

STATE OF HAWAII
HAWAII LABOR RELATIONS BOARD

In the Matter of)
BENJAMIN J. CAYETANO, Governor, State)
of Hawaii and BOARD OF EDUCATION,)
Public Employers-)
Petitioners,)
and)
HAWAII STATE TEACHERS ASSOCIATION,)
Exclusive Representative-)
Respondent.)

CASE NO. S-05-77

ORDER NO. 2003

ORDER DENYING APPROVAL OF
BOE'S IMPLEMENTATION PLAN
AND SUSPENDING DESIGNATION
OF ESSENTIAL WORKERS; AND
ORDER DENYING RECONSIDERA-
TION OF DENIAL OF SPECIAL
CONDITIONS

ORDER DENYING APPROVAL OF BOE'S IMPLEMENTATION
PLAN AND SUSPENDING DESIGNATION OF ESSENTIAL WORKERS; AND
ORDER DENYING RECONSIDERATION OF DENIAL OF SPECIAL CONDITIONS

On March 16, 2001, the Hawaii Labor Relations Board (Board) issued Decision No. 421, Findings of Fact, Conclusions of Law, and Order, on BENJAMIN J. CAYETANO, Governor, State of Hawaii and BOARD OF EDUCATION, State of Hawaii's (collectively BOE or Employer) petition to designate 322 special education teachers as essential and who must be precluded from participating in the event of a strike by Unit 05. After an investigation, the Board majority found, inter alia, that if schools remain open, attendance by certain special education students designated eligible for an Extended School Year (ESY) in their Individualized Education Program (IEP) without the services of special education teachers would present a present or imminent danger to the health or safety of the students. The Board majority thus ordered that 322 special education teachers be declared essential by the BOE 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,¹ 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.

¹EA/teacher ratios refers to Educational Assistant (EA) to teacher ratios.

On March 27, 2001, the BOE submitted its Implementation Plan (Plan) for the 322 essential worker positions with the Board. The BOE indicated that the essential workers would be limited to providing services to ESY students only. The BOE also submitted that the teachers would provide custodial and instructional services because both types of services are necessarily integrated and address the student's health and safety concerns. The BOE also requested an additional 15 essential worker positions for Maui District and the reconsideration of the Board's ruling on the denial of the Special Conditions.

Thereafter, on March 28, 2001, the BOE submitted a supplement to its Plan including the numbers of EAs assigned to the Hawaii Center for the Deaf and Blind (HCDB) and the Honolulu, Leeward, Maui and Kauai school districts which were omitted from its previous submission.

On March 29, 2001, the Board conducted a hearing on the BOE's Plan. Thereafter, on April 2, 2001, the Board conducted a hearing on the BOE's request for 15 additional essential worker positions in the Maui District as well as the reconsideration of the denial of the Special Conditions. At the latter hearing, the BOE further requested that it be provided with flexibility in assigning teachers between schools and districts.

The parties were represented by counsel at each hearing and had full opportunity to present evidence and argument to the Board. Based upon the consideration of the record in this matter, the Board makes the following findings of fact, conclusions of law, and order.

FINDINGS OF FACT

1. The BOE is a public employer within the meaning of Hawaii Revised Statutes (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. In Decision No. 421, the Board found in Finding of Fact No. 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.

4. In Decision No. 421, the Board found in Finding of Fact No. 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.

5. In Decision No. 421, the Board found in Finding of Fact No. 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 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.

6. In Decision No. 421, the Board found in Finding of Fact No. 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.

7. In Decision No. 421, the Board found in Finding of Fact No. 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. (footnote omitted.) 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.

8. In the Discussion in Decision No. 421, the Board majority stated:

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.

9. The Board further stated:

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.

10. The Board ordered the designation of 322 special education teachers upon the condition that the BOE develop and submit for the Board's approval 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.

11. The BOE submitted its Plan in response to Decision No. 421. The BOE's submission provides that the "teachers will be providing custodial and instructional services because both types of services are necessarily integrated

and address the student's health and safety concerns." The Plan includes a grid including, by school districts and schools, the identification and assignment of teachers, the number of students, and the number of assigned EAs. The Plan also includes the assignment of nine positions at the HCDB.

12. The ratio of teachers and EAs to students vary markedly from school to school. In the Honolulu District, Kalihi Kai School has a ratio of one teacher for 20 students; Central Middle has a ratio of one teacher for 13 students; Wilson School has a ratio of two teacher/EAs for six students. In the Leeward District, Makakilo School has one teacher for 16 students; Palisades School has two teacher/EAs for four students. In Maui District, Haiku Elementary School has no teacher or EA for 16 students; Kalama Intermediate School has one teacher for 18 students; Kamalii Elementary School has eight teacher/EAs for eight students. In Central Oahu District, Haleiwa School has one teacher for 15 students.
13. The BOE identifies 4,348 out of 6,422 ESY students who are anticipated to attend school during the teachers' strike, but it fails to identify the means by which the estimate of the number of ESY students was calculated as required by Decision No. 421.
14. The BOE did not include the functions that will be performed by the teachers, including the anticipated organization and classroom activities to be performed as required by Decision No. 421.
15. The BOE has 1,403 EAs assigned to special education classes. Nevertheless, the BOE's Plan lists only 651 EAs it expects to utilize. There appears to be no reason the DOE plans not to use its full complement of EAs to reduce the teacher/EA to student ratios.
16. There is no foundation for the 20:1 ratio proposed by the BOE in its petition, given the wide disparity in the teacher/EA to student ratios at the various schools in the BOE's Plan.
17. On March 29, 2001, Wendy Calizar (Calizar), special education teacher at Jefferson School Orthopedic Unit, testified that she teaches six students with the help of one EA. According to the Plan, the BOE designated Calizar as an essential worker for 13 students with the assistance of one EA. Calizar testified that there are 15 ESY students in the school, including one student who could suffer 100 seizures in a day and one with a colostomy. Calizar testified that she and the EA assist in feeding the students which takes approximately 45 minutes per student. She estimated that it would take the whole day to each feed seven students breakfast and lunch and assist them in

toileting. Calizar testified as to the potential danger for the severely multiply handicapped students in wheelchairs if a fire broke out. Calizar testified that in her opinion, because of the number and unfamiliarity with the students she would be assigned, including any food allergies, the students' health or safety would be compromised by the BOE's Plan.

18. On April 2, 2001, Debra Farmer (Farmer), Department of Education (DOE) Special Education Section Administrator, testified in support of the request for 15 additional positions for Maui District. Farmer testified that the unique geographic conditions of the Maui District and the fact that there were less designated teachers than schools would require the consolidation of services. Farmer testified that there are 29 base schools and 22 teachers requested by the BOE. She testified as to her opinion that such consolidation would create a health and safety risk to the ESY children because of issues of transportation and familiarity.
19. In reviewing the Plan for the Maui District, the Board is unable to determine the projected teacher/EA to student ratios because the Plan is premised upon the transportation of selected students to neighboring schools without any explanation as to how the determination will be made as to the number of students who may be transported to neighboring schools and what the final complement is anticipated at any particular school.

Discussion

In Decision No. 421, the Board conditioned the designation of 322 essential special education teachers upon the submission and approval of a plan because:

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.

The BOE has submitted a one page letter and appended chart as its plan. The submission has not, however, addressed any of the abovementioned concerns. It does not address the sufficiency or necessity of the 322 teacher figure, it provides no basis for the 20:1 ratio, it provides no information as to implementation other than to identify the number of teachers, EAs and students which will be assigned to each school, and most importantly, it has not addressed the concern that the proposed ratio of ESY students to teachers in the event of a strike would in itself exacerbate or create dangers to the health and safety of this most vulnerable population.

The BOE asks this Board to trust its judgment that its Plan as proposed can and will work. Unfortunately, the Plan as submitted begs more questions than creates confidence that it will work to avoid any danger to the health and safety of 4,348 ESY students it anticipates will attend school in a strike. For example, the BOE has 1,403 EAs assigned to special education classes, yet its Plan accounts for only 651 EAs. If the BOE is confident its Plan as provided will work, why not utilize its full complement of EAs? And, even more importantly, why is it necessary for 322 special education teachers to be designated essential when 752 EAs remain, have the training, and can be assigned to special education classes.

The BOE's Plan as submitted instills very little confidence that the DOE is capable of adequately ensuring the health and safety of special education needs children anticipated to attend school during a teachers' strike. Accordingly, the Plan cannot be approved.

We do not doubt the sincerity of the BOE in its professed desire to ensure the health and safety of ESY students. However, we also cannot ignore the fact that this petition occurs within the context of a threatened federal takeover of our system of special education. If all, or any part, of the BOE's essential workers petition is motivated or directed by this crisis, patchwork plans which will provide neither meaningful instruction nor adequate custodial care will not be approved by the Board as a gesture of compliance.

The legislature, in its wisdom, appears to have anticipated the kind of circumstance in which the BOE finds itself. HRS § 89-20 provides as follows:

Chapter inoperative, when. If any provisions of this chapter jeopardizes the receipt by the State of any federal grant-in-aid or other federal allotment of money, the provision shall, insofar as the fund is jeopardized, be deemed inoperative.

Our reference herein is not intended in any way to represent a ruling on the applicability or effect of this section. The BOE has not elected to move or petition on any basis other the health and safety of ESY students and we will respect that decision.

Unless or until the Board is presented with a plan that meaningfully demonstrates that the designation and implementation of special education teachers is "necessary to avoid or prevent imminent danger" to the health or safety of ESY students, we believe that the BOE would be well advised to follow the advice of Member Kunitake in his dissent to Decision No. 421 and trust their care to those by whom they are loved.

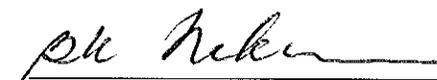
Having denied the approval of the BOE Plan, and accordingly suspended the designation of the initial 322 teachers, the Board need not rule at this time on the request for designation of 15 additional essential positions. Moreover, there having been presented no evidence on the necessity of the requested Special Conditions, the Board elects not to reconsider its initial denial of the Conditions.

CONCLUSIONS OF LAW

1. The BOE's Plan does not conform to the Board's conditions set forth in Decision No. 421 and is therefore not approved. The designation of 322 special education teachers as essential is hereby suspended.
2. The reconsideration of the Board's denial of Special Conditions in Decision No. 421 is denied.

DATED: Honolulu, Hawaii, April 2, 2001.

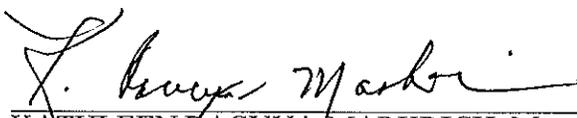
HAWAII LABOR RELATIONS BOARD



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