districts-in-remote-teaching-agreements/2020/04> [<https://perma.cc/GQ9C-2RCK>]; Summers, *supra* note 34.

68. See *infra* Part III.

C. The Scope of Collective Bargaining

In general, states divide negotiable subjects during collective bargaining into three areas: mandatory subjects, permissive or non-mandatory subjects, and prohibited or illegal subjects.⁶⁹ The line between what must be bargained over, what may be bargained over, and what may not be bargained over is not clearly drawn.⁷⁰ This may explain why the question over vaccine mandates, testing requirements, and other COVID-19 issues are questions of first impression for all parties.⁷¹

Wages, hours, and terms of conditions of employment are the generally defined mandatory subjects of collective bargaining.⁷² The phrase “mandatory subjects of collective bargaining” is a legal term of art and is defined differently across states.⁷³ California, for example, broadly defines this phrase.⁷⁴ New York courts, however, require that it must be plain and clear from the controlling statute that mandatory bargaining is not required.⁷⁵ An employer has no duty to bargain about non-mandatory subjects.⁷⁶ Overall, courts are trying to determine how to properly weigh the school districts’ interest in sound educational policy against the teachers’ valid concerns with their wages, hours, and terms and conditions of employment.⁷⁷

Due to the novelty of both COVID-19 and vaccination mandates for adults,⁷⁸ it remains an open legal question whether a COVID-19 vaccine requirement is a mandatory, permissive, or prohibited subject of bargaining. However, in one National Labor Review Board (NLRB) case,

69. See DODD, *supra* note 38, at 337.

70. See MICHAEL IMBER & TYLL VAN GEEL, *EDUCATION LAW* 417 (2d ed. 2000).

71. See generally Baxter, *supra* note 8; Alyson Raphael, Note, *Arbitrating “Just Cause” for Employee Discipline and Discharge in the Era of Covid-19*, 34 GEO. J. LEGAL ETHICS 1237, 1250–51 (2021) (discussing the novel task for arbitrators in the COVID-19 era to define reasonable workplace expectations between parties on face masks, PPE, workplace ventilation, contact testing and tracing, and vaccine policies).

72. See DODD, *supra* note 38, at 338.

73. See *id.*

74. See, e.g., *San Mateo City Sch. Dist. v. Pub. Emp. Rel. Bd.*, 663 P.2d 523, 532 (Cal. 1983) (rejecting the school district’s argument that EERA establishes a scope of negotiations narrowly limited to the terms and conditions of employment named in the California Government Code and holding that EERA implementation of a school counseling program was included within the broad scope of all matters related to terms and conditions of employment).

75. See *Webster Cent. Sch. Dist. v. Pub. Emp. Rel. Bd. of N.Y.*, 554 N.E.2d 886, 889 (N.Y. 1990) (citing *Syracuse Tchrs. Ass’n v. Bd. of Educ.*, 320 N.E.2d 646, 646 (N.Y. 1974)) (holding that a school district’s decision to participate in cooperative academic summer school program was not a mandatory subject).

76. See RAY ET AL., *supra* note 59, at 179.

77. See DODD, *supra* note 38, at 339.

78. See Baxter, *supra* note 8, at 914.

both the administrative law judge, the Board, and the Ninth Circuit held that an employer-implemented influenza vaccination policy is a mandatory subject of bargaining.⁷⁹ Thus, a school district's vaccination policy is likely a mandatory subject of bargaining that can only be waived if the teachers' union waived its collective bargaining right by agreeing to a broad management rights clause.⁸⁰

D. Managerial Prerogatives and Management Rights

Management rights or managerial prerogatives are typically non-mandatory subjects of collective bargaining.⁸¹ These management decisions are ones that directly imperil the job security of employees but lie "at the core of entrepreneurial control."⁸² In the private sector, these types of management decisions are necessary for the basic direction of the corporation and driven by the corporation's bottom line.⁸³ In the public school setting, management balances the interests of teachers, students, parents, and the community.⁸⁴ In schools, managerial prerogatives are rarely subjects of collective bargaining and are not typically grievable nor arbitrable.⁸⁵ In the context of a pandemic, the scope of the managerial prerogative in CBAs could expand significantly.⁸⁶

The management-rights doctrine is a philosophy for management negotiations in labor agreements.⁸⁷ The doctrine holds that management

79. See *Va. Mason Hosp. v. Wash. State Nurses Ass'n*, 511 F.3d 908, 912–13 (9th Cir. 2007) (ruling that a private hospital's mandatory influenza vaccination policy needed to be rescinded because the hospital did not bargain over the policy with the nurses' union as required by the parties' CBA, affirming the arbitrator's ruling, and district court's summary judgment); see also Baxter, *supra* note 8, at 909–11; Rene F. Najera & Dorit R. Reiss, *First Do No Harm: Protecting Patients Through Immunizing Health Care Workers*, 26 HEALTH MATRIX 363, 382 (2016) (summarizing the *Virginia Mason* case and the legal issues surrounding the influenza vaccine requirement for unionized health care workers).

80. See *infra* Section I.D.

81. See *Fibreboard Paper Prods. Corp. v. NLRB*, 379 U.S. 203, 223 (1964) (Stewart, J., concurring).

82. *Id.*

83. See *id.*

84. See MYRON LIEBERMAN, UNDERSTANDING THE TEACHER UNION CONTRACT: A CITIZEN'S HANDBOOK 30 (2000).

85. See DODD, *supra* note 38, at 368.

86. See OFF. OF THE GEN. COUNS., NLRB, GC MEMORANDUM 20-04, CASE SUMMARIES PERTAINING TO THE DUTY TO BARGAIN IN EMERGENCY SITUATIONS (2020). In March 2020, at the beginning of the COVID-19 pandemic, then-NLRB General Counsel Peter Robb issued a memorandum highlighting the fact that, in some circumstances, an emergency may suspend an employer's duty to bargain. See *id.* Robb's memorandum highlighted numerous cases of emergencies which dealt with the duty to bargain in emergencies, citing to hurricanes, 9/11, and an ice storm. See *id.*

87. See LIEBERMAN, *supra* note 84, at 30.

retains all those rights that it does not negotiate away in the CBA.⁸⁸ It is the management's duty to act and the union must challenge the management's action if the union believes that the action violates the CBA.⁸⁹ In the public sector, public employee unions, especially teachers' unions, assert the right to codetermine matters of public policy with school district management.⁹⁰

To protect the school district's rights, the management-rights section of CBAs usually includes a zipper clause that relieves the school district from the duty to bargain during the term of the contract.⁹¹ The union waives their rights to bargain during the term of the contract.⁹² Unless a waiver is phrased in clear, unambiguous language, the union will not be deemed to have waived its right to bargain.⁹³ A zipper clause begins by stating that the school district retains all management rights reserved to it so long as they are exercised consistently with the rest of the CBA.⁹⁴ After this clause, the rights of the district are listed.⁹⁵ However, the management-rights clause does not allow district leaders to ignore other bargained provisions, such as seniority, just cause, or safety and health committee responsibilities.⁹⁶ The question in the school reopening debates was whether the zipper clauses in the district's CBAs gave school district management unilateral decision making ability or whether health and safety issues needed to be negotiated at the bargaining table.⁹⁷ Some districts opted against using the zipper clause and instead negotiated with teachers' unions to form temporary MOUs for each school year.⁹⁸

88. *See id.*

89. *See id.*

90. *See id.*

91. *See id.* at 32.

92. *See id.*

93. *See id.*

94. *See id.* An example: "It is understood and agreed that the [authority] retains the right to operate the District and that all management rights are reserved to it, but that such rights must be exercised consistently with the other provisions of this contract. These rights include but are not limited to the following . . ." *See id.*

95. *See id.*

96. *See id.* In the private sector, an employer's insistence on a management rights clause so broad that it would make the union weaker than if it had not negotiated the CBA at all — for example, by reserving to management the discretion to make unilateral changes to many terms and conditions of employment — is evidence of bad faith by the employer. *See id.*; *see also, e.g.,* NLRB v. A-1 King Size Sandwiches, Inc., 732 F.2d 872, 877–78 (11th Cir. 1984); Hydrotherm, Inc., 302 N.L.R.B. 990, 994–95 (1991).

97. *See* discussion *infra* Parts II, III.

98. *See, e.g.,* *infra* Section III.C.

There is inherent tension in bargaining over these zipper clauses.⁹⁹ Teachers' unions will oppose attempts by district management to obtain a broad management-rights clause.¹⁰⁰ Some teachers' unions may have protection from state legislation, which may limit the scope of representation.¹⁰¹ For example, California's bargaining statute limits the scope of union representation to "wages, hours of employment, and other terms and conditions of employment."¹⁰² The statute defines terms and conditions of employment to include health and welfare benefits, leave and transfer policies, safety conditions of employment, class size, teacher evaluations, and procedures for processing grievances.¹⁰³ In the context of COVID-19 vaccination mandates, the question is whether requiring a vaccination was a term and condition of employment.¹⁰⁴

E. Bargaining for Safety and Health Policies

Safety and health rules as applied to public school teachers are often local because the federal occupational safety and health statutes do not uniformly protect such teachers.¹⁰⁵ Instead, the safety and health rules are often collectively bargained for between the districts and the unions.¹⁰⁶ Most private-sector CBAs and some public sector CBAs give the employer some scope to adjust working conditions to assure general productivity, efficacy, safety, etc.¹⁰⁷ However, most private employers who bargain with a union are not permitted to unilaterally implement policies that affect wages, hours, and terms and conditions of employment because these

99. See LIEBERMAN, *supra* note 84, at 33.

100. *See id.*

101. *See id.*

102. CAL. GOV'T CODE § 3543.2(a)(1) (Deering 2021).

103. *See id.*

104. *See infra* Sections III.A, III.B.

105. See James J. Brudney, *Forsaken Heroes: COVID-19 and Frontline Essential Workers*, 48 FORDHAM URB. L.J. 1, 49 n.218 (2020); *see also* 29 U.S.C. § 652(5) (noting that teachers are not covered under federal occupational safety and health statutes). The federal statute provides that these workers may have OSHA protections if they work in a state that has an OSHA-approved state program. *See* 29 U.S.C. § 667. Twenty-seven states have OSHA-approved plans covering public sector workers while 23 states do not. *See* OCCUPATIONAL SAFETY & HEALTH ADMIN., U.S. DEP'T OF LAB., OSHA 3302-01R, ALL ABOUT OSHA (2020), https://www.osha.gov/Publications/all_about_OSHA.pdf [<https://perma.cc/AC53-HD6X>].

106. See Celine McNicholas et al., *Why Unions Are Good for Workers — Especially in a Crisis Like COVID-19*, ECON. POL'Y INST. (Aug 25, 2020), <https://www.epi.org/publication/why-unions-are-good-for-workers-especially-in-a-crisis-like-covid-19-12-policies-that-would-boost-worker-rights-safety-and-wages/> [<https://perma.cc/6VJG-RP4V>].

107. *See* Brudney, *supra* note 105, at 49 n.218.

topics are mandatory subjects of bargaining.¹⁰⁸ Most public sector employers also cannot unilaterally implement policies.¹⁰⁹

In an example of a school district unilaterally instituting a health policy, a New York school district adopted a policy banning smoking in open areas of its schools and prohibited smoking in school buses regardless if students were present.¹¹⁰ The smoking ban was designed to prevent secondhand smoke.¹¹¹ The Newark Valley district refused to negotiate over the policy with the union representing the school bus drivers.¹¹² The union filed an improper labor practices charge with New York's Public Employment Relations Board (PERB), and an administrative law judge determined that no state law preempted the school district's obligation to negotiate a ban on smoking.¹¹³ The school district further litigated the issue up to New York's highest court, which determined that neither the state education law nor the public health law preempted the district's obligation to bargain with the drivers.¹¹⁴ The court held that because smoking regulations affected a term or condition of employment, the district's refusal to bargain with the drivers was improper.¹¹⁵

There is more scholarship and precedent on mandatory vaccination policies in the healthcare setting, such as hospitals for influenza.¹¹⁶ Some

108. See Mario R. Bordogna, *COVID-19 Vaccine Mandates in a Unionized Workforce*, LEGAL INTELLIGENCER (Oct. 7, 2021, 1:03 PM), <https://www.law.com/thelegalintelligencer/2021/10/07/covid-19-vaccine-mandates-in-a-unionized-workforce/> [<https://perma.cc/3FKF-F9LJ>].

109. See *id.*

110. See *Newark Valley Cent. Dist. v. Pub. Emp. Rels. Bd.*, 632 N.E.2d 443, 444 (N.Y. 1994).

111. *Id.* at 444.

112. See *id.*

113. See *id.*

114. See *id.*

115. See *id.* However, the court observed that after the commencement of the lawsuit, the state assembly had passed an amendment to forbid smoking in any school vehicle. See *id.* Thus, the court affirmed the appellate division's decision for the school bus drivers. See *id.*

116. See Baxter, *supra* note 8, at 909. Prior to the COVID-19 pandemic, mandatory vaccinations for adult workers were largely unprecedented outside of a health care setting. Hospitals and other healthcare facilities are one of the few unionized workplaces that requires vaccinations for adults as a term of employment. *Id.* Mandatory vaccinations for children are a hallmark of schools in the United States. *Id.* at 886. Most, if not all, children need to get vaccinated to attend school and day care. See *id.* at 886, 900 n.95. Thus, a majority of adults raised in the United States are vaccinated against common childhood infections such as mumps, rubella, measles, and chicken pox. *Id.* at 904. The Center for Disease Control recommends but does not require influenza vaccinations for the U.S. public. *Id.* at 906 n.131. Thus, there is little precedent on employers requiring flu shots outside of the health care setting. *Id.* at 905, 907 n.138. Hospitals have large groups of unionized employees, especially nurses, and there is some precedent about health care facilities unilaterally implementing a vaccination policy with limited or no bargaining. *Id.* at 904-09. This tracks the story of some unionized health workers during COVID-19.

hospitals have chosen to mandate flu vaccines, and many have faced opposition and litigation from both employees and unions.¹¹⁷ Although a private hospital is different from a public school, in the *Virginia Mason* case, a nurses' union successfully challenged and delayed a vaccination mandate designed to protect vulnerable patients because the hospital did not bargain over the impact of the mandate.¹¹⁸ Given the cost of litigation and the delay in implementation of the policy, hospitals with unionized employees may not be able to unilaterally implement policies without collective bargaining.¹¹⁹ Thus, a school district would likely need to negotiate with the teachers' union over an employee vaccination policy because this is a term and condition of employment.¹²⁰

However, vaccination policies look different during an outbreak of a disease or a pandemic.¹²¹ If there is an outbreak of a vaccine-preventable disease, employers would have an incentive to ensure that their employees are not vulnerable.¹²² Healthcare facilities would have an incentive to protect their patients, and schools would need to shield both their employees and their students from infection.¹²³ If an employer can show

Governor Kathy Hochul of New York was sued by individual nurses and the Civil Service Employee Association over her vaccination mandate for healthcare workers. *See* Brendan J. Lyons, *CSEA Files Lawsuit to Block New York Vaccine Mandate*, TIMES UNION (Sept. 23, 2021, 7:07 PM), <https://www.timesunion.com/state/article/CSEA-files-lawsuit-to-block-New-York-vaccine-16481682.php> [<https://perma.cc/FZG8-G7GS>]; *see also* Anne McCloy, *Hochul Administration "Working on the Legality" of Vaccine Mandate amid Newest TRO*, CBS ALB. (Sept. 24, 2021), <https://cbs6albany.com/news/local/hochul-administration-working-on-the-legality-of-vaccine-mandate-amid-newest-tro> [<https://perma.cc/43ZZ-MWG6>].

117. *See* Baxter, *supra* note 8, at 909; *see also, e.g.*, *Va. Mason Hosp. v. Wash. State Nurses Ass'n*, 511 F.3d 908, 912–13 (9th Cir. 2007) (dispute between nurses' union and Virginia Mason Hospital over a flu vaccination policy); *Mandatory Flu Vaccination Frequently Asked Questions*, JOHNS HOPKINS MED., http://www.hopkinsmedicine.org/mandatory_flu_vaccination/faq.html [<https://perma.cc/LA25-GV2A>] (describing Johns Hopkins's policy beginning in the 2012 to 2013 flu season, which applies to all Johns Hopkins Medicine entities, but allows employees to request religious or medical exceptions, and then wear a mask during all patient contact). After the litigation, Virginia Mason Hospital adopted a policy requiring unvaccinated employees to use facemasks. Najera & Reiss, *supra* note 79, at 382. That policy was appealed to the NLRB. *See id.* An administrative law judge decided that the union waived its collective bargaining right in that case, and the NLRB agreed, almost eight years after the initial policy was announced. *See id.*

118. *See* Baxter, *supra* note 8, at 911 n.176 (quoting the nurses' grievance from the Ninth Circuit's opinion: "although 'receiving influenza vaccine is a good choice for most nurses, it is just that — a choice' and that 'receipt of any medical treatment is up to the individual'" (quoting *Va. Mason*, 511 F.3d at 912)).

119. *See* Baxter, *supra* note 8, at 913.

120. *See id.* at 915–18.

121. *See id.* at 920.

122. *See id.*

123. *See id.* at 903.

that its employees would be “susceptible to an outbreak, that an outbreak among its employees would create a serious economic hardship, and that the required vaccine is safe, the employer will have a strong case for requiring employees to be vaccinated.”¹²⁴ An employer would need to consider factors outlined by the Equal Employment Opportunity Commission, the Americans with Disabilities Act of 1990,¹²⁵ and Title VII of the Civil Rights Act of 1964,¹²⁶ including accommodations for religious, medical, or disability-based exemption requests, and if the employees are unionized, collective bargaining requirements.¹²⁷ Thus, in the COVID-19 pandemic, the question became whether school district management could alter the terms and conditions of employment to promote the safety and health of students, faculty, and staff.¹²⁸ If school districts unilaterally promulgated a vaccination policy, disagreeing teachers’ unions could settle by the negotiated grievance and arbitration mechanisms found in CBAs.¹²⁹

F. Employee Grievances and Arbitration Mechanisms

Some teachers’ unions filed grievances and resorted to collective bargained mediation and arbitration procedures over COVID-19 vaccine mandates.¹³⁰ CBAs contain grievance procedures for the resolution of contractual items on which the parties cannot agree.¹³¹ When items in dispute concern the interpretation of the CBA, the district must enter into arbitration with the teachers’ union if it is called for in the CBA.¹³² Most states that allow collective bargaining between teachers and employers also allow grievance procedures and arbitration of matters relating to CBAs.¹³³ Another type of arbitration is impasse negotiation, where an appointed neutral arbitrator or mediator is used if the parties cannot agree on a collective bargaining item.¹³⁴

124. *Id.* at 920–21.

125. 42 U.S.C. §§ 12101–12213; *see also* Baxter, *supra* note 8, at 895.

126. 42 U.S.C. §§ 2000e to 2000e-17.

127. *See* Baxter, *supra* note 8, at 921 (“However, if the employer makes the decision carefully and thoughtfully, the risk that an employee will successfully sue the employer should be low.”).

128. *See infra* Part II.

129. *See infra* Section III.B.iii.

130. *See* discussion *infra* Section III.B.

131. *See* DESKBOOK ENCYCLOPEDIA OF AMERICAN SCHOOL LAW 327 (1998).

132. *See id.*

133. *See* DODD, *supra* note 38, at 359; *see also* FLA. STAT. § 447.401 (2021) (“Each public employer and bargaining agent shall negotiate a grievance procedure to be used for the settlement of disputes . . . involving the interpretation . . . of a [CBA].”).

134. *See* DODD, *supra* note 38, at 359; *see also, e.g.*, Bd. of Educ., Benton Consol. Sch. Dist. #47 v. Benton Fed. of Tchrs., Loc. No. 1956, 518 N.E.2d 1257 (Ill. App. Ct. 1988).

In the United States, arbitration is heavily favored to settle labor disputes.¹³⁵ This policy is established at the federal level in the well-known Supreme Court labor cases, *The Steelworkers' Trilogy*,¹³⁶ as well as in countless state court decisions.¹³⁷ The reliance on the trilogy by state court decisions demonstrates further the connection between federal labor law and state collective bargaining law.¹³⁸ Some courts determined that because many teachers do not have a right to strike, their ability to collectively bargain and arbitrate should be interpreted broadly.¹³⁹ As a result, the powers of the arbitrator in education disputes are generally quite broad and the scope of judicial review quite narrow.¹⁴⁰ Generally, if a subject is negotiable in the collective bargaining process, it is also arbitrable.¹⁴¹ Some courts hold that unless some aspect of the CBA says otherwise, if there is an interpretation of an arbitration clause that would cover the disputed matter, it should be arbitrable.¹⁴²

II. THE ROLE OF CBAS IN PRECIPITATING EVENTS AT SCHOOLS

School districts must notify their teachers' unions and provide an opportunity for bargaining before implementing any material change to the terms and conditions of employment.¹⁴³ However, because district management and teachers' unions cannot predict every issue that might arise over the term of a CBA, both parties need to deal with contractual

135. See DODD, *supra* note 38, at 359.

136. See generally *United Steelworkers v. Am. Mfg. Co.*, 363 U.S. 564 (1960); *United Steelworkers v. Enter. Wheel & Car Corp.*, 363 U.S. 593 (1960); *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960).

137. See e.g., *Paramount Unified Sch. Dist. v. Tchrs. Ass'n of Paramount*, CTA/NEA, 32 Cal. Rptr. 2d 311, 315 (Ct. App. 1994); *Scotch Plains-Fanwood Bd. of Educ. v. Scotch Plains-Fanwood Educ. Ass'n*, 651 A.2d 1018, 1022 (N.J. 1995); *Racine Educ. Ass'n v. Racine Unified Sch. Dist.*, 500 N.W.2d 379, 381 (Wis. Ct. App. 1993).

138. See DODD, *supra* note 38, at 359.

139. See *id.*

140. See DODD, *supra* note 38, at 360–61.

141. See *id.*; see also, e.g., *Teaneck Bd. of Educ. v. Teaneck Tchrs. Ass'n*, 462 A.2d 137, 139 (N.J. 1983), *superseded by statute* as cited in *Jackson Twp. Bd. of Educ. v. Jackson Educ. Ass'n*, 757 A.2d 311, 315 (N.J. Super. Ct. App. Div. 2000).

142. See DODD, *supra* note 38, at 360; see also, e.g., *Racine*, 500 N.W.2d at 281; *Chi. Tchrs. Union, Loc. 1 v. Ill. Ed. Lab. Rel. Bd.*, 800 N.E.2d 475, 483–84 (Ill. App. Ct. 2003) (finding aspects of a teacher's termination made it an arbitrable event, even though no unfair labor practice had occurred).

143. See Jeffrey S. Klein & Nicholas J. Pappas, *The Duty to Bargain During the COVID-19 Pandemic*, N.Y.L.J. (Dec. 1, 2020, 12:00 PM), <https://www.law.com/newyorklawjournal/2020/12/01/the-duty-to-bargain-during-the-covid-19-pandemic/?slreturn=20211011185106> [<https://perma.cc/U5H5-XLB2>]. However, in rare situations, the NLRB also recognizes the right of private employers to act unilaterally during certain emergencies even if the CBA is silent on the issue, and even without giving the union notice. See *id.*

issues that emerge as a result of precipitating events.¹⁴⁴ This Part explores how district management and teachers' unions handled precipitating events in schools and the role (or lack of) that district's CBA played. This Part also examines the COVID-19 pandemic as a precipitating event in schools and considers the negotiated MOUs in New York City, Los Angeles, and elsewhere at the beginning of the COVID-19 pandemic and in the 2020 to 2021 school reopening debate.

A. Precipitating Events in Schools

Financial or educational exigences may preclude some aspects of CBAs when the state legislature has enacted a rational legislative scheme.¹⁴⁵ One scholar likens teachers' unions CBAs to "an insurance policy to which teachers will subscribe for" emergencies, such as a worldwide pandemic where the teaching job becomes more uncertain.¹⁴⁶ Significant research shows that CBAs are resistant to change without a large precipitating event causing a reason to reconfigure the terms of the contract.¹⁴⁷ CBAs are rarely substantively modified, and the contract language remains constant.¹⁴⁸

However, additional research shows that shocks to state budgets can trigger attempted modifications to local CBAs.¹⁴⁹ For example, when a severe financial emergency plagued the city of Yonkers in 1975, the Yonkers Board of Education attempted to unilaterally terminate the services of a number of teachers, seemingly in breach of the CBA.¹⁵⁰ In that case, New York state's highest court reversed the lower court rulings and enforced the CBA by directing the parties to proceed to arbitration under its terms.¹⁵¹ The court held that job security was a proper subject for bargaining between public employers and employees because no statute,

144. See *supra* notes 61–66 and accompanying text.

145. See DODD, *supra* note 38, at 337; see also, e.g., *Bricklayers Union Loc. 21 v. Edgar*, 922 F. Supp 100, 108 (N.D. Ill. 1996) (finding a crisis in Chicago schools validated new Chicago School Reform Board); *Hearne v. Bd. of Educ. of Chi.*, 185 F.3d 770, 774 (7th Cir. 1999).

146. Marianno, *supra* note 21.

147. See Hemphill & Marianno, *supra* note 25, at 171–72; see also LORRAINE M. McDONNELL & ANTHONY PASCAL, *ORGANIZED TEACHERS IN AMERICAN SCHOOLS* 74–83 (1979); Joshua M. Cowen & Jacob Fowles, *Same Contract, Different Day? An Analysis of Teacher Bargaining Agreements in Louisville Since 1979*, 115 TCHRS. COLL. REC. 1 (2013).

148. See Hemphill & Marianno, *supra* note 25, at 172.

149. See *id.*

150. See Joan W. Keenan, *Case Note: Labor Law — Collective Bargaining — Job Security Is a Proper Subject of Negotiations Between a Public Employer and Public Employee Organization Under the Taylor Law*, 5 FORDHAM URB. L.J. 573 (1977).

151. See *Bd. of Educ. of Yonkers City Sch. Dist. v. Yonkers Fed'n of Tchrs.*, 353 N.E.2d 569, 574 (N.Y. 1976).

case law, or restrictive public policy prohibited negotiating about job security.¹⁵²

In another example, financial pressures from the Great Recession required California and other school districts and teachers' unions to revisit long-standing contract language.¹⁵³ Actions taken by school leaders during the Great Recession shaped labor negotiations and labor tensions in subsequent bargaining cycles.¹⁵⁴ Some argue that the fallout of the Great Recession contributed to the #RedforEd movement in which teachers in Los Angeles, Chicago, and other regions walked out on strike in protest of stagnant wages.¹⁵⁵ The protests attracted general public support and won concessions for educators.¹⁵⁶ The recent teacher strikes marked the relative strength of teachers' unions prior to the COVID-19 pandemic.¹⁵⁷

B. Strikes as Precipitating Events

In California, it is legal for teachers to strike.¹⁵⁸ In January 2019, in the nation's second-largest school district, the Los Angeles Unified School District (LAUSD), 32,000 Los Angeles teachers went on strike.¹⁵⁹ The teachers were motivated by the Chicago teachers' strike of 2012 and by the walkouts in West Virginia, Oklahoma, Indiana, and Arizona.¹⁶⁰ Their union, United Teachers Los Angeles (UTLA), had a list of demands that included more nurses, librarians, and school counselors, less standardized testing, and fewer random searches of students.¹⁶¹

152. *See id.*

153. *See generally* Katharine O. Strunk & Bradley D. Marianno, *Negotiating the Great Recession: How Teacher Collective Bargaining Outcomes Change in Times of Financial Duress*, 5 AERA OPEN 1 (2019).

154. *See* Hemphill & Marianno, *supra* note 25, at 179.

155. *See generally* STEVEN GREENHOUSE, BEATEN DOWN, WORKED UP: THE PAST, PRESENT, AND FUTURE OF AMERICAN LABOR 320–31 (2019); Mary Ellen Flannery & Amanda Litvinov, *Why We Are Red for Ed: It's About Protecting Students and Public Schools*, NAT'L EDUC. ASS'N, <https://educationvotes.nea.org/2018/10/17/why-we-are-red-for-ed/> [<https://perma.cc/49FH-QP9L>] (last visited Nov. 12, 2021).

156. *See* Goldstein & Shapiro, *supra* note 16.

157. *See generally id.*

158. *See* *Modesto City Schs. v. Modesto Tchr.'s Ass'n CTA/NEA*, PERB Decision No. 291, 65 (Cal. Pub. Emp. Rels. Bd. Mar. 8, 1983) (“We conclude that the strike engaged in by the Association was provoked by the District, and that the Association had participated in the collective bargaining process in good faith. We, therefore, hold that the strike by the Association was not in violation of EERA but was protected conduct.”).

159. *See* GREENHOUSE, *supra* note 155, at 321.

160. *See id.* (demanding legislators invest more in schools, teachers, and education over stagnant wages).

161. *See id.*

California's Governor Gavin Newsom and L.A.'s Mayor Eric Garcetti worked to settle the dispute.¹⁶² Eventually, LAUSD got the teachers to end their six-day strike by promising to hire 300 more nurses and 82 more librarians, reduce class sizes, reduce random searches, and create community schools with wraparound services.¹⁶³ Thus, the UTLA was in a position of strength after its successful strike in 2019.¹⁶⁴ The union president, Cecily Myart-Cruz, was considered one of the most prominent politicians in the state,¹⁶⁵ and the UTLA was described "as one of the most powerful public-employee unions in the U.S." because of the 2019 strike.¹⁶⁶ Their current CBA with the LAUSD is set to expire in 2022.¹⁶⁷ In contrast to the UTLA, the United Federation of Teachers in New York City may not legally strike.¹⁶⁸ While the United Federation of Teachers threatened a strike authorization during the 2020 to 2021 school reopening debate, the United Federation of Teachers did not follow through on its threat.¹⁶⁹

162. *See id.*

163. *See id.*

164. *See* Linda Jacobson, *Court Documents Reveal How L.A. Teachers Union Gained Upper Hand in Pandemic Negotiations, Limiting Instruction Time*, 74 MILLION (Mar. 30, 2021), <https://www.the74million.org/article/court-documents-reveal-how-l-a-teachers-union-gained-upper-hand-in-pandemic-negotiations-limiting-instruction-time/> [<https://perma.cc/2L5B-Q7ZU>].

165. *See* Jason McGahan, *Exclusive: Cecily Myart-Cruz's Hostile Takeover of L.A.'s Public Schools*, L.A. MAG. (Aug. 26, 2021), <https://www.lamag.com/citythinkblog/cecily-myart-cruz-teachers-union/> [<https://perma.cc/9KPU-39>].

166. Christine Mai-Duc, *Los Angeles Teachers Union Wields Power in Fight to Reopen Schools*, WALL ST. J. (Mar. 8, 2021, 3:16 PM), <https://www.wsj.com/articles/los-angeles-teachers-union-wields-power-in-fight-to-reopen-schools-11615215600> [<https://perma.cc/A8B4-VTZ5>].

167. CONTRACT BETWEEN LOS ANGELES UNIFIED SCHOOL DISTRICT AND UNITED TEACHERS LOS ANGELES, COLLECTIVE BARGAINING AGREEMENT FOR 2019–2022 TERM (2019) [hereinafter CONTRACT BETWEEN LAUSD & UTLA], https://www.utla.net/sites/default/files/2019-2022_utla-laUSD_collective_bargaining_agreement.pdf [<https://perma.cc/N5YR-QPK7>].

168. *See* N.Y. CIV. SERV. § 210(1) (McKinney 2021) ("No public employee or employee organization shall engage in a strike, and no public employee or employee organization shall cause, instigate, encourage, or condone a strike.").

169. *See* Alex Zimmerman & Christina Veiga, *NYC Teachers Union Prepares for Strike Authorization Votes This Week*, CHALKBEAT (Aug. 29, 2020, 6:04 PM), <https://ny.chalkbeat.org/2020/8/29/21407010/nyc-teachers-union-strike-vote> [<https://perma.cc/FA2A-3Y NQ>]; *see also* Matthew Cunningham-Cook, *Teachers Expect UFT To Vote on Whether to Authorize a Strike over School Reopening*, INTERCEPT (Aug. 28, 2020, 4:40 PM), <https://theintercept.com/2020/08/28/uft-new-york-teachers-strike-vote/> [<https://perma.cc/9DRP-TM8P>]; discussion *infra* Section II.C.iv.

C. COVID-19 as a Precipitating Event

One of the biggest challenges for school districts during the COVID-19 pandemic has been selecting the best course to address and respond to unforeseeable circumstances in schools.¹⁷⁰ The question was, and still is, does the existence of the COVID-19 pandemic create an exigent circumstance, such that the duty to bargain over safety measures or conditions of employment related to the pandemic may be suspended?¹⁷¹ Prior to the COVID-19 pandemic, some districts' CBAs explicitly gave district management the ability to disregard contract provisions in the case of pandemics or other emergencies.¹⁷² Given the lack of precedent and experience for school districts and teachers' unions to help guide them through the global emergency, school districts frequently made difficult decisions in the name of public health.¹⁷³

i. Early Federal Guidance on School-Related CBAs During COVID-19

In June 2020, the NLRB released an advice memo when a nurses' union alleged that a government contractor supplying nursing services to public schools in Washington, D.C. violated the NLRA.¹⁷⁴ The nurses' union claimed that the contractor illegally fired its employee nurses due to D.C.'s closure of public schools in March for the remainder of the 2019 to 2020 school year due to the COVID-19 pandemic.¹⁷⁵

The NLRB concluded that the contractor's actions were lawful because the nurses' union's CBA contained "an entire article devoted to layoffs" and the management rights clauses therein "also contained a general right to lay off."¹⁷⁶ The NLRB held that "the decision to lay off the nurses while school was out was within the compass or scope of contract provisions granting the [contractor] the right to act unilaterally."¹⁷⁷ The NLRB

170. See Klein & Pappas, *supra* note 143.

171. See Daniel Johns, *How Labor Law May Affect Your COVID Vaccine Mandate*, LAW360 (Oct. 29, 2021, 5:05 PM), <https://www.law360.com/employment-authority/articles/1435728/how-labor-law-may-affect-your-covid-vaccine-mandate> [<https://perma.cc/3VX5-7LZ7>].

172. See Sawchuk, *supra* note 17.

173. See Jon Valant, *School Reopening Plans Linked to Politics Rather than Public Health*, BROOKINGS INST. (July 29, 2020), <https://www.brookings.edu/blog/brown-center-chalkboard/2020/07/29/school-reopening-plans-linked-to-politics-rather-than-public-health/> [<https://perma.cc/F7YE-AA5Z>].

174. See NLRB ADVICE MEMORANDUM 05-CA-258669 (2020), <https://www.nlr.gov/sites/default/files/temporary/adv05-ca-258669-children-school-services-final.pdf> [<https://perma.cc/5RPL-Q2HK>]; see also Klein & Pappas, *supra* note 143.

175. See Klein & Pappas, *supra* note 143.

176. See *id.*

177. See *id.*

commented that the breadth of the agreement's zipper clause relieved the contractor of any obligation to bargain further.¹⁷⁸ While the NLRA and NLRB do not govern school districts,¹⁷⁹ this early matter gave some indication of how judges, boards, and arbitrators might interpret CBAs during the COVID-19 pandemic.

ii. The Response of Teachers' Unions in the Spring of 2020

COVID-19 forced district management and teachers' unions to ask unprecedented questions on managing teachers' duties and expectations over the course of a virtual school day in the spring of 2020.¹⁸⁰ In this time of uncertainty, CBAs provided "some clarity of expectations for those on either side of the bargaining table" but also forced further negotiations and MOUs over the rapid change to the school day.¹⁸¹ CBAs did not address the myriad new challenges that sprung up in remote learning because issues such as Zoom classes, asynchronous recordings, and Google Classroom assignments were not contemplated during the bargaining period.¹⁸² Thus, teachers' unions negotiated with district management using MOUs, MOAs, letters of agreement, successor contracts, or CBA extensions to reach an agreement on COVID-19 issues.¹⁸³

Teachers' unions found themselves walking a delicate line in the early days of the COVID-19 pandemic.¹⁸⁴ Unions in some of the largest school districts were fighting for the rights of their members, calling for restrictions on the number of hours and days that teachers were required to work, on the expectations that teachers conduct lessons synchronously as opposed to pre-recording lectures, and more.¹⁸⁵ Collective bargaining and negotiations protected the rights of some teachers in response to the transformative change to the school day. There were notable union

178. *See id.*

179. *See supra* Section I.A.

180. *See* Sawchuk, *supra* note 17.

181. *See id.*

182. *See* Madeline Will, *How Teachers' Unions Are Influencing Decisions on School Reopenings*, EDUC. WK. (Dec. 2, 2020), <https://www.edweek.org/teaching-learning/how-teachers-unions-are-influencing-decisions-on-school-reopenings/2020/12> [<https://perma.cc/N2C8-CEH8>].

183. *See, e.g.*, NAT'L EDUC. ASS'N, COVID-19 MOUs 1 (2020) (describing a summary and database of countrywide MOUs by [National Education Association] NEA affiliated local teachers' unions, providing "a good representation of the issues that are being negotiated and how those issues are being resolved through collective bargaining").

184. *See* Goldstein & Shapiro, *supra* note 16.

185. *See id.*

victories in Florida,¹⁸⁶ Colorado,¹⁸⁷ and Los Angeles.¹⁸⁸ All the while, teachers' unions were trying to retain the public support they won during the massive walkouts and strikes in 2018 and 2019.¹⁸⁹

Meanwhile, some district management opted for largely collaborative negotiations with teachers' unions that outlined what teachers and administrators would be responsible for throughout the rest of the school year as public opinion supported teachers.¹⁹⁰ Government guidance in states like California told districts to focus on the "complexities of remote learning" rather than putting every provision in these temporary agreements.¹⁹¹ Such guidance was endorsed by California's largest teachers' unions, the California Teachers Association (CTA) and the California Federation of Teachers (CFT).¹⁹² Still, there were some notable disagreements. The UFT in New York City reportedly pushed back against some of the new expectations for teachers.¹⁹³ The United Federation of

186. See MEMORANDUM OF AGREEMENT BETWEEN BREVARD PUBLIC SCHOOLS AND THE BREVARD FEDERATION OF TEACHERS 1 (2020), https://561fbc4c-d0a3-413b-a388-efcc1edf26d6.filesusr.com/ugd/0d6c24_ecce4b1025004703b403af36fe32b747.pdf [<https://perma.cc/693J-YQKV>] (demonstrating the union and district for Brevard County, Florida agreed to limit teachers' instructional time to three hours per day, that teachers were not required to communicate with families using their personal cellphones, and that it would not formally evaluate teachers' online instruction).

187. See Letter from Amie Baca-Oehlert, High Sch. Couns. & President of the Colorado Ed. Ass'n, to Jared Polis, Governor of Colorado 1 (Apr. 2020), <https://wp-cpr.s3.amazonaws.com/uploads/2020/04/A-Petition-to-Governor-Jared-Polis-from-the-Colorado-Education-Association.pdf> [<https://perma.cc/G7J9-RMUU>] (asking the governor to direct superintendents to bargain with local unions on expectations for remote teaching, and to reimburse educators for out-of-pocket expenses related to working online from home).

188. See SIDELETTER AGREEMENT BETWEEN THE LOS ANGELES UNIFIED SCHOOL DISTRICT AND UNITED TEACHERS LOS ANGELES ON COVID-19 IMPACT EFFECTS 1-6 (2020), https://www.utla.net/sites/default/files/utla-laUSD_sideletter_for_covid-19_impact_effects_-_final_all_signatures.pdf [<https://perma.cc/E7UV-Y7U9>] (announcing an agreement between the union and district to limit instruction and student support time to an average of four hours per day per teacher, to limit staff meetings to one hour per week, to encourage, but not require, live teaching via video platforms, and suspending teacher evaluations for the school year).

189. See *supra* notes 159-67 and accompanying text.

190. See Sawchuk, *supra* note 17; see also Emma Garcia, *The Pandemic Sparked More Appreciation for Teachers, But Will It Give Them A Voice in Education and Their Working Conditions?*, ECON. POL'Y INST. (May 7, 2020, 5:51 PM), <https://www.epi.org/blog/the-pandemic-sparked-more-appreciation-for-teachers-but-will-it-give-them-a-voice-in-education-and-their-working-conditions/> [<https://perma.cc/36GH-8DDB>].

191. Sawchuk, *supra* note 17; see also Memorandum from the Governor of California on Framework for Labor-Management Collaboration: Servicing Local Communities During the COVID-19 Emergency 1 (Apr. 1, 2020) [hereinafter Memorandum, Governor of California], <https://www.gov.ca.gov/wp-content/uploads/2020/04/4.1.20-Labor-Management-Framework.pdf> [<https://perma.cc/5BEZ-R8QG>].

192. See Memorandum, Governor of California, *supra* note 191.

193. See Goldstein & Shapiro, *supra* note 16.

Teachers clashed with then-Governor Andrew M. Cuomo over a canceled spring break and with then-Mayor Bill de Blasio when the Mayor kept teachers on the job for religious holidays, including Passover and Good Friday.¹⁹⁴ United Federation of Teachers spokespersons stated they were fighting to ensure that Mayor de Blasio did not force New York City's teachers to work more than six hours and 20 minutes a day, as stated in their CBA.¹⁹⁵

The MOUs for the rest of the 2019 to 2020 school year were described as “triage documents” that focused only on finishing out the school year, as opposed to the long-term procedures and expectations negotiated in CBAs.¹⁹⁶ A majority of the MOUs and MOAs focused on work hours and teacher time, meeting requirements and procedures, contact with students and their families, attendance, evaluation and grading, and professional development.¹⁹⁷ Research showed that 25 urban school districts formally altered contract language in their 2020 spring response to COVID-19 by signing MOUs, and not renegotiating CBAs, with their teacher unions.¹⁹⁸ The MOUs covered multiple sections, including teacher compensation, definitions of work hours, teacher evaluations, teacher leave, and requirements to protect teacher and students' identities in recorded lesson formats.¹⁹⁹

Overall, the MOUs and labor negotiating in the 2019 to 2020 school year were collaborative because both parties avoided litigation and arbitration.²⁰⁰ Districts that had stable relationships with their teachers' unions were able to reach new deals without much public disagreement.²⁰¹ In districts with a combative labor history, such as Los Angeles, teachers'

194. *See id.*

195. *See id.* However, UFT President Mulgrew, was more critical in an email to his members: “Never once during this crisis has the mayor thanked you for your service . . . [i]nstead, he diminishes your work by describing it only as a vehicle to keep children at home.” *Id.*

196. Sawchuk, *supra* note 17 (describing some MOUs as a lean one to two pages, although in Boston, they were 15 pages). *But cf.* THOMAS ET AL., *supra* note 18, at 438 (explaining that although such contracts traditionally were a few pages, modern MOUs are “lengthy agreements that frequently are complex and impenetrable”).

197. *See* Sawchuk, *supra* note 67.

198. *See* Hemphill & Marianno, *supra* note 25, at 171, 174 (including Los Angeles, San Francisco, Miami, Baltimore, Boston, Detroit, Portland, and Seattle in their study of urban school districts).

199. *See id.* at 175–78.

200. *See* Sawchuk, *supra* note 17 (describing that in Los Angeles, the UTLA and LAUSD were able to reach agreement by April 8, 2020, on a contract framework).

201. *See id.*

unions were able to put aside long-term disagreements for the short-term benefits of both teachers and students alike.²⁰²

A majority of the issues bargained in the MOUs were standard issues that would be included explicitly in CBAs: attendance, grading,²⁰³ teacher-evaluation process,²⁰⁴ and the length of the school day, meetings, and family-teacher conferences.²⁰⁵ However, the MOUs did not address long-term changes beyond the school year and “punt[ed]” on salaries and layoffs.²⁰⁶ Thus, district management and teachers’ unions were headed back to the bargaining table in the summer of 2020 to discuss school reopening plans. From the beginning, there were signs that these negotiations would be contentious.²⁰⁷

The MOUs and MOAs negotiated for remote learning were adopted quickly to get through the remainder of the 2019 to 2020 school year in a fully online and remote environment.²⁰⁸ More negotiations would be necessary for 2020 to 2021 as the transition back to in-person learning in the middle of a pandemic without a cure tested the strength of teachers’ unions and district management again.²⁰⁹

iii. School Reopening Negotiations for the 2020 to 2021 School Year

The big question entering the 2020 to 2021 school year was whether teachers’ unions would emerge as a powerful force in the school reopening debate.²¹⁰ Teacher anxiety on returning to school was widely reported on,²¹¹ and small protests occurred across the country over educator

202. *See id.*

203. *See* Stephen Sawchuk, *Grading Students During the Coronavirus Crisis: What’s the Right Call?*, EDUC. WK. (Apr. 1, 2020), <https://www.edweek.org/teaching-learning/grading-students-during-the-coronavirus-crisis-whats-the-right-call/2020/04> [<https://perma.cc/MWQ9-2PG5>].

204. *See* Madeline Will, *Should Teachers Be Evaluated During Coronavirus School Shutdowns?*, EDUC. WK. (Apr. 20, 2020), <https://www.edweek.org/policy-politics/should-teachers-be-evaluated-during-coronavirus-school-shutdowns/2020/04> [<https://perma.cc/9928-977V>].

205. *See* Goldstein & Shapiro, *supra* note 16.

206. *See* Sawchuk, *supra* note 17.

207. *See id.* (reporting that the UFT said that they wouldn’t agree to begin the 2020 to 2021 school year early).

208. *See supra* notes 180–83.

209. *See infra* Section II.C.iii.

210. *See, e.g.,* Belsha, *supra* note 67; The Daily, *Why Teachers Aren’t Ready to Reopen Schools*, N.Y. TIMES (Aug. 13, 2020), <https://www.nytimes.com/2020/08/13/podcasts/the-daily/school-reopening.html> [<https://perma.cc/SKP5-QN7G>].

211. *See, e.g.,* Dana Goldstein & Eliza Shapiro, *‘I Don’t Want to Go Back’: Many Teachers Are Fearful and Angry over Pressure to Return*, N.Y. TIMES (Aug. 13, 2020), <https://www.nytimes.com/2020/07/11/us/virus-teachers-classrooms.html> [<https://perma.cc/8WR3-ZBXA>].

safety.²¹² The school reopening debate became increasingly politicized as then-President Trump and then-Education Secretary Betsy DeVos pressured schools to fully reopen for in-person instruction.²¹³ At one point, American Federation of Teachers President Randi Weingarten said on July 28, 2020, that teacher strikes were an option to keep schools from reopening without adequate safety measures in place.²¹⁴

As new cases surged, district management and leaders had to deal with how to keep the schools safe in their plans, along with the reality that remote learning was inequitable and unpopular with families.²¹⁵ Once again, district management and union negotiators turned to the bargaining table to agree upon temporary MOUs or MOAs.²¹⁶ However, the topics of discussion changed from the spring's items to the availability of personal protective equipment such as masks, sanitizers, additional custodial staff, air circulation, COVID-19 testing of students, faculty, and staff, contract tracing, and social distancing.²¹⁷

212. See Belsha, *supra* note 67. For example, in Chicago, the CTU planned a “car caravan” protest over teacher safety in July after their calls for an all-remote start to the fall was met by district’s request for students being in person twice a week. See *CTU Holds Car Caravan to Protest CPS Decision to Return to In-Person Learning*, CBS CHI. (July 15, 2021, 6:18 PM), <https://chicago.chalkbeat.org/2020/7/15/21326588/chicagos-teachers-union-calls-for-an-all-remote-start-to-fall> [<https://perma.cc/ABR6-UAZ9>].

213. See Claire Bryan & Kalyn Belsha, *DeVos and Trump Put Pressure on Schools to Fully Open for In-Person Instruction This Fall*, CHALKBEAT (July 7, 2020, 6:41 PM), <https://www.chalkbeat.org/2020/7/7/21316680/devos-and-trump-put-pressure-on-schools-to-fully-open-for-in-person-instruction-this-fall> [<https://perma.cc/HMW4-LVH2>]; see also Erin Richards, *Trump Says Open Schools. Teachers Say Safety First. As Cases Rise, Unions May Win*, USA TODAY (Aug. 13, 2020, 9:08 PM), <https://www.usatoday.com/story/news/education/2020/08/13/covid-cases-back-to-school-reopening-teachers-union-trump/3312750001/> [<https://perma.cc/SFY4-NF6T>] (reporting about conservative critics accusing teachers’ unions of political posturing and over-dramatizing the risks of returning to class); Valant, *supra* note 173.

214. See *A Year of COVID-19: What It Looked Like for Schools*, EDUC. WK. (Mar. 4, 2021), <https://www.edweek.org/leadership/a-year-of-covid-19-what-it-looked-like-for-schools/2021/03> [<https://perma.cc/H4HF-7CJL>].

215. See Belsha, *supra* note 67. *But see* Matt Barnum & Claire Bryan, *America’s Great Remote-Learning Experiment: What Surveys of Teachers and Parents Tell Us About How It Went*, CHALKBEAT (June 26, 2020, 12:18 PM), <https://www.chalkbeat.org/2020/6/26/21304405/surveys-remote-learning-coronavirus-success-failure-teachers-parents> [<https://perma.cc/HZ99-KZB5>] (reporting that remote learning had massive equity issues, with engagement varying across racial and economic lines, as Black and Hispanic students and student from low-income families dealt with gaps in access to technology, internet, and school direction).

216. See *supra* Sections II.C.ii, II.C.iii.

217. See Goldstein & Shapiro, *supra* note 211; see also Doron Dorfman, *Pandemic “Disability Cons,”* 49 J.L., MED. & ETHICS 401, 405–06 (2021) (discussing the role of strong unions, and their requests in the return to in-person teaching).

Union power was determined to be one of the biggest factors influencing whether large urban school districts reopened.²¹⁸ Overall, the data showed that school reopening plans varied across districts.²¹⁹ Seventy percent of the 100 largest school districts in the United States chose remote learning as their sole back-to-school instructional model; almost half (49%) of all districts opened with a remote learning option; 27% of the school districts used hybrid instruction; and full in-person instruction was available to all students in only 24% of the districts.²²⁰ While major urban school districts avoided strikes, teachers' unions pushed their districts to delay reopenings until safety measures were in place,²²¹ and later, until educators were vaccinated.²²²

Once COVID-19 vaccines became available, teachers' unions fought for in-person educators to be prioritized and pushed to the front of the line in the states' phases of the vaccine rollout.²²³ The Centers for Disease

218. See, e.g., Mai-Duc, *supra* note 166 (noting the strength and success of LAUSD); Marianno et al., *supra* note 25.

219. See *School Districts' Reopening Plans: A Snapshot*, EDUC. WK. (Oct. 16, 2020), <https://www.edweek.org/leadership/school-districts-reopening-plans-a-snapshot/2020/07> [<https://perma.cc/YS7A-EMCN>] (explaining a data report of the school reopening plans for 907 school districts, including the 100 largest districts in the United States, including Puerto Rico, and the largest district in each state).

220. See *id.*

221. See *A Year of COVID-19: What It Looked Like for Schools*, *supra* note 214; see also Madeline Will, *Has the Public Turned on Teachers*, EDUC. WK. (Jan. 25, 2021), <https://www.edweek.org/teaching-learning/has-the-public-turned-on-teachers/2021/01> [<https://perma.cc/KRY5-6XPV>]. But cf. Will, *supra* note 182 (reporting that in some districts, pursuant to the management right clauses, teachers' unions did not have to sign off on a back-to-school plan, and district leaders proceeded with reopening regardless of labor opposition). See Will, *supra*. For example, the Baltimore Teachers Union (BTU) opposed a return to in-person instruction until school buildings were safe. See *id.* But Baltimore schools resumed in-person instruction for small groups of at-risk students in about 25 schools in November 2020. See *id.* BTU released the following statement:

BTU is not simply opposing what the district wants to do for the sake of opposition; we have legitimate health concerns and many of them could be addressed if the district was willing to prioritize the safety of its students, staff, and the broader community. The district has refused to bargain with the BTU over the most substantive issues of when and how schools will reopen, and the system is hastily shifting groups of students and staff to in-person instruction without taking the necessary precautions.

Press Release, Balt. Tchrs. Union, BTU Update #7: Problems with the November Reopening (Nov. 2020), <https://www.baltimoreteachers.org/covid-19/> [<https://perma.cc/4T4Y-5MML>].

222. See Madeline Will, *In Chicago and Other Big Cities, Teachers' Unions Are Delaying School Reopenings*, EDUC. WK. (Feb. 10, 2021), <https://www.edweek.org/teaching-learning/in-chicago-and-other-big-cities-teachers-unions-are-delaying-school-reopenings/2021/02> [<https://perma.cc/CQ39-32FA>].

223. See Sarah Schwartz, *Some States Order Schools to Be Open. But Teachers Can't Yet Get the Vaccine*, EDUC. WEEK (Jan. 15, 2021), <https://www.edweek.org/policy-politics/some>

Control and Prevention recommended the states to include teachers as prioritized “frontline essential workers” in states’ phases of vaccinations.²²⁴ In March 2021, President Biden directed states to prioritize educators for the vaccines, calling for the states to “treat in-person learning like an essential service that it is” as part of his Administration’s push to increase vaccinations amongst the general public across the country.²²⁵ President Biden’s address was applauded by both national teachers’ unions,²²⁶ who both endorsed Biden, a noted union ally,²²⁷ early in the 2020 election.²²⁸

iv. The 2020 to 2021 School Reopening in New York City

The United Federation of Teachers — American Federation of Teachers, Local 2 (UFT), is the sole and exclusive bargaining representative of all nonsupervisory pedagogical employees, as well as certain others employed

-states-order-schools-to-be-open-but-teachers-cant-yet-get-the-vaccine/2021/01 [https://perma.cc/NXS6-8AAG] (reporting that the Texas State Teachers Association urged Governor Abbott to add teachers to the states’ priority list); *see also* Mila Koumpilova, *Could Chicago’s School Reopening Deal Set a Higher Bar for Other Districts?*, CHALKBEAT (Feb. 9, 2021, 2:33 PM), <https://chicago.chalkbeat.org/2021/2/9/22275042/could-chicagos-school-reopening-deal-set-a-higher-bar-for-other-districts> [https://perma.cc/UX38-PNQ2] (outlining the Chicago Teachers’ Union’s demands for increased vaccine availability for teachers); *Where Teachers Are Eligible for the COVID-19 Vaccine*, EDUC. WK. (Apr. 5, 2021), <https://www.edweek.org/policy-politics/where-teachers-are-eligible-for-the-covid-19-vaccine/2021/01> [https://perma.cc/8LC5-GSZ6] (showing a data set tracking where K-12 educators, as a profession, became eligible for the COVID-19 vaccine in each of the 50 states, including Washington, D.C. and Puerto Rico).

224. *See* Evie Blad, *Include School Employees in Next Phase of Vaccinations, Federal Panel Recommends*, EDUC. WK. (Dec. 20, 2020), <https://www.edweek.org/policy-politics/include-school-employees-in-next-phase-of-vaccinations-federal-panel-recommends/2020/12> [https://perma.cc/2KBW-MBZY].

225. *See* Andrew Ujifusa, *Biden Announces Goal to Get Educators the COVID-19 Vaccine This Month*, EDUC. WK. (Mar. 3, 2021), <https://www.edweek.org/policy-politics/president-biden-announces-goal-to-get-educators-the-covid-19-vaccine-this-month/2021/03> [https://perma.cc/TQG6-DK4S]. *See generally* Adam Crepelle, *Tribes, Vaccines, and COVID-19: A Look at Tribal Responses to the Pandemic*, 49 *FORDHAM URB. L.J.* 31 (2021) (describing how American Indian Reservations successfully implemented the COVID-19 vaccine rollout); James G. Hodge, Jr. et al., *Vaccinating Urban Populations in Response to COVID-19: Legal Challenges and Options*, 49 *FORDHAM URB. L.J.* 1 (2021) (discussing some of the obstacles and providing solutions to vaccinating urban cities).

226. *See* Ujifusa, *supra* note 225.

227. *See* Kate Taylor & Amelia Nierenberg, *Teachers’ Union Leaders Face a Tough Test over School Reopening*, *N.Y. TIMES* (May 13, 2021), <https://www.nytimes.com/2021/02/10/us/teachers-unions-school-reopening.html> [https://perma.cc/Y6SY-TBJS].

228. *See* Press Release, Am. Fed’n of Tchrs., *AFT Endorses Joe Biden as Democratic Nominee for President* (Mar. 22, 2020), <https://www.aft.org/news/aft-endorses-joe-biden-democratic-nominee-president> [https://perma.cc/HH33-SAN8]; *see also* Nicole Guadiano, *National Education Association Endorses Biden for President*, *POLITICO* (Mar. 14, 2020, 10:03 PM), <https://www.politico.com/news/2020/03/14/national-education-association-endorses-joe-biden-129794> [https://perma.cc/U4YU-SZY6].

by the Department of Education of the City School District of the City of New York (DOE).²²⁹ The UFT and DOE are parties to a CBA covering the period from February 14, 2019, through September 13, 2022.²³⁰ Instead of a school board, the mayor and schools chancellor run the City's 1,800 schools.²³¹

In July 2020, Mayor Bill de Blasio announced the City's plan to partially reopen New York City's public schools in September with staggered student schedules to fulfill social-distancing requirements.²³² The DOE initially hoped to offer several days per week of in-person school.²³³ The Mayor's proposal insisted that all staff and students would wear masks.²³⁴ It also gave teachers the option to receive a medical exemption to work remotely.²³⁵

From the beginning, a dispute arose with the UFT.²³⁶ The UFT criticized the Mayor's plan for the lack of details and raised concerns about not enough personal protective gear, schools' nurses, and testing capacity.²³⁷ In an op-ed, UFT President Michael Mulgrew advocated for increased testing in school as "the kind of testing schools really need."²³⁸ Mulgrew noted that New York State already requires incoming students to be vaccinated against "more than a dozen diseases" and proposed that the state expand its health requirements by "insisting that all students and staff who are planning on attending school be tested in August for active or prior exposure to the coronavirus."²³⁹ He also advocated for medical personnel

229. See DECLARATION OF IMPASSE BETWEEN N.Y.C. DEPARTMENT OF EDUCATION AND UNITED FEDERATION OF TEACHERS 3 (2021) (on file with author) [hereinafter DECLARATION OF IMPASSE].

230. See *id.*

231. See Eliza Shapiro, *How de Blasio Backed Himself into a Corner on Closing Schools*, N.Y. TIMES (Jan. 6, 2021), <https://www.nytimes.com/2020/11/24/nyregion/deblasio-school-reopening.html> [<https://perma.cc/3ADR-KGU4>].

232. See Eliza Shapiro, *New York City's Biggest Decision: How to Safely Reopen Schools*, N.Y. TIMES (Aug. 5, 2020), <https://www.nytimes.com/2020/07/06/nyregion/nyc-school-reopening-plan.html> [<https://perma.cc/B37F-ZDD4>].

233. See Goldstein & Shapiro, *supra* note 211.

234. See Eliza Shapiro, *N.Y.C. Schools, Nation's Largest District, Will Not Fully Reopen in Fall*, N.Y. TIMES (Aug. 7, 2020), <https://www.nytimes.com/2020/07/08/nyregion/nyc-schools-reopening-plan.html> [<https://perma.cc/9H2A-MA8Q>].

235. See *id.*

236. See *id.*

237. See *id.*

238. Michael Mulgrew, Opinion, *The Kind of Testing Schools Really Need: Better Coronavirus Screening Is Imperative If the Nation's Largest Public School System Is to Reopen in the Fall*, N.Y. DAILY NEWS (Apr. 29, 2020, 5:00 AM), <https://www.nydailynews.com/opinion/ny-oped-the-kind-of-testing-schools-really-need-20200429-i3uce2ewpvc1tp7tbuyrv4hfoa-story.html> [<https://perma.cc/N43J-VZU4>].

239. *Id.*

to perform rapid temperature tests for all students and staff and to stagger split schedules to maintain social distancing.²⁴⁰ Mulgrew later said that he did not believe New York City schools could reopen in any capacity without federal aid, in large part because of the economic crisis the COVID-19 pandemic had caused in the City.²⁴¹ If the state and City did not have the funding for staff, protective equipment, and cleaning, Mulgrew said: “[T]hen that’s it, all bets are off, schools won’t open.”²⁴²

The initial start date for New York’s school reopening was September 10, 2020.²⁴³ However, the UFT was described as a “formidable obstacle” to the reopening plan because of a threatened strike.²⁴⁴ The UFT was poised to authorize its 75,000 members to walk off the job, which would have been the UFT’s first walkout in almost 50 years.²⁴⁵ The two major issues were the school start date and the testing protocol for students and staff.²⁴⁶ The Mayor resisted mandatory testing, arguing that other school districts had successfully opened without it, while the union demanded testing to help assuage teacher fears of the return to the classroom.²⁴⁷ After a “flurry of late-night negotiations” to avoid a strike, Mayor de Blasio reached a temporary one-year deal with the UFT, which would mark New York City as the only major urban school district to welcome back students in the fall of 2020.²⁴⁸ The Mayor announced that schools would begin reopening for in-person learning on September 21, 2020.²⁴⁹ As part of the union demands, the Mayor announced there would be mandatory random testing of more than 10% of students and teachers once a month.²⁵⁰ Additionally, children who did not have parental consent to testing were

240. *See id.*

241. *See* Shapiro, *supra* note 232.

242. *Id.*

243. *See* Eliza Shapiro, Dana Rubinstein & Emma G. Fitzsimmons, *New York City Delays Start of School to Ready for In-Person Classes*, N.Y. TIMES (Sept. 21, 2020), <https://www.nytimes.com/2020/09/01/nyregion/schools-open-coronavirus-nyc.html> [<https://perma.cc/V52D-JSA2>].

244. *See id.*

245. *See id.*

246. *See id.* (“The stakes of the reopening endeavor in New York pushed the mayor and union leaders to start negotiating in earnest over the weekend, with the school start date and testing protocol for students and staff left as the two major outstanding issues.”).

247. *See* Emma G. Fitzsimmons, *N.Y.C. School Plan Hinges on Hundreds of Thousands of Virus Tests*, N.Y. TIMES (Sept. 20, 2021), <https://www.nytimes.com/2020/09/02/nyregion/schools-reopen-testing-nyc.html> [<https://perma.cc/USZ2-VKMU>] (quoting UFT President Mulgrew’s emphasis on testing: “We’re going to make sure that if there’s any signs that there could be a problem, that we’re in there as quick as possible and stopping it very quickly”).

248. *See* Shapiro et al., *supra* note 243.

249. *See* Fitzsimmons, *supra* note 247.

250. *See id.*

required to learn remotely at home.²⁵¹ Finally, the DOE put school staff who chose not to participate in the testing regime on unpaid leave.²⁵² Overall, UFT President Mulgrew signaled victory for his members and stated “that the New York City public school’s system has the most aggressive policies and safeguards of any school system in America.”²⁵³

Over the course of the school year, many criticized the deal between the City and the UFT as inflexible.²⁵⁴ Eight weeks after schools reopened, the City announced that it was closing in-person learning on November 19, 2020, after the rate of COVID-19 test results cracked the agreed upon 3% positivity benchmark.²⁵⁵ The City switched to all-remote learning amid criticism from parents who argued the 3% positivity benchmark was too conservative and not backed by science.²⁵⁶ The UFT defended the 3% benchmark by arguing that the City should continue to prioritize teachers’ and staff members’ safety in conjunction with student learning.²⁵⁷

Mayor de Blasio abruptly announced that all public elementary schools would reopen on November 29, 2020, and announced that the City was abandoning the 3% positivity threshold.²⁵⁸ Despite demands from the UFT that the City’s schools be closed again in January 2021, as cases rose, the elementary schools remained open for the rest of the year, and the City’s middle and high schools reopened again in February and March.²⁵⁹ When the states distributed vaccines, New York educators joined Hawaii, Michigan, and Utah in becoming the first teachers eligible to receive a COVID-19 vaccine on January 11, 2021.²⁶⁰

251. *See id.*

252. *See id.*

253. Shapiro et al., *supra* note 243.

254. *See* Eliza Shapiro, *Parents in N.Y.C. Public Schools Now Face This Agonizing Choice*, N.Y. TIMES (Nov. 18, 2020), <https://www.nytimes.com/2020/11/02/nyregion/nyc-schools-reopening.html> [<https://perma.cc/GH89-YC2T>].

255. *See* Bill de Blasio (@NYCMayor), TWITTER (Nov. 18, 2020, 2:19 PM), https://twitter.com/NYCMayor/status/1329142152639733761?ref_src=twsrc%5Etfw [<https://perma.cc/V8PM-HG9T>].

256. *See* Stephen Sawchuk, *New York City Shuttters Schools After COVID-19 Rate Crosses Benchmark*, EDUC. WK. (Nov. 18, 2020), <https://www.edweek.org/leadership/new-york-city-shuttters-schools-after-covid-19-rate-crosses-benchmark/2020/11> [<https://perma.cc/UEB5-GPCR>]; *see also* The Daily, *New York City’s 3 Percent Problem*, N.Y. TIMES (Nov. 23, 2020), <https://www.nytimes.com/2020/11/23/podcasts/the-daily/new-york-city-school-reopening.html> [<https://perma.cc/PQ7C-RZDR>].

257. *See* Sawchuk, *supra* note 256.

258. *See* Giulia Heyward, *From Shutdown to Reopening: Here’s A Look at N.Y.C. Schools’ Trek Through the Pandemic*, N.Y. TIMES (Sept. 13, 2021), <https://www.nytimes.com/2021/09/13/world/reopening-timeline-nyc-schools.html> [<https://perma.cc/C5W2-4CRU>] (detailing the timeline of N.Y.C. school reopening process).

259. *See id.*

260. *See Where Teachers Are Eligible for the COVID-19 Vaccine*, *supra* note 223.

v. The 2020 to 2021 School Reopening in Los Angeles

The United Teachers of Los Angeles, Local 121 (UTLA) is the sole and exclusive bargaining representative of all nonsupervisory pedagogical employees, as well as certain others employed by LAUSD.²⁶¹ The UTLA is affiliated with the California Teachers Association, California Federation of Teachers, National Education Association, and the American Federation of Teachers/AFL-CIO.²⁶² The UTLA and LAUSD are parties to a CBA for teachers and functional chapters covering the period from January 2019 through June 2022.²⁶³

Tensions between the UTLA and LAUSD increased in the school reopening debate, and the nation viewed their negotiations as a test of how much influence a strong urban teachers' union could exercise in the back-to-school debate.²⁶⁴ The UTLA took the initiative in framing the reopening debate in Los Angeles, publicly calling for school campuses to remain closed with distance learning to continue for the beginning of the school year before the LAUSD announced their reopening plan.²⁶⁵ The UTLA surveyed its members and published that 83% agreed that campuses should not physically reopen.²⁶⁶ The district announced a few days later that instruction would be online-only in the fall.²⁶⁷

The focus of the negotiations over the course of the school year was a suitable testing regime.²⁶⁸ Over four months, the LAUSD and UTLA designed a testing program that would eventually test all employees and students.²⁶⁹ However, Los Angeles schools remained online throughout the

261. See CONTRACT BETWEEN LAUSD & UTLA, *supra* note 167.

262. See *id.*

263. See Taylor Swaak, *A Look into the LAUSD, UTLA Contract Deal Ending the 6-Day Teacher Strike*, L.A. SCH. REP. (Jan. 22, 2019), <http://laschoolreport.com/a-look-into-the-laUSD-utla-contract-deal-that-could-end-the-6-day-teacher-strike/> [https://perma.cc/Q7Z9-SRH8].

264. See Mai-Duc, *supra* note 166.

265. See Nina Agrawal, Howard Blume & Sonali Kohli, *L.A. Teachers Union Says Schools Should Not Reopen Next Month, Citing Coronavirus Spike*, L.A. TIMES (July 10, 2020, 9:21 PM), <https://www.latimes.com/893auds893mia/story/2020-07-09/los-angeles-teachers-union-calls-for-delay-reopening> [https://perma.cc/23YS-6F48].

266. See United Teachers Los Angeles (@UTLANow), TWITTER (July 10, 2020, 11:54 PM), <https://twitter.com/UTLANow/status/1281798939922935808?s=20> [https://perma.cc/M8PT-TEW2].

267. See Shawn Hubler & Dana Goldstein, *Los Angeles and San Diego Schools to Go Online-Only in the Fall*, N.Y. TIMES (July 24, 2020), <https://www.nytimes.com/2020/07/13/us/893auds-san-diego-school-reopening.html> [https://perma.cc/4HDW-3HGC].

268. See Shawn Hubler, *Can Los Angeles Schools Test 700,000 Students and 75,000 Employees? That's the Plan*, N.Y. TIMES (Mar. 8, 2021), <https://www.nytimes.com/2020/08/16/us/los-angeles-schools-virus-testing.html> [https://perma.cc/JK4T-572W].

269. See *id.*

fall and winter.²⁷⁰ When the vaccine rollout began in the state, Governor Gavin Newsom announced that as of March 1, 2021, the state would designate 10% of the state's allotment for vaccinating K-12 educators and staff.²⁷¹ On February 25, 2021, the state published guidelines for how the state's health agencies would distribute this statewide.²⁷²

As the school year progressed, the UTLA did not agree to return to in-person learning unless its demands were met and L.A. County reached a lower rate of COVID-19 infections.²⁷³ The UTLA requested vaccinations for school staffers and enhanced safety protocols, including social distancing, PPE, and improved ventilation in the buildings.²⁷⁴ The UTLA remained transparent that its demands were led by its rank and file members — 91% of voting members endorsed the UTLA's position in March 2021.²⁷⁵ The LAUSD superintendent had been mostly aligned with the UTLA on vaccines and safety measures, such as air filters and regular testing, until the impasse in March.²⁷⁶ He publicly noted that he needed a “completed agreement” with the UTLA before schools would reopen.²⁷⁷ Eventually, the UTLA and LAUSD came to a temporary, one-year agreement, and LAUSD schools began a phased reopening in early April 2021.²⁷⁸

*vi. Overall Research and Findings from the 2020 to
2021 School Reopenings*

Overall, empirical research suggested that strong teachers' unions slowed fall reopening and returns from winter break.²⁷⁹ The research

270. See Shawn Hubler, *Los Angeles Schools and Teachers' Union Agree to Reopen Classrooms*, N.Y. TIMES (June 21, 2021), <https://www.nytimes.com/2021/03/09/us/los-angeles-schools-reopening-deal.html> [<https://perma.cc/P5QT-RTNZ>].

271. See Memorandum from California Dep't of Pub. Health on Vaccines for K-12 School Staff and Childcare Workers to Local Counties 2 (Feb. 25, 2021), https://www.cdph.ca.gov/Programs/CID/DCDC/CDPH%20Document%20Library/COVID-19/K-12_Vaccines_Overview.pdf [<https://perma.cc/H74V-GNTE>].

272. See *id.*

273. See Mai-Duc, *supra* note 166.

274. See *id.* (“Los Angeles Unified School District Superintendent Austin Beutner . . . secured 25,000 vaccine doses . . . enough for all the teachers and staff who work with children in sixth grade and below.”).

275. See *id.*

276. See *id.*

277. See *id.*

278. See Kyle Stokes, *Everything We Know About LAUSD's Plan to Reopen Schools*, LAIST (Apr. 19, 2021, 6:30 PM), <https://laist.com/news/education/guide-everything-we-know-about-lausds-plan-to-reopen-schools-in-april> [<https://perma.cc/T9LC-T6L4>].

279. See, e.g., Marianno, *supra* note 21; see also Corey DeAngelis & Christos Makridis, *Are School Reopening Decisions Related to Union Influence* (Sept. 1, 2020) (unpublished manuscript), <https://ssrn.com/abstract=3684867> [<https://perma.cc/2QLR-W5BJ>]; Matt

shows that school districts with longer and more detailed CBAs were less likely to start the 2020 to 2021 school year with in-person instruction, were less likely to ever open for in-person teaching during the fall, and spent more weeks overall in remote learning.²⁸⁰ Despite some of the loud protests from educators, it was the “long-standing, entrenched union power relationships captured by the length of the [CBA] that are associated with a slowed reopening timeline.”²⁸¹ Still, in districts with strong unions and detailed CBAs, one-year MOUs and MOAs were negotiated and bargained over as the ultimate agreement for the day-to-day operations of the school year, instead of the CBA.

Research from the 2019 to 2020 and 2020 to 2021 school years suggested that urban school districts agreed upon “a diverse set of changes, highlighting the localized nature of response to the COVID-19 crisis . . . showing that there is no one-size-fits-all approach.”²⁸² One policy suggestion for the 2021 to 2022 school year was additional cooperation and “heightened transparency” between district leaders and labor groups to prevent teacher and labor unrest.²⁸³ However, potential vaccination mandates threatened any good will between district management and teachers’ unions.²⁸⁴

III. THE ROLE OF CBAS IN TEACHER VACCINE MANDATES IN THE 2021 TO 2022 SCHOOL YEAR

As vaccine mandates for educators became a topic of discussion in the summer of 2021, the question became whether district management would bargain with teachers’ unions over a vaccine mandate or unilaterally

Grossmann et al., *All States Close but Red Districts Reopen: The Politics of In-Person Schooling During the COVID-19 Pandemic* 1–26 (Brown Univ., EdWorking Paper No. 21-355, 2021), <https://www.edworkingpapers.com/sites/default/files/ai21-355.pdf> [<https://perma.cc/3VEL-ZWMX>]; Rick Hess, *Have School Reopening Decisions Been Driven by Union Influence?*, EDUC. WK. (Apr. 22, 2021), <https://www.edweek.org/leadership/opinion-have-school-reopening-decisions-been-driven-by-union-influence/2021/04> [<https://perma.cc/V2B9-BEF3>].

280. See Marianno, *supra* note 21.

281. *Id.*

282. Hemphill & Marianno, *supra* note 25, at 171.

283. *See id.*

284. *See, e.g.*, Shane Dixon Kavanaugh, *All of Portland’s Employee Unions Demand Right to Negotiate over City’s COVID-19 Vaccine Mandate*, OREGONIAN (Aug. 31, 2021, 5:48 PM), <https://www.oregonlive.com/news/2021/09/all-of-portlands-employee-unions-demand-right-to-negotiate-over-citys-covid-19-vaccine-mandate.html> [<https://perma.cc/5LN S-AB2Q>]; James Surowiecki (@JamesSurowiecki), TWITTER (Aug. 31, 2021, 8:58 PM), <https://twitter.com/JamesSurowiecki/status/1432870383292723201?s=20> [<https://perma.cc/7MLZ-LHQK>] (exchanging in a Twitter debate with Dave Kamper from the Economic Policy Institute on the importance of impact bargaining over vaccine mandates, summarizing the general tension in this Note).

promulgate a vaccination policy, and then whether a district's CBA would give unions legal grounds for bargaining about the processes by which these requirements would be implemented — including the scope for medical or religious exceptions and an alternative option for daily or frequent testing.²⁸⁵ Part III addresses these questions in four sections. The first section identifies the broader argument on teacher vaccine mandates from the summer of 2021. The following two sections are case studies on the implementation process of vaccine mandates for teachers in New York City and Los Angeles.²⁸⁶ Finally, the fourth section provides a comparative analysis of the two case studies. It concludes with proactive and prescriptive recommendations for future bargaining between school districts and teachers' unions over precipitating events, including additional challenges resulting from the COVID-19 pandemic, and argues that temporary MOUs and MOAs remain better suited for handling emergencies and exigencies.

A. Discussions in the Summer of 2021 Around Teacher Vaccine Mandates

Many parents, students, administrators, and teachers pushed for a return to full in-person learning in pre-K-12 education for the 2021 to 2022 school year.²⁸⁷ There was urgency from multiple actors to get students back into the classroom in the short term.²⁸⁸ However, in the long-term, national and local teachers' unions were reluctant to give up hard-fought protections in

285. See discussion *infra* Section III.A.

286. See *New York City, The Country's Largest School System, Mandates Teacher Vaccinations*, *supra* note 10 (reporting that several unions “bristled” at the new vaccination policy and stated that the City “needed to negotiate, not dictate”). *But cf.* Blume & Gomez, *supra* note 10 (reporting that the LAUSD's order was fully endorsed by the UTLA and that immediately after the LAUSD announcement, a separate order supporting the mandate was released by the UTLA, after UTLA's board of directors “overwhelmingly” approved the vaccine mandate).

287. See Collin Binkley & Hannah Fingerhut, *AP-NORC Poll Finds School Mask, Vaccine Mandates Supported in U.S.*, PBS NEWSHOUR (Aug. 23, 2021, 2:53 PM), <https://www.pbs.org/newshour/education/ap-norc-poll-school-mask-vaccine-mandates-supported-in-u-s> [<https://perma.cc/SU9N-VC2V>] (reporting nearly six in ten Americans say students and teachers should be required to wear face masks while in school, and teachers and eligible students should be required to receive a COVID-19 vaccine, according to a poll from the Associated Press-NORC Center for Public Affairs Research).

288. See, e.g., Joshua M. Sharfstein & Christopher C. Morpew, *The Urgency and Challenge of Opening K-12 Schools in the Fall of 2020*, 342 JAMA 133 (2020); Jaime Saavedra, *The Urgency and Opportunity to Return to Learning*, WORLD BANK BLOGS (Jan. 24, 2021), <https://blogs.worldbank.org/education/urgency-and-opportunity-return-learning> [<https://perma.cc/DTR3-V3ER>]; Press Release, U.S. Dep't of Educ., Secretary Cardona's Remarks on the “Return to School Roadmap” (Aug. 4, 2021), <https://www.ed.gov/news/speeches/secretary-cardonas-remarks-return-school-roadmap> [<https://perma.cc/3YXJ-B8JB>].

their CBAs over an integral condition of employment like a vaccination requirement.²⁸⁹ One commentator noted that vaccine mandates were potential “bargaining chips” for unions as their teachers returned to school and national teachers’ unions did not want to weaken local unions’ stances.²⁹⁰ Some local unions were in favor of a vaccine mandate in exchange for other workplace protections.²⁹¹ This required a tight-rope act for national teachers’ union leaders who did not want to alter the collective bargaining power of the local unions.²⁹²

Teachers’ unions also dealt with the perception that they were the obstacle in return to normalcy for students and their families.²⁹³ For example, in August 2021, Becky Pringle, President of the National Education Association (NEA), was asked about the public perception that teachers’ unions did not want schools open and relied on extended contract negotiations to delay reopenings.²⁹⁴ Pringle responded:

It is a perception. It is not a reality. And though many of those protracted conversations that you’ve referenced made the news, the majority of our conversations — whether they were collective bargaining or memorandums of understanding or just collaboration between educators and school districts — came to a mutual agreement about what was best for students and educators and schools.²⁹⁵

Still, many parents, students, administrators, and teachers pushed for a return to full in-person learning in pre-K-12 education for the 2021 to 2022 school year with a vaccination requirement.²⁹⁶

School districts were likely wary of forcefully changing teacher working conditions, given the already-low teacher morale.²⁹⁷ Previous research on

289. See Madeline Will, *Teachers’ Unions Have Opposed Vaccine Mandates. But That May Change*, EDUC. WK. (Aug. 9, 2021), <https://www.edweek.org/teaching-learning/teachers-unions-have-opposed-vaccine-mandates-but-that-may-change/2021/08> [<https://perma.cc/7VK8-823V>].

290. See *id.*; see also Alexandra Ellerbeck, *The Health 202: Labor Unions Are Split on Vaccine Mandates*, WASH. POST (Aug. 17, 2021, 7:50 AM), <https://www.washingtonpost.com/politics/2021/08/17/health-202-labor-unions-are-split-vaccine-mandates/> [<https://perma.cc/LS3X-UKQY>].

291. See Ellerbeck, *supra* note 290.

292. See *id.*; see also Mervosh, *supra* note 10.

293. See, e.g., Rachel M. Cohen, *Inside a Long, Messy Year of Reopening Schools*, NEW REPUBLIC (Mar. 8, 2021), <https://newrepublic.com/article/161608/inside-long-messy-year-reopening-schools> [<https://perma.cc/3295-ZE59>] (discussing accusations that teachers’ unions were “obstinate and compromising education”).

294. See Emma Green, *Why America’s Largest Teachers’ Union Refuses to Support Vaccine Mandates*, ATLANTIC (Aug. 20, 2021), <https://www.theatlantic.com/politics/archive/2021/08/becky-pringle-nea-vaccine-mandates/619836/> [<https://perma.cc/K7TV-XFJ9>].

295. *Id.*

296. See Binkley & Fingerhut, *supra* note 287.

collective bargaining negotiations suggests that teachers' unions remember what they perceive to be unfair labor practices in future bargaining sessions.²⁹⁸ However, once the FDA gave full approval to the Pfizer-BioNTech vaccine, some school district leaders quickly instituted a vaccine mandate.²⁹⁹ Once again, teachers' unions struck a challenging balance between advocating for their members' safety and representing their members' preferences.³⁰⁰ Commentators predicted that unions would retain their power during bargaining over the details of the mandates, including issues such as religious or medical accommodations, who will pay for testing, and dismissal procedures for unvaccinated educators.³⁰¹

B. New York City

The protracted dispute between the UFT and then-Mayor Bill de Blasio over school reopenings in 2020 to 2021 signaled that negotiations over any potential vaccination mandate would be contentious.³⁰²

i. Initial Vaccine-or-Test Policy

Initially, the DOE announced in July 2021 that the policy would be a vaccine-or-test mandate.³⁰³ This vaccine-or-test policy was praised by the UFT.³⁰⁴ The union heralded the policy as keeping the schools safe, emphasizing vaccinations, and still allowing members to choose.³⁰⁵ Other

297. See Hemphill & Marianno, *supra* note 25, at 179.

298. *See id.*

299. See Will, *supra* note 9 (writing that FDA's approval of the Pfizer vaccine provided legal cover for districts to require their staff to get vaccinated); *see also infra* notes 312–17 and accompanying text.

300. See Will, *supra* note 11 (quoting Marianno: "Some would call upon unions to put a lot of public pressure on the small remaining amount of their members who have not been vaccinated — that's not what unions do . . . They're trying to appeal to those members and retain them. Teachers losing their jobs goes against unions' interests").

301. See, e.g., Will, *supra* note 9; Johns, *supra* note 171.

302. See discussion *supra* Section II.C.iv.

303. See Laurel Wamsley, *New Vaccine Mandates Are Coming for Government Employees and Health Care Workers*, NPR (July 27, 2021, 8:27 PM), <https://www.npr.org/2021/07/26/1020709931/nyc-will-require-vaccines-or-weekly-tests-for-hundreds-of-thousands-of-city-work> [<https://perma.cc/KH8F-BUC9>].

304. See Press Release, United Fed'n of Tchrs., UFT Statement on New York City Vaccination/Testing Policy (July 26, 2021), <https://www.uft.org/news/press-releases/uft-statement-on-new-york-city-vaccination-testing-policy> [<https://perma.cc/7MNU-FD63>].

305. *See id.*

industry unions pushed back against this requirement because the FDA had not given final approval to any of the COVID-19 vaccines.³⁰⁶

As the COVID-19 Delta variant spread throughout the country, Renee Campion, the commissioner at the New York City Office of Labor Relations, said if employees refused to comply with the vaccine-or-test policy, the City would put them on leave without pay.³⁰⁷ Campion added that under the New York City collective bargaining law,³⁰⁸ the City did not have to negotiate with unions regarding the safety impacts of such policies.³⁰⁹ Mayor de Blasio agreed, noting that the City had the right as an employer to take urgent actions to protect the health and safety of its workers.³¹⁰ De Blasio did say that the City was “in talks” with various unions on the specifics of the mandate.³¹¹

ii. The No-Test Policy

On August 23, 2021, hours after the FDA fully approved the first COVID-19 vaccine, then-Mayor de Blasio, then-Schools Chancellor Meisha Porter, and then-Department of Health and Mental Hygiene Commissioner Dr. Dave A. Chokshi unilaterally announced a mandate by executive order requiring all DOE employees to provide proof of a first dose of vaccination by September 27.³¹² The mandate applied to all 148,000 DOE employees as well as DOE contractors who worked in school-based settings.³¹³

The mandate was the first of its kind and far stricter than other mandates which were being imposed in other cities and states because it did not give educators the option to be tested instead of being vaccinated.³¹⁴ This no-

306. See Wamsley, *supra* note 303 (reporting that FDNY EMS Local 2507, which represents over 3,000 EMTs, paramedics and fire inspectors, strongly opposed the new rules).

307. See *id.*

308. See generally N.Y.C., N.Y. ADMIN. CODE tit. 12, ch. 3, §§ 12-301 to 12-316 (2021).

309. See Wamsley, *supra* note 303.

310. See *id.*

311. See *id.*

312. See Press Release, Off. of the Mayor of New York City, Mayor de Blasio, Chancellor Porter and Commissioner Chokshi Announce Department of Education Employee Vaccine Mandate (Aug. 23, 2021), <https://www1.nyc.gov/office-of-the-mayor/news/578-21/mayor-de-blasio-chancellor-porter-commissioner-chokshi-department-education> [<https://perma.cc/G554-EPA5>].

313. See *id.*

314. See Jordan Weissmann, *96 Percent of New York's Teachers Are Now Vaccinated, Because Mandates Work*, SLATE (Oct. 4, 2021, 6:04 PM), <https://slate.com/business/2021/10/new-york-city-teachers-vaccine-mandate-public-schools.html> [<https://perma.cc/8P4D-AZUC>].

test option required all teachers to get vaccinated.³¹⁵ Less restrictive mandates allowed teachers to opt-out of the vaccine by getting tested weekly.³¹⁶ UFT President Mulgrew immediately responded that the City must negotiate with the UFT and other unions over the implementation details of the City's new policy and arbitration might be necessary.³¹⁷

iii. "Draconian Imposed Policy": UFT Files a Statement of Impasse

On September 2, 2021, the UFT charged that the City's imposition of a "draconian" COVID-19 vaccine mandate for all educators violated federal and state law and the teachers' CBA.³¹⁸ The UFT formally requested the intervention of New York's PERB to help resolve the dispute by mediation.³¹⁹ If PERB mediation failed, the vaccine mandate issue would be resolved by arbitration.³²⁰ In its filing with PERB, the UFT cited the City's new "sudden and rigid policy," which went against the initial vaccination-or-test policy announced earlier that summer.³²¹ In a subsequent bargaining session, the City maintained that the City would not accommodate teachers with a legitimate medical exception with COVID-19 testing or a remote assignment.³²² Instead, according to City negotiators, teachers with medical issues could stay on the payroll until they used up their sick days and then go on unpaid leave, while those with

315. *See id.*

316. New York City's initial policy did allow educators to either get the vaccine or be tested weekly for the virus. *See* Wamsley, *supra* note 303. *But see* New York City, *The Country's Largest School System, Mandates Teacher Vaccinations*, *supra* note 10 (announcing the new no-option vaccination policy).

317. *See* Press Release, United Fed'n of Tchrs., UFT Statement on New York City Vaccination Policy (Aug. 23, 2021), <https://www.uft.org/news/press-releases/uft-statement-on-new-york-city-vaccination-policy> [<https://perma.cc/7A7K-SYLQ>] ("While the city is asserting its legal authority to establish this mandate, there are many implementation details, including provisions for medical exceptions, that by law must be negotiated with the UFT and other unions, and if necessary, resolved by arbitration . . .").

318. *See* Press Release, United Fed'n of Tchrs., UFT Says City Refuses to Negotiate Medical or Religious Accommodations to Vaccine Mandate (Sept. 2, 2021), <https://www.uft.org/news/press-releases/uft-says-city-refuses-negotiate-medical-or-religious-accommodations-vaccine-mandate> [<https://perma.cc/9UPT-T2VJ>]; *see also* DECLARATION OF IMPASSE, *supra* note 229.

319. *See* Press Release, *supra* note 318. PERB consists of three members appointed by the Governor and confirmed by the State Senate. *See Office of the Chairperson*, PERB, <https://perb.ny.gov/office-of-the-chairman/#:~:text=The%20Board%20is%20composed%20of,May%2031%20every%20other%20year.> [<https://perma.cc/2HFJ-NGBA>] (last visited Mar. 25, 2022). PERB regulates the state's Taylor Law over public sector unions and manages disputes between employers and workers. *See* Press Release, *supra* note 318; *see also* N.Y. CIV. SERV. § 204(2) (McKinney 2022).

320. *See* Press Release, *supra* note 318.

321. DECLARATION OF IMPASSE, *supra* note 229.

322. *See id.* at 6.

religious objections would immediately go on unpaid leave.³²³ The UFT claimed that teachers with religious and medical objections would lose both their salaries and health insurance.³²⁴

The Union's filing noted that the City's "intransigent stance" ignored the fact that there were estimated to be at least immunocompromised 5,000 students on "home instruction" for the 2021 to 2022 school year and there were other tasks — among them curricular development, academic and social screening as well as school data management and analysis — that could be done outside the classroom setting.³²⁵ The UFT walked the line of encouraging vaccinations with defending the interests of its members, saying "the UFT supports vaccination and encourages all of its members to become vaccinated if they are able," and noting that teachers already had the highest vaccination rate of any group of City workers at 80%.³²⁶ In closing, the UFT said: "The City has closed the door on good faith bargaining."³²⁷ A few days later, the UFT accused the DOE of implementing a "get-tough" policy on refusing medical accommodations for deserving teachers.³²⁸ Mulgrew accused the DOE of acting in bad faith by rejecting immunocompromised teachers while the arbitration process was underway.³²⁹

iv. Arbitrator Decision

The City did not challenge the UFT's statement of impasse.³³⁰ PERB appointed Martin F. Scheinman to mediate the matters.³³¹ Given the

323. *See id.*

324. *See id.*

325. *See id.* at 7.

326. *Id.* at 2.

327. *Id.*

328. *See* Press Release, United Fed'n of Tchrs., REJECTED: City Begins Denying Medical Accommodations for Deserving Teachers (Sept. 10, 2021), <https://www.uft.org/news/press-releases/rejected-city-begins-denying-medical-accommodations-deserving-teachers> [<https://perma.cc/END8-EZFK>].

329. *See id.* The UFT cited three cases of deserving teachers who were denied an accommodation: a teacher who underwent a kidney transplant, a high school teacher with stage IV kidney cancer, and a teacher with diabetes along with a suppressed immune system due to an organ transplant. *Id.* It provided an example of a sample rejection letter:

This is to advise you that your request for a Reasonable Accommodation has closed for the following reason: There are no further accommodations for COVID risk. If you need an accommodation for a disability or other limitations related to the essential functions of your position, you are welcome to reapply in SOLAS.

Id.

330. *See Bd. of Educ. of the City Sch. Dist. of the City of N.Y. v. United Fed'n of Tchrs.*, Loc. 2, (Sept. 10, 2021) (Scheinman, Arb.) [hereinafter Arbitration Award].

331. *See id.* at 4. Scheinman is the appointed neutral arbitrator in the UFT's CBA with the DOE. *See* UFT Contract, *supra* note 57.

exigencies of the start of the school year and the September 27, 2021 deadline, four days of mediation sessions were held from September 2 through September 5.³³² By agreement by the parties, the process moved to arbitration.³³³

There were two days of arbitration sessions.³³⁴ Then, on September 10, 2021, Scheinman issued an award in the dispute over the DOE's vaccination policy.³³⁵ The award carved out certain medical and religious exemptions.³³⁶ Unvaccinated teachers who did not meet the new exemptions would be placed on leave without pay, with an opportunity to appeal, and would not be allowed to seek employment elsewhere during the leave period.³³⁷ Other staffers reluctant to take the vaccine would be offered either an unpaid leave that maintains their health coverage or a severance package.³³⁸

The UFT praised the arbitrator's decision as a victory for its union members.³³⁹ However, in its press release, the UFT noted that only the courts could resolve the question of the City's legal authority in implementing the mandate.³⁴⁰ The Municipal Labor Committee, of which

332. See Arbitration Award, *supra* note 330.

333. See *id.*

334. See *id.*

335. See Press Release, United Fed'n of Tchrs., Arbitrator Rules City Must Offer Non-Classroom Work to Teachers with COVID Vaccination Medical/Religious Exemptions (Sept. 10, 2021), <https://www.uft.org/news/press-releases/arbitrator-rules-city-must-offer-non-classroom-work-teachers-covid-vaccination-medicalreligious> [<https://perma.cc/PFZ2-ZCY5>].

336. See *id.* ("Under the terms of the arbitrator's ruling, teachers and other staff with certain medical conditions that prevent them from being vaccinated, either temporarily or permanently, including certain cancer treatments, must be offered educational and administrative work in non-classroom buildings.")

337. See *id.* ("In cases where teachers seek exemptions for medical conditions not on the list, independent arbitrators will decide if the exemption is appropriate. Teachers who have been vaccinated but whose immune systems are suppressed must also be offered office or remote assignments as long as their medical conditions last.")

338. See Arbitration Award, *supra* note 330, at 13–14 ("Any unvaccinated employee who has not requested an exemption pursuant to Section 1, or who has requested an exemption which has been denied, may be placed by the DOE on leave without pay effective September 28, 2021, or upon denial of appeal, which is later, through November 30, 2021 Except as otherwise noted, herein, this leave shall be treated consistent with other unpaid leaves at the DOE for all purposes As with other DOE leaves without pay, employees are prohibited from engaging in gainful employment during the leave period.")

339. See Press Release, *supra* note 335 ("As a group, teachers have overwhelmingly supported the vaccine, but we have members with medical conditions or other reasons for declining vaccination. After our demand for independent arbitration, the city backed off its initial position that all unvaccinated personnel be removed from payroll, and will offer out-of-classroom work for those with certified medical or other conditions.")

340. See *id.*

the UFT is a member, brought a suit in Manhattan Supreme Court to resolve that issue.³⁴¹

*v. Lawsuit: New York City Municipal Labor Committee v.
City of New York*

The UFT and other New York City public employee unions filed suit against the City, arguing that vaccination should not be a condition of employment.³⁴² New York Supreme Court Judge Laurence Love initially issued a temporary restraining order on the vaccination mandate but lifted it on September 22, 2021, clearing the way for the mandate to go into effect on September 27.³⁴³ The court ruled that state and federal courts have consistently upheld mandatory vaccination orders.³⁴⁴ The court also cited extensively the Eastern District of New York's decision from the day before.³⁴⁵ As a result, Mayor de Blasio extended the deadline to submit

341. *See id.*

342. *See Will, supra* note 11.

343. *See N.Y.C. Mun. Lab. Comm. v. City of N.Y.*, 156 N.Y.S.3d 681, 686 (Sup. Ct. 2021).

344. *See id.* at 685.

345. In a separate case, a group of DOE teachers and paraprofessionals sought a preliminary injunction enjoining the City from enforcing the mandate. *See Maniscalco v. N.Y.C. Dep't of Educ.*, No. 21-CV-5055 (BMC), 2021 WL 4344267, at *1 (E.D.N.Y. Sept. 23, 2021). The class of teachers claimed that the mandate violated their substantive due process and equal protection rights under the Fourteenth Amendment. *See id.* The Eastern District denied the plaintiffs' motion because the plaintiffs did not show a likelihood of success on the merits. *Id.* at *3. The court cited that the mandate was a "rational policy decisions surrounding how best to protect children during a global pandemic." *Id.* The court concluded that the City's arguments in favor of vaccination were made in good faith and rational, requiring the court to afford deference to defendants' weighing of the "competing concerns." *Id.* at *4. In addition, the court concluded that requiring that DOE employees take a dose of ivermectin as a condition of employment might qualify as "a plain, palpable invasion" of such rights, not having any real relation to the public health crisis. *Id.* at *3. However, "mandating a vaccine approved by the FDA does not." *Id.* On the same day that the District Court decided the case, the teachers moved for an expedited injunction pending appeal, as the deadline for DOE workers to submit proof of the first dose of the COVID-19 vaccination was three days later, on September 27, 2021. *See Maniscalco v. N.Y.C. Dep't of Educ.*, No. 21-2343 (2d Cir. Sept. 24, 2021). The Second Circuit granted the initial request to grant a temporary injunction, the request for appeal was referred to a three-judge motions panel on an expedited basis. *See Eliza Shapiro & Jonah E. Bromwich, A Federal Appeals Court Delays New York City's Vaccine Mandate for Teachers*, N.Y. TIMES (Nov. 4, 2021), <https://www.nytimes.com/2021/09/25/nyregion/nyc-vaccine-mandate-teachers.html> [<https://perma.cc/W9AK-887H>]. Three days later, the Second Circuit dissolved the September 24 injunction and denied the motion for an injunction pending appeal. *See Eliza Shapiro & Benjamin Weiser, New York City Can Proceed with Vaccine Mandate for Educators and Staff, Judges Ruled*, N.Y. TIMES (Oct. 20, 2021), <https://www.nytimes.com/2021/09/27/nyregion/new-york-city-schools-vaccine-mandate.html> [<https://perma.cc/93UG-EUWF>].

proof of vaccination to Friday, October 1 and announced that the mandate would take effect Monday, October 4.³⁴⁶

Mayor de Blasio, who staked part of his legacy on successfully reopening the public schools, celebrated the high vaccination rates amongst education workers on the first day the mandate went into effect.³⁴⁷ He said: “These mandates work.”³⁴⁸ The data supported this; on October 1, 2021, a week before the mandate went into effect, 90% of school employees, including 93% of teachers and 98% of principals, were vaccinated.³⁴⁹ A few days later, after the mandate went into effect, approximately 95% of all full-time school employees received at least one dose of a vaccine, including 96% of teachers, 99% of principals, and 94% of non-education staff.³⁵⁰

C. Los Angeles

California was the first state in the nation to require all teachers and staff in K-12 public and private schools to get vaccinated or undergo weekly COVID-19 testing.³⁵¹ Governor Gavin Newsom’s vaccinate-or-test policy affected the state’s 320,000 public school teachers, 250,000 support staff, and over 80,000 private school employees.³⁵² Newsom announced that all California school districts must have a system in place to test unvaccinated workers every week for infection.³⁵³

Previously, Newsom had left the decision of whether to require vaccines up to local districts.³⁵⁴ Newsom changed his position with the full support of both the California Teachers Association and the California Federation

346. See Shapiro & Weiser, *supra* note 345.

347. See Eliza Shapiro, *N.Y.C. Schools’ Vaccine Mandate Is in Place. 96% of Teachers Got a Shot.*, N.Y. TIMES (Nov. 1, 2021), <https://www.nytimes.com/2021/10/04/nyregion/vaccine-mandate-teachers-nyc.html> [<https://perma.cc/W2FZ-VGNF>].

348. *Id.*

349. See Danielle Filson (@DanielleFilson), TWITTER (Oct. 4, 2021, 10:17 AM), <https://twitter.com/DanielleFilson/status/1445030338351222785?s=20> [<https://perma.cc/AN7L-NFGE>].

350. See Shapiro, *supra* note 347; see also Weissmann, *supra* note 314. Approximately 8,000 DOE employees refused vaccinations and were placed on unpaid leave. See Shapiro, *supra* note 347.

351. See *California Becomes the 1st State to Require Vaccination for All School Staff*, NPR (Aug. 11, 2021, 8:16 PM), <https://www.npr.org/sections/back-to-school-live-updates/2021/08/11/1026798288/california-teachers-covid-vaccination-mandatory-schools> [<https://perma.cc/WA5M-S7S2>].

352. *See id.*

353. See Press Release, Off. of Governor, California Implements First-in-the-Nation Measure to Encourage Teachers and School Staff to Get Vaccinated (Aug. 11, 2021), <https://www.gov.ca.gov/2021/08/11/california-implements-first-in-the-nation-measure-to-encourage-teachers-and-school-staff-to-get-vaccinated> [<https://perma.cc/D2RG-LM9X>].

354. *See id.*

of Teachers.³⁵⁵ Still, Newsom released no details on how the policy would be enforced, and the state's labor unions suggested that the details still needed to be worked out.³⁵⁶

i. LAUSD Policy

LAUSD was the first major urban school system in the country to order a vaccine mandate.³⁵⁷ On August 13, 2021, Interim Superintendent Megan Reilly announced that all employees in the LAUSD must be vaccinated by October 15.³⁵⁸ The UTLA's Board of Directors voted overwhelmingly to support the vaccine mandate for all LAUSD employees.³⁵⁹ UTLA President Cecily Myart-Cruz cited the Delta variant as a concern and reasoning for this stronger position.³⁶⁰

ii. Continued Bargaining and Allegations of Bad Faith

Despite the agreement on the vaccine mandate, the UTLA continued impact bargaining sessions with LAUSD on additional safety proposals, including more remote learning options and continued weekly testing of all students and staff.³⁶¹ The UTLA presented proposals that included a fair pay raise for educators, strengthened quarantine protocols to protect vulnerable students, and a Continuity of Learning Plan that includes educator discretion and flexibility for families whose children need to quarantine.³⁶²

On August 30, LAUSD Interim Superintendent Reilly instructed principals to unilaterally implement the district's Continuity of Learning Plan — without having reached a bargaining agreement.³⁶³ The UTLA

355. *See id.* (reporting that California's two largest teachers' unions, both political allies of the Governor, fully supported Newsom's policy).

356. *See id.*

357. *See* Howard Blume, *As Deadlines Approach, Thousands of L.A. School Employees, Students Remain Unvaccinated*, L.A. TIMES (Sept. 29, 2021, 5:00 AM), <https://www.latimes.com/california/story/2021-09-29/lausd-struggles-to-meet-covid-vaccine-mandate-deadlines> [<https://perma.cc/8UKE-CKY6>].

358. *See id.*

359. *See* Press Release, United Tchrs. L.A., UTLA Board Supports Vaccine Mandate for LAUSD Employers (Aug. 13, 2021), <https://www.utla.net/news/utla-board-votes-support-vaccine-mandate-lausd-employees> [<https://perma.cc/2HD4-AF74>].

360. *See id.*

361. *See* Press Release, United Tchrs. L.A., UTLA Presses for Continuity of Learning with Flexibility & Options for Educators & Families (Aug. 30, 2021), <https://www.utla.net/news/utla-presses-continuity-learning-flexibility-options-educators-families> [<https://perma.cc/2CP4-DZF7>].

362. *See id.*

363. *See id.*

characterized this as an act of bad faith and filed an Unfair Labor Practice charge with California's Public Employment Relations Board.³⁶⁴

On September 20, the UTLA reached a tentative agreement with LAUSD.³⁶⁵ The tentative agreement was reached through reopening bargaining and included extended safety measures, a 5% pay raise for educators, strategies for staffing the City of Angels online independent study program, and learning continuity for students who must quarantine.³⁶⁶ The agreement was hailed as a “national model for providing a safe environment and building confidence” among families and employees, in part because of the weekly testing for all students and employees.³⁶⁷ The UTLA Board overwhelmingly endorsed the agreement and recommended a yes vote.³⁶⁸ After a three-day voting period, UTLA members approved the tentative agreement, with 97% Yes ballots (15,344) and 3% No (447).³⁶⁹ The agreement remains in effect until June 30, 2022.³⁷⁰

Some of the critical elements of the tentative agreement included: continued regular testing of all students and staff, regardless of vaccination status, through at least December 17, 2021, and UTLA members will receive a 5% ongoing raise along with a one-time \$2,000 stipend for this school year and a one-time \$500 technology stipend for the previous school year.³⁷¹

A unique aspect of the tentative agreement in Los Angeles was the fully online City of Angels program.³⁷² The City of Angels program was an existing independent study program that was adapted for the 2021 to 2022 school year to serve parents unable or unwilling to return their children to in-person classes due to ongoing COVID-19 pandemic-related safety

364. *See id.*

365. *See* Press Release, United Tchrs. L.A., UTLA Reaches Agreement with LAUSD on Extended Safety Protocols and 5% Pay Raise (Sept. 20, 2021), <https://www.utla.net/news/utla-reaches-agreement-laUSD> [<https://perma.cc/FV35-6MXW>].

366. *See id.*

367. *See* Blume, *supra* note 357.

368. *See id.*

369. *See* Press Release, United Tchrs. L.A., UTLA Members Overwhelmingly Approve Agreement with LAUSD (Oct. 2, 2021), <https://www.utla.net/news/utla-members-approve-agreement-laUSD> [<https://perma.cc/36CQ-QVRD>].

370. *See* Press Release, *supra* note 365.

371. *See Summary of Tentative Agreement*, UNITED TCHRS. L.A. (Sept. 2021) [hereinafter *Tentative Agreement*], https://www.utla.net/sites/default/files/ta_summary_sept_2021.pdf [<https://perma.cc/HHT9-5L5B>].

372. *See* CITY ANGELS, <https://www.cityofangelschool.org/> [<https://perma.cc/S82Y-Z65H>] (last visited Nov. 12, 2021).

concerns.³⁷³ The City of Angels program was designed for students who could not attend physical school during the pandemic and for teachers with health issues.³⁷⁴ It was also characterized as a workaround to the vaccine mandate.³⁷⁵

From the beginning, interest in the remote option was high for both students and educators.³⁷⁶ More than 15,000 students enrolled in the program, essentially building the largest single school in LAUSD's history within a month.³⁷⁷ As expected with the scaling up of such a program, the City of Angels program was unprepared to handle the number of students, especially when many signed up the week before school in mid-August.³⁷⁸ The program was beleaguered by numerous problems, including enrollment, communications, teaching vacancies, and meeting the state's educational standards.³⁷⁹ Only 2,000 students were fully enrolled on August 16, when more than 10,000 students had requested enrollment.³⁸⁰

The LAUSD and UTLA addressed the severe shortages at City of Angels in the tentative agreement, agreeing that all UTLA members have the option to volunteer for temporary assignment to City of Angels.³⁸¹ If additional teachers are needed, the district may temporarily assign some teachers who have been protected from displacement at overstaffed schools.³⁸² All teachers assigned to City of Angels have return rights to their current school.³⁸³

According to the mandate, all school-district employees must be fully vaccinated by October 15, 2021, unless they have an approved religious or medical exemption.³⁸⁴ The exemptions will be limited, and the process for documenting those who cannot take the vaccine due to disability or

373. See Howard Blume, *Surge of Families Seeking Remote Learning Overwhelms L.A. Public Schools*, L.A. TIMES (Sept. 27, 2021, 5:00 AM), <https://www.latimes.com/california/story/2021-09-27/independent-study-california-laUSD> [<https://perma.cc/SUG8-HJXX>].

374. See *FAQs on Tentative Agreement — September 2021*, UNITED TCHRS. L.A., <https://www.utla.net/faqs-tentative-agreement-september-2021> [<https://perma.cc/S3RG-N3YE>].

375. See Blume, *supra* note 357.

376. See Blume, *supra* note 373.

377. See *id.*

378. See Blume, *supra* note 357.

379. See Blume, *supra* note 373.

380. See *id.*

381. See Howard Blume, *Teachers to Receive 5% Raise, Pandemic-Related Bonuses Under Tentative Agreement*, L.A. TIMES (Sept. 22, 2021, 6:09 PM), <https://www.latimes.com/california/story/2021-09-22/l-a-teachers-to-receive-5-percent-raise-and-bonuses> [<https://perma.cc/2ALJ-BXP6>].

382. See *id.*

383. See *Tentative Agreement*, *supra* note 371.

384. See Blume & Gomez, *supra* note 10.

sincerely held religious beliefs was posted by the school system.³⁸⁵ Similar to the New York City policy, employees who do not get a vaccine could face discipline and could lose their jobs.³⁸⁶

Despite the difference in the process from New York City, the primary result of the vaccination mandate was the same: approximately 97% of Los Angeles teachers and 97% of administrators met LAUSD's initial deadline to be vaccinated.³⁸⁷ That number jumped to 99% among classroom teachers later that week.³⁸⁸

D. The Significance of Teachers' Unions CBAs During COVID-19 and in Future Precipitating Events

The case studies revealed the influence of the protections guaranteed to teachers' unions by CBAs. CBAs may remain important to protecting the legal rights of teachers during the COVID-19 pandemic as new variants and challenges appear.³⁸⁹ However, school districts were within their legal rights to mandate that teachers and school workers receive a vaccine against COVID-19.³⁹⁰ During the ongoing COVID-19 pandemic and in future health emergencies, school district management should unilaterally issue health and safety policies to protect students, faculty, and staff.

CBAs are ill-equipped to handle the needs of major urban school districts in times of an emergency.³⁹¹ Throughout the COVID-19 pandemic, school districts used temporary MOUs and MOAs to set the expectations and policies for each school year, and in some cases, used

385. *See id.*

386. *See id.*

387. *See* Howard Blume, *97% of LAUSD Teachers, Administrators Meet COVID-19 Vaccination Deadline*, L.A. TIMES (Oct. 15, 2021, 6:38 PM), <https://www.latimes.com/california/story/2021-10-15/most-teachers-meet-covid-19-vaccination-deadline-union-says> [<https://perma.cc/KL3S-VUZD>].

388. *See* Howard Blume & Melissa Gomez, *Confronted with Losing Their Jobs, 99% of LAUSD Teachers Meet COVID-19 Vaccine Requirements*, L.A. TIMES (Oct. 19, 2021, 5:00 AM), <https://www.latimes.com/california/story/2021-10-19/a-normal-l-a-school-day-unless-your-teacher-was-unvaccinated> [<https://perma.cc/NS5Q-FXM8>].

389. *See, e.g.*, Dana Goldstein, *Are Schools Ready for the Next Big Surge*, N.Y. TIMES (Dec. 21, 2021), <https://www.nytimes.com/2021/12/21/us/covid-schools.html> [<https://perma.cc/W6MA-9BMH>] (discussing that so far, union leaders in New York, Boston, and Philadelphia are not asking for district-wide remote learning amid the Omicron surge, and were “instead focused on pushing administrators to enforce virus mitigation measures”). *But cf.* Eliza Shapiro (@elizashapiro), TWITTER (Dec. 22, 2021, 10:53 AM), <https://twitter.com/elizashapiro/status/1473683074554679297?s=20> [<https://perma.cc/G3BZ-D5J7>] (reporting that the UFT issued a warning to New York City then-Mayor-elect Eric Adams that if testing does not increase in schools, the UFT is “going [to] take a different position on this entire schools have to remain open” messaging).

390. *See supra* notes 343–46 and accompanying text.

391. *See supra* Section I.B.

multiple MOUs over the course of one school year to address rising surges in cases or changes to the science or data.³⁹²

This is not to ignore the importance of CBAs. In New York City, the UFT relied on its CBA to file the grievance, which led to an arbitration award that expanded the scope of religious and medical accommodations for its members.³⁹³ In Los Angeles, the UTLA negotiated from a position of strength and collectively bargained to sign another temporary agreement that also provided exemptions to its members through the City of Angels online option.³⁹⁴ Even if districts and unions signed temporary MOUs, CBAs gave some unions leverage in impact bargaining over the effects and details of vaccination mandates.³⁹⁵

Ultimately, however, the vaccine mandates were approved in both school districts.³⁹⁶ In addition, the vaccine mandates were effective in their purpose: getting a majority of educators vaccinated for the full return to school in 2021.³⁹⁷

In New York, once the FDA gave official authorization to the Pfizer vaccine, Mayor Bill de Blasio issued a strict executive order without negotiating with the UFT.³⁹⁸ The order and accompanying vaccination policy were held to be legal.³⁹⁹ It is true that after arbitration, the UFT was able to win accommodations for its members with sincere religious beliefs and valid medical exemptions.⁴⁰⁰ Still, the core of the City's policy remained intact, and the mandate compelled thousands of educators to get vaccinated instead of losing their jobs.⁴⁰¹

Throughout the COVID-19 pandemic in New York, both the Mayor and the UFT relied on temporary one-year agreements to reopen schools and keep students learning.⁴⁰² These agreements give the City the flexibility it needs to handle the ever-changing situation. The UFT acts as a bulwark against perceived overreach by the Mayor and the DOE, but New York City was able to bring back in-person learning in the 2020 to 2021 school year and institute a rigid vaccine mandate in 2021 to 2022, despite

392. *See supra* Parts II, III.

393. *See supra* Section III.B.

394. *See supra* Section III.C.

395. *See supra* Section III.B.iii.

396. *See supra* Sections III.B, III.C.

397. *See supra* notes 347–50, 387–88 and accompanying text.

398. *See supra* Section III.B.ii.

399. *See supra* notes 331–35 and accompanying text.

400. *See supra* Section III.B.iv.

401. *See supra* notes 347–50 and accompanying text.

402. *See supra* Section II.C.iv.

objections from the UFT.⁴⁰³ The temporary agreements and the DOE's policies have dictated the course of the school year — not the CBA.

Los Angeles paints a similar picture because the UTLA's CBA was ignored in favor of temporary agreements approved by the LAUSD, UTLA's Board, and UTLA's rank-and-file members.⁴⁰⁴ The process was different from New York City because there was more public cooperation between the LAUSD and UTLA in the 2021 to 2022 school reopening process.⁴⁰⁵ The UTLA unanimously supported the vaccine policy and, instead of arbitration, impact bargained for several more protocols, more testing, a union-wide raise, and entirely virtual accommodation for students and educators.⁴⁰⁶

The successful teacher vaccine mandates in New York City and Los Angeles stand in contrast to other urban districts, such as Chicago and Richmond, which watered down vaccine mandates because of staff shortages and stiff opposition from teachers' unions.⁴⁰⁷ As cases rise and new variants emerge, school district management should unilaterally promulgate legal, strict health and safety policies to protect students, teachers, staff, and the community. District management can impact bargain with teachers' unions after they announce the initial policy, but in a health emergency, swift action saves lives and promotes the health of the most vulnerable, especially the district's students.

A high vaccination rate among teachers and staff is essential to keeping schools open for in-person learning and protecting students who are too young to receive the COVID-19 vaccine.⁴⁰⁸ A full vaccine mandate is safer than allowing a testing opt-out since a test “only represents a moment in time.”⁴⁰⁹ As the nation grapples with a shortage of tests and COVID-19 cases rise in schools, a full vaccine mandate seems prudent now more than ever.⁴¹⁰

403. See *supra* Sections II.C.iv, III.B.

404. See *supra* Sections II.C.v, III.C.

405. See *supra* Section III.C.

406. See *supra* Section III.C.

407. See Madeline Will, *Teachers Who Refuse to Comply with Vaccine Mandates Won't Face Consequences in Many Places*, EDUC. WK. (Nov. 23, 2021), <https://www.edweek.org/teaching-learning/teachers-who-refuse-to-comply-with-vaccine-mandates-wont-face-consequences-in-many-places/2021/11> [<https://perma.cc/F2Y5-DGZK>].

408. See Will, *supra* note 9.

409. See *id.* (quoting Dr. Shira Doron, a hospital epidemiologist at Tufts Medical Center: “With every day that goes by that you're not testing someone who's not vaccinated, you run the risk of them becoming infected and contagious on that day”).

410. See, e.g., David Leonhardt, *Where Are the Tests?*, N.Y. TIMES (Oct. 6, 2021), <https://www.nytimes.com/2021/09/21/briefing/rapid-testing-covid-us.html> [<https://perma.cc/P5TG-FVT8>]; Luke Money, Howard Blume & Rong-Gong Lin II, *California to Distribute COVID Tests to K-12 Students as Omicron Spreads Through State*,

CBA's cannot predict an ever-changing situation like a global pandemic in a major city. At the beginning of the 2021 to 2022 school year, a vaccination mandate for teachers seemed to be the best solution.⁴¹¹ Only months later, there are new debates: student vaccination requirements,⁴¹² booster requirements,⁴¹³ and increased testing,⁴¹⁴ in addition to enforcement of the existing vaccine mandate.⁴¹⁵ In order to confront new challenges, school district management should unilaterally implement policies and rely on temporary agreements bargained afterward instead of relying on a CBA.

L.A. TIMES (Dec. 22, 2021, 6:54 PM), <https://www.latimes.com/california/story/2021-12-22/california-to-expand-covid-testing-provide-kits-to-students> [<https://perma.cc/CWV8-6GF4>]; Christina Veiga, *Some NYC Schools Shift to Remote Learning Option as COVID Surges Again*, CITY (Dec. 20, 2021, 8:57 PM), <https://www.thecity.nyc/2021/12/20/22847544/some-nyc-schools-go-to-remote-learning-option-as-covid-surges> [<https://perma.cc/AP62-M3GG>].

411. See *supra* Section III.A.

412. See Blume, *supra* note 357; see also Jacey Fortin & Guilia Heyward, *Why Los Angeles Delayed Enforcing Its Student Vaccine Mandate*, N.Y. TIMES (Dec. 18, 2021), <https://www.nytimes.com/2021/12/18/us/los-angeles-vaccine-mandate-delayed.html> [<https://perma.cc/USN9-KHHB>].

413. See Chris Isidore, *Employers Are Starting to Mandate Booster Shots*, CNN (Dec. 22, 2021, 8:21 AM), <https://www.cnn.com/2021/12/22/business/employer-booster-mandate/index.html> [<https://perma.cc/639G-UX5Q>] (reporting that health care workers, state workers, and public school teachers will need to receive booster shots by January 17, 2022, to be considered fully vaccinated); see also Eliza Shapiro (@elizashapiro), TWITTER (Dec. 23, 2021, 11:07 AM), <https://twitter.com/elizashapiro/status/1474049050479677451?s=20> [<https://perma.cc/SPP9-28CR>] (noting that UFT has remained silent about a booster mandate for teachers, despite data showing that boosters make “a huge difference” against Omicron and breakthrough infections).

414. See, e.g., Emma G. Fitzsimmons, *New York City Will Increase Testing at Schools and Relax Quarantine Rules*, N.Y. TIMES (Oct. 19, 2021), <https://www.nytimes.com/2021/09/20/nyregion/nyc-schools-covid-testing.html> [<https://perma.cc/457J-4Q2L>]; Jaclyn Jeffrey-Wilensky, *As Children Lead NYC COVID Rates, Blind Spots Remain in School Testing Strategy*, GOTHAMIST (Dec. 7, 2021, 9:24 PM), <https://gothamist.com/news/children-lead-citywide-covid-rates-nyc-shifts-school-testing-strategy-fix-blindspots> [<https://perma.cc/5JJY-TCFY>]; Eliza Shapiro, *New York City's Schools Will Ramp Up Testing to Limit Classroom Closures*, N.Y. TIMES (Dec. 28, 2021), <https://www.nytimes.com/2021/12/28/nyregion/nyc-schools-covid-testing-students.html> [<https://perma.cc/KXG8-8W8B>]; Press Release, United Fed'n of Tchrs., UFT Calls on Mayor to Restore Weekly COVID Testing (Sept. 19, 2021), <https://www.uft.org/news/press-releases/uft-calls-on-mayor-restore-weekly-covid-testing> [<https://perma.cc/4V5N-ZXJY>].

415. See Susan Edelman, *DOE Skips Deadline to Suspend Employees Who Haven't Shown Proof of Second Vax*, N.Y. POST (Dec. 25, 2021, 3:33 PM), <https://nypost.com/2021/12/25/doe-skips-deadline-to-suspend-employees-who-havent-shown-proof-of-second-vax/> [<https://perma.cc/MZ9P-QJNZ>] (reporting on a letter sent to principals by New York City's DOE to give school workers who are “not in full compliance” with the vaccine mandates, which reminds the staffers of the November 18 deadline, instead of putting them on unpaid leave).

Strong teachers' unions will continue to represent the interests of their members, and their CBAs will give some protection and guidelines on processes for filing grievances and arbitration.⁴¹⁶ Still, as student vaccination requirements become the norm, some noted that teachers' unions will be in a difficult position if they advocate for schools to require vaccines for students but not for their own members.⁴¹⁷ If teachers' unions continue to push back against health and safety policies during the COVID-19 pandemic, policymakers and the public will scrutinize their actions amid the ongoing conversation on whether the current local educational governance systems best serve student interests.⁴¹⁸

In the long-term, unionized school district employers may negotiate in future collective bargaining sessions for the right to impose unilateral changes for emergency or disease-prevention purposes into the CBA.⁴¹⁹ Inevitably, strong teachers' unions will resist such a broad right.⁴²⁰ Yet, the stories from New York City and Los Angeles show that an extended three-year CBA is not equipped to handle the exigencies of a pandemic or any health-related emergency.⁴²¹ For the rest of the COVID-19 pandemic and in future health emergencies, school district management should rely on implementing their own policies based on health and safety guidelines and temporary agreements impact bargained with teachers' unions after the policy is established.

CONCLUSION

Urban school district leaders, administrators, teachers, and their labor representatives navigated the challenges of COVID-19 schooling through three different school years. Each year presented new obstacles along with the task of educating millions of students. Through each stage of the COVID-19 pandemic, teachers' unions fought for the rights of their

416. *See supra* Section I.F.

417. *See* Will, *supra* note 407 (quoting Bradley Marianno: "They're going to get damaged in the court of public opinion if they come out and say, 'Students should get vaccinated against COVID-19, but we're not supporting it for teachers' . . . I think it's an untenable situation for them"); *see also* Linda Jacobson, *Facing Thousands of Unvaccinated Students, Los Angeles District Pushes Back Vaccine Mandate Until Fall*, THE74 (Dec. 15, 2021), <https://www.the74million.org/article/facing-thousands-of-unvaccinated-students-los-angeles-district-weighs-pushing-back-vaccine-mandate-until-fall/> [<https://perma.cc/EYU6-T4EJ>] (writing that while student vaccine mandates are "outside the scope of bargaining negotiations," unions can be more firmly pro-vaccine mandate for students "because the policy doesn't require anything of members who oppose getting vaccines themselves").

418. *See* Marianno, *supra* note 21.

419. *See supra* Section I.D.

420. *See supra* Section I.D.

421. *See supra* Sections III.B, III.C.

members, and school district management balanced creating a safe environment for all with an educational environment for its students. This Note reveals that the national narrative that teachers did not want to work or that school district leaders were putting educators in harm's way is much more complex. Teachers' unions were unwilling to dilute their union's strength or their CBAs, and district leaders worked with long-term contracts that did not address the exigencies of a global pandemic. Both sides balanced the rights and, in this case, the safety and health of the teachers, with the educational outcomes, safety, and health of the students. The story of the COVID-19 pandemic in urban schools reveals that CBAs still protect teachers' unions. Nevertheless, school district leaders have the right to require vaccinations, and during the ongoing COVID-19 pandemic and in future health emergencies, school district management should unilaterally issue health and safety policies to protect students, faculty, staff, and the community.