

STATE OF HAWAII
HAWAII LABOR RELATIONS BOARD

In the Matter of)	CASE NO. S-05-77
)	
BENJAMIN J. CAYETANO, Governor, State)	DECISION NO. 421
of Hawaii and BOARD OF EDUCATION,)	
)	FINDINGS OF FACT, CONCLUSIONS
Public Employers-)	OF LAW, AND ORDER
Petitioners,)	
)	
and)	
)	
HAWAII STATE TEACHERS ASSOCIATION,)	
)	
Exclusive Representative-)	
Respondent.)	
)	

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

On February 9, 2001, BENJAMIN J. CAYETANO, Governor, State of Hawaii and the BOARD OF EDUCATION, State of Hawaii (collectively BOE or Employer) filed a Petition Relating to Strike Occurring or About to Occur Endangering Public Health or Safety with the Hawaii Labor Relations Board (Board). The BOE petitioned this Board to conduct an investigation pursuant to the Hawaii Revised Statutes (HRS) § 89-12 to determine whether a strike by certain special education teachers in bargaining unit 05¹ (Unit 05) presents an imminent or present danger to the health or safety of the public and to set requirements to avoid or remove any danger.

The BOE contends that a strike by certain Unit 05 employees would present an imminent and present danger to the public's health or safety. Thus, it seeks the designation of 322 special education teachers as essential who must be precluded from participating in a Unit 05 strike. The BOE also urges the Board to adopt specified requirements in order to remove or avoid any danger to the public during a strike by Unit 05.

After notice, the Board conducted an investigation in this matter on February 26 and 27, 2001. All parties were represented by counsel and participated in the investigation. All parties were afforded the right to present evidence and cross-examine witnesses. On March 13, 2001, the parties filed written arguments with the Board.

¹ Bargaining unit 05 consists of teachers and other personnel of the Department of Education under the same salary schedule, including part-time employees working less than twenty hours who are equal to one-half a full-time equivalent.

After reviewing the entire record and the credible evidence presented during its investigation, the Board majority makes the following findings of fact, conclusions of law, and order.

FINDINGS OF FACT

1. Petitioner BOE is a public employer within the meaning of HRS § 89-2, of employees of the Department of Education (DOE) who are included in bargaining unit 05.
2. The HSTA is the certified exclusive representative, as defined in HRS § 89-2, of employees in bargaining unit 05.
3. There are approximately 12,559 employees in Unit 05.
4. The BOE and the HSTA are parties to a collective bargaining agreement covering Unit 05 which was scheduled to expire on June 30, 1999.
5. On November 13, 2000, the HSTA filed a Notice of Impasse and Request for Board Assistance requesting the Board to declare an impasse in the Unit 05 negotiations and to appoint a mediator. On December 6, 2000, the Board issued Order No. 1972 declaring an impasse and appointing a mediator to assist the parties pursuant to HRS § 89-11. No agreement was reached on any of the proposals during mediation.
6. On December 21, 2000, Federal Mediator Ken Kawamoto informed the Board that mediation efforts had failed to resolve the dispute between the parties and that the parties were prepared to proceed with fact finding. On December 27, 2000, the Board appointed a Fact-Finding Panel, consisting of Thomas E. Crowley, Esq., Chair, and Cynthia S. Nakamura, Esq., and James H. Takushi, members, in accordance with HRS § 89-11(b)(2) to make recommendations for the resolution of the dispute. On January 8, 2001, the Fact-Finding Panel issued its Fact-Finders Report and Recommendations.
7. On January 12, 2001, each party filed its respective rejection of the Fact-Finders Report and the BOE did not agree to refer the impasse to final and binding arbitration.
8. The Fact-Finders Report and Recommendations was made public on January 17, 2001 and the 60-day cooling-off period began.

9. On March 19, 2001, the 60-day cooling-off period mandated by HRS § 89-11 expires and Unit 05 members will be free to strike after a ten-day notice of intent to strike is filed with the Board and the BOE.
10. Based upon the foregoing, the Board finds that a strike by Unit 05 employees is about to occur.
11. The BOE filed the instant petition on February 9, 2001. The BOE alleges that the withholding of services by 322 special education teachers would pose an imminent or present danger to the public's health or safety during a Unit 05 strike. The BOE requests that the Board declare these positions essential to protect the public school children who are mentally and physically challenged.
12. The Board issued a notice of investigation on the petition on February 13, 2001 and commenced the instant investigation on February 26, 2001.
13. The BOE's only witness in the investigation was Ms. Susan Farmer (Farmer), Administrator of the DOE's Special Education Section.
14. As represented by the BOE, the DOE has 2,000 special education teachers who provide special education services to approximately 22,000 children. Of this population, 6,422 students have been designated eligible for an Extended School Year (ESY). ESY students are so designated based on an evaluation conducted during the establishment of their Individualized Education Program (IEP). Pursuant to Hawaii Administrative Rules (HAR) § 8-56-40(d), the designation is based upon the severity and nature of the disability, the probability of regression, and the rate of recoupment.
15. Almost all of the ESY students are characterized as severely handicapped and accordingly, are the most "needy" of all the BOE's student population.
16. The disabilities suffered by the ESY students are represented to fall principally into the following categories (number of students in parenthesis):²
 - a. Autism (569): A developmental disability significantly affecting verbal and nonverbal communication and social interaction, which adversely affects the students' performance. The student may have one or more of the following characteristics:

² Paragraphs 1-4, Petitioner's Exhibit E.

- i. Engagement in repetitive activities and stereotyped movements;
 - ii Resistance to environmental changes or change in daily routines;
 - iii. Unusual responses to sensory experiences.
- b. Multiple Disability (334): A concomitant impairment, which causes severe needs with the following criteria:
 - i. Subaverage general intellectual functioning as demonstrated by three or more standard deviations below the mean;
 - ii. Subaverage intellectual functioning and deficits in adaptive skills;
 - iii. Subaverage intellectual functioning and deficits in adaptive skills, which were manifested during the developmental period.
- c. Developmental Delay (1,624): Ages three through eight exhibiting delay in the following areas:
 - i. Cognitive development and adaptive behavior as demonstrated by one and one half deviations below the mean for the following areas:
 - (1) Motor development, including fine motor, gross motor, and sensory motor;
 - (2) Communication, including speech language development;
 - (3) Academic development;
 - (4) Adaptive behavior;
 - (5) Cognition.
- d. Emotional Disturbance (3,445): Exhibits one or more of the following characteristics over a long period of time and to a marked degree that adversely affects the student's performance:
 - i. An inability to learn that cannot be explained by intellectual, sensory, or health factors;
 - ii. An inability to build or maintain satisfactory interpersonal relationships with peers and teachers;
 - iii. Inappropriate types of behaviors or feelings under normal circumstances;
 - iv. A general pervasive mood of unhappiness or depression;

- v. A tendency to develop physical symptoms or fears associated with personal or school problems;
 - vi. Schizophrenia.
17. Other students within the special education community who qualify for ESY may suffer from deaf-blindness, deafness, hearing impairment, visual impairment, orthopedic impairment, traumatic brain injury, mental retardation, specific learning disability, or speech language impairment.
 18. The health and safety of ESY students require the constant supervision of a trained special education teacher to continue the implementation of each student's IEP. Without such continuous implementation, Farmer testified that regression or an adverse response to the changed circumstances of a strike could precipitate violent behavior, self-destructive behavior, or exacerbate their vulnerability.
 19. The BOE admits that IEP evaluations do not include assessments of risks of danger to health or safety; and that such assessment would need to be done on a case-by-case basis. No such case-by-case evaluation has been conducted in connection with the instant petition.
 20. In its petition, the BOE requests that 322 special education teachers be designated as essential workers in the event of a strike. It identifies these teachers as necessary to provide instructional and custodial services to the ESY special education students. These teachers would be assisted by the 1,403 Educational Assistants (EAs)³ who currently assist in special education classes.
 21. The number of requested teachers is based on the maintenance of a 20:1 ratio of students to teachers. The BOE could provide no plausible explanation of what, if any, bearing the ratio has to the health or safety of the students other than it seemed an appropriate balancing of the needs of the students and teachers' right to strike.
 22. The BOE could provide no description, and admitted that it had no current plan, of how the staffing of requested essential workers would be implemented in the event of a strike. It requests, however, that the designations be apportioned by district and provided the requested apportionment based on the

³The number of EAs were provided by the BOE as a supplement to the record, at the request of the Board on March 5, 2000. The HSTA objected to such supplementation of the record. The Board, however, permitted the Union to file any renewed objection to the inclusion of the figure in the record after receipt. No such objection has been received.

number of ESY students in each district. The requested apportionment is as follows: Honolulu 61; Central 45; Leeward 70; Windward 42; Hawaii 55; Maui 22; Kauai 18; and the Hawaii Center for the Deaf and Blind (HCDB) 9.

23. Pursuant to a BOE policy adopted in October 1972, the BOE plans to keep the schools open in the event of a teachers' strike.⁴
24. The HSTA presented three witnesses on behalf of the Union: Ms. Kay Kroehler, a special education teacher of pre-kindergarten developmentally delayed or disabled children at Red Hill Elementary School; Ms. Sydney Freitas, a teacher of high school English at the HCDB; and Ms. Debbie Cheesman, a special education teacher at Jefferson School. Each teacher is assisted by at least one EA.
25. It was the un rebutted testimony of the HSTA witnesses that:
 - a. Each witness taught students participating in the ESY program;
 - b. The duties of Kroehler and Cheesman as special education teachers include both custodial and instructional duties since these functions are necessarily integrated due to the students' inability to attend to normal daily functions;
 - c. That the IEP process by which the ESY designation is made does not include an evaluation of dangerousness or health and safety considerations, so that the ESY designation does not necessarily correlate to any danger to health or safety;
 - d. Some parents of ESY-qualified children elect not to have the children participate in the ESY program;
 - e. Notwithstanding the ESY program, participating students spend extended periods of time (vacations, weekends, holidays, sick days, etc.) away from school without apparent harm or exacerbated conditions;

⁴Union Exhibit E:

STRIKE SITUATION POLICY

Every reasonable effort will be made to provide uninterrupted, quality educational services during a strike or work stoppage while continuing to give the health, safety, and welfare of students primary consideration.

- f. The parents of ESY children take adequate care of their children while they are away from school, and would be fully capable of doing so in the event of a strike;
 - g. During a teachers' strike, the ESY students would be as safe, or safer, at home; and
 - h. In the event that ESY students attended school during a strike, the risk of danger would be much greater than under parental care if the students were attended to at a 20:1 ratio or if inadequately trained supervision were provided.
26. The Board majority finds that of the 6,422 special education students who qualify for ESY, there is a danger posed to the health or safety of the students with autism, multiple disabilities, and emotional disturbance disabilities who attend school during a teachers' strike. Of the 1,624 special education students with developmental delay disabilities, there are probably 1,000 who, based on their IEPs, pose no health or safety danger to themselves and others if they attend school during a teachers' strike.
27. Special education teacher Kroehler, currently has six pre-kindergarten age special education students including one who does not qualify for ESY and one who qualifies for ESY but whose parents have chosen not to participate in the program. The disabilities of her current students include two developmentally delayed, one early childhood learning impaired, one pervasive developmental disorder similar to autism but not autistic, and one emotionally disturbed. Kroehler opined that if her current students attend school in a teachers' strike, there is a danger posed to their health and safety if only one EA is in the classroom. This danger posed would be present on the first day of a strike, would remain constant, and would not change after one week of a strike. In her opinion at least two EAs would be needed to remove the danger to her students' health and safety.
28. Special education teacher Cheesman teaches four students who are in the orthopedic unit at Jefferson Elementary, one is orthopedically impaired and three are severely multiply disabled with physical impairments and mental retardation. To ensure the health and safety of her students during the day, Cheesman and her EA or a general education teacher, share the work needed to provide not only physical activity such as stretching out her students' legs, but also helping with basic toileting functions, feeding, personal hygiene, and redressing. Feeding each student takes approximately 45 minutes per student. The special education EA assigned to work with Cheesman is fully trained to provide the custodial care to her students. Based on Cheesman's testimony, the Board majority finds there is an imminent and present danger posed to the

health or safety of a vulnerable population of elementary special education students with severe physical impairments and mental disabilities who attend school during a teachers' strike.

29. Special education teacher Freitas testified that, currently she teaches high school English to approximately 30 students daily in classes of six to eight students per period at the HCDB. She also has a homeroom class with eight students ranging in age from 18 to 20. All of the 80 students currently attending the HCDB qualify for ESY including ten with developmentally delayed disabilities, and two with autism. The school employs 13 EAs, 16 teachers and three mental health counselors trained to communicate in sign language. Freitas opined that she does not believe there is any danger posed to the health and safety of the students who attend school in a teachers' strike because she is comfortable that the staff of EAs, mental health counselors and the principal are capable of carrying on with the students in school. The Board majority credits Freitas' opinion and finds there no imminent or present danger is posed to the public school students attending the HCDB during a teachers' strike.
30. At HSTA's urging, the Board majority takes notice of precedents in the disposition of essential position petitions filed by the BOE, Decision No. 186, Board of Education, 3 HPERB 251 (1983), and Decision No. 383, Board of Education, 5 HLRB 681 (1997). Since the designation of special education teachers was requested on both occasions, and since they were for the most part denied, HSTA argues that the findings and conclusions of the decisions should, for the most part,⁵ be adopted.

⁵The Board in Decision No. 383 declined to designate any special education teachers except for nine teachers at the HCDB. The HSTA, however, presented testimony regarding changed circumstances and the alleged recanting of testimony given in the course of that proceeding. It argues that on the evidence presented in the instant petition, the nine HCDB teachers should not be identified as essential.

DISCUSSION

The only⁶ standards governing the disposition of the instant petition is identified in HRS § 89-12(c)(1):

If a strike, which may endanger the health or safety of the public, is about to occur or is in progress, the public employer concerned may petition the board to make an investigation. If the board finds that there is imminent or present danger to the health or safety of the public, the board shall establish specific requirements that must be complied with and which shall include:

- (A) Designation of essential positions; and
- (B) Any other requirement it deems necessary in order to avoid or remove any imminent or present danger to the health or safety of the public.

“Essential position” is defined in HRS § 89-1 to “mean any position designated by the board as necessary to be worked in order to avoid or remove any imminent or present danger to the public health or safety, which position shall be filled by the public employer.” (Emphasis added).

In applying this standard to the BOE’s petition to designate 322 special education teacher positions as essential, the Board majority must evaluate, first, whether a strike about to occur presents an “imminent or present danger to the public health or safety of the public,” and second, whether any, or all, of the requested designations are “necessary to be worked in order to avoid or remove any imminent or present danger....”

imminent or present danger

In both Decision Nos. 186 and 383, supra, the respective Boards concluded that in the event of a teachers’ strike, the absence of special education teachers would not present an imminent or present danger to the health or safety of students because:

⁶At the initial meeting regarding this matter, the BOE indicated that it intended to seek the designation of all special education teachers as essential pursuant, in part, to what it perceives to be its obligations under federal law. It subsequently advised the Board that its petition would be limited to health or safety considerations. It is arguable that the provisions of HRS § 89-20 might make, in this case, some or all of the provisions of Chapter 89 inoperative insofar as application would jeopardize federal funds. We defer, however, to the judgment of the BOE in framing its petition.

1. the duties of special education teachers are principally instructional and the withdrawal of instruction was not demonstrated to present an imminent or present danger to the health or safety of students; and
2. the caregivers for special education students are equally or better equipped to protect the health and safety of their charges in the event of a strike.

In the instant proceeding, the HSTA adopted and presented evidence in support of these conclusions. The BOE urged that the Board deviate from these conclusions on the apparent grounds that the ESY students, if deprived of instruction, would risk regression, or the exacerbation of conditions, which may endanger their health or safety in the event of a strike.

We find the BOE's arguments in this regard, unconvincing. It is uncontroverted that there is no direct correlation between the ESY designation, the withholding of instructional services, and any particular danger to the health or safety of any student. The BOE admits that a case-by-case evaluation would have to take place to determine whether the withholding of instruction would endanger the health or safety of any particular ESY student. They further admit that no such evaluation has been done. The HSTA convincingly established that ESY students spend significant amounts of time without instruction, and that any regression during such periods does not necessarily endanger the health or safety of the student. It is uncontroverted that each student's caregivers provide for their health and safety during the absence of instruction.

Accordingly, the Board majority adopts the conclusions identified above regarding the essentiality of instruction and adequacy of alternative care. This does not, however, mean that we conclude that a strike will present no imminent or present danger to the health or safety of ESY students.

There is an implicit assumption underlying each of the Boards' previous decisions in this matter. That assumption is that if special education teachers are not designated as essential, either such classes will be suspended or caregivers will elect not to send their charges to school. Essentially, the respective Boards' rationale appears to have been: no teachers, equals no school, equals home care, so no danger. This assumption has never been tested since no strikes followed the 1984 or 1997 decisions. While this assumption might appear to reflect common sense, neither evidence nor experience compel its adoption.

In this proceeding, it is undisputed that the existing policy of the BOE is to attempt to keep schools open in the event of a teachers' strike. If schools remain open it is possible that some ESY students will be in attendance. This is even more likely if the BOE does not suspend compulsory attendance. See, HRS § 302A-1131. It is undisputed that ESY students include those children who are the most vulnerable to harm if continuous

supervision and assistance is not provided in some form. The BOE has presented no plan or proposal for the care of ESY students in the event of a strike during which schools are open but no special education teachers are present. Based on the evidence in the record, it is therefore possible to conclude, and the Board majority so concludes, that in the event of a teachers' strike, attendance by ESY students in the schools will present a present or imminent danger to the health or safety of those students.

In other words, the Board majority concludes that the nature and severity of the disabilities suffered by most ESY special education students is such that, if any ESY students are in attendance at school, the withdrawal of services by special education teachers would present an imminent or present danger to the health or safety of those children.

The Board majority will not second guess the BOE to override the policy to keep schools open during a teachers' strike. The petition presented to the Board assumes that the BOE intends to rely on all of its employees who cannot lawfully participate in the teachers strike -- excluded managerial staff, EAs, cafeteria workers, and custodians-- to keep the schools open. It is in this context that the Board is asked to designate essential positions.

Thus, the threshold question for the Board is whether any present or imminent danger is posed to the health or safety of the public in attendance at school during a teachers' strike. In petitioning for 322 special education teachers, the BOE has no choice but to apply its policy to keep the schools open. To assume the schools are closed eliminates any basis or need to petition for essential workers because the BOE could not meet its burden to prove "there is imminent or present danger to the health or safety of the public" as this Board is required to find under HRS § 89-12(c)(1).

The HSTA submitted opinion testimony from two experienced special education teachers that there would be no imminent or present danger posed because their students would be safer at home during a strike. Because the Board majority defers to the BOE's decision to implement its policy to keep the schools open during a strike, such opinions are neither relevant nor helpful to the Board for purposes of investigating the BOE's petition for 322 special education teachers to be designated essential in the upcoming teachers' strike.

necessary to avoid or prevent ...

The next issue is whether precluding 322 special education teachers from participating in the impending teachers' strike is "necessary to avoid or prevent" the danger identified above.

We cannot unqualifiedly answer in the affirmative. The BOE has not provided the Board with any foundation from which to evaluate the sufficiency or necessity of the 322 teacher figure. It represents a 20:1 ratio which is ostensibly based upon a balancing of ESY

students' and special education teachers' respective interests—no evidence has been presented as to how, or if, any such balance is achieved. It has developed no plan as to how this ratio will be implemented—the BOE simply promises to develop a strike plan after the number of essential teachers have been identified by the Board. And, the BOE cannot rebut evidence presented by the HSTA that the 20:1 ratio would prove to be woefully inadequate, and exacerbate any danger, if the ESY students attend school during a strike.

Nevertheless, we are confronted with the real possibility that disabled children as young as three years old may be in attendance at strike-disrupted schools without adequate custodial care. The Board majority simply cannot let the inadequacy of the BOE's planning or rationales put these children at risk.

ORDER

Accordingly, the Board majority orders that the 322 special education teachers identified by the BOE be declared essential subject to the following conditions:

1. That during the occurrence of any Unit 05 strike, the schools to which the teachers are assigned remain open and ESY students are in actual attendance at those schools, provided that the essential position designation shall be immediately suspended for any teacher assigned to a school that is closed or at which no ESY students are present; and
2. That within ten days of the issuance of this decision and order, the BOE develops and submits, and the Board approves a plan for the identification, assignment and use of the designated teachers, such plan to include:
 - a. An estimate of the number of ESY students that are anticipated to attend school in the event of a BU 05 strike including the means by which such estimate was calculated; and
 - b. The way in which teachers will be allocated to schools and the functions that will be performed by the teachers, including anticipated student/teacher ratio, EA/teacher ratios, and organization and classroom activities.

The failure of the BOE to submit the required plan shall suspend the essential position designation until such time as the plan has been submitted and approved by the Board.

The bottom line of the above-conditioned designation is that the Board majority concludes that appropriate custodial and instructional supervision by special education teachers should be provided to ESY students who attend school during a strike in order to avoid or prevent danger to the students' health or safety. The BOE has not, however, provided an adequate basis upon which to identify the number or utilization of the requested teachers. This order provides them with another opportunity to do so.

In its petition, the BOE also identified a number of special conditions that it sought to have the Board adopt in connection with the impending Unit 05 strike. No evidence or testimony was submitted with regard to the conditions. Accordingly, the conditions are denied.

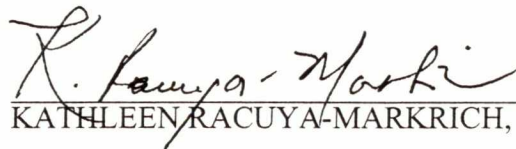
The instant investigation shall remain open and this order shall remain subject to amendment by the Board.

DATED: Honolulu, Hawaii, March 16, 2001.

HAWAII LABOR RELATIONS BOARD



BRIAN K. NAKAMURA, Chair



KATHLEEN RACUYA-MARKRICH, Member

DISSENTING OPINION

I agree with my fellow Board members that special education children are among the most vulnerable children in the public school system. I also agree that these children would be exposed to danger should they attend school during a strike of public school teachers. However, I dissent from their decision because I believe that the safety of these children would be better served by the closing of the schools in the event of a strike and would have ordered the BOE to do so.

I am concerned that the position of the BOE, as presented in these hearings, reflects political and public relations concerns instead of a plan to protect the safety of this vulnerable population.

I think that this is especially demonstrated in the BOE's position that it would come up with a plan to use and distribute essential special education teachers only after the Board has identified the number that would be made available. This is like requesting money on the basis of a promise that an excellent spending plan will be developed after the money is provided. If the Board's overwhelming concern for the safety of children is such that the essential teachers were provided, the BOE is under no obligation to use them in any particular fashion because it has committed itself to nothing.

By presenting no plan the BOE leaves the Board without a basis in the first instance upon which to evaluate the request. This virtually invites dismissal of the petition. If the petition were denied, any danger posed to the children is the fault of the Board—the BOE has avoided accountability.

By petitioning for 322 teachers, the BOE is able to create the impression that the health or safety of the children would be protected if the petition were to be granted-- that it has done its job. Yet by providing no plan, the BOE avoided both accountability and blame. The inadequacy of the BOE's preparation and presentation and the state of the record before us is underscored by the majority's requirement in its order that the BOE present a plan to the Board before securing the 322 ESY teachers requested.

A plan is not the only thing that is missing. The BOE based its request upon the ESY special education population of 6,400. But it concedes that there is no direct relationship between ESY and any imminent danger to the health or safety of the children. It also concedes that an assessment of danger would require individual evaluations and these have not been done. Similarly, with the number of teachers requested, 322, the BOE provides no basis for the proposed 20:1 ratio. The Board is thus left with no foundation upon which to assess the BOE's petition. The ESY children are simply dropped on the Board's doorstep and any risk of danger is placed on this Board. This approach is either lazy or cynical.

Even if the BOE receives its requested designation, the unrebutted evidence received by the Board is that the 20:1 ratio proposed by the BOE would put ESY students in greater danger of harm than if the students remained the responsibility of their caregivers. Granting the petition may then increase the risk of danger to children. This risk can be avoided almost entirely if the schools are closed, but the BOE presented no evidence or argument on the option of closing the schools other than to resurrect its policy statement made in 1972. It is my understanding that the schools were in fact closed during the 1973 teachers' strike to protect the safety and health of students. The Board, and our students, would have greatly benefitted from evidence of this experience. Yet the BOE failed to either

examine or present evidence of this actual experience. The failure to meaningfully consider this option as a part of this petition suggests to me that considerations other than the health or safety of the ESY children may have gone into the formulation of the petition.

I agree that ESY special education children may be at risk if they attend school during a strike and adequate supervision and care are not provided. I think that this is also true of almost any other four, five, six, or seven-year old in a strike-disrupted school. It is also probably true of a disturbing number of older children as well. But the BOE not only made no requests for the general population, it did not present evidence of any evaluation of danger to these children. Again, risks of danger to the health or safety of all school children can probably be avoided simply by closing the schools. Other than pointing to its 30-year-old untested policy, no reason was provided for avoiding this option.

I appreciate that the BOE is under considerable public, political, parental, and even judicial pressure to act as though it is addressing the interests of special education children and not simply caving in to the Union. In framing the petition as it did it was able to create the impression that it would both combat the Union by keeping the schools open and accommodate the particular vulnerabilities of special needs children by requesting essential workers. But this is a political posture that failed miserably when put to the test. I don't think that the safety of children should be put at risk by political posturing.

The direct and effective way to protect the health and safety of children during a strike is to close the schools. Because the BOE failed to meaningfully consider this option or demonstrate its failings, I would have ordered the schools closed to avoid or prevent imminent danger to the health or safety of all of our school children.



CHESTER C. KUNITAKE, Member

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