

STATE OF RHODE ISLAND  
AND  
PROVIDENCE PLANTATIONS

COMMISSIONER OF  
EDUCATION

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**Donald Proto**

v.

**Providence School Board**

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**DECISION**

Held: The School Board has not proven the “good and just cause” on which it relied in suspending Mr. Proto for five days without pay.

DATE: January 27, 2006

## **Travel of the Case**

On August 27, 2004 Donald Proto, through his attorney, appealed a decision of the Providence School Board, announced after a hearing held on August 23, 2004. The decision affirmed the Board's prior issuance of a five-day suspension without pay for an incident which occurred on May 16, 2003 in which Mr. Proto was alleged to have used physical aggression in trying to control a student. The undersigned was designated by Commissioner Peter McWalters to hear and decide this appeal on August 30, 2004. The parties were directed to confer and choose an agreed-upon hearing date, which they did after some delay. The matter was heard on October 20, 2004 and May 16, 2005. Final arguments were submitted in writing, with the last memorandum submitted to the hearing officer on July 20, 2005.

## **Findings of Relevant Facts**

- Donald Proto is a tenured teacher at the Charlotte Woods Elementary School in Providence where he has been employed for eight years as a health and physical education teacher. Tr. Vol. II p.84. For the past couple of years, Mr. Proto has also been designated the "teacher in charge" of the building in the absence of the principal. Tr.Vol.II, p.47 and 84.
- Student Doe was an eleven-year-old student enrolled in the fifth grade<sup>1</sup> at the Charlotte Woods Elementary School. He describes himself as having a "temper problem" and testified that on several occasions when he would become angry and his classroom behavior was affected, his teacher permitted him to leave the classroom and go the gym. Tr. Vol.I. pp.24, 28-29, 39-46.
- Once at the gym, Student Doe would talk to Mr. Proto, who would assist him in calming down and regaining self-control. Mr. Proto would also let him help younger children with various activities in the gym. This occurred once or twice a week, beginning in September of the 2002 school year. Tr. Vol. I. p.41 and 46; Vol.II, pp. 44-46;86-88, 90.
- On other occasions the principal would be called to the classroom if Student Doe's behavior became aggressive or out of control, and the principal would talk to him and bring him to the office for a "cooling off period". Tr.Vol.II, pp.43-44; 53-54.
- The principal was aware that Student Doe's teacher had an understanding with Mr. Proto that Student Doe would be sent to the gym, or be allowed to go there on his own, when he became angry and behavioral issues arose in the classroom. Tr. Vol.II, pp. 39, 44-46. He was also aware that spending time with Mr. Proto in the gym provided Student Doe with an environment in which he was able to diffuse his anger and regain his self-control. Tr. Vol.II, pp.43-46.

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<sup>1</sup> Although there was testimony that Student Doe had an IEP, the record is unclear as to the nature of his disability and the type of special education services he received. He testified that he was in a "behavior" classroom (Vol.I, p.51), however the principal testified that Student Doe, after being referred for a special education evaluation, was not placed in a self-contained classroom, but received resource services (Vol.II, pp. 67-68).

- Mr. Proto and Student Doe developed a good relationship and Student Doe testified that he considers Mr. Proto a kind and nurturing teacher. Tr.Vol.I.p.37-38; Vol.II.p.91.
- On May 16, 2003 Mr. Proto was on “lunch duty” and observed Student Doe and another child unsupervised in the hallway outside the doors of the cafeteria. He directed both Students to go to their assigned classrooms. Tr. Vol.II.p.92.
- A short while later, as Mr. Proto was leaving the cafeteria after having supervised the students’ lunch, he again saw Student Doe and the other student unsupervised in the hallway and approached them, asking Student Doe, “Where do you belong?” Student Doe replied, “I can go wherever I need to go”. Tr. Vol.II.pp.92-93.
- Mr. Proto put his arm around Student Doe to “escort him” to the stairs leading to his classroom whereupon Student Doe elbowed him, swore, and tried to get away. Tr.Vol.II.pp. 70-73; 93, 96 and 102.
- Since he observed Student Doe to be agitated and angry and felt that his behavior could quickly get out of control, Mr. Proto decided that he needed to take Student Doe to the principal so that he could handle the situation. The office was a short distance away. As Student Doe turned around to try to get away, Mr. Proto grabbed the back of his shirt and forcibly escorted him into the principal’s office. As they entered the principal’s office, Mr. Proto tripped over a chair, falling down on top of Student Doe. Tr. Vol.I.pp.18-20; Vol.II.pp.70-74; 93, 96-97. As they fell, Student Doe banged his head on the floor. Tr.Vol.I, p.19.
- During the fifteen to twenty seconds they were on the floor Student Doe repeatedly said “I’m sorry Mr. Proto”, as Mr. Proto struggled to get up. Mr. Proto said “Sorry is too late, we’re going to have to call your father now”. The Principal approached them and requested Mr. Proto to get up. As he repeated this instruction a second time, Mr. Proto, with difficulty, got up from the floor. Tr. Vol. II.pp.48-50; 71-72; 93-94.
- As a result of his fall to the floor, Student Doe had a “huge lump” on his head (Vol.I.p.10). The school nurse applied ice and referred him to his doctor for further treatment. Vol.I, pp.20-21. It was not until later that Mr. Proto found out that Student Doe had been hurt as a result of the fall. Tr. Vol. II.pp. 95 and 105.
- Mr. Proto has no prior disciplinary history. Vol.II, p.114-115.
- At the time of this incident, Mr. Proto had not received training in crisis intervention or application of the Physical Restraint Regulations of the Board of Regents. After this incident, he did receive training in physical restraints and crisis intervention. Tr. Vol.II.pp.98, 101-102;110-111.
- Mr. Proto was suspended for five (5) days without pay as a result of the incident on May 16, 2003. PSB Ex.1. The Board rejected the twenty (20) day suspension recommended by the Superintendent primarily because of Mr. Proto’s “good reputation” in the school. PSB. Ex.1.

## **Positions of the Parties**

### **Donald Proto**

Mr. Proto, in testimony and through his attorney, requests that the decision to suspend him be overturned and all reference to this discipline contained in his personnel file be deleted. His position is that when he grabbed Student Doe's shirt in an attempt to get him to go to the principal's office, he did so as a legitimate response to the child's angry state and, given what he knew about his past behavior, the physical aggression that could be expected to follow. The responsibility to intervene in Student Doe's episodes of anger had been willingly accepted by Mr. Proto in the past and he did not hesitate to take on this responsibility on May 16, 2003. He did not use excessive force. His action was not physically aggressive, and the fact that both he and Student Doe landed on the floor was an unfortunate accident. His clear purpose in grabbing Student Doe's shirt was to protect him, and other students, from physical harm.

The factual account of what happened that is contained in the Providence School Board's written decision to suspend him was not proven in the subsequent hearing before the Board. There is no written decision which followed the hearing before the Board, and thus there is no statement as to what the Board's factual findings were as a result of that hearing. In any event, the evidence adduced at the hearing before the Commissioner's designee does not substantiate the allegations relied on by the Board in making its suspension decision. Mr. Proto's account of what happened has been proven by substantial evidence before the hearing officer. The single witness who testified as to a "scuffle" between Mr. Proto and Student Doe was not in a position to observe the incident or appreciate that Mr. Proto was on top of Student Doe on the floor because they had fallen. Her estimation that the two struggled on the floor for two or three minutes and that Mr. Proto got up only when directed to do so two or three times by the principal is contradicted by every other witness who testified, including Student Doe and the principal. An eyewitness confirmed Mr. Proto's account that he grabbed Student Doe's shirt only after being elbowed and sworn at and verified that as they entered the office, Mr. Proto tripped on the leg of the chair and fell on top of Student Doe. Thus, counsel submits that the record substantiates that Mr. Proto acted reasonably and with an appropriate level of force needed to bring Student Doe to the office.

There has also been no showing that Mr. Proto's actions violated rules governing the touching of students or appropriate use of physical restraint. He clearly intervened only to prevent imminent physical harm that he predicted on the basis of his past experience in dealing with this student's behavior problems. Counsel points out that there is no evidence of a regulatory violation and notes that even when the principal was asked if Mr. Proto's actions were inconsistent with the Physical Restraint Regulations, he testified that he was unable to make a finding of a violation. In the incident report that the principal prepared and submitted to the Human Resources office he made no recommendation that Mr. Proto be disciplined. It is argued that his supervisor's failure to make a recommendation for discipline supports Mr. Proto's position that this case does

not warrant a suspension. It has the effect of tarnishing his unblemished record in the Providence school department.

### Providence School Board

In arguing that the School Board's decision should be upheld, counsel submits that a five-day suspension is warranted given that Mr. Proto made a serious mistake which resulted in a potentially severe injury to a child's head. Counsel for the School Board argues that it takes issue with Mr. Proto's actions when he determined that Student Doe was agitated (after he hit Mr. Proto with his elbow and swore at him), at that juncture he did the wrong thing—he grabbed Student Doe's shirt "in anger" and attempted to steer him into the office. The school department does not allege that Student Doe was intentionally pushed to the floor, but points out that if Mr. Proto had not grabbed his shirt and maintained an inappropriate physical restraint on him as they entered the principal's office, he would not have fallen on top of this student when he tripped over the chair. Thus, although he may not have intended to hurt Student Doe, it was Mr. Proto's loss of control that set in motion the chain of events that resulted in Student Doe's banging his head on the floor. It is also argued that Mr. Proto's behavior was inappropriate in that he did not stay to see if Student Doe was injured, but came back later to "make a deal" with Student Doe's father.

The implications of Mr. Proto's actions are that he inappropriately used physical intervention with a Student when it was not justified by the situation. As a result, he violated the instructions of the School Department that there should be no touching of any student except in extreme emergency or danger. He also violated the Board of Regents' Physical Restraint Regulations, since it was not necessary to grab Student Doe's shirt in order to protect him or another person from injury. For these reasons a five-day suspension is supportable. The reduction from the twenty (20) days recommended by the Superintendent reflects the fact that the School Board took into account his lack of any prior disciplinary record. The five-day suspension has been served and is in the past, but in the application of progressive discipline there will be written documentation of it in his personnel file. Provided there are no further incidents, counsel submits that the suspension will have no effect on Mr. Proto's future employment. He should accept it and move forward.

### **DECISION**

According to R.I.G.L. 16-13-5, certain formalities must accompany the suspension of a tenured teacher. These include a pre-suspension hearing, a statement of cause and, if requested, a hearing and appeal pursuant to the procedure set forth in R.I.G.L. 16-13-4. This process typically results in two decisions by a school committee, one after its pre-suspension hearing and another following its full hearing of the matter.

An appeal to the Commissioner usually places under review the school committee's second decision in the context of a de novo hearing at the state level. This process is in accordance with the long-standing interpretation of Title 16 that has been made by our Rhode Island Supreme Court. See the discussion in Pawtucket School Committee v. Board of Regents for Elementary and Secondary Education, 513 A.2d 13 ( R.I. 1986). In the de novo hearing, the school committee has the burden of proof to demonstrate that its reasons, and the facts supporting them, provide "good and just cause" for the suspension.

In this case, the only written decision of the Providence School Board in evidence with respect to its suspension of Donald Proto is dated July 24, 2003. In this decision, the School Board summarizes certain allegations against Mr. Proto. There was no written decision or findings following its hearing of Mr. Proto's appeal in August of 2004.<sup>2</sup> The practical effect of this is that even though some of the allegations against Mr. Proto may have proved unfounded as a result of the evidentiary hearing, the School Board did not revise its reasons when it reaffirmed the five-day suspension on August 23, 2004. Thus, while a different set of facts may have supported its decision, the burden of proof as to "good and just cause" remains those facts outlined in the July 23, 2004 statement of cause.

The statement of cause alleges that Mr. Proto exercised poor judgment in resorting to physical aggression against a student on May 16, 2003 with the result that the student was hurt. The Board concluded that Mr. Proto presented a poor role model to all students because he had invoked physically aggressive action when no action other than perhaps a verbal command was warranted. The School Board indicated that it had evidence that Mr. Proto "claimed" to have been sworn at and elbowed prior to grabbing Student Doe by the shoulders and forcing him into the office. The Board alleged that Mr. Proto had "either tripped over a chair or pushed Student A to the floor", remaining on top of him while he was not resisting "far too long". Further allegations were that Student Doe was "begging him to stop" and that the principal "finally" had to "physically remove" Mr. Proto from Student Doe. The School Board alleged that there was evidence that Mr. Proto had pushed Student Doe to the floor and shouted "Are you sorry now?"<sup>3</sup>

If the facts cited by the Providence School Board on July 24, 2003 had been proven in the hearing at this level, Mr. Proto's suspension would undoubtedly be supported by just cause. However, as our Findings of Fact indicate, an entirely different scenario is presented by the evidence in this case. We find that Student Doe was told by Mr. Proto to move along to his classroom and was guided to the stairway by an affectionate physical gesture. At that point, Student Doe elbowed Mr. Proto and swore at him. Mr. Proto did grab Student Doe by his shirt and forcibly push him into the school office. We do not agree with the argument that Mr. Proto had no alternative but to grab Student Doe by his shirt and physically force him to the principal's office. His grabbing of Student Doe's shirt and pushing him some twenty feet to the office was an inappropriate physical restraint/intervention. The evidence before us is that this act was

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<sup>2</sup> The legal implications of this procedural defect have not been addressed by the parties in this case.

<sup>3</sup> The evidence, for the most part, consisted of a summary presented to the Board by the Director of Human Resources (Tr.Vol.I, pp.11-12).

prompted by his split-second assessment that the situation was volatile and Student Doe's anger required the immediate intervention of the principal. There is no evidence that he did so because he lost his temper or was "out of control", as alleged by the School Board. Thus, when he grabbed Student Doe's shirt and pushed him into the office, Mr. Proto was guilty of misjudging the situation. His use of physical force was not aggressive<sup>4</sup>, as asserted by the School Board, but at that point physical force was not necessary or authorized.

As they entered the office, Mr. Proto fell over a chair, and both he and Student Doe landed on the floor. If there were witnesses who observed Mr. Proto push Student Doe to the floor and shout "Are you sorry now" they did not testify at the hearing at this level. Not a single witness testified that Mr. Proto intentionally pushed Student Doe to the floor or that he shouted at Student Doe. The witness who observed them fall indicated that Mr. Proto tripped on the chair at the entrance to the office. There is no persuasive evidence that once on the floor, Mr. Proto remained on top of Student Doe as he "begged him to stop" or that Mr. Proto was "physically aggressive". Only one witness out of the several who testified described Mr. Proto as being involved in a "scuffle" with Student Doe. This witness was contradicted by the other witnesses who stated that within fifteen to twenty seconds, Mr. Proto got up from the floor on his own. The explanation for the delay of fifteen or twenty seconds in Mr. Proto getting up was his physical condition.<sup>5</sup> The principal testified that he attributed the short delay in Mr. Proto's getting up to physical difficulty he had in moving his body. It is true that Student Doe was injured as a result of the fall and that there is a causal connection between Mr. Proto's unauthorized use of a physical force and Student Doe's injury, however, the inference that there was any intent on the part of Mr. Proto to hurt this child has been completely dispelled on this record.

In summary, the facts alleged by the Providence School Board to constitute "good and just cause" for the five-day suspension of Mr. Proto have not been proven. His appeal of this suspension is sustained. He should be compensated for the loss of pay and other benefits he lost, and all reference to his suspension should be removed from his personnel file.

Although a verbal warning to Mr. Proto for his use of an inappropriate restraint/intervention with Student Doe is something we considered, it is our assessment that his mistake of judgment is more appropriately addressed by providing him (and perhaps other staff at the Charlotte Woods Elementary School) with additional training in application of the Physical Restraint Regulations. Sanctioning him for his mistake of judgment seems particularly inappropriate given that the district did not provide him (and, we assume other professional staff at the school) training in the Physical Restraint Regulations until **after** the May 16, 2003 incident even though the Regulations required such training of **all staff** in the district annually not later than within the first month of each school year (See Section 4.0 "Procedures and Training"). Furthermore, Mr. Proto had been utilized as a resource in addressing Student Doe's behavioral issues and in de-

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<sup>4</sup> i.e. hostile, intended to harm or attack according to the dictionary definition

<sup>5</sup> Although we can make no finding with respect to the specific nature of this condition.

escalating his “uncontrollable behavior” throughout the school year. His willingness to work with Student Doe’s special education teacher in addressing Student Doe’s behavior without the benefit of additional training placed him at a predictable disadvantage when he exercised this responsibility on May 16, 2003. In the absence of training or a behavior management plan, Mr. Proto did the best he could to recognize those episodes which called for physical intervention and those which did not. Under this set of facts, he should not be disciplined for this unfortunate incident, even though the student involved received a potentially serious injury.

His appeal is sustained, and the School Board is directed to provide Mr. Proto, as well as other staff it may deem appropriate, with additional training in the application of the Board of Regents Physical Restraint Regulations, no later than ninety (90) days from the date of decision in this matter.

For the Commissioner

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Kathleen S. Murray  
Hearing Officer

APPROVED:

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Peter McWalters, Commissioner

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January 27, 2006  
Date