

COMMONWEALTH OF MASSACHUSETTS  
DEPARTMENT OF LABOR RELATIONS  
BEFORE THE COMMONWEALTH EMPLOYMENT RELATIONS BOARD

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In the Matter of \* Case No. CAS-19-7235  
\*  
LITTLETON SCHOOL COMMITTEE \* Date Issued:  
\* July 21, 2020  
\*  
and \*  
\*  
LITTLETON EDUCATORS' ASSOCIATION \*  
\*\*\*\*\*

CERB Members Participating:

Marjorie F. Wittner, Chair  
Joan Ackerstein, CERB Member

Appearances:

Rebecca Bryant, Esq. - Representing Littleton School Committee  
Richard A. Mullane, Esq. Representing Littleton Educators' Association

1 **CERB Decision**

2 **Summary**

3 On March 26, 2019, the Littleton Educators' Association (Union) filed a unit  
4 clarification petition with the Department of Labor Relations (DLR) seeking to accrete the  
5 position of Therapeutic Mental Health Counselor (TMHC) into its existing bargaining unit  
6 (Unit A) of certain professional employees employed by the Littleton School Committee  
7 (Employer or School Committee) in the Littleton Public Schools (District).

8 On June 13, 2019, the Union and the Employer participated in an informal  
9 conference at the DLR's offices. Through position statements, exhibits and affidavits

1 submitted before and after the conference, the Union argued that the petitioned-for  
2 position shares a community of interest with other positions in its bargaining unit. The  
3 Employer contended the TMHC is a clinical position, not a teaching position, and should  
4 thus be excluded from the bargaining unit as are other therapists who are excluded from  
5 Unit A.

6 On May 11, 2020, the DLR sent the parties a letter asking them to show cause  
7 why the unit placement dispute should not be resolved based on the information  
8 summarized therein and requesting some additional information. On June 12, 2020, the  
9 Union and the Employer provided responses to the Show Cause letter. The Employer's  
10 response was in the form of an affidavit from Justine Muir (Muir), the District's Director of  
11 Pupil Personnel Services (PPS). The affidavit provided the additional information  
12 requested in the Show Cause Letter. The affidavit also sought to correct and add other  
13 information. The Union's response consisted of one additional document and an affidavit  
14 from a Union official explaining the genesis of that document. On June 26, 2020, the  
15 Employer filed a reply to the Union's response. Also on June 26, 2020, the Union filed a  
16 Motion to Strike Muir's affidavit. The Employer filed a response opposing that motion on  
17 July 2, 2020.<sup>1</sup>

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<sup>1</sup> The CERB denies the Motion to Strike. In general, the CERB agrees with the Union that a party's response to a CAS Show Cause letter should not be the place to provide information or arguments for the first time. The Show Cause letter nevertheless states that the "CERB is prepared to decide the accretion issue based on the above-facts, unless a party's submission demonstrates that . . . other material facts are needed to resolve the accretion issue." The Show Cause process therefore contemplates that parties' responses may include facts (but not new arguments) that the parties deem relevant to the proceeding, including information that was already in the record but not included in the Show Cause letter, or new information. If the CERB agrees that this information is needed to resolve the accretion issue and if that information does not create a material

1           After reviewing the responses and incorporating certain of the changes, the  
2 Commonwealth Employment Relations Board (CERB) has determined that there are no  
3 material disputes of fact and grants the Union's petition to accrete the TMHC to its  
4 bargaining unit. As explained below, we find that the TMHC shares a community of  
5 interest with other members of the bargaining unit in terms of common supervision, work  
6 contact, and similar skills, functions, training, experience, pay and working conditions.

7           **Background**

Littleton Public Schools

8           There are four schools in the District: Shaker Lane School (pre-K through second  
9 grade); Russell Street School (grades three through five); Littleton Middle School (LMS)  
10 (grades six through eight); and Littleton High School (grades nine through twelve).

11 Clinical Services

12           The following positions come under the umbrella of the District's Clinical Services:  
13 Adjustment Counselor, Guidance Counselor, Board Certified Behavior Analysts (BCBA),  
14 School Psychologists,<sup>2</sup> and the disputed TMHC. At the time of the investigation, Sarah  
15 Dorfman (Dorfman), a School Adjustment Counselor whose duties and background are  
16 described in more detail below, served as what she refers to as the "Department Head of

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dispute of fact, the CERB will include that information in its final decision. As a means of ensuring the integrity of the CAS procedure, however, the CERB will not include information that it requested before issuing the Show Cause letter, if the party now seeking to provide the information could have, but did not, provide it at the time of the request. The CERB has limited its modifications to the Show Cause letter based on these criteria.

<sup>2</sup> The description of the clinical services team in the Show Cause letter inadvertently omitted the School Psychologist. We have corrected the omission.

1 Clinical Services” and what the School Committee refers to as “Head of Clinical Team  
2 (K-12).”<sup>3</sup> The Head Of Clinical Team is a two-year position with a yearly stipend of \$3,000.  
3 According to a job posting, this position is “responsible for providing leadership in the  
4 continued development and implementation of the Littleton Public Schools social and  
5 emotional competencies programs, curriculum and safety in order to support social-  
6 emotional learning, health and safety for all students.” Specific duties include coordinating  
7 and conducting monthly meetings with the district clinicians and assisting in designing  
8 professional development for members of the clinical team and serving as a member of  
9 the Littleton Public Schools Wellness Committee. This position does not evaluate or  
10 supervise staff.

11 The number and type of clinical positions varies from school to school. There is  
12 one Guidance Counselor, one School Psychologist, and a BCBA at the Shaker Lane  
13 School. There is one Guidance Counselor, one School Psychologist and a .8 FTE BCBA  
14 at the Russell Street School. At LMS, there is one School Adjustment Counselor  
15 (Dorfman), a .2 FTE BCBA and one School Psychologist.<sup>4</sup> At the high school, there are  
16 two Guidance Counselors, one School Psychologist and the disputed TMHC position.

17 Bargaining Unit

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<sup>3</sup> Dorfman provided an affidavit referring to this position as the Department Head of Clinical Services for the District. The School Committee claims that the correct title is “Head of Clinical Team (K-12).” Because the titles are essentially synonyms, and because there is no dispute that Dorfman held this leadership position at the time of the investigation, we need not resolve this dispute.

<sup>4</sup> There is also a Speech and Language Pathologist at LMS.

1           The face of the petition indicates that the Union was either certified or recognized  
2 as the exclusive representative of the School Committee's professional employees  
3 around 1955.<sup>5</sup> The Union and Employer are parties to a collective bargaining agreement  
4 (CBA) effective by its terms from September 1, 2017 to August 31, 2020. Article II of the  
5 CBA recognizes the Union as the exclusive bargaining agent of the following unit:

6           Unit A: All professional employees of the public schools of the Town of  
7 Littleton except the superintendent, assistant superintendent, director of  
8 business, coordinator of technology, occupational therapists, physical  
9 therapists, director of management services, all principals and assistant  
10 principals, coordinator of support service, administrator of special  
11 education, substitute teachers, physicians, and dietitians, [BCBA], [Pupil  
12 Personnel Services] Director, Director of Curriculum, Out of District  
13 Coordinator.

14 Article III of the CBA (Compensation), Section K states:

15           Any position that requires certification from the Department of Education  
16 and which involves the performance of work that has traditionally been  
17 performed by members of the bargaining unit represented by the  
18 Association unless otherwise excluded by the language of the recognition  
19 clause, will be included in the bargaining unit represented by the  
20 Association.

21  
22           In addition to teachers, the bargaining unit includes School Nurses,<sup>6</sup> Adjustment  
23 Counselors, Speech and Language Pathologists and School Psychologists. All of these  
24 titles require a license from the Department of Secondary and Elementary Education  
25 (DESE) and are eligible for professional teacher status pursuant to M.G.L. c. 71, §41.  
26 The school nurses were added to the unit in 2006 pursuant to a Memorandum of

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<sup>5</sup> The precise contours of the original unit are unknown.

<sup>6</sup> The District employed four School Nurses as of the investigation.

1 Agreement (MOA) that the parties executed that year.<sup>7</sup> The parties agreed in the same  
2 MOA to exclude occupational therapists (OTs) and Physical Therapists (PTs) from the  
3 CBA's recognition clause. The parties also agreed to exclude the BCBA from the unit at  
4 some point after the parties' 2011-2014 CBA expired.<sup>8</sup> The OTs, PTs and BCBA positions  
5 do not require DESE licensure and are not eligible for professional teacher status.<sup>9</sup>

6 **Therapeutic Mental Health Counselor**

7 At some point in 2018, the Littleton Public Schools decided to create the TMHC  
8 position to provide clinical mental health services directly to students.<sup>10</sup> The Employer  
9 had previously used outside contractors or had funded placements for students in out-of-  
10 district therapeutic programs to provide such services when it deemed necessary.

11 The Employer posted the TMHC position at some point before November 2018.

12 The posting described the position as follows:

13 Description: The Littleton Public Schools is currently seeking qualified  
14 applicants for the position of Therapeutic Mental Health Counselor to work  
15 with adolescents at the high school level and possibly in other buildings  
16 within the district as needed and as assigned by the Superintendent and/or  
17 Director of Pupil Services.

18 Responsibilities:

- 19 • Provide daily support to students with identified emotional and  
20 mental health needs.

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<sup>7</sup> School Nurses became eligible for professional teacher status in 2006 pursuant to St.2006, c. 267.

<sup>8</sup> Prior to that date, the CBA contained no reference to the BCBA position.

<sup>9</sup> These titles are licensed by the applicable state Board of Allied Health Professionals or Board of Allied Mental Health and Human Services.

<sup>10</sup> Clinical mental health services include, but are not limited to, identifying the mental health needs of students, individual or small group mental health therapy, crisis intervention, and conducting risk assessments of students.

- 1           • Responsible for providing in-school individual and/or small group  
2 therapeutic mental health therapy.  
3           • Responsible for crisis intervention and conflict resolution.  
4           • Responsible for supporting students re-entering school following an  
5 extended mental health and/or health-related absence.  
6           • Conduct risk assessments as needed.  
7           • Responsible for serving as a referral agent and case manager for the  
8 student and parent/guardians in developing a network of social  
9 services with community agencies.  
10          • Responsible for identification and navigation of outside resources for  
11 students such as psychological, medical, and substance abuse  
12 treatment resources.

13           Qualifications:

- 14
- 15           • Candidate must have experience working with students with mental  
16 health challenges including but not limited to anxiety, depression,  
17 suicidal ideation, school avoidance, trauma, gender identity, and  
18 peer interpersonal conflicts.  
19           • Candidate must be trained to handle crisis situations involving  
20 mental health.  
21           • Candidate must have demonstrated capacity for leadership,  
22 effective organizational skills and evidence of effective  
23 communication skills orally, and in writing.  
24           • Candidate must establish and maintain positive working  
25 relationships with administrators, members of the clinical team,  
26 students, staff, parents, community and other professionals.

27 The posting did not contain any educational or licensing requirements.<sup>11</sup>

28           Nardi-Williams

29           Around November 2018, the Employer selected Shane Nardi-Williams (Nardi-  
30 Williams) as the first TMHC. His first day of work was December 10, 2018. The Employer  
31 did not notify the Union in advance that it intended to create the TMHC position. The

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<sup>11</sup> In her affidavit in response to the Show Cause letter, Muir indicates that she helped to draft the posting. She, contends that this was a deliberate omission because the District “wished to cast a wide net to encourage application of individuals who met the criteria regardless of licensure.” We address this contention in the Opinion section of this decision.

1 Union first learned of it in a communication sent by the Littleton High School principal on  
2 Nardi-Williams' first day of work.

3 Nardi-Williams holds a Bachelor of Social Work degree from Salem State  
4 University (2016) and a Master of Social Work degree from Boston College (2017).  
5 Additionally, he was licensed by the Board of Social Work on June 21, 2017 as a certified  
6 social worker. He was licensed by DESE on October 27, 2017 as a School Adjustment  
7 counselor. Nardi-Williams' prior experience included working as a clinician at Beacon  
8 High School, a private school in Watertown Massachusetts. His resume indicates that  
9 his duties there included providing weekly individual therapy/case management to the  
10 adolescents in his case load to help them overcome personal/social/emotional/behavioral  
11 problems affecting educational progress and overall well-being. He also conducted direct  
12 clinical services, including assessment, treatment planning and goal focused treatment  
13 implementation in collaboration with students' IEP and personal goals.

14 The Employer executed an employment contract with Nardi-Williams on November  
15 19, 2018 for the 2018-2019 school year. Under the terms of the contract, Nardi-Williams  
16 was required to work 182 school days per school year. His annual salary was \$50,764  
17 and he was eligible for all benefits and insurance programs offered to all District  
18 employees, as well as for reimbursement from the Employer for professional development  
19 classes. The contract further provides that with respect to personal/bereavement/family  
20 illness/maternity leave, the TMHC would be allowed benefits equal to that included in the  
21 Littleton Public School Teacher contract agreement.<sup>12</sup> The contract also provided that

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<sup>12</sup> Information about the TMHC's leave allowance was inadvertently omitted from the Show Cause letter.

1 the Employer would support Nardi-Williams in the completion of his Initial School Social  
2 Worker/School Adjustment Counselor DESE licensure.<sup>13</sup> Additionally, the Employer  
3 agreed to provide Nardi-Williams with a mentor who is a Licensed Independent Clinical  
4 Social Worker for one hour per week. This was for the purpose of enabling Nardi-Williams  
5 to complete the requirements to become a licensed certified social worker (LICSW).<sup>14</sup>

6 Nardi-Williams' 2019-2020 contract was essentially the same as the 2018-2019  
7 contract, except for salary (\$60,764) and the contract no longer contained a mentor  
8 provision. Nardi Williams is not a member of the Massachusetts Teachers Retirement  
9 System (MTRS).

#### 10 Duties and Schedule

11 Nardi-Williams reports to Muir..<sup>15</sup> Muir's supervision primarily involves monthly  
12 meetings to review Nardi-Williams' progress notes regarding students in his caseload.

13 During the 2018-2019 school year, Nardi-Williams had a caseload of twenty-seven  
14 students and saw over fifty students.<sup>16</sup> A student's IEP team may refer students to Nardi-  
15 Williams, or he may see them on a walk-in basis if he is available. The criteria for referring

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<sup>13</sup> The Employer agreed to provide this even though the TMHC position itself does not require DESE licensure.

<sup>14</sup> Nardi Williams was awarded this license in May 2020.

<sup>15</sup> As indicated above, although Dorfman is the Department Head of Clinical Services, she has no supervisory responsibilities.

<sup>16</sup> Generally, students must be referred to the TMHC. Students may be referred to the TMHC when they present with emotional difficulties related to anxiety, depression, post-traumatic stress disorder, low self-esteem and mood disorders. Additionally, students with health disabilities, such as attention-deficit/hyperactivity disorder, victims or offenders of bullying/teasing, attendance issues related to emotional or medial issues, may be referred to the TMHC.

1 a student to the TMHC include if the student has a documented emotional and/or health  
2 disability; displays isolation or withdrawal due to school phobia, depression, or low self-  
3 esteem; has familial challenges; there is a history of school counseling services; the  
4 student is returning to school after a prolonged absence due to mental health or medical  
5 conditions; the student's IEP or 504 team has reconvened to consider changes to the  
6 student's plan; and all other resources and available supports have been exhausted.

7 Nardi-Williams primarily works at the high school, but he consulted on serious  
8 cases involving elementary school students and other matters involving students who  
9 were previously placed by the District in out of district therapeutic placements. His  
10 scheduled hours mirror the regular school day. However, there are times when Nardi-  
11 Williams must be flexible and be available on weekends and evenings. He does not clock  
12 in or out but is expected to keep track of who he sees during the day and when he sees  
13 them. Students may see Nardi-Williams by appointment, or, as indicated above, on a  
14 walk-in basis, if he is available. Unlike other bargaining unit members, Nardi-Williams  
15 may also do home visits if necessary. Nardi-Williams is not part of a special education  
16 student's service delivery team, although he can serve as a resource to the team or  
17 participate in a team meeting if a parent requests his presence. Each school also has a  
18 crisis intervention team, comprised of the school psychologist and the building principal  
19 and other resource personnel. If the crisis involves mental health issues, the TMHC could  
20 be included on the crisis intervention team.

1 Nardi-Williams uses a variety of therapeutic modalities to treat students, including  
2 Cognitive Behavioral Therapy,<sup>17</sup> Solution Focused Therapy,<sup>18</sup> Dialectical Behavioral  
3 Therapy,<sup>19</sup> Narrative Therapy, Internal Family Systems, and Motivational Interviewing.  
4 Nardi-Williams works with students on coping skills and managing their symptoms.  
5 Additionally, he works with students who are aggressive towards themselves or others,  
6 avoid school, are angry and defiant, and refuse to comply with work and rules. Lastly,  
7 Nardi-Williams works with students regarding family challenges. Nardi-Williams also  
8 participates in Section 504 plans for some of the students he sees.<sup>20</sup>

### **Comparator Unit A Positions**

#### **School Adjustment Counselor**

10 Pursuant to DESE regulation 603 CMR 7.00, the educational requirements for a  
11 School Adjustment Counselor include a Master's degree in Social Work (MSW) or  
12 Counseling. A 2008 DESE memorandum explaining how individuals with MSW degrees  
13 can apply for their initial School Social Workers/School Adjustment Counselor license

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<sup>17</sup> Cognitive Behavioral Therapy (CBT) is a form of psychological treatment for individuals who may have negative thoughts about themselves and the world which can have a negative impact on the actions they take. CBT may be used to treat a range of issues including depression and anxiety disorders.

<sup>18</sup> Solutions Focused Therapy focuses on the solution rather than the origin of the problem.

<sup>19</sup> Dialectical Behavioral Therapy (DBT) aims to help people validate their emotions and behaviors, examine those behaviors and emotions that have a negative impact on their lives, and make a conscious effort to bring about positive changes.

<sup>20</sup> The show cause letter incorrectly stated that Nardi-Williams did not participate in 504 plan meetings.

1 included the following “School Social Worker/School Adjustment Counselor subject  
2 matter knowledge listing:”

- 3 • Principles of therapeutic relationships.
- 4 • Theories of normal and abnormal intellectual, social, and emotional  
5 development.
- 6 • Learning disorders, including emotional issues affecting student  
7 achievement, and their treatment.
- 8 • Prevention and treatment of substance abuse, physical and sexual  
9 abuse, and violence in PreK-12 students.
- 10 • Knowledge of state-of-the-art diagnostic instruments; procedures  
11 for testing and interpreting results.
- 12 • Techniques for communicating and working with families and  
13 school and community personnel.
- 14 • Knowledge of the criminal justice system with particular reference  
15 to the juvenile justice system and organizations.
- 16 • Knowledge of medical conditions and medication related to physical  
17 disabilities and learning disorders.
- 18 • Federal and state laws and regulations addressing the legal rights  
19 of students and families.

20 In December 2019, the District posted a vacancy for a full-time School Adjustment  
21 Counselor.<sup>21</sup> The posting listed a number of duties and responsibilities, including:

- 22 • Provide daily support to students with emotional and mental health needs.
- 23 • Provide case management, mental health referral, counseling and crisis  
24 intervention for students.
- 25 • Support students re-entering school following an extended mental health or  
26 health-related absence.
- 27 • Conduct social skill development groups, individual, and/or group counseling.
- 28 • Provide services to students per IEP and 504 plans.
- 29 • Serve as an active member of the school crisis team.
- 30 • Manage and maintain confidential student records.
- 31 • Provide behavioral/conflict intervention, mediation and resolution services.

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<sup>21</sup> Neither party provided a job description or job posting for a District School Adjustment Counselor position before the Show Cause letter issued. The Union did, however, provide a School Adjustment Counselor job description from the New Bedford Public Schools, which the Show Cause letter described in a footnote. In its response to the Show Cause letter, the Union provided a December 2019 posting for a District School Adjustment Counselor position. Because that posting is directly on point, we have eliminated the footnote regarding the New Bedford position.

- 1 • Collaborate with colleagues, therapists, clinics, hospitals, schools, community
- 2 agencies in developing and providing support for students.
- 3 • Provide consultation with staff about psych/social needs of students.
- 4 • Support the development of programs and activities that promote Social
- 5 Emotional Learning and positive school climate.
- 6 • Establish and maintain positive working relationships with administrators,
- 7 clinical team members, teachers, students, staff members, parents,
- 8 professional colleagues and community representatives.

9 The required qualifications that are listed in the posting include:

:

- 10 • Master's degree in counseling, guidance, social work, psychology or related
- 11 field.
- 12 • Appropriate MA DESE licensure (School Adjustment counselor/School Social
- 13 Worker).
- 14 • At least three years' experience working with young children and adolescents
- 15 in a counseling capacity.

16 Dorfman has been the School Adjustment Counselor at Littleton Middle School for  
 17 sixteen years. As of the investigation, she was also the District's only School Adjustment  
 18 counselor.<sup>22</sup> Dorfman has an MSW degree and holds a certification of School Social  
 19 Worker/School Adjustment Counselor from DESE.<sup>23</sup> In 2019-2020, Dorfman, who is on  
 20 the CBA salary schedule as a Masters Step 13, had an annual salary of \$81,071.<sup>24</sup>

21 Dorfman spends at least 80% of her workday doing clinical work, i.e., providing  
 22 counseling services directly to students, either individually or in small groups. She rarely  
 23 works outside of regular school hours. Her clinical work concerns both school-related and  
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<sup>22</sup> The Union's response to the Show Cause letter indicates that the District hired a School Adjustment counselor in the spring of 2020 to start in the 2020-2021 school year. The new hire is a long time District employee who is currently working as a special education teacher.

<sup>23</sup> Pursuant to 603 CMR 7.00, the educational requirements for School Adjustment Counselor include a Master's degree in Social Work or Counseling.

<sup>24</sup> Appendix A of the 2017-2020 CBA contained salary schedules. The salary range for bargaining unit members with Masters degrees in 2018-2019 ranged from \$48,224 (Step 1) to \$81,071 (Step 13). The range for 2019-2020 was \$49,188 to \$82,692.

1 non-school related issues, such as personal or family issues or troubles with friends. She  
2 also addresses issues like classroom social skills, bullying prevention, depression, grief,  
3 and trauma.

4 All of Dorfman's clinical work is performed at the LMS, which has 350 students. Of  
5 those students, ten are on Individualized Education Plans (IEPs) that relate to emotional  
6 disturbances. The LMS School Psychologist sees those students. Dorfman is  
7 responsible for seeing the remainder of the students, as needed.

8 Her duties also include, as noted above, serving as Head of the Clinical Team (K-  
9 12), collaborating with outside resources and assisting parents in accessing resources.  
10 Dorfman also serves as the LMS Coordinator of 504 plans and participates in Team  
11 Meetings with teachers from each grade as well as the "Unified Arts Team" (art, music,  
12 gym and technology teachers), and the school principal and vice principal to coordinate  
13 efforts for students.

14 The LMS principal evaluates Dorfman using the rubrics and formal process  
15 outlined in the parties' collective bargaining agreement (CBA), described below.

#### 16 School Psychologists

17 According to the job description and posting, School Psychologists administer  
18 cognitive and academic evaluation instruments relative to suspected areas of  
19 educational disability for initial and reevaluation referrals. They also provide direct  
20 psychological therapy to individual students and small groups. School Psychologists are  
21 required to have "a well-developed repertoire of clinical skills to address the social and  
22 emotional needs of students." They practice CBT and DBT as well as solution-focused  
23 therapies. School Psychologists identify emotional disabilities in students for purposes

1 of special education. They administer cognitive and projective evaluations of students  
2 and produce quarterly progress reports regarding students. They participate in various  
3 team meetings regarding the students and contribute to the development of the IEP.  
4 Generally, school psychologists work regular school hours. There may be exceptions  
5 when a student is in crisis.

6 The educational requirements for School Psychologists include a Master's degree  
7 or higher in school psychology.<sup>25</sup> As noted above, DESE licensure is also required, and  
8 they are required to maintain the requirements necessary for School Psychologist  
9 certification. The PPS Director evaluates the School Psychologists in consultation with  
10 the Building Principal pursuant to the procedures set forth in the CBA, described below.

#### 11 Diagnoses

12 In general, diagnoses of students are made outside of the school setting. Although  
13 School Psychologists and Adjustment Counselors do not formally diagnose students,  
14 School Psychologists can identify the presence of an emotional disability for purposes of  
15 special education. The Adjustment Counselor can also state that a student is exhibiting  
16 signs of a condition, such as depression.

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<sup>25</sup> 603 CMR 7.00.

1 Evaluations<sup>26</sup>

2 Appendix F of the 2017-2020 CBA contains various “educator evaluator  
3 documents,” including overviews, forms, and separate evaluation rubrics for teachers,  
4 “Specialized Instructional Support Personnel (SISP),” and “Guidance Counselors.”<sup>27</sup> The  
5 introductory language to this section states that this contract language is “locally  
6 negotiated and based on M.G.L. c. 71, M.G.L. c. 150E, 603 CMR 35.00, et. seq., the  
7 Educator Evaluation regulations and the Department of Elementary and Secondary  
8 Education (DESE) Model System for Educator Evaluation.” The Guide to the SISP Rubric  
9 states in pertinent part:

10 This rubric describes practice that is common across educators<sup>28</sup> in  
11 professional support roles such as school counselors, school psychologists,  
12 school nurses, and others defined in the recognition clause of the  
13 appropriate collective bargaining agreement. It is intended to be used  
14 throughout the 5 step evaluation cycle for educators who provide direct  
15 services such as education, therapy, counseling, assessment, and  
16 diagnosis to a caseload of students, as well as educators who may provide  
17 indirect support to students through consultation to and collaboration with  
18 teachers, administrators, and other colleagues.

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<sup>26</sup> In the affidavit that Muir provided in response to the Show Cause letter, she identified who evaluated the School Adjustment Counselor, the School Psychologists and the non-unit positions described in the letter. Because we agree that this information is relevant to the community of interest analysis, we expand upon it by excerpting relevant material regarding the evaluation process from the parties’ 2017-2020 CBA.

<sup>27</sup> Although the introductory materials indicate that there is a School Nurses rubric, the CBA does not have one.

<sup>28</sup> Appendix F of the CBA contains a Definitions section, which defines the term “educator” as including both classroom teachers and “Caseload Educators.” Caseload Educators are defined as “Educators who teach or counsel individual or small groups of students in consultation with the regular classroom teacher, for example, school nurses, guidance counselors, speech and language pathologists, and some reading specialists and special education teachers.”

1 The rubric further indicates that evidence used in evaluation include judgments based on  
2 observations and artifacts of observation.

3 **Job Titles Specifically Excluded from Unit A**

4 **Board Certified Behavior Analyst**

5 BCBAAs work with students who have severe special needs and/or behavior issues.  
6 According to the job description, BCBAAs deliver small group and individualized instruction  
7 to students. They write evaluations and develop measurable academic, behavioral and  
8 social IEPs for students under their direction. They also develop and modify academic,  
9 behavioral and social curriculum based on Massachusetts Curriculum frameworks and  
10 the student's learning style. They may also develop alternative MCAS assessments as  
11 determined by the IEP. They collaborate with General Education teachers to ensure  
12 success in regular education classrooms.

13 BCBA qualifications include a Master's degree or higher in Severe Special Needs  
14 or Applied Behavioral Analysis, a minimum of three years of experience with individuals  
15 with Autism, and BCBA certification. BCBAAs do not require DESE certification.

16 BCBAAs enter into separate employment contracts with the Employer. The contract  
17 indicates that the BCBA is required to work 7 hours a day, 35 hours a week for 182 school  
18 days. The BCBA is entitled to all benefits provided by the Town of Littleton and accrues  
19 15 days of leave per year for a maximum of 300 days. The contract indicates that they  
20 are responsible for training district staff on conflict resolution and restraint training, once  
21 they are trained as a trainer. It further indicates that the BCBA is responsible for  
22 supervising the educational assistants who are certified as registered behavioral

1 technicians. If necessary, the BCBA can and has made home visits. In 2018-2019, one  
2 of the District's two BCBA's had an annual salary of \$70,500; the other earned \$75,643.

3 The Building Principal evaluates the BCBA in conjunction with the PPS director.<sup>29</sup>  
4 Muir's affidavit indicates that, although there is no formal mandated process for such  
5 evaluation, the PPS Director has in recent years incorporated observations and  
6 documentations into the process.

### 7 Occupational Therapists

8 Occupational Therapists develop and implement therapy plans for students. They  
9 consult with professionals and parents regarding special education. OTs participate in  
10 IEP conferences to develop goals for occupational therapy that integrate with classroom  
11 goals. The qualifications for an OT include a degree in Occupational Therapy and  
12 licensure as an OT. School OTs do not require DESE certification. They report to the  
13 principal for the overall program and the supervising administrator for day to day  
14 administration of the program. According to the job description, they are evaluated  
15 annually by the Building Principal with input from the supervising administrator.<sup>30</sup> They  
16 work during regular school hours.

17 OTs receive separate at-will employment contracts, which indicate that they are  
18 entitled to all Town-provided benefits. They can accrue up to 15 days of leave a year with

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<sup>29</sup> This statement is taken from the BCBA job description. Muir's post-Show Cause affidavit reverses the order, i.e., that the PPS Director conducts the evaluation in conjunction with the Building Principal. We need not resolve this discrepancy because, as explained below, the identity of the primary evaluator is not dispositive of the accretion issue.

<sup>30</sup> In her Show Cause affidavit, Muir states that she "informally evaluates" the OTs.

1 a maximum of 100 days. They receive the same holiday, bereavement and maternity  
2 leave as provided in the Teachers' Assistants' Association's CBA. The one-full time OT  
3 had an annual salary of \$59,123.03.

#### 4 Physical Therapists

5 Physical therapists deliver direct therapeutic services in small groups or individual  
6 instruction in accordance with a student's schedule. They evaluate and/or screen  
7 students using appropriate tests and observations to develop and implement a therapy  
8 plan. They interpret assessment findings and appropriately convey the information to  
9 parents and schools teams. They participate in 504 and IEP meetings to develop plans,  
10 and complete necessary paperwork for such plans. PTs report to the building principal  
11 for day-to-day supervision and the PPS Director for overall functions. According to the  
12 job description, the Physical Therapist is evaluated by the Building Principal in conjunction  
13 with the PPS Director.<sup>31</sup>

14 PTs enter into individual at-will employment contracts with the District. They are  
15 required to work seven hours a day for 181 school days. They are entitled to all Town-  
16 provided benefits and can accrue up to fifteen days of leave per year. They receive the  
17 same holidays, bereavement and maternity leave contained in the parties' CBA. They  
18 perform their work during regularly scheduled school hours. In 2018-2019, the PT's  
19 annual salary was \$67,539.16.

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<sup>31</sup> Muir's post-Show Cause affidavit states that "Physical Therapists are evaluated by the PPS Director using an informal process."



1 bargaining unit. The Union asserted that the work performed by the TMHC involves  
2 professional work being performed by members of the bargaining unit. The Union  
3 processed the grievance through Step 3 of the grievance procedure. The District denied  
4 the grievance at all three steps.

5 On January 30, 2019, Superintendent Dr. Kelly R. Clenchy (Clenchy) denied the  
6 grievance at Step II on grounds that the TMHC: 1) is not subject to M.G.L. c. 71, Section  
7 41 or 42; 2) does not share a community of interest with other Unit A positions, but rather,  
8 is similarly situated and shares “certain salient characteristics” with therapist positions  
9 that are not in Unit A; 3) provides “therapeutic mental health counseling to students who  
10 typically access these services via private community-based clinical providers outside the  
11 district;” and 4) “requires flexibility in working hours,” unlike Unit A employees who work  
12 during specified hours. The Step II answer further indicated that the District intends to  
13 add “administrative duties” to the position of TMHC that focus on “Student Safety and  
14 Wellness.”<sup>32</sup>

15 The Union advanced the grievance to Step III, the School Committee, on February  
16 13, 2019. The Union rebutted each of the five grounds for Clenchy’s denial, stating  
17 among other things, that the recognition clause includes professional positions apart from  
18 the listed exceptions and the TMHC is a professional position; the TMHC performs work  
19 already performed by other bargaining unit members; and the TMHC is simply an  
20 Adjustment Counselor position with a different title. The School Committee denied the  
21 grievance on March 18, 2019 for the same reasons that it denied the grievance at Step

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<sup>32</sup> The Employer made the same argument in its position statement but provided no further information about these administrative duties.

1 II, and because it believed that the grievance was not arbitrable. The Union filed this  
2 petition shortly thereafter. It did not advance the grievance to arbitration.

3 Opinion<sup>33</sup>

4 A unit clarification is the appropriate procedural vehicle to determine whether  
5 newly-created positions should be included in or excluded from a given bargaining unit or  
6 to determine whether substantial changes in the job duties of an existing position warrant  
7 inclusion or exclusion from a bargaining unit. Town of Athol, 32 MLC 50, 52, CAS-04-  
8 3567 (June 29, 2005).

9 The Union seeks to accrete the TMHC position to its existing unit of professional  
10 employees. In deciding whether an employee should be accreted into an existing  
11 bargaining unit, the CERB applies a three-step analysis. First, the CERB determines  
12 whether the position existed when the DLR originally certified the unit. City of Boston,  
13 35 MLC 137, 140, CAS-07-3669 (December 31, 2008). If the position existed at the time  
14 of the original certification but was not included in the unit and has not since changed, the  
15 DLR will not accrete it to the unit using the CAS process. University of Massachusetts,  
16 41 MLC 205, CAS-14-3424 (April 10, 2015). Here, the TMHC was created in 2018, long  
17 after the bargaining unit was established. This prong of the test is therefore inconclusive.

18 Second, the CERB examines the parties' subsequent bargaining history to  
19 determine whether a particular employee classification was considered by the parties to  
20 be included in the unit. City of Boston, 35 MLC at 140. Under the second prong of the  
21 accretion analysis, the CERB examines how the parties have treated the disputed  
22 position in their dealings with each other and in collective bargaining. City of Malden, 32

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<sup>33</sup> The CERB's jurisdiction is not contested.

1 MLC 97, 100, CAS-04-3599 (November 2, 2005). Absent bargaining history to support a  
2 finding that the parties addressed and resolved the unit placement of the contested  
3 position, the CERB will find that it is unable to determine whether the parties explicitly  
4 agreed to exclude the contested position from the bargaining unit. Town of Somerset, 25  
5 MLC 98, 100, CAS-3145 (January 6, 1999).

6 Here, the Town relies on Article III, Section K of the CBA to argue that the parties  
7 specifically agreed to exclude all non-DESE certified titles from the unit. That provision  
8 states however that “[a]ny position that requires certification from the Department of  
9 Education . . . unless otherwise excluded by the language of the recognition clause, *will*  
10 *be included* in the bargaining unit. . .” (Emphasis added). While this provision clearly  
11 requires all DESE certified titles to be included in the unit, it does not expressly *exclude*  
12 non-DESE certified titles.<sup>34</sup> Nor have the parties expressly agreed to exclude the TMHC  
13 from the unit, as they did with the BCBA and other titles excluded in the recognition  
14 clause. Absent such agreement, this prong of the analysis is inconclusive. Town of  
15 Somerset, 25 MLC at 100.

16 Under the third and final step, the CERB examines whether the disputed position  
17 shares a community of interest with others in the bargaining unit. City of Boston, 35 MLC  
18 at 140. To determine whether employees share a community of interest, the CERB  
19 considers such factors as similarity of skills and functions, similarity of pay and working  
20 conditions, common supervision, work contact, and similarity of training and experience.  
21 Boston School Committee, 12 MLC 1175, 1196, CAS-2598 (August 30, 1985) (citations

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<sup>34</sup> Notably, the School Committee does not argue that accretion to Unit A is inappropriate under the second prong of the accretional analysis because the TMHC is not a professional employee.

1 omitted). The CERB traditionally favors broad, comprehensive units over small,  
2 fragmented units. Town of Berkley, 35 MLC 266, 267, MCR-09-5361 (May 7, 2009). No  
3 single factor is outcome determinative. Town of Ludlow, 27 MLC 34, 36, CAS-3435  
4 (October 17, 2000)

5 The School Committee argues that the TMHC does not share a community of  
6 interest for a variety of reasons, including differences in duties, hours, DESE licensure  
7 and other requirements that dictate how the position would be compensated and  
8 evaluated under the CBA and by statute. We disagree that these factors, viewed  
9 individually or as a whole, warrant excluding the TMHC from the unit.

10 First, the TMHC is a clinical position that provides mental health services directly  
11 to students. As such, the TMHC, along with three other bargaining unit positions, School  
12 Psychologists, Guidance Counselors and the School Adjustment Counselor, is part of the  
13 District's Clinical Services Department or Team. Like the School Psychologist, the TMHC  
14 provides direct psychological therapy, including CBT and DBT, to individual students and  
15 small groups. Like the School Adjustment Counselor, the TMHC spends the majority of  
16 the workday providing daily support to students with emotional and mental health needs.

17 The similarities between the job duties listed on the TMHC's and School  
18 Adjustment Counselor's respective job postings are significant and striking. All but one  
19 of the TMHC's seven listed duties,<sup>35</sup> has a counterpart in the School Adjustment  
20 Counselor posting, including, as stated above, the very first duty listed on both postings,  
21 providing "daily support to students with . . . emotional and mental health needs." Although

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<sup>35</sup> The only item on the TMHC posting without a counterpart on the School Adjustment Counselor posting is "Doing risk assessments." In her affidavit, however, Dorfman states that she performs risk assessments as needed.

1 the other listed duties are not likewise identical, other duties common to both job  
2 descriptions include conducting individual and group therapy or counseling sessions,  
3 providing support to students returning from an extended absence, providing crisis  
4 management/intervention, providing conflict resolution and case services, and providing  
5 referrals to students to community resources and other staff members.

6 The School Committee acknowledges these similarities but contends that the  
7 TMHC's role is different because the TMHC serves students with a different level of need  
8 than those served by the School Adjustment Counselor, thereby requiring different levels  
9 be the case, that does not affect our community of interest analysis. The Law requires  
10 that members of a bargaining unit share only a community of interest, not an identity of  
11 interest, provided there is no inherent conflict among consolidated groups of employees.  
12 Town of Somerset, 25 MLC at 100. Minimal differences do not mandate separate  
13 bargaining units where employees perform similar job duties under similar working  
14 conditions and share common interests amenable to the collective bargaining  
15 process. Higher Education Coordinating Council, 23 MLC 194, 197, CAS-3058 (March  
16 7, 1997).

17 Here, while it may be true that the TMHC serves a different population of students  
18 and employs different, perhaps more advanced, therapy or counseling techniques than  
19 the School Adjustment Counselor or School Psychologist, similar differences exist  
20 between the School Adjustment Counselor and School Psychologists. Indeed, similar  
21 differences are likely to be found in any education professional or paraprofessional unit,  
22 where different titles provide services that may differ in degree or kind, depending on the  
23 population that they serve. Absent evidence of conflict, supervisory status, or other

1 special circumstances not present here, such differences do not warrant separate  
2 representation. See, e.g., New Bedford School Committee, \_\_ MLC \_\_, WMAM-19-7700  
3 (slip. op., June 26, 2020) (Wraparound Coordinators share a community of interest with  
4 other support specialists); Springfield School Committee, 44 MLC 7 (CAS-16-5059,  
5 August 1, 2017) (accreting tutors to a unit of paraprofessionals notwithstanding  
6 differences in population served and services provided).

7 Nor do we agree that the absence of any stated educational or DESE licensure  
8 requirements on the posting warrants separate representation. First, we note how  
9 unusual it is for a job posting to have no educational or licensure requirements at all.  
10 Indeed, all of the other District job postings/descriptions, in the record (other than the  
11 stipended Head of Clinical Team Position) contain such requirements. Second,  
12 notwithstanding the absence of any requirements, it is clear from the School Committee's  
13 conduct and pleadings that it intended the TMHC to have some type of advanced degree  
14 or licensure commensurate with the duties of the position. Thus, when explaining why it  
15 chose not to require DESE licensure, the School Committee explained that limiting the  
16 pool of candidates to those with a DESE license would eliminate many individuals with  
17 clinical licenses such as an LICSW, licensed mental health providers or licensed clinical  
18 psychologists. In other words, the School Committee asserts that it left such  
19 requirements off the posting in order to attract *more*, not less qualified applicants for the  
20 position. It is not surprising, therefore, that Nardi-Williams held both a bachelor's and  
21 master's degree in Social Work when hired, or that the School Committee agreed to

1 provide him with a mentor to enable him to obtain his LICSW.<sup>36</sup> Nor is it surprising, given  
2 the strong similarities between the TMHC and the School Adjustment Counselor, that  
3 Nardi-Williams' level of education is commensurate with what DESE regulations require  
4 for School Adjustment Counselors. Accordingly, the de facto requirements for the TMHC,  
5 as described by the School Committee and possessed by Nardi-Williams, are similar to  
6 those held by other members of this professional unit including, most notably, the School  
7 Psychologist and the School Adjustment Counselor, providing yet another basis to  
8 conclude that the TMHC shares a community of interest with those titles. The fact that  
9 other professional non-DESE titles, like the BCBA, are excluded from the unit does not  
10 change this result because the parties specifically bargained to agreement to exclude  
11 such titles. That did not occur here. See Boston Public Health Commission, 39 MLC 218,  
12 CAS-11-1091/1092 (February 28, 2013) (declining to accrete a position to the unit,  
13 notwithstanding a similar position in the unit, where the recognition clause of the CBA  
14 excluded the disputed title and the other position was in the unit only as the result of  
15 extensive negotiations).

16 For similar reasons, we do not believe that the absence of DESE licensure  
17 requirements prevents the TMHC from sharing a community of interest with the rest of  
18 the unit. We agree with the Union that these differences are a result of the title that the  
19 School Committee gave to the TMHC, rather than the duties performed. DESE licensed  
20 School Adjustment Counselors and School Psychologists' duties and educational  
21 requirements are similar to the TMHC's. While we cannot mandate that the School

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<sup>36</sup> The School Committee states in its response to the Union's show cause letter that the Superintendent believed that a LICSW license was "important to the TMHC role."

1 Committee either change the title or requirements for the positions, given all the other  
2 similarities between the TMHC and the School Psychologists and Adjustment  
3 Counselors, the fact that the TMHC is not a title recognized by DESE does not dictate its  
4 unit placement. Town of Agawam, 13 MLC, 1364, MCR-3511 (December 24, 1986) (unit  
5 placement not based on job titles but on actual terms and conditions of employment).

6 The claimed differences in terms and conditions of employment that may result  
7 from the lack of DESE licensure similarly do not affect unit placement. Regarding  
8 differences in evaluation procedures, the evidence reflects that PPS Director evaluates  
9 both the TMHC and School Psychologists. Further, although Muir's affidavit indicates that  
10 she evaluates the School Psychologist using the procedures outlined in 603 CMR 35.00  
11 et. seq. and the CBA, the DESE Guide to the SISP Personnel Rubric included in the CBA  
12 explicitly contemplates that it will cover educators in "professional support roles" such as  
13 school counselors and school psychologists, who provide "direct services," such as  
14 "therapy" to a caseload of students. Given that the TMHC works in a similar professional  
15 support role, nothing prevents the PPS Director from using the SISP rubric, or elements  
16 of it, when evaluating the TMHC. Indeed, Muir recognized that she has flexibility in this  
17 regard when she stated in her affidavit that she has recently begun incorporating  
18 observations and documentation in the BCBA's evaluations, even though there is no  
19 formal mandated process for BCBA evaluations

20 We are also not persuaded by the School Committee's argument that it could not  
21 apply the CBA's salary structure to the TMHC because it does not have the same  
22 educational or licensing requirements as other bargaining unit members. Appendix A of  
23 the CBA groups salary ranges by the degree and number of credits attained beyond that,

1 i.e., BA, MA, MA+15, MA+30, etc. Because, for the reasons discussed above, the de  
2 facto requirements for this position include some type of clinical licensure, it is to be  
3 expected that someone hired for the position must possess a college degree or higher.  
4 The TMHC's place in the salary scale therefore be easily determined. In any event, Nardi-  
5 Williams' salary in his first two years of employment fell squarely within the CBA's range  
6 for bargaining unit members with a Master's degree. The lack of eligibility for the MTRS  
7 system is also not critical. Brockton School Committee, 26 MLC 191, 194, MCR-4740,  
8 CAS-3393 (April 6, 2000) (including school nurses in bargaining unit of teaching and non-  
9 teaching professionals despite various different terms and conditions of employment,  
10 including not belonging to the teachers' retirement system).

11 Finally, despite these differences, the TMHC shares a number of key similarities  
12 with bargaining unit members. In addition to performing the similar duties discussed  
13 above, the TMHC, works in a school setting, where there are multiple daily opportunities  
14 to interact with other bargaining unit members. Other points of contact include monthly  
15 Clinical Team meetings or occasional special education or crisis intervention team  
16 meetings.

17 The TMHC's hours also mirror the regular school day. Although the record reflects  
18 that the TMHC is expected to have a flexible schedule, it does not reflect how frequently  
19 Nardi-Williams worked outside of regular school hours.<sup>37</sup> Moreover, the School  
20 Psychologist also works regular hours with exceptions when a student is in crisis.

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<sup>37</sup> The School Committee was asked to provide such information after the informal conference, but its response to the contained no specifics.

1 Finally, under the terms of Nardi-Williams' employment contract, the TMHC is  
2 eligible for all benefits and insurance programs offered to District employees and his  
3 personal/bereavement/family illness/maternity leave benefits are equal to those in the  
4 teachers' CBA.

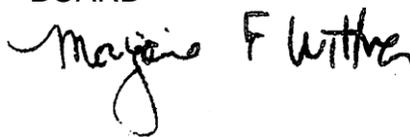
5 In sum, although the School Committee may have intended the TMHC to play a  
6 different role than the School Adjustment Counselor and School Psychologists in  
7 providing therapy to students, and, for this reason, decided not to require DESE licensure  
8 for the position, these factors do not prevent the TMHC from sharing a community of  
9 interest with other Unit A members who provide direct services to students with mental  
10 health and emotional needs, because they have similar skills, duties, educational  
11 qualifications, work location, hours, wages, benefits and regular interaction with other  
12 bargaining unit members.

13 Conclusion

14 For the reasons states above, the CERB grants the Union's petition to accrete the  
15 TMHC to Unit A.

16 **SO ORDERED**

17 COMMONWEALTH OF MASSACHUSETTS  
18 COMMONWEALTH EMPLOYMENT RELATIONS  
19 BOARD



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MARJORIE F. WITTNER, CHAIR



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JOAN ACKERSTEIN, CERB MEMBER

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