

COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

MIDDLESEX COUNTY

NO. 2011-P-0127

ROBERT DOE, a Minor,
By his Father and Next Friend, RH

Plaintiff-Appellee,

v.

CHERYL R. MALONEY,
As she is Superintendent of Schools,
Town of Weston

Defendant-Appellant

On Appeal from an Order of the Superior Court

BRIEF AMICUS CURIAE OF THE CHILDREN'S LAW CENTER OF
MASSACHUSETTS, THE EDLAW PROJECT, THE JUVENILE JUSTICE
CENTER OF SUFFOLK UNIVERSITY LAW SCHOOL, AND THE
MASSACHUSETTS ADVOCATES FOR CHILDREN

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TABLE OF CONTENTS

Table of Authorities..... ii

Argument..... 1

 I. This Court Should Give Great Weight to the Risk of Irreparable Harm Because the Deleterious Effects of Exclusion From School Are Documented and Well-Known..... 1

 A. Courts have recognized that education is a critical component of good citizenship. 1

 B. Contemporary scientific and sociologic research confirms the life-changing nature of exclusion from school. 2

 C. Just as students suffer the irreparable injury of exclusion, society shares in their loss. 7

 II. The Permanent Effect of School Exclusion in Massachusetts and in the Town of Weston Make It Even More Critical That the Preliminary Injunction Allowing Robert Back To School Be Upheld Until the Court Conducts Meaningful Review of the School's Procedure in Excluding Robert..... 9

 A. The consequences of exclusion from Weston Public Schools are particularly acute. 10

Conclusion..... 14

Certificate of Service..... 16

Certificate of Compliance..... 16

TABLE OF AUTHORITIES

CASES

Bd. of Educ. v. School Comm. of Quincy, 415 Mass. 240 (1993)..... 10

Brown v. Bd. of Educ., 347 U.S. 483 (1954)..... 1

Doe v. Superintendent of Schs. of Stoughton, 437 Mass. 1 (2002)..... 9

Doe v. Superintendent of Schs. of Worcester, 421 Mass. 117 (1995)..... 9

Goss v. Lopez, 419 U.S. 565 (1975)..... 13

Graham v. Florida, 130 S. Ct. 2011 (U.S. 2010)..... 9

LB v. O’Connell, No. cv-40124 Excerpt Mot. Hr’g Tr., ECF No. 15 (D. Mass. Aug. 6, 2009)..... 12

McDuffy v. Sec’y of Exec. Office of Educ., 415 Mass. 545 (1993)..... 2

W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943)..... 13

Wis. v. Yoder, 404 U.S. 205 (1972)..... 1, 2

CONSTITUTIONAL PROVISIONS

Mass. Const. pt. II, ch. V, § II..... 2

STATUTES

Mass. Gen. Laws ch. 71, § 37H..... 6, 10

Mass. Gen. Laws ch. 71, § 37H1/2..... 10

OTHER AUTHORITIES

Advancement Project, Education on Lockdown: The Schoolhouse to Jailhouse Track (2005)..... 8

American Academy of Pediatrics, Policy Statement: Out-of-School Suspension and Expulsion, 112 Pediatrics 1206 (2003)..... 4

American Psychological Association, <u>Are Zero Tolerance Policies Effective in the Schools? An Evidentiary Review and Recommendations</u> , 63 <i>American Psychologist</i> 852 (2008).....	3
<u>An Act to Help Students Stay in School: Hearing on HB 3435 Before the J. Comm. on Educ., 2009 Leg., 186th Sess. (Mass. 2009) (statement of Isabel Raskin, Suffolk University Juvenile Justice Center)</u>	8
Andrew Sum et al., Boston Youth Transitions Task Force and Boston Private Industry Council, <u>An Assessment of the Labor Market, Income, Health, Social, Civic and Fiscal Consequences of Dropping Out of High School: Findings for Massachusetts Adults in the 21st Century</u> (2007).....	7
Boston Public Schools, <u>Code of Conduct</u> (2010).....	11
Jen Vorse Wilka, <u>2010 SDDR Data - Initial Analysis</u> (2010).....	5
Massachusetts Appleseed Center for Law and Justice, <u>Keep Kids In Class: Breaking the School to Prison Pipeline</u> (2009).....	11
Massachusetts Graduation and Dropout Prevention and Recovery Commission, <u>Making the Connection</u> (2009)...	5, 6, 11
Rennie Center for Education Research & Policy, <u>Act Out, Get Out? Considering the Impact of School Discipline Practices in Massachusetts</u> (2010).....	4, 5
Rennie Center for Education Research & Policy, <u>Meeting the Challenge: Fiscal Implications of Dropout Prevention in Massachusetts</u> (2011).....	7
Robert V. Antonucci, Massachusetts Commissioner of Education, <u>Advisory Opinion On Student Discipline</u> (Jan. 27, 1994).....	6
Sarah Biehl, <u>School Expulsion: A Life Sentence?</u> , Children's Rights Litigation, Spring 2011 (ABA Section of Litigation Children's Rights Litigation Committee).	8

Weston Public Schools, Weston High School
Student/Parent Handbook (2010)..... 11

ARGUMENT

This Court should uphold the Superior Court's preliminary injunction allowing Robert to return to school until the case is decided because exclusion from school causes irreparable harm to students and to society.¹

I. THIS COURT SHOULD GIVE GREAT WEIGHT TO THE RISK OF IRREPARABLE HARM BECAUSE THE DELETERIOUS EFFECTS OF EXCLUSION FROM SCHOOL ARE DOCUMENTED AND WELL-KNOWN.

A. Courts have recognized that education is a critical component of good citizenship.

The United States Supreme Court has described education as "the very foundation of good citizenship."² The Court determined that the nation's founders "recognized that education was essential to the welfare and liberty of the people."³ Public education is "a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust

¹ This brief addresses only the irreparable harm requirement of the preliminary injunction. Likelihood of success on the merits will be discussed in the Student's brief.

² Brown v. Bd. of Educ., 347 U.S. 483, 493 (1954).

³ Wis. v. Yoder, 404 U.S. 205, 221 (1972) (citing Letter from Thomas Jefferson to Joseph Cabell, Sept. 9, 1817, in 17 Writings of Thomas Jefferson 417, 423-424 (Mem. ed. 1904)).

normally to his environment.”⁴ As the Court recognized nearly sixty years ago, “it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education.”⁵

The Massachusetts Constitution reflects a similar view of the crucial importance of education:

Wisdom, and knowledge, as well as virtue . . . being necessary for the preservation of their rights and liberties . . . it shall be the duty of legislatures and magistrates, in all future periods of this commonwealth, to cherish the interests of literature and the sciences, and all seminaries of them; especially . . . public schools and grammar schools in the towns.⁶

The Supreme Judicial Court has held that this language in the Constitution is not merely aspirational; it “imposes instead a constitutional duty on the Commonwealth to ensure the education of its children in the public schools.”⁷

B. Contemporary scientific and sociologic research confirms the life-changing nature of exclusion from school.

The American Psychological Association (APA) has reported on the negative effects of excluding a child

⁴ Id.

⁵ Id.

⁶ Mass. Const. pt. II, ch. V, § II.

⁷ McDuffy v. Sec’y of Exec. Office of Educ., 415 Mass. 545, 551 (1993).

from school,⁸ pointing out that adolescents are psychologically immature. Developmental neuroscience research reveals adolescent brains are less well-developed than previously thought.⁹ Preliminary studies of zero-tolerance policies, wherein schools impose discipline strictly based on conduct with little or no consideration of attendant circumstances, raise concerns that exclusion from school “may create, enhance, or accelerate negative mental health outcomes for youth by creating increases in student alienation, anxiety, rejection, and breaking of healthy adult bonds.”¹⁰ As one remedy, the APA recommends that schools focus on keeping students in an active learning environment, even those students who create repeated disciplinary problems.¹¹

The American Academy of Pediatrics (AAP) echoed and affirmed the APA’s concerns regarding school exclusions.¹² According to the AAP, out-of-school

⁸ American Psychological Association, Are Zero Tolerance Policies Effective in the Schools? An Evidentiary Review and Recommendations, 63 *American Psychologist* 852 (2008).

⁹ Id. at 855.

¹⁰ Id. at 856.

¹¹ Id. at 858.

¹² American Academy of Pediatrics, Policy Statement: Out-of-School Suspension and Expulsion, 112 *Pediatrics*

adolescents are more likely to engage in risky and harmful behaviors, and their risk of suicide may be expected to increase.¹³ Moreover, the AAP stated, "The lack of professional assistance at the time of exclusion from school, a time when a student most needs it, increases the risk of permanent school drop-out."¹⁴ As a result, the AAP recommended limiting exclusion "to the most egregious circumstances."¹⁵

The Rennie Center for Education Research & Policy has reported on the detrimental effects of disciplinary exclusion within Massachusetts.¹⁶ Exclusion breaks students' connection with their school, which has detrimental academic, social, and psychological consequences.¹⁷ The Center found that exclusion as punishment may not be developmentally appropriate for adolescents because adolescents lack neurological maturity, making them susceptible to

1206, 1207 (2003) (reaffirmed 122 Pediatrics 450 (2008)).

¹³ Id.

¹⁴ Id.

¹⁵ Id. at 1208.

¹⁶ Rennie Center for Education Research & Policy, Act Out, Get Out? Considering the Impact of School Discipline Practices in Massachusetts (2010).

¹⁷ Id. at 5.

temporary lapses in judgment without due regard for potential consequences.¹⁸

Despite these serious consequences, the Center found that disciplinary exclusion in Massachusetts is common. Preliminary analysis of discipline data from the most recent complete school year confirms the Center's findings.¹⁹ During the 2009-2010 school year, students in Massachusetts missed a total of 199,056 days, the equivalent of 1,076 years of school, due to disciplinary exclusions.²⁰

Recently, the Massachusetts Graduation and Dropout Prevention and Recovery Commission, created by Chapter 315 of the Acts of 2008, concluded that harsh disciplinary policies are linked to dropout.²¹ The Commission described the many negative consequences of

¹⁸ Id. at 4.

¹⁹ Jen Vorse Wilka, 2010 SDDR Data - Initial Analysis (2010) (describing preliminary findings from ESE's Student Safety and Discipline Report for 2009-2010 school year). Notably, schools are not required to report how many general education students were suspended from school for non-serious offenses. Id. at 1. Thus, these numbers likely underestimate the use of exclusion. Id. The 2010 SDDR data is available at www.doe.mass.edu.

²⁰ Id. at 1.

²¹ Massachusetts Graduation and Dropout Prevention and Recovery Commission, Making the Connection (2009), http://www.mass.gov/?pageID=edumodulechunk&L=1&L0=Home&sid=EOedu&b=terminalcontent&f=Dropout_Commission_Report_Text&csid=EOedu.

dropping out on students' lives. For example, students who drop out are more likely to be incarcerated. The Commission characterized the Commonwealth's discipline policies as "outdated" and recommended reform, such as ending permanent expulsion.²² It recognized the peril of laws that allow school districts to permanently expel students, "thereby cutting off young people at the moment they most need intervention."²³

In the years following the enactment of the Education Reform Act of 1993,²⁴ including Mass. Gen. Laws ch. 71, § 37H, the Massachusetts Department of Education (DOE) issued an advisory encouraging schools to carefully consider the decision to exclude students.²⁵ The DOE noted the extraordinary nature of exclusion from school and the important steps schools should take to ensure this punishment is used sparingly and fairly.²⁶

²² Id. at 21.

²³ Id.

²⁴ See Chapter 380 of the Acts of 1993.

²⁵ Robert V. Antonucci, Massachusetts Commissioner of Education, Advisory Opinion On Student Discipline (Jan. 27, 1994), <http://www.doe.mass.edu/lawsregs/advisory/discipline/AOSD1.html>.

²⁶ Id.

C. Just as students suffer the irreparable injury of exclusion, society shares in their loss.

Students who do not finish high school are more likely to be unemployed and make less money each year.²⁷ These low salaries contribute to the poverty rate,²⁸ and students who do not finish high school have higher health care costs.²⁹ In sum, the Commonwealth ends up supporting these adults and their children.³⁰ This creates a lifetime disparity between graduates and non-graduates of more than \$450,000.³¹

Society as a whole is affected, as "[t]he children we are banishing from our schools are the same children with whom we share an intertwined and interdependent future. . . . The students we expel from school will not disappear from society. We are

²⁷ Andrew Sum et al., Boston Youth Transitions Task Force and Boston Private Industry Council, An Assessment of the Labor Market, Income, Health, Social, Civic and Fiscal Consequences of Dropping Out of High School: Findings for Massachusetts Adults in the 21st Century 13, 80-86 (2007) available at http://www.bostonpic.org/files/resources/dropout_social_cost_1-07.pdf.

²⁸ Id. at 42.

²⁹ Id. at 57.

³⁰ Id. at 81.

³¹ Rennie Center for Education Research & Policy, Meeting the Challenge: Fiscal Implications of Dropout Prevention in Massachusetts 1 (2011) (describing "disturbing societal costs" of a student's failure to finish high school).

in danger of not only creating an underclass, but creating an outclass that will come back to haunt us.”³²

A report from the Advancement Project describes how the intersection of zero-tolerance policies and law enforcement presence in school greatly raises stakes for students accused of disciplinary infractions.³³ The report explains how “the consequences of child or adolescent behaviors may long outlive students’ teenage years.”³⁴

More recently, an article in an American Bar Association-sponsored publication compared expelling a child from school to a lengthy prison sentence.³⁵

³² An Act to Help Students Stay in School: Hearing on HB 3435 Before the J. Comm. on Educ., 2009 Leg., 186th Sess. (Mass. 2009) (statement of Isabel Raskin, Suffolk University Juvenile Justice Center), available at <http://www.massadvocates.org/education-law-task-force.php>.

³³ Advancement Project, Education on Lockdown: The Schoolhouse to Jailhouse Track 12-13 (2005) available at <http://www.advancementproject.org/sites/default/files/publications/FINALEOLrep.pdf>.

³⁴ Id. at 12.

³⁵ Sarah Biehl, School Expulsion: A Life Sentence?, Children’s Rights Litigation, Spring 2011, at 2 (ABA Section of Litigation Children’s Rights Litigation Committee). In 2009, the ABA stated that schools should provide full procedural protections when a school seeks to exclude a student from his or her educational program. See Recommendation and Report, 2009 A.B.A. H.D. 118B.

Although “vastly different deprivations of a child’s rights,” the article stated that both have consequential and long-lasting effects on a child.³⁶ The comparison is timely because of the Supreme Court’s recent decision in Graham v. Florida.³⁷ Reasoning, in part, that children are different from adults because their brains are not yet fully mature,³⁸ the Court held that life sentences without possibility of parole for juveniles in non-homicide cases were unconstitutional.³⁹ The article concluded that the education system cannot “continue to justify the relative ease with which school administrators expel children from school” because of this difference.⁴⁰

II. THE PERMANENT EFFECT OF SCHOOL EXCLUSION IN MASSACHUSETTS AND IN THE TOWN OF WESTON MAKE IT EVEN MORE CRITICAL THAT THE PRELIMINARY INJUNCTION ALLOWING ROBERT BACK TO SCHOOL BE UPHELD UNTIL THE COURT CONDUCTS MEANINGFUL REVIEW OF THE SCHOOL’S PROCEDURE IN EXCLUDING ROBERT.

Although deference is given to school discipline decisions,⁴¹ the Superior Court needs to carefully

³⁶ Id. (citing 130 S. Ct. 2011, 2026-27 (2010)).

³⁷ 130 S. Ct. 2011 (2010).

³⁸ Id.

³⁹ Id.

⁴⁰ Id. at 2-3.

⁴¹ The courts of Massachusetts defer to school personnel in deciding disciplinary issues, but that deference has limits. See Doe v. Superintendent of Schs. of Stoughton, 437 Mass. 1, 5 (2002) (noting

review exclusion decisions because of the irreparable harm of exclusion from Massachusetts schools in general, and Weston Public Schools in particular. Students' immature, but age-appropriate, conduct can have serious life-long consequences. Judicial oversight is essential to ensure fundamental fairness. Schools have an interest in an efficient process to maintain safety. The trial court must make certain that safeguards were in place to ensure that Weston's process for excluding Robert was not flawed. The Superior Court did not abuse its discretion by ordering that Robert remain in school while that judicial review is completed.

A. The consequences of exclusion from Weston Public Schools are particularly acute.

Children in Massachusetts can be permanently excluded, and there is no obligation for the school district to provide them with any educational services thereafter.⁴² Once a student is expelled, no other

substantial deference to school officials in matters of discipline) (citing Doe v. Superintendent of Schs. of Worcester, 421 Mass. 117, 132 (1995) (applying rational basis review to school officials' decision to expel student)).

⁴² Bd. of Educ. v. School Comm. of Quincy, 415 Mass. 240, 245 (1993); see also Massachusetts Graduation and Dropout Prevention and Recovery Commission, Making the Connection (2009) at 21,

Massachusetts school district is ever required to enroll the student.⁴³ Recently, Massachusetts schools permanently expelled children as young as ten.⁴⁴ No matter how old the permanently expelled child, once a decision to expel becomes final, school officials need not ever reconsider the decision to exclude the student.

In Weston, expulsion is forever, and Weston does not offer alternative education programs for expelled general education students.⁴⁵ Weston does not provide a procedure wherein students can request that the school review their expulsions, no matter how much time has passed.⁴⁶ The dearth of procedural protection afforded and lack of evidence presented against Robert

http://www.mass.gov/?pageID=edumodulechunk&L=1&L0=Home&sid=EOedu&b=terminalcontent&f=Dropout_Commission_Report_Text&csid=EOedu.

⁴³ Mass. Gen. Laws ch. 71, §§ 37H-37H1/2 (2011).

⁴⁴ Massachusetts Appleseed Center for Law and Justice, Keep Kids In Class: Breaking the School to Prison Pipeline 3 (2009), available at http://www.massappleseed.org/projects/pdfs/kids_out.pdf.

⁴⁵ See generally Weston Public Schools, Weston High School Student/Parent Handbook (2010) available at <http://westonschools.org/index.cfm?pk=download&pid=19912&id=21072>.

⁴⁶ See id. Contra Boston Public Schools, Code of Conduct 36 (2010) (providing alternative education and limiting exclusion to one calendar year) available at <http://www.bostonpublicschools.org/files/Code%20of%20Conduct.pdf>.

raise serious due process concerns in this case, which the Superior Court recognized by ordering Robert back to school until the issues are decided.

Minimal scrutiny of school disciplinary decisions does not mean absence of scrutiny. In this case, where Weston imposed permanent expulsion with no opportunity for future review, Weston should meet a high evidentiary burden and provide significant procedural protection. A recent case in the District of Massachusetts highlighted the need for meaningful judicial review of a school's decision to expel.⁴⁷ The district court enjoined a school district from expelling a student for possession of a knife under a zero tolerance policy.⁴⁸ The court held that the policy violated the student's right to due process.⁴⁹ In its reasoning, the district court recognized, "as the stakes get higher, the need for safeguards and protections increase."⁵⁰

⁴⁷ LB v. O'Connell, No. cv-40124 Excerpt Mot. Hr'g Tr., ECF No. 15 (D. Mass. Aug. 6, 2009). (granting student's motion for a preliminary injunction), available at <http://www.cleweb.org/sites/default/files/LBWorcestertanscript.pdf>.

⁴⁸ Id. at 5-6.

⁴⁹ Id. at 22.

⁵⁰ Id.

Schools must not be allowed to make exclusion decisions with complete impunity because exclusion from school can "seriously damage the students' standing with their fellow pupils and their teachers as well as interfere with later opportunities for higher education and employment."⁵¹ When evidence is murky and facts disputed, "[t]he risk of error is not at all trivial, and it should be guarded against if that may be done without prohibitive cost or interference with the educational process."⁵² Finally, the fact that schools "are educating the young for citizenship is reason for scrupulous [judicial] protection of Constitutional freedoms of the individual, if we are not to strangle the free mind at its source and teach youth to discount important principles of our government as mere platitudes."⁵³

⁵¹ Goss v. Lopez, 419 U.S. 565, 575 (1975) (requiring minimum procedure protections for students facing long-term exclusion from school).

⁵² Id. at 580.

⁵³ W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 637 (1943).


CONCLUSION

Amici urge this Court to uphold the preliminary injunction issued by the Superior Court because of the great weight to be given to the risk of irreparable harm resulting from excluding a student from school. The irreparable harm resulting from exclusion from school on both the student and society is documented and well-known. Due to these harmful effects, this Court should uphold the Superior Court's allowance of a preliminary injunction until the Court conducts a meaningful judicial review of Weston's decision to exclude Robert.

Respectfully Submitted,

THE CHILDREN'S LAW CENTER OF MASSACHUSETTS,
THE EDLAW PROJECT, THE JUVENILE JUSTICE
CENTER OF SUFFOLK UNIVERSITY LAW SCHOOL, AND
THE MASSACHUSETTS ADVOCATES FOR CHILDREN

By,

A handwritten signature in cursive script, reading "Lisa A. Morrow". The signature is written in black ink and is positioned above the typed name.

Lisa A. Morrow, Esq.

BBO 670987

Children's Law Center of Massachusetts

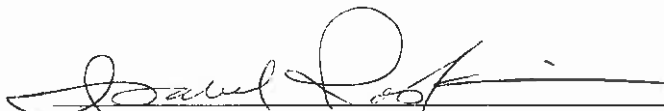
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CERTIFICATE OF SERVICE

I, Thomas A. Mela, Esq., certify under the pains and penalties of perjury that I served two copies of: BRIEF AMICUS CURIAE OF THE CHILDREN'S LAW CENTER OF MASSACHUSETTS, THE EDLAW PROJECT, THE JUVENILE JUSTICE CENTER OF SUFFOLK UNIVERSITY LAW SCHOOL, AND THE MASSACHUSETTS ADVOCATES FOR CHILDREN on Leonard H. Kesten, Esq., counsel for Defendant/Appellant Town of Weston Superintendent of Schools, and Richard J. Hayes, Esq., Counsel for the Plaintiff/Appellee, at the addresses below via first class mail on the date following my signature.

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CERTIFICATE OF COMPLIANCE

I, Thomas A. Mela, Esq., certify that the foregoing brief complies with the rules of court pertaining to the filing of briefs including, but not limited to, Massachusetts Rules of Appellate Procedure 16, 18, and 20.



Thomas A. Mela, Esq.

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