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STATE OF IOWA

CITIZENS' AIDE OFFICE
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WILLIAM P. ANGRICK II
CITIZENS' AIDE / OMBUDSMAN

In reply, please refer to:

June 22, 1983

CONTACT: WILLIAM HORNBOSTEL
281-3592

FOR IMMEDIATE RELEASE:

NEWS RELEASE

Iowa Ombudsman, William P. Angrick, released a Critical Report issued to the Madrid Community School District Board of Directors based on the Ombudsman's investigation into the use of physical force in the school district. The investigation was conducted following two complaints by a parent that excessive force had been used against his children by school employees.

The first incident occurred in May 1982 when the Elementary School Principal broke up a fight in the school yard, striking one of the students across the face. Angrick declined to determine whether the blow was struck intentionally, because the case is in court. However, he was critical of the school board's failure to fully investigate the incident. Angrick pointed out that the superintendent's reasoning that any blow would have been within the law was incorrect and that the Board failed to ask the superintendent how he had reached his conclusions.

The second incident occurred when a substitute teacher handled a student roughly during recess. Angrick stated that the handling of the student was an assault and illegal under Iowa law.

Angrick recognized that the report would generate controversy and stated his hope that "each governmental body responsible for discipline at schools will reach its own conclusions and let teachers and administrators know what is expected of them."

The Ombudsman recommended to the Board that they review their policy regarding use of force in their schools and provide additional training to school personnel in the appropriate use of force. He also invited the Board to have a public discussion of the issues of force and corporal punishment in the district.

Stated Angrick, "The use of force and physical punishment in the schools is not so much a question of what is legal, it is a question of what the community will tolerate. Discipline can be maintained in our schools without resorting to excessive force."

The official response of the Madrid Community School District is appended.

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CRITICAL REPORT

83-1

Investigation of Complaints Alleging Inappropriate Use of Physical Force Against Students in the Madrid Community School System

TO: Board of Directors
Madrid Community School District
Marlowe Carlson, President
Helen Aarons, Member
Paul Johnson, Member
Darwin Knox, Member
Larry Peterson, Member

Superintendent Marion Romitti

Principal Ronald Bromert

Mrs. Marilyn Erickson

FROM: William P. Angrick II
Citizens' Aide/Ombudsman

RE: Case File 82-564

DATE OF ISSUANCE: June 3, 1983

INTRODUCTION

The office of Citizens' Aide/Ombudsman (CA/O) has completed an investigation as per Chapter 601G, Code of Iowa, into two complaints from a parent in the Madrid Community School District alleging inappropriate and excessive use of physical force against his children, and another complaint alleging discrimination and unequal application of disciplinary sanctions.

On May 6, 1982, Thu Lai of Madrid contacted CA/O complaining that his son Vu, a fourth grader at the time, had been struck in the right side of the face the previous day, May 5, 1982 by Madrid Elementary School Principal Ronald Bromert, causing temporary partial (20%) disability to the boy's jaw, although no permanent injury was sustained. The parent, who is of Vietnamese origin, was concerned primarily about the use of force against his son, and secondly that the alleged act may have been motivated by prejudice.

At the time of contact with this office, the complainant had already been in contact with the Superintendent of Schools. CA/O suggested that he also bring the complaint to the School Board, which he did at the Board meeting May 10, 1982. The Board directed the Superintendent to "do some checking", and indicated in the minutes that a special meeting would be held when that investigation was complete. Subsequently, Mr. Lai received a letter dated May 13, 1982 from the Superintendent, indicating that he did not believe that the Principal acted in violation of any rule or regulation of the School District nor had he violated any of the unwritten standards of conduct expected of a professional administrator. He indicated that he would not be making any recommendation to the School Board for termination, reprimand or other disciplinary action. Neither did he indicate the substance of his investigation, or how he arrived at his conclusions.

Mr. Lai then indicated to CA/O that he was dissatisfied with this response, that he wanted a complete investigation of the matter and, ultimately, disciplinary action or dismissal of the Principal if that was determined to be warranted.

Because the CA/O lacks authority to impose disciplinary sanctions against school district personnel, we referred Mr. Lai to the Iowa Professional Teaching Practices Commission, and a complaint was filed with them on May 17, 1982.

In December of 1982, Mr. Lai again contacted CA/O. At this time, he alleged unequal application of disciplinary sanctions arising from a classroom incident involving his younger son, Huy, a fourth grader, and another student. He also indicated that although the Iowa Professional Teaching Practices Commission had held a hearing and dismissed his complaint on the first incident because he had failed to meet the burden of proof, he was not satisfied that his children were not being discriminated against in the school because they are of Vietnamese origin.

CA/O made inquiry into the second complaint and determined that both boys, Mr. Lai's son and the Caucasian boy involved, had received a disciplinary sanction for a classroom incident on October 22, 1982. This involved a one-day detention over the noon recess. Mr. Lai's son voluntarily presented himself to serve the detention, the other boy did not. From our inquiry, CA/O determined that although in light of the previous incident and allegations of discrimination it was unfortunate, we were unable to substantiate that it was an unequal or unfair application of disciplinary sanctions, or anything more than an oversight. When the incident was brought to the school administrator's attention, the other boy was then required to serve the detention, and procedures were implemented to reduce the possibility of such occurrences in the future.

As we are unable to substantiate that this incident was anything more than an unfortunate oversight, we will not consider the matter further for purposes of this report. However, while CA/O was making this inquiry, Mr. Lai filed a third complaint, alleging inappropriate use of physical force by a substitute teacher against the younger son, Huy, in a playground incident December 22, 1982. Upon complaint, CA/O suggested that Mr. Lai follow the usual channels of complaint through the Elementary Principal and then to the District Superintendent and School Board if dissatisfied with the Principal's response.

Subsequently, Mr. Lai received a letter from the Principal stating that the evidence he gathered did not substantiate the accusations made and that, in his opinion as Principal, the teacher handled the matter properly. The response did not indicate what evidence had been considered or whether witnesses were interviewed. Mr. Lai then wrote to the Superintendent, expressing his dissatisfaction with that response. Several days later, the Superintendent responded, indicating that in his opinion the teacher acted properly in her capacity and that the Principal's investigative procedure was "more than adequate."

Based on the nature of the two allegations of inappropriate use of physical force out of the same school district in the same family in less than a year, the apparent inadequacy of the administrators' responses, the complainant's continuing dissatisfaction and frustration with the response of school administrative personnel, and the agreement of the school personnel that neither of the Lai children are particular disciplinary problems, CA/O determined that an independent, outside investigation by our office into the allegations was warranted.

For the purposes of this report, we will first consider the December complaint involving use of physical force by a substitute teacher, in order to set forth legal analysis.

DIVISION I

This section of the report concerns a complaint that on December 22, 1982, a substitute teacher used inappropriate physical force on Huy Lai. During the course of the investigation, CA/O interviewed seventeen persons including student witnesses to the incident, school administrators, teachers, and parents.

FACTS

On December 22, 1982, during a noon recess, the boys in the fourth grade class were playing a game of basketball on the playground. The class's substitute teacher, Marilyn Erickson, was on playground duty and was refereeing the game, which by all reports was getting a bit unruly. Everyone interviewed concurs that this is an unusually rambunctious fourth grade class. The basketball game was beginning to get rough, and the teacher decided to call a jump ball. She called for the boys to throw the basketball to her. After several boys tossed the ball back and forth among themselves, the ball was thrown to Huy Lai. The teacher directed Huy to give or throw her the ball. He did so. According to witnesses, the student was standing approximately four to six feet from the teacher. The teacher was unable to catch the ball as it was thrown, and it hit her in the stomach, not hard enough to cause any appreciable injury, but apparently hard enough to startle her. Apparently believing the ball was thrown by the student too hard, either accidentally or on purpose, the teacher physically took ahold of the student and

physically escorted him over to stand by the wall of the school building. Standing a student by the wall of the school building is a usual sanction for student playground infractions. While this was taking place, the student protested, saying something to the effect that "But I threw you the ball." The teacher responded, "Yes, but you know how you threw it."

There is a discrepancy in the testimony of the student and the teacher as to how the student was grabbed and as to what happened when he was escorted to the wall of the building. According to the teacher, she took hold of his coat collar and walked him by the arm over to the building. She states that the student did not come into contact with the wall. According to the student, the teacher grabbed him around the neck with her forearm and dragged him to the wall, where his head snapped back and hit the wall. Several witnesses corroborated this, although several were unsure as to how the teacher had taken ahold of him and whether or not his head hit the wall. It is established that there was no injury severe enough to warrant medical attention, and the student participated in class activities for the remainder of the day. The Principal, in responding to CA/O's written inquiry in this regard, responded that he drew the following conclusions from the evidence he considered; 1) the student acted improperly with vented anger toward the teacher; and 2) the throwing of the ball in such a manner could have caused extreme harm to the teacher and that she acted appropriately in the situation.

ANALYSIS

Whenever a person intrudes on the bodily security of another, a question arises of whether an assault has occurred. Section 708.1 of the Iowa Code defines an assault:

"A person commits an assault when without justification, the person does any of the following:

1. Any act which is intended to cause pain or injury to, or which is intended to result in physical contact which will be insulting or offensive to another, coupled with the apparent ability to execute the act."

Under Iowa law, a battery is an aggravation of an assault, rather than a separate offense. State v. Cokely, 4 Iowa 477 (1857). A physical touching which is offensive to the person touched constitutes a battery. State v. Spears, 312 B.W. 2d 79 (Iowa 1981). Therefore, when Mrs. Erickson grabbed the collar of Huy's coat, an assault occurred, unless there was justification (privilege) for Erickson's action.

It is well settled that the question of the privilege of a teacher to discipline is a defense to an action for assault and battery (unlawful intrusion on a person's bodily integrity). See Prosser, Law of Torts §§16, 27, 4th Ed. West Pub. 1971, Second Restatement of Torts, §10. Thus, in Peck v. Smith, 41 Conn. 442 (1874), a student was removed from the schoolroom by the defendant placing his hand on the shoulder of the student and escorting him to the door. The Court agreed that this was assault and battery, although the defendant prevailed based upon his defense of privilege and the fact that the use of force was not excessive.

A teacher is justified or privileged to use reasonable force in two settings. The first is to protect persons or property. Main v. Ellsworth, 237 Iowa 1970, 23 N.W. 2d 429 (1976); Wessman v. Sundholm, 228 Iowa 344, 291 N.W. 137 (1940).

There is no question in this case that Erickson was not acting to protect any person or property.

A teacher is also privileged to use reasonable force to punish a student, Tinkham v. Kole, 110 N.W. 2d 258 (Iowa 1961). The difficult question presented in this matter is whether Erickson's actions were justified as the use of reasonable force to discipline Huy. In the event that any use of force was not reasonable, Erickson could be subject to criminal sanctions, State v. Mizner, 50 Iowa 145 (1878); civil liability, Tinkham, supra; and professional sanction. Mahan v. Kollmorgen, case 82-18 Iowa Professional Teaching Practices Commission; Crowley v. Yoshimura, case 79-1, Iowa Professional Teaching Practices Commission.

Two approaches can be used in determining whether the use of force by Erickson was privileged as necessary for proper discipline of Huy. First, the Madrid Elementary School has a policy for administering corporal punishment (Black's Law Dictionary defines corporal punishment as "any kind of punishment of or inflicted on the body." 5th Ed. 1979). The policy is contained in the Elementary School Handbook and provides that corporal punishment is to be used only as a last resort, after other means of punishment have proven ineffective. At least one teacher witness is necessary. As far as this matter is concerned, the following rules are pertinent:

1. The student shall clearly understand the seriousness of the offense.

2. The student shall be allowed to speak in his or her own defense prior to being punished.

3. The student shall be informed as to why he or she is being punished.

***

8. Corporal punishment shall not be administered in the presense of other students.

9. Corporal punishment shall be administered only to the buttocks with the palm of the hand or a paddle and in no other manner.

***

11. Parents shall be informed.

It might appear that this policy is supposed to be applied only when a paddling is in order. However, as pointed out above, any physical punishment is corporal punishment. The facts of this case are in dispute; Erickson states that she grabbed Huy's coat by the scruff of the neck and moved him to the wall. Huy states that Erickson put her arm around his neck and moved him to the wall; his head snapped back and hit the wall. In either event, the teacher committed an assault and battery. The question is whether it was privileged.

A school can make reasonable rules to govern the conduct of teachers as well as pupils. Iowa Code §279.8 (1983); Sims v. Colfax Community Schools, 307 F. Supp 485 (D.C. Iowa 1970). These rules can restrict the authority a teacher might otherwise have to physically punish a student, although it is not clear that they do so in this case. In any event, a teacher acting contrary to those rules is not protected from civil liability or the other remedies stated above, even though they may be acting reasonably to discipline a student.

A case which illustrates this approach is McKinney v. Greene, 379 So. 2d 69 (La. App. 1979). Robert Hicks, a thirteen year old student, had been fighting in the school yard. The teacher brought both students inside to see the principal, Greene. While the teacher explained what had happened, Robert began pushing the other boy. Greene ordered Robert to "back off". Greene was standing on the opposite side of a serving counter and had a lunch tray in his hands. He repeated his command twice to Robert and then walked around the end of the serving counter and kicked Robert in the buttocks with the side of his shoe. The force of the kick was

slight and only designed to get Robert's attention. There was no physical harm from the kick.

The Court found that Louisiana Law permitted the use of reasonable corporal punishment as a disciplinary method. However, the School Board had adopted rules which provide:

> "Section 2.
>
> (a) Corporal punishment for purposes of this resolution, and use in this school system is defined as, and limited to, punishing or correcting a student by striking the student on the buttocks with a paddle a maximum of five (5) times. When such corporal punishment is administered to a student, it must be administered in a reasonable manner taking into consideration the age, size, emotional condition and health of the student.
>
> (b) Nothing contained herein shall be interpreted as prohibiting an employee from using physical force, reasonable and appropriate under the circumstances, in defending himself against a physical attack by a student or from using physical force, reasonable and appropriate under the circumstances, to restrain a student from attacking another student or employee."

In holding the principal liable for $100 in damages for his actions in kicking Robert, the Court found that Greene was bound to observe these rules and that his liability should be determined by reference to them.

Applying this reasoning to this matter, and assuming that Erickson's actions were justified by Huy's behavior, she could potentially be found liable.

Before continuing into an analysis of whether Erickson's use of force was reasonable corporal punishment apart from the rules, some comments on the school's rules regulating corporal punishment are in order.

The rules are good rules. They follow many of the principles of reasonableness set out below. If these rules are followed, they should go a long way toward insuring that the teachers and school will not be held liable for administering corporal punishment.

Even more importantly, these rules protect the student from many of the evils of corporal punishment and show a respect for the student. As long as corporal punishment is permitted in the schools, rules regulating its use are in order. The school is commended for the substance of these particular rules.

It should also be noted that clause (b) of the Louisiana rules cited above deals with the privilege to protect self and others, not corporal punishment. Such a clause is not necessary to permit a teacher or administrator or anyone else from using reasonable physical force in defense of self or others. However, in view of the conclusions reached in this report and the confusion that may already exist among teachers and administrators as to the extent of permissible use of force, the school may wish to spell out the fact that defensive use of reasonable force is appropriate.

The preceding discussion is based on the assumption that Erickson's actions were privileged as reasonable corporal punishment. For a number of reasons, set out below, the Citizens' Aide is concerned that the use of force on the facts of this case is not privileged.

The legal principle governing the use of corporal punishment is simply that teachers or administrators may impose reasonable but not excessive force to discipline a student. Ingraham v. Wright, 430 U.S. 651, 97 S.Ct. 1401, 51 L.Ed. 2d. 711 (1977) The general rule privileges such force as a teacher or administrator reasonably believes to be necessary for proper control, training or education of the student. Id. at S.Ct. 1407. Restatement (Second) of Torts

§147 (2) (1965). Excessive or unreasonable force is subject to possible civil, criminal and administrative penalties as stated earlier. See, supra, at S.Ct. 1407.

While early cases found that the authority of the teacher was derived from the in loco parentis status of the teachers, particularly before compulsory education, more recent decisions hold that the State may impose such corporal punishment as is reasonably necessary for the proper education of the student and maintenance of group discipline. Ingraham supra., at S.Ct. 1407; 1 F Harper & F. James, Law of Torts §3.20, p. 292 (1956).

Tinkham v. Kole, 110 N.W. 2d. 258 (Iowa 1961), the Supreme Court adopted the language contained in the annotation from, "Teacher's Civil Liability for Administering Corporal Punishment to Pupil", 43 ALR Sd. 469, as stating the Law of Iowa.

> "***a teacher is immune from liability for physical punishment, reasonable in degree, administered to a pupil.***
>
> "But a teacher's right to use physical punishment is a limited one. His immunity from liability in damages requires that the evidence show the punishment administered was reasonable, and such a showing requires consideration of the nature of the punishment itself, the nature of the pupil's misconduct which gave rise to the punishment, the age and physical condition of the pupil, and the teacher's motive in inflicting the punishment. If consideration of these factors indicates that the teacher violated none of the standards implicit in each of them, then he will be held free of liability; but it seems liability will result from proof that the teacher ...violated any one of such standards." (Emphasis added, Id. at 471-2).

In Iowa, the final decision as to the reasonableness of the punishment is up to the fact finder, either the judge, jury or Professional Teaching Practices Commission. See Tinkham, supra. at 261.

The determination of reasonableness is based on the factors set out in Tinkham as well as other factors which might be appropriate in any given case. One of those factors is whether the force was applied in anger or for punishment. Id. at 262. Thus, the teacher's motive must be considered. It must be borne in mind that the privileged use of force is for a student's control, training or education. Restatement, supra. §147(2). Any force applied in anger, out of frustration or for any reason personal to the teacher is not privileged. State v. Mizner, 50 Iowa 145 (1878).

There is evidence in this case from which it could be concluded that Erickson acted out of anger or frustration. In her own testimony and that of another student it appears that she had a problem on the same day with another student in which she used force in some fashion in dealing with the student. Huy and other classmates acknowledged that the class as a whole was unruly. Erickson's comments to another teacher at the end of the day indicate that the day had been trying for Erickson. The Principal expressed that Erickson might have been "brisk" with Huy. Finally, the circumstances of the incident itself suggest that Erickson was angry as a result of the ball hitting her in the stomach. While Erickson stated that she did not act out of anger or frustration, sufficient facts are available to enable a fact finder to conclude that anger and/or frustration were the primary motivating factors behind Erickson's response.

A second factor is determining whether or not the force used was reasonable and appropriate to compel obedience to a proper command. Restatement §148; Tinkham, supra at 262.

The facts in this case show that the only command given to Huy was to throw the ball to Erickson, which he did. While Erickson concluded that, because of the manner in which the ball was thrown, Huy should be punished; and that the punishment would be for Huy to stand by

the wall, she never told Huy to stand by the wall. There is no indication that any use of force was necessary at all for Huy to stand by the wall.

A third factor, factually related to the second, is whether a less severe but equally effective means of discipline is available. Note, 57 Nebraska Law Review 221 (1978). The difficulty in applying this factor to this case is that while the punishment of standing next to the wall certainly seems acceptable, there is no reason to believe that the use of force was part of the punishment, or a necessary part of the punishment.

The choices available to Erickson included a verbal reprimand, standing by the wall, referral to the office for detention and paddling. Again, this office has no argument with the decision to stand Huy by the wall as punishment. The fact that a mild form of punishment was used further confuses the issue of why any use of force at all was necessary. This dilemma highlights the earlier discussion that if force is used as a reasonable part of the punishment, its use is restricted by the corporal punishment policy.

A fourth factor, and one the CA/O finds particularly at point here, is stated in State v. Mizner, supra at 149.

> "...in no case can the punishment be justifiable unless it is inflicted for some definite offense or offenses which the pupil has committed, and the pupil is given to understand what he or she is being punished for. And if... the punishment in this case was inflicted upon the prosecutrix, without her knowing what she was being punished for, then the punishment was wrongful on the part of the defendant. Punishment inflicted when the reason for it is unknown to the punished is subversive, and not promotive, of the true objects of punishment, and cannot be justified."

This "does not require the teacher to state to the pupil in clear and distinct terms the offense for which he or she is punished.

It only requires that the pupil, as a reasonable being, should understand from what occurred for what the punishment is being inflicted." Id. at 150.

There is question whether Huy was aware of why he was punished. His statement to Erickson was, "But I threw you the ball." Her answer was "Yes, but you know how you threw it." This exchange seems to indicate that Huy was being punished for throwing the ball too hard or in some other fashion wrongly.

It is open to debate whether a reasonable student would understand why he or she was being punished, considering this exchange between Erickson and Huy.

Again, this office will call attention to the fact that a group charged with deciding whether Erickson's conduct was reasonable might well find that it was not, because the reason for any punishment was not made clear to the student.

Citing Mizner, supra, one commentator made this point:

> "(t)he punishment must be administered because of a definite offense which the pupil has committed, and the pupil should be told why he is being punished. The purposes of punishment are for reformation of the pupil, enforcement and maintenance of school discipline and setting an example for other students; but unless the punishment is related to a specific wrong and this relation is made known, these ends cannot be met and the punishment cannot be proper." Arnold Taylor, "With Temperate Rod: Maintaining Academic Order in Secondary Schools," 58 Kentucky Law Journal 617 (1970).

The failure of Erickson to clearly articulate her reasons for punishing Huy seriously diminishes any beneficial effect of the punishment. If Huy was being punished because the teacher was angry with him or because of the build-up of frustrations through the

day, he was punished unfairly.

In October of 1980, the Professional Teaching Practices Commission proposed Rules to regulate the use of corporal punishment. Although those Rules were not enacted, they support the discussion above and are a succinct statement of the law relied on in this report.

In particular, two Rules are helpful in evaluating this case. Proposed Rule 640--6.5(272A) provides,

> "Privilege to punish - purpose. Corporal punishment is privileged if, and only if, its purpose and goal is to seek discipline, reformation, training and education of the errant student. Physical force employed for other unrelated reasons (e.g. anger, malice, as a spontaneous reaction to physical contact, stress or the like), is not a purpose for which force is privileged."

Rule 640--6.6(272A) provides:

> "Corporal punishment - execution and procedure. Conceptually and as contrasted to involuntary, spontaneous or immediate physical response, corporal punishment is an intentional, deliberate and objective process wherein a calm and informed decision is made to inflict pain upon a student for the reasons permitted by the privilege as noted in Rule 615(272A) supra."

(The Rules are set out in Appendix II).

As stated earlier, a student has the right to be secure in his person. The United States Supreme Court recognized that a student has a Fifth Amendment right, a "liberty" interest, when school authorities deliberately decide to punish a child for misconduct by restraining the child and inflicting appreciable physical pain. Ingraham v. Wright, 97 S.Ct. at 1414.

COMMENTS

It is the conclusion of this office that Erickson's actions in grabbing Huy by the coat collar were not privileged and therefore constitute an assault and battery as well as arbitrary administrative action. This conclusion is reached looking at the testimony in the light most favorable to Erickson. There is testimony in our record which would indicate that her actions were more severe, although no appreciable physical injury was shown. To the extent that the force applied by Erickson was any greater than simply grabbing Huy by the scruff of the collar and walking him to the wall, the conclusions reached are strengthened.

This office is certain that this portion of the report will generate some controversy, as it should in order to bring this most important topic to the public's attention. As the premises and conclusions are debated, this office suggests that the law be consulted and compared to the facts. It would be naive to believe that this report will settle the issue surrounding the use of corporal punishment. It is only hoped that each governmental body responsible for discipline at schools will reach its own conclusions, formulate its own policy and let the teachers and administrators know what is expected of them.

DIVISION II

This portion of the report will consider the incident of May 5, 1982 in which the Principal of the elementary school allegedly hit a student while breaking up a fight outside the school building. For two reasons, CA/O is not going to make a determination as to whether or not the Principal intentionally struck the student. First, this matter is currently in litigation. This office does not wish to

prejudice the case of either side. Second, because of the purpose and function of this office, little useful purpose would be served in making a determination concerning the striking of the student. The CA/O functions primarily to investigate complaints of arbitrary administrative action in various aspects. See Chapter 601G, Code of Iowa. While the intentional striking of a student without justification would certainly constitute arbitrary administrative action, subject to investigation by this office, this office lacks the authority to impose any sanctions against the Principal and lacks the ability to change the administrative action, which occurred on May 5, 1982. Therefore, we will concentrate on the actions of the School Superintendent and School Board in discharging their obligations under the law and school rules.

FACTS

On May 5, 1982, at 8:30 a.m., Vu Lai, fourth grader and another boy, a sixth grader, were fighting on the school yard. Ronald Bromert, the elementary school Principal, observed the fight from the library window. He went down to the playground.

The sixth grade boy is a relatively large student and Vu, relatively small. The fight consisted on Vu's attack on the sixth grader, with the sixth grader simply warding off his efforts. The older boy was not particularly concerned with Vu's attack and did not strike back because he was concerned he might hurt Vu.

The activity had moved over near the school door. Mr. Bromert came out of the door and separated the two students by grabbing Vu by the arm and removing him from the scene. In the process of breaking up the fight, Bromert either intentionally or unintentionally struck Vu on the right side of the face. (See the decision of the Professional Teaching Practices Commission in this case.) As stated

earlier, CA/O is not going to make a finding on the exact manner in which this was accomplished, due to the pending lawsuit concerning civil liability for this incident.

When Vu returned home from school, he reported this incident to his parents. Mr. Lai called Bromert and discussed the incident with him. Lai also discussed the matter with several of the students who were on the playground and witnessed the incident.

Lai took his son to be examined by the physician's assistant at the Madrid Sandhouse Clinic. The examination showed a 20% limitation of motion in Vu's jaw, and Vu was referred to the Boone Hospital for x-rays. Upon returning home, Lai contacted Dr. Marion Romitti, the School Superintendent, and explained that he felt he had good reasons to believe that Bromert had struck Vu. After discussing the matter with Lai, Romitti stated that he would investigate the matter and contact Lai the next afternoon.

On Thursday afternoon, Romitti called Lai and stated basically that he was concerned about the accounts of the incident he had heard during his investigation. He also stated he would continue to investigate the matter and let Lai know his decision by Monday, May 10.

On Thursday evening Charles White, a former School Board member before consolidation, called Romitti. Lai had contacted White and asked him for assistance in getting the matter resolved. On Friday night, Romitti called White and asked him to call Lai to see what type of disciplinary action Lai wanted Romitti to take against Bromert. White called back later that evening and told Romitti that Lai wanted Bromert to be fired or resign.

On Saturday, Romitti discussed the matter further with Bromert. Romitti was concerned that he would need to involve the School

Board in the resolution of the matter and asked Bromert if he had hit Vu. Bromert stated that he had not.

Romitti did not investigate the matter further. On Monday, May 10, he spoke with Lai by phone and agreed to meet with Lai after 5:00 p.m. that day. At that time Romitti,

> "went through what I'd been finding but I did not feel that...I could go ahead and be the one to have him fired ...that a reprimand might be, although it wasn't something I said that was definite. (inaudible) That this might be something that would happen. But I said I did not think there was enough evidence to warrant anybody getting fired. And as to Mr. Bromert's resigning, nothing like this had ever happened before, I'd never had any complaints. So I decided that what he'd indicated (inaudible) the material, would like to come to the Board meeting. I said fine and he might want to come around nine o'clock or so and at that time the Board meeting will be about over with...(H)e did come to the Board meeting that evening." Transcript at hearing before the Professional Teaching Practices Commission, p. 50, Dr. Romitti.

Lai presented his complaint in writing to the Board at their meeting that night. Romitti indicated to the Board that they should not comment on the presentation by Lai, but simply receive his complaint. Romitti further stated at the meeting that he would be coming back to the Board within a week or so with a recommendation. The Board minutes for Monday, May 10, 1982 reflect, "Thu Lai, a parent, appeared before the Board alleging Mr. Bromert, Elementary Principal, had struck his child. The Superintendent will be doing some checking and a special meeting will be held later."

By this time, Lai had stated to Romitti that he was considering filing criminal charges, although he did not do so until after receiving Romitti's letter of May 13, 1982.

On Tuesday, Romitti contacted the school attorney, and met with him

on Wednesday. At the meeting Romitti drafted a letter stating his conclusions to Lai. He stated,

> "This letter will serve to inform you that in my opinion Principal Ronald Bromert has not acted in violation of any rule or regulation of this school district nor do I believe he has violated any of the unwritten standards of conduct expected of a professional administrator.***
>
> In summary, Mr. Lai, I will not make any recommendation to the Board of Directors of the Madrid Community School District to terminate the employment of Principal Bromert nor will any request be made for the School Board to reprimand or discipline the administrator."

Romitti sent the letter to Lai and sent copies to the Board of Directors to inform them of his determination. Neither Romitti nor the Board took further action in the matter, and no special Board meeting was held to consider the matter.

Upon receiving Romitti's letter, Lai decided that since the Superintendent and Board were not going to act, he would pursue the matter further. It was at this time he filed a criminal charge against Bromert. He also filed a complaint with the Iowa Professional Teaching Practices Commission.

ANALYSIS

As stated earlier, the function of this office is to investigate administrative action and report the findings of its investigation in an effort to eliminate arbitrary administrative action. §601G.11, Code of Iowa. Several agencies have already dealt with various aspects of this case. The Boone County District Court determined that Bromert was not guilty of the criminal charge of assaulting Vu Lai. The Iowa Professional Teaching Practices Commission determined that Bromert had unintentionally struck Vu, and therefore had not

engaged in any unprofessional conduct.

Our concern in this matter is with the manner in which the complaint was handled by Superintendent Romitti and the School Board. To begin, the Superintendent did a fine job of promptly and thoroughly investigating the facts of the case. It appears that up until the time he conferred with the school's attorneys, he felt that the facts he had discovered implicated Bromert sufficiently for the Board to consider the matter further.* Without further discussion with the Board, Romitti decided to terminate any further consideration of the matter.

In our investigation into this matter, Romitti was asked about the findings that he made. His decision to drop further proceedings was based upon his understanding that Bromert was privileged to use force to protect the safety of the other student. Romitti concluded that even if Bromert intentionally struck Vu, as was alleged, such conduct would be privileged. Because Romitti felt that whether the action of Bromert was intentional or unintentional it was privileged, he declined to make any decision regarding whether the act was intentional or unintentional. The letter to Lai did not make this clear, nor did it invite further discussion of this issue. The net

*Both of these agencies have obligations different from the Citizens' Aide. The issue in the criminal case was whether Bromert committed an assault and should be held criminally responsible. The burden was on the state to prove its case beyond a reasonable doubt. In the Practices Commission action, the issue was whether Bromert acted in an unprofessional manner. The results in these two cases do not prevent a finding in the civil action now on file that the defendant in that suit is liable to Vu for any damage done to him by an intentional or unintentional striking. We see no good reason to make a determination on any issue of civil liability. The civil suit is a proper and recommended route for a full hearing on the issue of civil liability. See, Frank v. Orleans Parish School Board, 195 So. 2d 451 (La. 1967).

effect of closing the investigation in this fashion was threefold. First, Lai felt that the school had foreclosed further consideration of the matter and that he would have to pursue the case through other channels. Second, the School Board had only the letter which Romitti sent to Lai, and therefore did not have the opportunity to review Romitti's findings, reasoning or investigation. Finally, the question of whether Bromert's actions were appropriate should have been determined by the Board.

Romitti's conclusion that any striking by Bromert was privileged was wrong. Assuming that Bromert had the privilege to use force, the force used must still be reasonable. There is no indication that, once Bromert had removed Vu from the fight, any further force was necessary. Therefore an intentional blow would be punishment, outside of the school's corporal punishment policy, and not necessary to protect the other student involved in the fight. Even if the blow was struck unintentionally, a question remains as to whether the force used by Bromert was reasonable in light of all the circumstances. Of course, none of this was made known to either Lai or the Board through Romitti's letter.

The School Board has the obligation to determine whether an administrator should be discharged. Under the Iowa Code, a Superintendent is the executive officer of the Board. §279.20, Code of Iowa. The decision to terminate contract for cause, pursuant to §279.25, is made first by a hearing officer, subject to review by the Board. §279.24, Code of Iowa.

At the same time, the Board has set up a grievance procedure. Policies, Madrid Community School District, Code No. 204.11 B. These policies require a citizen to make a written complaint to the Board through the Superintendent. This was done in this case.

CA/O discussed this matter with Marlowe Carlson, Chairperson of the School Board. His concern was that the Board should remain impartial and avoid hearing evidence and making any decision until both sides of the matter could be heard. This, of course, is quite appropriate. However, in this effort to remain impartial, the Board failed to review or understand the basis of Romitti's decision.

This matter became confusing when Lai made his presentation to the Board and left with the understanding that the Board would consider the matter further, as reflected in the minutes of the May 10, 1982 Board meeting. Romitti had told Lai on Monday afternoon that a reprimand might be considered, although firing Bromert was unlikely. In this context, the May 13th letter to Lai was seen by Lai as terminating any further review by the Board. The fact that no action to review Romitti's decision was taken by the Board and that Romitti had not told Lai that he had a right under the grievance policy to appeal to the Board effectively closed off this avenue. No special meeting about this incident was ever held, although the Board minutes of May 10 indicated one would be held.

COMMENTS

It is impossible to tell what the outcome of this matter would have been had the Board fully considered the matter. Perhaps, even had they determined that Lai's complaint was not justified, a reasoned statement as to why Bromert's actions were appropriate, i.e., because they were privileged as protecting the safety of a student, would have been understood, although not necessarily agreed with by Lai. The complaint with the Teaching Practices Commission was not filed until May 17, 1982 and the criminal action was not filed until May 27, 1982.

The failure of the Board to review Romitti's findings and conclusions

was inappropriate administrative action for two reasons. First, Lai had presented his complaint to the Board as required by the grievance procedure. Second, the facts and law upon which Romitti based his decision present serious questions of policy for Board resolution.

The earlier legal discussion of the use of force made it clear that whether force is used for discipline or for the protection of others, the use of force must be reasonable. This determination is usually made on a case by case basis. See Frank v. Orleans Parish School Board, 195 So. 2d 451 (La. 1967). The allegations made by Lai were very serious and required some response from the Board. The Board relied too heavily on the Superintendent in this matter and as a consequence lost the opportunity to resolve this matter within the confines of the district.

CONCLUSIONS

A teacher or Principal is privileged to use physical force in dealing with a student in two situations: 1) to protect persons or property and 2) to punish.

With regard to the Erickson incident, there is no question that Mrs. Erickson was not restraining Huy to prevent injury to himself or others or to prevent destruction of property. It is also apparent that this incident did not meet the criteria the Madrid Community School District has established for corporal punishment, as the student was not informed as to the nature of the charges nor given the opportunity to respond. There is no indication that Mrs. Erickson ever verbally instructed Huy to go stand by the wall. Use of force is never privileged when the motivation is anger. We believe it is clear from the testimony of the witnesses and of Mrs. Erickson herself that she was reacting to what she perceived as a "lack of

respect" on the part of Huy. From the facts available it is clearly indicated that the act was not to protect persons or property, for corporal punishment, or otherwise privileged.

We conclude that any use of physical force under these circumstances is inappropriate because there is no indication that it was necessary to physically touch the student at all in this situation. Such a reaction from a teacher as a role model is disappointing, and conveys to the students that use of physical force is an appropriate means of forcing respect.

As far as the Bromert matter is concerned, it has already been established by the Iowa Professional Teaching Practices Commission hearing that Vu was struck. As previously stated, we will not make a determination as to whether the striking was intentional. Whether it was intentional or unintentional, a very serious question arises as to whether it was privileged to protect any person.

Superintendent Romitti was wrong in his conclusion that the use of force was appropriate even if it included the intentional striking of Vu in order to break up the fight. The fact that Romitti failed to advise the Board of his reasoning in this matter is a failure on his part. The fact that the Board failed to inquire as to his reasoning or otherwise follow-up was a failure on its part.

The net result of failing to fully address the issues raised, which are of legitimate concern to a parent, was that the parent was forced to seek other avenues of redress.

Attached to this report is Appendix I, Additional reports of violence in various forms expressed toward students in school districts throughout the state. While this office will not be as presumptious as to demand that every community agree with our concepts of appropriate discipline for public school students, we cannot ignore the apparent

tolerance for use of physical force when it is not legally justified.

No matter what the law requires, each community must decide for itself the extent to which it will tolerate improper use of physical force in its schools.

RECOMMENDATIONS

Pursuant to the authority of §601G.16, the Citizens' Aide/Ombudsman makes the following recommendations:

1. Because the Bromert matter is in litigation, we will not recommend that the School Board review this matter further.

2. We recommend that the Madrid Community School Board consider both of these complaints as far as they reflect on the use of force in the school district and determine whether the system needs a more clear statement of policy regarding the use of force, both as a disciplinary tool and in protection of persons and property. We further recommend that whether or not a more clear policy statement is determined to be in order, that the School Board take steps to provide in-service training to school personnel in the appropriate use of force in this district.

We would also invite the Board to hold an open session on the use of physical force and corporal punishment in the district.

INVESTIGATION BY: Doneen Woodward
Assistant Citizens' Aide/Ombudsman

and

William J. Hornbostel
Legal Analyst

REPORT BY: William P. Angrick II
Citizens' Aide/Ombudsman

DW/WJH:jg

APPENDIX I

REPORTS OF USE OF FORCE BY EDUCATORS AGAINST STUDENTS

1. On March 10, 1983, the Des Moines Register reported that a high school football coach was acquitted of assault against a student. The testimony in the case indicated that the student had attended a school pep rally and cheered for the opposing team. The coach poked the student in the chest and asked the student to give a school cheer. When the student refused, the coach ordered him to the office, shoving the student occasionally.

A complaint is pending before the Iowa Professional Teaching Practices Commission.

2. Mahan v. Kollmorgen, case no. 82-18 before the Iowa Professional Teaching Practices Commission. The student was sorting papers with several other students at a table. The student was talking with another student but otherwise behaving herself. The teacher struck the student on the head with a book in order to get her attention. The evidence was conflicting on whether there was any significant injury.

The Commission dismissed the case, although it made it clear that such conduct by the teacher was not proper. They stated, "Were a comparable factual situation presented following this case, there is strong likelihood of the necessary criteria involvement to warrant statutory sanctions. We are aware, however, that in relation to issues of student management many educators, like respondent, commonly believe that numerous kinds of nonprivileged bodily intrusions are permissible and are substituted in lieu of verbal directions."

3. Crowley v. Yoshimura, case no. 79-1 before the Iowa Professional Teaching Practices Commission. A student from another school district was chasing another student around a school parking lot. The teacher unsuccessfully demanded the offending student's name, school and driving permit. Faced with an uncooperative attitude by the student, the teacher directed him to go into the school. The student responded that he could not be forced to go into the school.

The teacher grabbed the student by the hair. The student told the teacher to get his hands off, which was met by the teacher's blow to the student's chin. Without relinquishing his hold on the student's hair, the teacher took the student into the school building. In an effort to secure the student while unlocking the door, the teacher took ahold of both of the student's arms and either threw or pushed the student against a brick wall, cutting his head, which required stitches to close.

The Commission formally reprimanded the teacher and found his conduct to be unprofessional.

4. Cook v. Pollitt, case no. 82-12 before the Iowa Professional Teaching Practices Commission. The study hall teacher requested the student to make a list of his teachers and classes. The list referred to the study hall teacher as a midget. After study hall, the student went to his next class. The teacher went to the student's class, took him to the hall and questioned him about the remark. The student, not knowing how to respond, stood mute. The teacher then grabbed the student's head and beat it against the locker; started hitting the student with his fists; then put the student in a head lock and hit his head against the brick wall; threw him to the floor and started strangling him.

The Commission found that such conduct by the teacher was unprofessional and kept the case open for a year. A reprimand and warning were placed in the teacher's certification file.

APPENDIX II

Proposed Rules of the Iowa Professional Teaching Practices Commission

STUDENT DISCIPLINE -- CORPORAL PUNISHMENT AND CONFINEMENT

640--6.3(272A) LEGAL PRIVILEGE TO DEFEND OR PROTECT PERSONS AND PROPERTY. In common with all persons, educators have a legal privilege to use reasonable and necessary force to restrain or subdue another for the purpose of protecting one's self, others or property. The following criteria concerning professional restrictions as to the use of corporal punishment are inapplicable and not relevant to an issue of force used to protect or defend. In all such cases, however, the use of unnecessary, excessive or other unreasonable force is not privileged, is unlawful and is professionally impermissible.

640--6.5(272A) PRIVILEGE TO PUNISH--PURPOSE. Corporal punishment is privileged if, and only if, its purpose and goal is to seek discipline, reformation, training and education of the errant student. Physical force employed for other unrelated reasons (e.g., anger, malice, as a spontaneous reaction to physical contact, stress or the like), is not a purpose for which force is privileged.

640--6.6(272A) CORPORAL PUNISHMENT--EXECUTION AND PROCEDURE. Conceptually and as contrasted to involuntary, spontaneous or immediate physical response, corporal punishment is an intentional, deliberate and objective process wherein a calm and informed decision is made to inflict pain upon a student for the reasons permitted by the privilege as noted in rule 6.5(272A) supra. The educator actually administering the punishment should abide by the following procedural steps: The student should be given a clear statement as to why he or she is being punished; provided a fair opportunity to state his or her side of the case; and permitted to offer any defense regarding the alleged transgression. Since pain once inflicted is irrevocable, corporal punishment should not be administered if doubts remain as to its justification. In the absence of clear and convincing evidence as to a legitimate goal of education, corporal punishment is not to be administered in the presence of other students.

640--6.7(272A) NATURE OF FORCE PRIVILEGED--REASONABLENESS.

6.7(1) Consistent with the purpose of corporal punishment and in conformity with the above criteria, an educator is privileged to use reasonable and moderate physical force in those cases where corporal punishment of a student is indicated and justified by creditable facts of record. The issue as to reasonableness of force depends on the facts and circumstances of each case, some examples of which are:

a. Age, size, and weight.
b. Health and physical condition of student, including psychological emotional or other mental defects or disabilities.
c. The nature and extent of the student transgression at issue.

6.7(2) Nature has provided posterior portions of the anatomy reasonably suited to corporal chastisement. Physical force and violence applied for reasons of discipline to certain portions of the body and in a given manner are highly questionable and probably unreasonable and nonprivileged per se. For example:
a. Kicking any part of the student.
b. Striking the student with closed fist or hand about the body.
c. Slapping the student about the face and head with palm, back of hand or other objects.
d. Pushing or throwing the student against solid objects such as walls, floors or the like.
e. Seizing and applying painful pressure on bodily parts such as hair, ears, nose and the like.
f. Forcing the student's head into motion so as to cause contact with some object.
g. Causing any intentional contact with and activity upon the external sexual organs, including the breasts of a female student.

640--6.8(272A) NONPRIVILEGED FORCE--ANGER AND THE LIKE. The use of physical force against a student by an educator acting from anger, malice, passion or other such emotional states is nonprivileged, unlawful and unprofessional. This rule applies only to an issue of corporal punishment. Whether the presence of anger or passion affects the privilege to protect or defend under rule 6.3(272A) supra depends on whether the emotional state produced excessive and unreasonable force.

640--6.9(272A) SERIOUS OR PERMANENT INJURY. For the purpose of inflicting corporal punishment, an educator is not privileged to cause serious or permanent bodily or psychogenic injury or to aggravate and complicate any such pre-existing condition. The issue of intent or nonintent to injure is not relevant if the force used to punish is likely to or reasonably capable of causing injury. Corporal punishment privileged at its inception and inflicted in a reasonable and moderate manner does not lose its privileged status by reasons of an injury not reasonably foreseeable or reasonably guarded against. An example might be an injury suffered by a student in efforts to avoid the discipline.

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June 20, 1983

TO: William P. Angrick II
Citizens' Aide/Ombudsman

RE: Respondents' Response to Critical Report

The undersigned is the legal representative of the Respondents to your Critical Report and offers the following comments surrounding the same:

This response will be divided into two segments as the Critical Report itself concerns two separate and distinct items. First of all, comments will be directed towards the event occurring on or about December 22, 1982 at the Elementary School of the Madrid Community School District.

In the Critical Report, it was stated at page 16,

> "It is the conclusion of this office that Erickson's actions in grabbing Huy by the coat collar were not privileged and therefore constitute an assault and battery as well as arbitrary administrative action. This conclusion is reached looking at the testimony in the light most favorable to Erickson. There is testimony in our records which would indicate that her actions were more severe, although no appreciable physical injury was shown. To the extent that the force applied by Erickson was any greater than simply grabbing Huy by the scruff of the collar and walking him to the wall, the

conclusions reached are strengthened."

It is the position of the Respondents and in particular, the Respondent Marilyn Erickson, that the Citizens' Aide/ Ombudsman has overstepped its power as contained in Chapter 601G, the Code. For a state agency to conclude that the actions of teacher Erickson constituted an assault and battery within the meaning of our criminal statute places the Citizens' Aide/Ombudsman in the position of judge and jury. Not only is the agency confused and misinformed as to the definition of the crime of assault, which is mistakenly referred to as "assault and battery", but in addition, is confused of the elements of said crime. This agency's further inquiry as to whether or not the actions taken by teacher Erickson in controlling the student, Huy Lai, were privileged totally ignores the duty of a teacher to immediately control a violent situation erupting upon the playground so as to protect not only the other students but the teacher herself. Your agency has seemingly ignored all common sense and in its overreaching to satisfy the complainant, has intruded upon the civil liberties of the teacher herself in making said accusations above quoted.

Your statements which in essence say that teacher Erickson has committed a criminal act violating your own understanding of the law as contained on page 11 wherein you have stated:

> "In Iowa, the final decision as to the reasonableness of the punishment is up to the

fact finder, either the judge, jury or Professional Teaching Practices Commission."

You have stated in your Report that Thu Lai contacted your agency on May 6, 1982 shortly after the time of the first incident involving Mr. Lai's son, Vu Lai. You, at that point in time, recommended or referred Mr. Lai to the Professional Teaching Practices Commission. The Iowa Professional Teaching Practices Commission as you know, is a state agency organized under authority of Chapter 272A, the Code. Section 272A.6 of the Iowa Code provides:

> "The commission shall have the responsibility of developing criteria of professional practice including but not limited to such areas as... (2) competent performance of all members of the teaching profession; and (3) ethical practice toward other members of the profession, parents, students, and the community...".

Knowing that the Iowa Professional Teaching Practices Commission exists, you did not choose to refer the Lai complaint to the Iowa Professional Teaching Practices Commission concerning the December, 1982 incident involving Marilyn Erickson, although you are empowered to do so by Section 601G.1, the Code. Surely you would admit that the Iowa Professional Teaching Practices Commission would have greater expertise in the area of investigating school problems than your agency. It is strangely suspect that you did not make this referral in that the Iowa Professional Teaching Practices Commission did not find fault concerning the handling involving the incident and the Lai son, Vu Lai. In addition, on page 16 of

of your Report, when you speak of the Bromert-Vu Lai incident, you stated that you would not make any determination as to whether the principal (Bromert) intentionally struck the student. Yet at this point in time, you make that exact determination concerning the conduct of teacher Erickson. You further mention at page 16 that any further comment may prejudice litigation. Considering the frequency with which Mr. Lai brings complaints, it surely should have occurred to your agency that this Report would prejudice possible litigation against teacher Erickson.

Division II of your Report deals with the incident occurring on the Madrid Elementary School location on May 5, 1982 between Principal Ronald Bromert and Vu Lai. It is unbelievable that your agency has spent the additional time and resources in investigating a factual situation that has previously been litigated in an action entitled State of Iowa v. Ronald Bromert, a criminal proceeding initiated by Mr. Lai as the complainant and the action before the Iowa Professional Teaching Practices Commission entitled Tu Lai, as Next Friend of Vu Lai, a Student, Complainant, and concerning Ronald Bromert, Principal, Madrid Elementary School, Madrid Community School District, Respondent. In the criminal action, Mr. Bromert was found not guilty by Boone County Magistrate Stanley R. Simpson. The court's ruling is attached and made a

part of this response. It is surprising that the same was not made part and parcel of your Critical Report. In addition, the Professional Teaching Practices Commission issued an opinion which does not substantiate the complaint made before your agency. Again, we find it unusual that this state agency's opinion was not included as part of your Report, especially in light that you have conceded that the criminal court and the Iowa Professional Teaching Practices Commission is the proper forum for determining issues that arise such as what have been reported on in your Critical Report.

You are especially critical of the Madrid Board of Education in that the Board did not fully consider the matter. The Board of Education has acted legally in all respects. You offer no citation as to any wrongdoing by the Board of Education. The gravamen of your Critical remark towards the Board seemingly may be summarized by saying that perhaps the Board of Education could have approached the matter with greater involvement. It is extremely easy for someone removed from the everyday workings of a school system to offer criticism.

In essence, your Critical Report concerning the actions of Ronald Bromert is an attempt to collaterally attack the decision of the Iowa Professional Teaching Practices Commission. This writer knows of no legal authority for your agency to sit as a reviewing body of the decisions of the Iowa Pro-

fessional Teaching Practices Commission.

On page 22 of your Critical Report, you state,

> "The decision of terminating a superintendent's contract pursuant to Section 279.25 is made first by a hearing officer, subject to review by the Board".

It appears that you have included this in your Critical Report to advise the Board of Education that they have a right to terminate the contract of the superintendent. We do not find that your Report makes any recommendation of this sort and it is uncomprehensible why this is set forth.

At page 24 you state that the failure of the Board to review Romitti's findings and conclusions was inappropriate administrative actions for two reasons. You fail to cite authority to back up this conclusory statement. Could the Board have resolved the issue of whether or not Ronald Bromert was guilty of the crime? Could the Board of Education issued a decision concerning the appropriateness of the action of Ronald Bromert as the Professional Teaching Practices Commission did? The answer to both of these questions is obviously no. In addition, Mr. Lai has maintained repeatedly that the only item that will satisfy him is termination of the contract of both Bromert and Romitti. Why hasn't the true request of Mr. Lai been set forth in your Critical Report?

Often times, one who repeatedly complains eventually

finds someone that will listen. The Respondents to your Critical Report feel that you have responded to the complaint in a fashion to silence the complainant with little regard to the attack made upon the Respondents in your Report.

This is submitted as an official response to your Critical Report.

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By _____
Kirke C. Quinn

ATTORNEYS FOR RESPONDENTS

Iowa Professional Teaching Practices Commission

Thu Lai, Next Friend of Vu Lai, Complainant vs. Ronald Bromert, Madrid School Administrator, Respondent	Case 82-10 Hearing Decision

Statement of Case

Lai complaint was filed on May 17, 1982. Subsequent to inquiry and staff recommendation, the commission, on June 12, 1982, unanimously assigned the matter for contested case review on August 10, 1982; hearing notice was served on all parties late June; respondent's answer furnished June 30, 1982; and both parties appeared on the date designated, Lia and Bromert each respresented respectively by attorneys William Wickett (Des Moines) and Kirke Quinn (Boone). Testimony and legal proceedings commenced at 9:00 a.m., the record being closed at 2:30 p.m.

A number of prehearing and hearing motions, requests and evidential issues remain for formal disposition (e.g., issues as to discovery, continuance, preclusion doctrine, role of our counsel respecting hearing and the like). In light of the disposition to follow, we forego the customary legal analysis of all such issues and these and all other issues not finally and fully ruled upon are hereby overruled and denied.

Complainant is parent of Vu Lai, a Madrid student and charge of Ronald Bromert, a state certified school administrator and Madrid elementary principal. Accordingly, we have personal jurisdiction of the parties (Iowa Professional Teaching Practices Act, Section 272A.2--Iowa Administrative Code [640], Professional Teaching, Chapter 2). Subject matter jurisdiction is present in that the pleadings generate a not insubstantial issue of alleged Bromert involvement with agency criteria of professional practices (Section 272A.6 and Chapters three and four, Iowa Administrative Code, supra).

Statement of Facts

Preface

Since our disposition is predicated on the singular issue of whether respondent formed an intent to and did deliberately strike Vu Lai, much of the hearing evidence bears little relevance to that inquiry and does not warrant review. Moreover, this division also serves as our findings of fact, the remainder of this preface enumerating the essentially undisputed findings:

1. The commission finds that on the morning of May 5, 1982, on the playground of the Madrid, Iowa elementary school, students Vu Lai and Robert Braunschweig were involved in a physical encounter; that Vu Lai was the aggressor, with the other's efforts solely defensive; and that numerous other students were positioned relative to the arena watching the fight.

2. We further find, that at this point and from inside the building Ronald Bromert, Madrid elementary principal, observed the fracas and proceeded outward to terminate same. Upon arriving in the vicinity of the two students, Bromert reached down in some fashion (respondent approximately 6'7"--Vu 4') and bodily detached complainant's son and took him to the office.

3. Finally, the record is without substantial dispute that during the brief course of disengaging and bodily retracting Vu Lai, the student encountered some form of trauma to the body resulting in mandibular injury for which medical evaluation and treatment was necessary. There is no evidence that Braunschweig caused the trauma or that the injury had lasting effect.

Other Facts

Respecting actual knowledge of respondent's intervention, only four live witnesses testified, two in support of each party. Hearsay utterances of non-hearing students, present at the fight, will be considered only in the "Discussion" infra.

Complainant's theory: Complainant's son, Vu Lai, a relatively small (4') 10-year-old Madrid fourth grader, testified that he did not see or hear respondent approach, becoming aware of his presence only when Bromert "yanked" him up and slapped his face (R. pp. 12-13).[1] Vu concedes that respondent was to his rear and he did not see an actual hand approach or strike; that he did not perceive or feel a hand but rather "a hit" (R. p. 25); and that he was certain respondent struck him "because it hurt" (R. p. 26). Student Lai attempted but could only give a confused account of their relative positions and the bodily manner by which Bromert pulled him from the encounter (R. p. 20). Pressed by counsel, Vu admitted no recall of some things related to the playground incident (R. p. 9). He testified further, that prior to this morning he knew of no problems between he, his family and the administrator (R. pp. 22-23).

Todd White, approximately 10 years of age, a fourth grader and friend to Vu last May, was essentially supportive of Vu Lai's evidence, except in one important aspect. Todd testified that at the moment of contact he was about three feet behind Vu and that Bromert was positioned face-to-face with Lai (R. p. 34). White stated that the principal lifted Vu with the left arm and hit him across the face (subsequently "neck") with the right (R. pp. 35-36). In response to a commission inquiry as to whether what Todd observed might have been a part of the "grabbing", the student indicated he believed it a "hitting" (R. p. 37; see also p.33--wasn't mistaken). Finally, White reported hearing no slap or no sound (R. p. 33).

Respondent's Theory: Though not germane to the singular issue here and with due respect to the school administrator's accuracy of observation and unambiguous

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1. Record references are to a partial transcript (testimony only) obtained from a private firm. While the witnesses generated many inaudible record problems, we find the transcript accurately reflects the tape evidence.

perception of Robert's danger, the record reflects that the older Braunschweig (tall sixth grader) did not view Vu as presenting much peril (R. pp. 82-83, 88; Vu scored a shin kick that hurt, but Robert didn't go on the offensive because "I would have hurt him seriously" due to his size). Robert testified that as respondent approached he (Braunschweig) pushed Vu away (R. pp. 83, 86); that Bromert grabbed Vu by the arm and proceeded into the building (R. p. 84); that he had a clear view of both Vu and Bromert (R. p. 84); and that the principal did not slap the student but in the process of securing Vu's arm Bromert's elbow or forearm impacted with Vu's neck or jaw (R. pp. 83-84, 86-87, 89). He stated the contact produced no appreciable sound (R. p. 86). At a conference the following day, respondent questioned Robert as to his observations at the point of seizure, at which time the elbow-forearm account was allegedly recited (R. pp. 87-89). While the record generally reflects Vu absent following the incident (Wed.) until Monday, Braunschweig testified that at school on Friday (day after conference) complainant's son warned of future encounters if Robert did not report Bromert's bodily contact as "on purpose" (R. pp. 84-85, 87-88, 89-93). Testifying that he was not "scared" (R. p. 85), the student confusedly implies that Vu's threat is the reason why he failed to relate the elbow-forearm account a couple of days later during inquiry by Superintendent Romitti (R. pp. 91-92):

"Bennett: Did you make a statement to Romitti?

"Robert: Yes.

"Q: Did you tell him about the elbow?

"A: No.

x x x

"Q: ...were you under influence of ...Vu?

"A: Yes.

"Q: ...honoring [the] threat?

"A: Yes

"Q: ...did you tell him...that you saw Bromert deliberately strike Vu?

"A. No. [2]

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2. If Robert were under threat influence, logically wouldnt he report to Romitti it was "on purpose" rather than withholding the "elbow" account and (according to the superintendent) simply stating that Vu was not struck? See also respondent's Answer, portion of 6/4/82, wherein attorney Quinn makes Robert state only that Vu was not struck with no explanatory elbow-forearm assertion.

Principal Bromert, physically a rather tall person (perhaps 6'7"), testified that on the day in issue he watched the Vu Lai encounter for awhile; proceeded out on the playground; and ordered the crowd to disperse (R. pp. 69-71). Respondent asserts that simultaneously "I turned and wheeled and grabbed Vu Lai's right shoulder to lead him to the door; ...I did not slap Vu...[nor] intend to hurt him; ...[but] there may have been a possibility that my elbow or forearm came in contact with his jaw." (R. pp. 71-72).

Discussion

From an evidentiary reference, this case presents many problems. Indeed, of all those involved, including the agency, perhaps only complainant and respondent take comfort from knowing the precise factual situation. At any rate, our analysis permits a summary disposition of at least this much: Everyone substantially agrees that in retracting Vu Lai from the May playground encounter, some portion of Bromert's lower right arm struck, hit, slapped or otherwise made contact upon the student's neck-jaw region. The claim of injury consequent upon the trauma is also established. The crucial and troublesome issue is characterization of the inflicted trauma; i.e., accidental or intentional. If accidental or if complainant fails to proffer substantial evidence of intent as required by law (Chapter 17A, Iowa Code), the case must be dismissed. Toward that inquiry, we turn our efforts.

First, we concede that the record supports Vu Lai's belief that respondent intentionally hit him across the lower portion of the face. Standing alone, however, Vu's evidence is equally consistent with the positions of Bromert and Braunschweig. Despite his belief, the facts proffered by Vu show he did not see the principal before being hit, did not feel a hand but a hit and knew he was struck because it hurt. Apart from these facts, Vu could offer no evidence (e.g., hostility toward student) tending to show an intent or design to strike. Moreover, in view of the "threat" assertion related by Braunschweig, one might question the creditability of Vu's evidence. Such would not be appropriate on this record. Assuming a "threat," Vu's efforts came after Robert had articulated the elbow-forearm theory and Lai's action could be construed as immature judgment to convert Braunschweig to Vu's good faith belief. Such construction is supported by the record and leaves Vu's creditability intact.

Todd White is the complaint's singular hearing witness to state that he saw Bromert hit Vu. White, asserting he was behind Vu, testified, contrary to Vu and all others, that Bromert was face-to-face at the crucial moment. White is a friend to Vu. Finally, apart from a brief conclusory assertion, complainant does not make Todd provide evidential details or a rationale as to how he knew that what he saw was an act done intentionally and by design.

Investigations by Mr. Lai and Dr. Romitti both produced young students present at the incident who seemingly contend they saw respondent strike Vu Lai. Our case file contains three or four unsworn statements from among this group. It would be inappropriate to rely on any of this data in disposing of the complaint. In the first place, some of the information is at substantial variance with hearing testimony. For example, at least one locates the "hit" inside and most

insist the "hit" or "slap" produced an acute noise. Secondly, while we concede the fact of bodily contact (i.e., being struck), our recollection is that none of the nonhearing assertions advanced evidence and rationale on the issue of purpose or design. Finally, the prime evil in using this data is the unfairness it would visit upon respondent, since he would be denied opportunity to ascertain credit-ability, accuracy of perception and veracity of the reporter. Some hearsay is, of course, discretionarily admissible in administrative proceedings but restraint must be used where the hearsay is intended to prove the only crucial issue involved. To do otherwise is to flirt with denial of due process consequent on an unfair hearing. We mention that Mr. Wickett made good faith efforts to produce some of these young students but encountered failure in the late stages due to parents.

Following careful review of the relevant record, we are forced to conclude, and we hold only, that complainant has failed to meet the required burden of proof, i.e., he has not established by substantial evidence that respondent intentionally and deliberately struck, hit or slapped his son. This is a unanimous decision. Case dismissed.

September 7, 1982

Carol Bradley

Carol Bradley, Ph.D.
Commission Chairman

Not Guilty 5-28-82 June 22

Kirke Quinn, attorney

Trial 5-5-82 @ 10:00 a.m.

Case submitted to Court

Witnesses:

Vu Lai.

Troy Alden

Aaron Peterson

Robert Braunschweig

Jo Johnson - School Sec.

Marion Romitti

Ronald Bromert.

Judgment of Court: Def. Not Guilty

Court adjourned.

Stan Stimpson

Judge

FILED
Boone County, Iowa
JUN 22 1982
Enid M. Stortz
Clerk of District Court

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1982 AUG -6 AM 9:00
Connie Bly, Deputy
CLERK OF DISTRICT COURT
BOONE COUNTY, IOWA

END