

STATE OF HAWAII

HAWAII LABOR RELATIONS BOARD

In the Matter of)	CASE NO. CE-05-268
HAWAII STATE TEACHERS)	ORDER NO. 1234
ASSOCIATION (HSTA),)	ORDER GRANTING COMPLAINANT'S
Complainant,)	MOTION FOR INTERLOCUTORY
and)	ORDER
LOUIS VIERRA, Principal, Camp-)	
bell High School, Department of)	
Education, State of Hawaii; ¹)	
et al.,)	
Respondents.)	

ORDER GRANTING COMPLAINANT'S MOTION FOR INTERLOCUTORY ORDER

On September 19, 1995, Complainant HAWAII STATE TEACHERS ASSOCIATION (HSTA or Union), by and through its attorney, filed a Motion for Interlocutory Order with the Hawaii Labor Relations Board (Board). Complainant seeks an order enjoining the Respondents and their agents from admitting "John Doe" into the regular curriculum at James Campbell High School. Complainant further seeks an order requiring Respondents to provide a home study program or have properly trained administration personnel tutor the student in the administrative offices until the student is deemed by psychological examination not to be a danger to teachers or other students.

¹At the hearing on the motion for interlocutory order, the parties stipulated that LOUIS VIERRA is the principal of Campbell High School and that his name could be substituted for that of JAMES VIERRA which was erroneously designated by Complainant as a Respondent in the Prohibited Practice Complaint filed in this matter.

The Board conducted a hearing on Complainant's motion on September 28, 1995. All parties were represented and had full opportunity to present evidence and argument to the Board. After reviewing the record and arguments presented, the Board, based upon the following findings, hereby grants Complainant's motion.

Complainant HSTA is the exclusive representative of employees in Unit 05 as defined in § 89-6, Hawaii Revised Statutes (HRS).

Respondents BOARD OF EDUCATION (BOE) and DEPARTMENT OF EDUCATION (DOE), State of Hawaii, operate the public school system in the State of Hawaii. The BOE is the public employer, as defined in § 89-2, HRS, of employees of the DOE who are included in Unit 05.

Respondent LOUIS VIERRA is the principal of James Campbell High School. Respondent AMY MAEDA is the Leeward District Superintendent and Respondent HERMAN AIZAWA is the Superintendent of the DOE. As such, Respondents VIERRA, MAEDA and AIZAWA are representatives or agents of the DOE and the BOE.

The HSTA and the BOE are parties to a collective bargaining agreement, dated July 1, 1993 to June 30, 1995. The Board takes notice that the Unit 05 agreement has been extended to September 30, 1995 and is presently being extended to January 31, 1995.

John Doe is a 17-year-old, 6'2", 285-pound male special education student who was recently readmitted into Campbell High School.

Alvin Akiyama teaches special education students in regular education at Campbell High School and testified that in 1994, John Doe struck a vice principal at Waipahu Intermediate School. According to the memorandum filed in support of the motion for interlocutory order, the vice principal was hospitalized. John Doe was expelled from Waipahu Intermediate for striking the vice principal and damaging a window.

Thereafter, John Doe attended Campbell High School and in April 1995, Akiyama attempted to remove John Doe from his physical education class. John Doe became enraged, swore at him and overturned surrounding furniture, including an eight-foot work table. Four people attempted to subdue the student and Akiyama was struck by the student several times. John Doe also grabbed a student by the throat and threw him down. John Doe was subsequently expelled from Campbell and attended Hale O Ulu, an alternative school. There, he was involved in two violent incidents, including one in which he grabbed a female student, threw her across a table and hit her. The student required hospitalization. Thereupon, John Doe was expelled from Hale O Ulu in September 1995.

After his expulsion from Hale O Ulu, John Doe was readmitted into Campbell High School as a ninth grade student in September 1995. He presently has a regular school schedule where he changes classes and is in contact with six different teachers.

Akiyama also testified that as recently as Thursday, September 21, 1995, John Doe was involved in incidents with two of his teachers. In one incident, Akiyama testified that John Doe

swore at his female English teacher because she was writing a report on him. Later, John Doe returned and further threatened her.

Akiyama testified that he spoke to Campbell High School Principal LOUIS VIERRA about John Doe and concerns for the safety of the teachers and students. There is no evidence of any action taken by the principal or the DOE with regard to Akiyama's concerns. In addition, the HSTA sent a letter, dated September 14, 1995, to VIERRA indicating the Special Education Department of Campbell High School made a recommendation that the student undergo a thorough evaluation to determine how best to provide educational services to meet the student's needs. The HSTA indicated that it would file a grievance and requested that John Doe remain in the administrative offices throughout the day tutored by a vice principal until the required evaluations were completed.

Also on September 14, 1995, the HSTA filed a grievance with Respondents AIZAWA and MAEDA alleging violations of the contract because of John Doe's readmittance to Campbell High School.

Dr. Robert Campbell, Acting Administrator of the Office of Instructional Services, DOE, testified that the interlocutory relief requested by Complainant would constitute a change in the student's Individualized Educational Program (IEP)² and would violate federal laws and regulations. Dr. Campbell was not

²Respondents define the IEP as a comprehensive statement of the educational needs of a handicapped child, and the specially designed program of instruction, related services, and school placement to be employed to meet those needs.

familiar with John Doe but testified generally as to the federal requirements and DOE procedures regarding special education students.

The Board relies on the analysis for interlocutory relief stated by the Hawaii Intermediate Appellate Court in Penn v. Transportation Lease Hawaii, Ltd., 2 Haw. App. 272 (1981). The three requirements for the granting of interlocutory injunctive relief are: 1) Is the party seeking the relief likely to prevail on the merits? 2) Does the balance of irreparable damage favor issuance of injunctive relief? 3) Does the public interest support the granting of injunctive relief? The Court also noted that:

The more the balance of irreparable damage favors the issuance of the injunction, the less the party seeking the injunction has to show the likelihood of success on the merits. [Citations omitted.] Likewise, the greater the probability the party seeking the injunction is likely to prevail on the merits, the less he has to show that the balance of irreparable harm favors the issuance of the injunction.

Id. at 276.

At this juncture of this case, the HSTA has shown that John Doe has a history of violent acts in the school setting, including assaults against teachers, school personnel and other students. These acts have resulted in hospitalization for some individuals. The HSTA contends that because of the documented history of physical assaults on students and teachers, including security personnel who attempted to physically restrain John Doe, the teachers are not prepared to deal with such violent behavior, especially from a student of his size and strength. Complainant requests that the Board order Respondents to remove John Doe from

the regular curriculum at Campbell and place him in a home-study program, or in the alternative, have John Doe tutored in the administrative offices by administration personnel.

Complainant relies on Article XI, Teacher Protection, of the applicable contract. The provision states in pertinent part:

- B. Teachers shall not be required to work under unsafe or hazardous conditions or to perform tasks which imminently endanger their health or safety.

* * *

When any teacher believes that the personal safety of his/her students or his/her person is jeopardized or endangered, the teacher shall inform the principal who shall take appropriate action. Within a reasonable length of time, the principal/designee will inform the teacher of the action which has been taken.

Respondents have not presented the Board with any evidence regarding John Doe. Respondents maintain that the Board does not have jurisdiction to order a remedy which would be contrary to John Doe's IEP and therefore violative of federal laws and regulations, i.e., home study or one-on-one tutoring by the administration officials. Further, Respondents indicate that John Doe has been assigned a shadow who follows him to each class. However, the shadow works approximately 19 1/2 hours and is not always present when John Doe attends school.

Respondents contend that the HSTA will not be able to prevail on the merits of this complaint because Complainant cannot show that the Respondents acted wilfully. In addition, Respondents contend that this Board is not the appropriate forum to change a special education student's educational program and placement.

According to the DOE's administrative rules, the appropriate forum to challenge the appropriateness of the IEP and to modify its contents rests ultimately with the federal district court or the State courts. Respondents further argue that there is no evidence that the HSTA or its members will sustain any irreparable injury. Respondents appear to contend that any injuries sustained by the teachers would be fully compensable. On balance, Respondents argue that John Doe would be damaged because he will be deprived of his civil rights and any action by this Board will subject it to liability under 42 U.S.C. § 1983.

Lastly, Respondents contend that the overwhelming public interest favors compliance with the State and federal regulations pertaining to special education students. Respondents suggest that John Doe can be crisis suspended³ pursuant to Administrative Rules § 8-19-17 when he engages in violent behavior. Thus, Respondents argue that there are already existing procedures which address the safety concerns of the HSTA and therefore, the public interest does not support the granting of this motion.

As stated above, Respondents have not presented the Board with any evidence of compliance with the foregoing contract provision. The evidence before the Board indicates that John Doe has a history of violent outbursts which has resulted in physical injury to Unit 05 members, classmates, and other personnel. The evidence suggests that there is a real possibility that future violent acts are imminent with the strong likelihood that there

³Pursuant to Administrative Rules § 8-19-17, the DOE may crisis suspend a handicapped student when the student engages in any violent behavior.

will be physical harm and injury to others, including Unit 05 members. The evidence also shows that the matter has been brought to the attention of the principal and the DOE administration. There is no evidence that any action has been taken to address the concerns of the teachers for their personal safety and for the safety of the students at the school. Moreover, there is no evidence of any type of response from the administration to the teachers' concerns in accordance with Article XI. It appears therefore that Complainant is likely to succeed on the merits of its complaint in showing a violation of the contract.

With respect to the wilfulness argument put forth by the Respondents, the Board previously stated that "wilfulness" has been defined as a "conscious, knowing, and deliberate intent" to violate the law. Jerelene M. Aio, 2 HPERB 458 (1980). The Board also stated in Dennis Yamaguchi, 2 HPERB 656 (1981), that in recent decisions the Board found the requisite wilfulness where a violation of the act was a natural consequence of Respondent's actions. Thus, under the recent Board cases, Complainant need not show a deliberate intent to violate Chapter 89, HRS, for the Board to conclude that there is a showing of wilfulness.

However, with regard to the nature of the interlocutory relief sought, the Board agrees with Respondents that the relief requested by Complainant, i.e., refusal to admit John Doe into the regular classroom and to confine him to home-study or tutorial by the vice principal, would be contrary to the student's IEP. According to the authorities presented to the Board, any changes to the student's educational program must be made in accordance with

established procedures. There has been no showing that there has been any attempt to modify the student's IEP by either the Complainant or the Respondents to address John Doe's violent episodes. Thus, in accordance with the contract language which ensures a safe working environment, the Board finds it appropriate to fashion the following order. The Board grants Complainant's motion to the extent that the Respondents shall take immediate steps to ensure that the safety of the Unit 05 members who work in the classrooms in the presence of John Doe is protected. These steps shall include, but not be limited to, placing appropriate personnel in the student's classrooms who are trained to deal with violent outbursts by students.

The Board further finds that the balance of irreparable damage favors the issuance of injunctive relief. Given the evidence of John Doe's violent propensities and therefore, the possibility of the infliction of serious physical injury to other students as well as to the Unit 05 members, the Board finds that ensuring the safety of the teachers and the students at the high school far outweighs any interference or intrusion which the additional security personnel would have on John Doe. The Board notes that a shadow is already assigned to John Doe for 19 1/2 hours per week. Having appropriate personnel available during the remainder of John Doe's school day would be no more intrusive and would not irreparably damage John Doe. Thus, the Board finds that the balance of irreparable harm tips in favor of requiring the additional safeguards.

Respondents contend that the overwhelming public interest favors the compliance with State and federal regulations pertaining to special education students. Respondents argue that in the appropriate case, a student can be crisis suspended when the student engages in violent behavior. It is apparent however, that the threat of crisis suspension does not present a deterrent to John Doe. Moreover, in all likelihood, a crisis suspension would be imposed only after the next violent episode occurs which may result in serious injury or damage. In the Board's view, under these facts this alternative does not offer sufficient protection for the teachers or the students.


Respondents also argue that school officials could also invoke the aid of the courts under 20 U.S.C. § 1215(c)(2) for relief where parents of a truly dangerous child refuses to permit any change in placement. Respondents however, never established that these alternatives or any others were considered by the administration and that a decision pertaining thereto was communicated to the concerned teachers. Thus, while the Board fully appreciates the rights of the special education students, in this case, the Board is convinced that the public interest clearly favors ensuring, to the fullest extent possible, the safety of the Unit 05 members and the students.

Based upon the foregoing, the Board hereby orders Respondents to take immediate steps to ensure the safety of the Unit 05 members who work in the classrooms in the presence of John Doe. These steps shall include, but not be limited to, placing personnel in the classroom who are trained to deal with violent

outbursts by students. This order shall remain in effect until a final disposition of this matter.

DATED: Honolulu, Hawaii, October 6, 1995.

HAWAII LABOR RELATIONS BOARD



BERT M. TOMASU, Chairperson



RUSSELL T. HIGA, Board Member

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