COMMONWEALTH OF MASSACHUSETTS
APPEALS COURT

No. 2011-P-0127

ROBERT DOE,

Plaintiff-Appellee

v.

TOWN OF WESTON
SUPERINTENDENT OF SCHOOLS,

Defendant-Appellant

On Appeal from an Order of the Superior Court

BRIEF *AMICI CURIAE* OF THE CENTER FOR LAW AND EDUCATION AND THE CHARLES HAMILTON HOUSTON INSTITUTE FOR RACE AND JUSTICE, HARVARD LAW SCHOOL

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Dated: March 31, 2011

CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Judicial Court Rule 1:21, *amicus curiae*, **Center for Law and Education, Inc.**, states that it is a non-profit corporation exempt from taxation pursuant to Section 501(c)(3) of the Internal Revenue Code and is not a publicly held corporation that issues stock. It has no parent corporation.

Pursuant to Supreme Judicial Court Rule 1:21, *amicus curiae*, **Charles Hamilton Houston Institute for Race and Justice** states that it is part of **Harvard University**, which is a non-profit corporation exempt from taxation pursuant to Section 501(c)(3) of the Internal Revenue Code, is not a publicly held corporation that issues stock, and has no parent corporation.

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INTRODUCTION AND INTERESTS OF *AMICI CURIAE*

The Center for Law and Education and the Charles Hamilton Houston Institute for Race and Justice at Harvard Law School respectfully submit this brief *amici curiae* for the purpose of addressing "the question of judicial abstention from scholastic disciplinary disputes" raised by this Court (Sikora, J.) in an order dated January 5, 2011. This question is a matter of importance for all school age youth in Massachusetts, in particular low-income youth who are disproportionately students of color without access to legal counsel. *Amici*, together with the Boston law firm, Choate, Hall & Stewart, LLP, are partners in the *Pro Bono* Education Project, providing direct representation to low-income students who are subject to disciplinary suspensions/expulsions; constructive exclusions from school as a result of the school's failure to provide effective instruction; and other school pushout practices, including inappropriate referrals to the juvenile court.

The Center for Law and Education, Inc. ("CLE") is a national non-profit advocacy organization with offices in Boston and Washington, D.C. that works with parents, advocates and educators to improve the

quality of education for all students and, in particular, for indigent students. CLE is one of a few national organizations rooted in both civil rights and school reform. It is focused on bringing the two together to address systemic barriers that impede low-income students, who are disproportionately students of color and students with disabilities, from accessing a rigorous curriculum aligned to state standards. CLE seeks to ensure that students who are entitled to services under both Title I of the Elementary and Secondary Education Act and the Individuals with Disabilities Education Act remain in school and receive an appropriate, quality education designed to prepare them for post secondary education and employment.

Through its role with the Commission on Youth at Risk of the American Bar Association ("ABA"), CLE took the lead in developing three formal resolutions, along with extensive accompanying reports, that were adopted by the ABA House of Delegates in 2009, promoting a variety of coordinated actions to advance the right of all children to quality education – the right to a high-quality educational program, the right to remain in school (also addressing policies and practices that

tend to result in students' leaving school), and the right to resume education in a high-quality program (for those who have left) – and calling for the bar at local, state, and national levels to become involved in making those rights a reality. In Massachusetts, CLE receives limited support from the Massachusetts Legal Assistance Corporation to provide statewide advocacy in education law-related matters to students from low-income families.

The Charles Hamilton Houston Institute for Race and Justice at Harvard Law School ("CHHIRJ") was launched in September 2005 by Charles J. Ogletree, Jr., Jesse Climenko Professor of Law. The Institute honors and continues the unfinished work of Charles Hamilton Houston, one of the 20th century's most important legal scholars and litigators. Houston engineered the multi-year legal strategy that led to the unanimous 1954 Supreme Court decision, Brown v. Board of Education, 347 U.S. 483 (1954), repudiating the doctrine of "separate but equal" schools for black and white children. By facilitating a continuous dialogue between practitioners and scholars, he ensured that legal scholarship would resonate outside

the academy, and that new legal strategies would be immediately incorporated into the training of lawyers.

CHHIRJ uses this model to address contemporary civil rights challenges in our increasingly multi-racial society. Its long-term goal is to ensure that every member of our society enjoys equal access to the opportunities, responsibilities and privileges of membership in the United States. Since its founding, it has conducted and commissioned legal and policy analyses related to students' rights and opportunities to remain in school, and to research-based alternatives to zero tolerance and other exclusionary school disciplinary policies.

STATEMENT OF THE ISSUE

Whether the trial court abused its discretion in reinstating in school a student permanently expelled under M.G.L. c. 71, § 37H for alleged possession of a controlled substance when the decision to expel lacked adequate evidentiary support, and the school district's discipline procedures failed to comport with due process and the district's own rules.

STATEMENT OF FACTS

At all time relevant to this matter, Doe was a 17 year old student of the Weston Public Schools

("Weston") who was in his junior year at Weston High School. (R. App. 10, ¶3). Doe was a good student, was taking an Advanced Placement United States history class, and had no prior discipline record. (R. App. 112). On March 31, 2010, Officer Mahoney, a uniformed police officer of the Weston Police Department, appeared at Doe's residence. (R. App. 10, ¶ 3). Doe's father answered the door, and Officer Mahoney asked to speak with Doe. Id. When Doe's father inquired about the reason, Officer Mahoney answered, "Drugs." Id. Doe's father declined to allow Officer Mahoney to speak to his son. (R. App. 10, 66, ¶ 3). Officer Mahoney told Doe's father to come with Doe to a meeting with Principal Parker at Weston High School on the following day, April 1, 2010. (R. App. 10, 66, ¶ 3).

On April 1, 2010, Doe and his father attended a meeting at Principal Parker's office at Weston High School, also attended by Assistant Principal Flynn and Officer Mahoney. (R. App. 11, 66, ¶ 4). Principal Parker told Doe and his father that two other students had been implicated in an incident involving marijuana on the previous day (March 31, 2010) and that Doe had been identified as also being involved. (R. App. 11,

66 ¶ 4). Principal Parker did not offer any evidence to Doe at this meeting (R. App. 11, ¶ 4) and did not provide Doe the names of his accusers. See id. Doe did not speak at the meeting in Principal Parker's office. (R. App. 66, ¶ 4). At the end of the meeting, Principal Parker told Doe and his father that Doe was suspended indefinitely. (R. App. 11, 66 ¶ 4).

In a letter dated April 7, 2010, Principal Parker informed Doe's father that one of the two students had named Doe "as the source of marijuana that was purchased in the high school by a third student." (R. App. 34, Ex. C). The April 7, 2010 letter also stated that Principal Parker was suspending Doe for 10 days and that an expulsion hearing would be scheduled. Id. From April 9, 2010 to April 14, 2010, Doe's father and Principal Parker exchanged several letters regarding the computation of the 10 day suspension and the scheduling of the expulsion hearing. (R. App. 13-15, 67-68, ¶¶ 9-16).

In a letter dated April 14, 2010, Principal Parker informed Doe's father that Principal Parker had "made numerous efforts to accommodate [Doe's father's] schedule this week in order to hold the expulsion hearing and to hear [Doe's] response to the charges."

(R. App. 44, Ex. L). The letter further stated that, because neither Doe nor his father had addressed the serious charge that Doe "possessed and distributed a marijuana cookie at school" and because Principal Parker had "direct evidence from the student that received the cookie that [Doe] was the source and that he received money from the sale of that cookie," Principal Parker had "no choice but to expel [Doe] from Weston High School." Id. No expulsion hearing was held prior to Principal Parker's decision to expel.

Doe's father requested an appeal of Principal Parker's decision to expel Doe in a letter to Superintendent Maloney dated April 21, 2010. (R. App. 46, Ex. N). The appeal hearing before Superintendent Maloney was held on May 4, 2010 and was attended by Doe, Doe's father, and Doe's attorney. (R. App. 16, 69 ¶ 22). At the appeal hearing, Doe was not provided access to any oral or written witness statements and was not afforded the opportunity to confront or cross-examine any witnesses. On the advice of his counsel, Doe did not speak at the appeal hearing. (R. App. 16, ¶ 22). In a letter dated May 12, 2010, Superintendent Maloney informed Doe's father of her decision to

uphold Principal Parker's expulsion of Doe for the charge of "possessing, distributing and selling a controlled substance on school grounds during the school day." (R. App. 56, Ex. Q).

SUMMARY OF ARGUMENT

Courts have generally given deference to the discretion of school officials in school discipline matters in order to promote the safety and security of the school environment. Such discretion, however, is not unfettered; there are limits within which school officials may exercise their discretion. Judicial review of school discipline cases is necessary to ensure that school officials have acted within the appropriate bounds of their discretion and that they have not violated the rights of students. (pp. 9-12).

Here, the trial court did not abuse its discretion in denying deference to Weston's decision to expel Doe under M.G.L. c. 71, § 37H because Weston lacked an adequate evidentiary basis to support the expulsion decision. (pp. 12-29). Weston incorrectly relied on Doe's silence to draw an adverse inference in the absence of independent, probative evidence offered against Doe. (pp. 15-24). In addition, the evidence Weston had was insufficient to prove that a

statutory violation of M.G.L. c. 71, § 37H had occurred. (pp. 24-29). Because of the lack of adequate evidence, Weston's decision to expel Doe permanently was arbitrary and capricious and in violation of substantive due process. (pp. 12-29).

Further, the trial court did not err in refusing to accord deference to Weston's expulsion decision because Weston failed to provide Doe with an expulsion hearing, access to the evidence against him, and the opportunity to confront and cross-examine witnesses. These omissions violated procedural due process (pp. 30-43) as well as the rules specified in Weston's policy handbook. Weston's actions in violating its own rules deprived Doe of due process and equal protection and were *ultra vires* (i.e., beyond Weston's authority under M.G.L. c. 71, § 37H). (pp. 43-48).

ARGUMENT

I. While Courts Have Generally Accorded School Officials Discretion in Discipline Matters to Promote a Safe and Secure Learning Environment, Such Discretion Is Not Unlimited.

Massachusetts courts have generally granted deference to school officials' discretion in school discipline matters when necessary "to provide a safe and secure environment in which all children can

learn." Doe v. Superintendent of Schs. of Stoughton, 437 Mass. 1, 5 (2002) (quoting Doe v. Superintendent of Schs of Worcester, 421 Mass. 117, 131 (1995)). The rationale underlying this discretion is that school officials, with their educational expertise, are in the best position to make decisions at the school level. See id. This discretion, however, is not unlimited; and school officials' decisions are not impervious to judicial review merely because the officials argue that they were acting within their "discretion." As the United States Supreme Court has stated, children do not "shed their constitutional rights . . . at the schoolhouse gate." Tinker v. Des Moines Indep. Community Sch. Dist., 393 U.S. 503, 506 (1969). "In our system, state-operated schools may not be enclaves of totalitarianism. School officials do not possess absolute authority over their students. Students in school, as well as out of school, are 'persons' under our Constitution. They are possessed of . . . rights which the State must respect." Id. at 511. See also Wood v. Strickland, 420 U.S. 308, 326 (1975) ("Public high school students do have substantive and procedural rights while at school.") (internal citation omitted); Goss v. Lopez, 419 U.S.

565, 574 (1975) ("The authority possessed by the State to prescribe and enforce standards of conduct in its schools, although concededly very broad, must be exercised consistently with constitutional safeguards."); Shelton v. Tucker, 364 U.S. 479, 487 (1960) ("The vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools.").

Judicial review of school discipline cases[1] is necessary to ensure that school officials have acted within the appropriate bounds of their discretion and that the rights of the student have not been violated. See, e.g., South Gibson Sch. Bd. v. Sollman, 728 N.E.2d 909, 917 (Ind. Ct. App. 2000) ("We are mindful that it is not our role to question professional expertise or to undermine school officials' legitimate exercise of statutory authority. However, it is our

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[1] Courts have generally expressed greater reluctance to intervene in cases pertaining to an "academic" decision made by educational professionals than in discipline matters such as the present case. See Board of Curators of University of Missouri v. Horowitz, 435 U.S. 78, 87, 90 (1978) (emphasizing that "there are distinct differences between decisions to suspend or dismiss a student for disciplinary purposes and similar actions taken for academic reasons" and noting that judgments of academic adequacy or inadequacy are "by ... nature more subjective and evaluative than the typical factual questions presented in the average disciplinary decision.").

duty to determine whether such expertise and authority are employed arbitrarily and capriciously . . . [W]e merely acknowledge the reasonable limits within which official expertise and authority must exist.”). Two of the most basic constraints placed upon school officials’ discretion in discipline matters is that their decisions: (1) must have adequate evidentiary support, see, e.g., Parkins v. Boule, 2 Mass. L. Rptr. 331, at *9, 1994 WL 879558 (Mass. Super. 1994), aff’d sub nom. Doe v. Superintendent of Schs. of Worcester, 421 Mass. 117 (1995); and (2) must comport with the standards of due process, see, e.g., Pomeroy v. Ashburnham Westminster Reg’l Sch. Dist., 410 F. Supp. 2d 7, 15-16 (D. Mass. 2006), as well as the school’s own rules. See, e.g., Warren County Bd. of Educ. v. Wilkinson, 500 So. 2d 455, 461 (Miss. 1986). As explained below, Weston did not have adequate evidence to support its decision to expel Doe. In addition, Weston did not satisfy the procedural requirements of due process or follow its own rules.

II. The Decision of Weston to Expel Doe Permanently under M.G.L. c. 71, § 37H Was Arbitrary and Capricious and in Violation of Substantive Due Process Because There Was an Inadequate Evidentiary Basis to Support the Decision.

Massachusetts courts "will overturn a superintendent's decision to suspend a student only if it is arbitrary and capricious, so as to constitute an abuse of discretion." Superintendent of Schs. of Stoughton, 437 Mass. at 5.[2] The test for whether the discipline decision of school officials is arbitrary and capricious is whether there is a rational basis for the decision. Parkins, 2 Mass. L. Rptr. at *9. To pass the rational basis test there must be "substantial evidence" to support the decision. See Ding ex rel. Ding v. Payzant, 17 Mass. L. Rptr. 656, 2004 WL 1147450 at *2 (Mass. Super. Ct. 2004). "Substantial evidence" is "such evidence as a reasonable mind might accept as *adequate* to support a conclusion," taking "into account whatever fairly detracts from the weight of the conclusion reached." Id. (emphasis added). Thus, a decision of school officials to suspend or expel a student is considered arbitrary and capricious if the decision is not supported by adequate evidence. See, Parkins, 2 Mass. L. Rptr. at *10 (examining the adequacy of the

[2] The standard is the same for expulsions. See Nicholas B. v. School Committee of Worcester, 412 Mass. 20, 21-22 (1992) (citing Leonard v. School Committee of Attleboro, 349 Mass. 704, 711 (1965)).

evidence underlying the principal's decision to expel a student for possession of a dangerous weapon under M.G.L. c. 71, § 37H to determine whether the decision was arbitrary and capricious).

A decision to suspend or expel a student without adequate evidence also violates substantive due process because the decision is not rationally related to the governmental interest of promoting a safe learning environment. See Parkins, 2 Mass. L. Rptr. at *15 (evaluating substantial evidence in relation to substantive due process). To "punish a man without evidence of his guilt" violates due process. Thompson v. Louisville, 362 U.S. 199, 206 (1960). See also James P. v. Lemahieu, 84 F.Supp.2d 1113, 1120 (D. Hawaii 2000) (finding that a student had been denied due process when there was insufficient evidence to prove a statutory violation by the student and stating that "since it would be fundamentally unfair to punish someone for some wrongdoing that he did not commit, a disciplinary body must have evidence of a statutory violation by an individual before it may punish that individual."). In the present case, because Weston did not have an adequate evidentiary basis to support its decision to expel Doe permanently under M.G.L. c.

71, § 37H, the decision was arbitrary and capricious and in violation of substantive due process.

A. Weston Was Not Permitted to Draw a Negative Inference from Doe's Silence Absent Independent, Probative Evidence Offered against Him.

Because the police had summoned Doe to a meeting with Principal Parker at the school and were present at that initial meeting on April 1, 2010, Doe chose to remain silent, consistent with his privilege against self-incrimination (R. App. 66, ¶4). He also maintained his silence at the appeal of the expulsion before Superintendent Maloney on May 4, 2010. (R. App. 16, ¶ 22). The continued police presence throughout this matter sent a clear message that more than just school discipline was at issue and that the school and police were working together. Under those intimidating circumstances, it is hardly surprising that Doe, at the direction of his lawyer father, chose not to answer questions that could have led to criminal action being taken against him.[3]

The privilege against self-incrimination under the Fifth Amendment of the United States Constitution

[3] The blurring of the lines between the police and the schools is particularly problematic for low-income youth who do not have access to legal counsel.

and Article 12 of the Declaration of Rights of the Massachusetts Constitution[4] protects an individual in any type of proceeding in which the individual's testimony might later subject him or her to criminal prosecution. Lefkowitz v. Turley, 414 U.S. 70, 77 (1973) ("The Amendment not only protects the individual against being involuntarily called as a witness against himself in a criminal prosecution but also privileges him not to answer official questions put to him in any other proceeding, civil or criminal, formal or informal, where the answers might incriminate him in future criminal proceedings.").

In the present case, Police Officer Mahoney, a uniformed municipal police officer and employee of the Weston Police Department, was omnipresent in every stage of what should have been a school discipline matter. Officer Mahoney first appeared at Plaintiff Doe's residence on March 31, 2010, telling Doe's father who answered the door that she wanted to speak with Doe about "drugs." (R. App. 10, ¶ 3). When Doe's father denied her access, she told him to come

[4] See Commonwealth v. Simon, 456 Mass. 280, 291 (2010) ("We have 'consistently held that art. 12 requires a broader interpretation [of the right against self-incrimination] than that of the Fifth Amendment.'") (internal citation omitted).

with his son to a meeting on April 1, 2010 at the school with Principal Parker. (R. App. 10, 66, ¶ 3). Officer Mahoney was then present at the meeting with Principal Parker on April 1, 2010, during which Plaintiff Doe was questioned about the alleged incident (R. App. 11, 66, ¶ 4). Because Weston involved the police from the outset and in a significant, obvious, and continuing way, from Doe's standpoint, it was certain that any of his responses made to questions posed by Principal Parker or Superintendent Maloney would be used against him in future criminal proceedings.

Citing Baxter v. Palmigiano, 425 U.S. 308, 316-18 (1976), Weston admits that Weston school officials drew an adverse inference from Doe's silence and relied heavily on that adverse inference in justifying his expulsion. (Appellant's Br., 31-32). Baxter, however, did not create a blanket rule for the drawing of negative inferences from silence in a non-criminal context. Rather, the Court in Baxter held that in non-criminal proceedings, "the Fifth Amendment does not forbid adverse inferences against parties to civil actions when they refuse to testify *in response to probative evidence offered against them*." 425 U.S. at

318 (emphasis added). Further, the Court cautioned that silence may not be the sole basis for an adverse decision but may be considered one factor in support of such a decision, provided that probative evidence has been offered against the individual. Id. ("[S]ilence in and of itself is insufficient to support an adverse decision . . . silence [may be] given no more evidentiary value than . . . warranted by the facts surrounding [the] case."). See also Lefkowitz v. Cunningham, 431 U.S. 801, 808 n.5 ("Respondent's silence in Baxter was only one of a number of factors to be considered by the finder of fact in assessing a penalty, and was given no more probative value than the facts of the case warranted"); Custody of Two Minors, 396 Mass. 610, 616 (1986) ("No inference can be drawn, however, unless a case adverse to the interests of the party affected is presented so that failure of a party to testify would be a fair subject of comment. . . . In other words, the adverse inference drawn from the failure of a party to testify is not sufficient, by itself, to meet an opponent's burden of proof.") (internal citation omitted); LaSalle Bank Lake View v. Seguban, 54 F.3d 387, 390 (7th Cir. 1995) ("Silence is a relevant

factor to be considered in light of the proffered evidence, but the direct inference of guilt from silence is forbidden."); Harmon v. Mifflin County Sch. Dist., 713 A.2d 620, 624 (Pa. 1988) (insisting "upon the presence of independent, probative evidence to support an inference drawn when one invokes the protection of the Fifth Amendment.").

Thus, in a non-criminal proceeding – here, a school discipline proceeding – the decision-maker is permitted to draw a negative inference from an accused's silence *only if* there is independent "probative evidence" that has been "offered" against the individual. Baxter, 425 U.S. at 318. In this case, no other probative evidence was offered against Doe.

To be sure, Weston did cite "other" evidence, in addition to Doe's silence, to justify expelling him. In his April 14, 2010 letter stating his expulsion decision, Principal Parker noted without further specification that he had "*direct evidence* from the student that received the cookie that [Doe] was the source and that he had received money from the sale of that cookie." (R. App. 44, Ex. L) (emphasis added). Similarly, in an earlier letter dated April 7, 2010,

Principal Parker pointed to “the information that we received, and deemed credible.” (R. App. 34, Ex. C). The problem with this “other” evidence, however, is that Weston never provided any of it to Doe. Weston never informed Doe of the contents of the “direct evidence” mentioned in the April 14, 2010 letter and never presented to Doe the information mentioned in the April 7, 2010 letter that the school had “deemed credible.” In fact, with the exception of written notice that he had been charged with possession and distribution of a marijuana cookie and received $10 for it, Doe never received an iota of the so-called evidence against him. At the meeting with Principal Parker, at the Superintendent’s appeal hearing, and at all times in between, Doe was not provided access to the evidence that Weston school officials had before them. Weston did not identify the witnesses against Doe, did not provide Doe with copies of any oral or written witness statements, and did not make those witnesses available for questioning by Doe. By such acts of omission, as explained at pages 30-43, Weston violated the basic tenets of fundamental fairness and Doe’s right to procedural due process under the U.S. and Massachusetts Constitutions. Accordingly, Doe had

no way of knowing who had accused him of the alleged incident or what they had specifically claimed to have seen or known.

Because this "other" evidence cited by Weston was not disclosed to Doe, it was not "offered" against him, as is required under Baxter. 425 U.S. at 318. Moreover, because Doe was denied access to this so-called evidence, he was unable to assess its probative value and to determine whether the information contained therein implicated or exculpated him. In the absence of independent, probative evidence offered against Doe, Weston was not permitted to draw a negative inference from Doe's silence. See Butler v. Oak Creek-Franklin Sch. Dist., 172 F. Supp. 2d 1102, 1127 (E.D. Wis. 2001) (finding that there was insufficient probative evidence beyond the student's invocation of his right to remain silent to support the decision to suspend the student from the school's athletic program, noting that "[a]bsent evidence in addition to the bare fact of arrest and formal charge, defendants could not draw an adverse inference from plaintiff's silence without violating the Fifth Amendment.").

Not only did Weston draw an inappropriate negative inference from Doe's silence in light of the lack of probative evidence that had been offered against him, but Weston also attempted to force Doe to answer questions by giving him the ultimatum that if he did not speak, he would be subject to an automatic expulsion. In a series of cases, the United States Supreme Court has held that it is unconstitutional for decision-makers to impose significant consequences on an individual based solely on the fact that the individual refused to speak and to waive his or her privilege against self-incrimination. See Garrity v. New Jersey, 385 U.S. 493, 497 (1967) (police officers given the choice "either to forfeit their jobs or to incriminate themselves"); Spevack v. Klein, 385 U.S. 511, 516 (1967) (lawyer disbarred for failure to waive his Fifth Amendment privilege); Uniformed Sanitation Men Ass'n v. Commissioner of Sanitation of City of New York, 392 U.S. 280, 283 (1968) (sanitation workers fired "for invoking and refusing to waive their constitutional right against self-incrimination"); Lefkowitz, 414 U.S. at 71 (architects disqualified from future contracts when they refused to sign waivers of immunity and testify before a grand jury).

Here, Doe was given the choice to speak or else be expelled. Weston's counsel has stated that, at the Superintendent's appeal hearing, Superintendent Maloney "implored . . . and informed [Doe's father and attorney] that [Doe] has to . . . participate in this hearing; that *if he does not talk . . . they will presume that he's guilty; that he did this*. . . The school is left with no choice."). (R. App. 191) (emphasis added). Weston's direct pressure on Doe to speak or be expelled is further evident in Superintendent Maloney's May 12, 2010 decision letter in which she upheld Principal Parker's expulsion and stated the following:

> [Doe]'s failure to talk with me and the Principal is a serious mistake. It is important that students be held accountable for their actions and to speak honestly about their behavior. *This failure to talk with me or the Principal regarding the incident implicates him in a very material way, and I regret that you have taken the path you have taken. I can only conclude then that he has done what was alleged.* I am upholding his expulsion from Weston High School for possessing, distributing and selling a controlled substance on school grounds during the school day.

(R. App. 56, Ex. Q) (emphasis added). It could not be any more transparent: Doe was expelled because he chose to remain silent and refused to

answer Weston's questions.[5] The law is clear that silence, especially in circumstances where Weston chose to involve the police, is not a sufficient basis to justify expulsion.

B. Weston Was Not Permitted to Expel Doe under M.G.L. c. 71, § 37H without Adequate Evidence That He Had Violated the Plain Language of the Statute.

Notwithstanding the fact that Weston did not present any evidence to Doe, the evidence upon which Weston purportedly relied in making its decision to expel Doe was insufficient to prove that a statutory violation had occurred. M.G.L. c. 71, § 37H(a) provides in relevant part:

> Any student *who is found on school premises* or at school-sponsored or school-related events, including athletic games, *in possession of* a dangerous weapon, including, but not limited to, a gun or a knife; or *a controlled substance* as defined in chapter ninety-four C, including, but not limited to, *marijuana*, cocaine, and heroin, may be subject to expulsion from the school or school district by the principal.

(emphasis added).

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[5] The fact that the other two students allegedly involved in the marijuana cookie incident were merely suspended and not expelled (Appellant's Br., 22) provides further proof that Doe was expelled *because* he chose to remain silent. The differential treatment of Doe in this regard raises equal protection concerns.

The Massachusetts Supreme Judicial Court has stated that when "the text of a statute is clear and unambiguous, it must be construed in accordance with its plain meaning." Commonwealth v. Ray, 435 Mass. 249, 252 (2001); see also Sullivan v. Town of Brookline, 435 Mass. 353, 360 (2001) ("A fundamental tenet of statutory interpretation is that statutory language should be given effect consistent with its plain meaning"). Further, in the interpretation of Massachusetts statutes, "[w]ords and phrases shall be construed according to the common and approved usage of the language." M.G.L. c. 4 § 6; see also Commonwealth v. Disler, 451 Mass. 216, 222 (2008). Although the term "possession" is not defined under M.G.L. c. 71, § 37H(a), in other contexts, Massachusetts courts have recognized this term as having two meanings: (1) "actual possession" – defined as "the intentional exercise of control over an item," Commonwealth v. Fernandez, 48 Mass. App. Ct. 530, 532 (2000) (internal citation omitted), and (2) "constructive possession" – defined as "knowledge coupled with the ability and intention to exercise dominion and control." Commonwealth v. Than, 442 Mass. 748, 751 (2004) (internal citation omitted).

The language of M.G.L. c. 71, § 37H(a) states that the term "controlled substance" is defined in accordance with the definition of this term in M.G.L. c. 94C, including, but not limited to, marijuana, cocaine, and heroin.

In the present case, Weston lacked sufficient evidence to prove that Doe had committed a statutory violation of M.G.L. c. 71, § 37H(a). At no time did Weston have any physical evidence that Doe was in actual or constructive "possession" of a controlled substance, as prohibited under the plain language of the statute. No marijuana was found on Doe's person (i.e., actual possession) or in his locker or car (i.e., constructive possession). Rather, the alleged contraband was a "cookie," and because the cookie was allegedly ingested, there was no physical evidence to prove that it actually existed; nor was there any physical evidence to show – if such a cookie existed – that it actually contained marijuana. Although physical evidence may not be necessary in every case, here, the fact that Weston failed to present any evidence to Doe prior to making the decision to expel him based on M.G.L. c. 71, § 37H heightened the need for Weston school officials to have had probative

evidence before them. It is also significant that, in the present case, notwithstanding the active involvement of a police officer in every stage of the matter, no criminal charges were filed against Doe, a finding that further underscores the lack of evidence in this case.

As noted above, it is impossible to identify the specific evidence that Weston relied upon, in addition to Doe's silence, in making its decision to expel because Weston did not provide Doe access to this evidence at any time. The various descriptions of the charges, however, in Principal Parker's letters dated April 7, 2010 (R. App. 34, Ex. C) and April 14, 2010 (R. App. 44, Ex. L) and in Superintendent Maloney's letter dated May 12, 2010 (R. App. 56, Ex. Q) indicate that, for the evidence beyond Doe's silence, Weston relied primarily on the undisclosed statements made by the other two unnamed students who were implicated in the cookie incident and who had identified Doe as being the "source" of the cookie. (Appellant's Br., 9). The facts of this case differ from those of S.W. v. Holbrook Pub. Schs., in which the school nurse received information from students claiming to have seen the plaintiff student distributing an actual drug

– i.e., that the student "had distributed some '*blue pills*' to one or more students." 221 F. Supp. 2d 222, 223 (D. Mass. 2002) (emphasis added).[6] Here, in contrast, the student witnesses did not report having seen an actual drug but, rather, merely a "cookie," thereby creating a weaker chain of evidence.

The lack of evidence to substantiate a statutory violation, coupled with the inappropriate negative inference that was drawn from Doe's silence in the absence of additional, probative evidence offered against him, makes the decision to expel Doe under M.G.L. c. 71, § 37H arbitrary and capricious and in violation of substantive due process. The facts of the present case differ from those of Parkins, in which the trial court found that the decision to expel the student under M.G.L. c. 71, § 37H was not arbitrary and capricious because there was "more than adequate evidence before the defendants," including

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[6] S.W. further differs from the present case in that S.W.'s attorney was permitted to cross-examine the nurse who had examined the student exhibiting medical problems as a result of having ingested the pills allegedly distributed by the plaintiff student. Id. at 224. In contrast, in the present case, Weston's counsel indicated that the school nurse may have examined the student who allegedly ingested the cookie (R. App. 189-90); however, Weston did not provide Doe with the nurse's statement or the opportunity to cross-examine her.

the physical evidence of the knife and the fact that the plaintiff student had brought the knife to school, showed it to other students, and allowed them to handle it. 2 Mass. L. Rep. at *10, *15; but see, James P., 84 F.Supp.2d at 1120 (finding that although the plaintiff student's friends had testified that he had been drinking alcohol prior to the school event, the school's decision to suspend the student violated due process because the school lacked evidence that he was in "possession of intoxicating liquor on school grounds" in violation of the statute even if alcohol was "present in his body.").

Given the lack of evidence here that Doe had violated M.G.L. c. 71, § 37H and given the fact that Weston had not presented any evidence to Doe, judicial deference to Weston's experience in these matters was neither warranted nor appropriate. Courts can and do defer to school officials in weighing evidence. Where no evidence was presented to Doe, there was nothing for the trial court to defer to. All that was left was Weston's arbitrary and capricious decision to expel Doe, prompted by Weston's anger at Doe's decision to remain silent.

III. A Balancing of the Mathews Factors Indicates That Weston's Failure to Provide Doe an Expulsion Hearing, Access to the Evidence against Him, and the Opportunity to Confront and Cross-Examine Witnesses Violated Procedural Due Process.

The trial court's issuance of an injunction reinstating Doe in school was not an abuse of its discretion for the added reason that Weston, by depriving Doe of an expulsion hearing, the evidence against him, and the opportunity to confront and cross-examine witnesses, violated Doe's right to procedural due process under both the United States and Massachusetts Constitutions. There is no question that Doe has a property interest in his education and a liberty interest in his reputation that are protected under due process.[7] See Gorman v. University of Rhode Island, 837 F.2d 7, 12 (1st Cir. 1988); Pomeroy, 410 F. Supp. 2d at 14-15. Doe's property interest in his education derives from the Education Clause of the Massachusetts Constitution. See Mancuso v. Massachusetts Interscholastic Athletic Ass'n, Inc.,

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[7] Massachusetts courts have treated the procedural due process protections afforded by the Fourteenth Amendment to the U.S. Constitution and art. 10 of the Massachusetts Declaration of Rights in the same manner. See, e.g., Liab. Investigative Fund Effort, Inc. v. Massachusetts Med. Prof'l Ins. Ass'n, 418 Mass. 436, 443 (1994); Neff v. Commissioner of Dep't of Indus. Accidents, 421 Mass. 70, 80 (1995).

453 Mass. 116, 125 (2009) (citing McDuffy v. Secretary of Executive Office of Educ., 415 Mass. 545, 621 (1993)) ("Because all children in the Commonwealth have a constitutional right to a public education . . . it is clear under Goss that no State actor could deny the plaintiff a public education without complying with the requirements of the due process clause.").[8] Furthermore, Doe has a protected liberty interest in his reputation that has been implicated because of the serious nature of the charges that have been brought against him (i.e., possession, distribution, and selling of a controlled substance) that "could seriously damage [his] standing with [his] fellow pupils and [his] teachers as well as interfere with later opportunities for higher education and employment." Goss, 419 U.S. at 575.

In Goss v. Lopez, the United States Supreme Court established the *minimum* procedural requirements for a student facing a suspension of 10 school days or less – namely, the student must be given: (1) notice of the

[8] A student's property interest in his education also derives from the Massachusetts compulsory education statute, M.G.L. c. 76, § 1. See Parkins, 2 Mass. L. Rptr. at *13; Pomeroy, 410 F.Supp.2d at 14-15. See also M.G.L. c. 76, § 5 ("Every person shall have a right to attend the public schools of the town where he actually resides").

charges; (2) an explanation of the evidence the authorities have; and (3) an opportunity to present his or her side of the story. 419 U.S. at 581; see also Pomeroy, 410 F. Supp. 2d at 15 (citing same). The Court in Goss further noted that longer suspensions and expulsions "may require more formal procedures." 419 U.S. at 584; see also L.B. v. O'Connell, Mot. Hr'g Tr., at 20 (No. 09-CV-40124) (D. Mass. 2009)("[A]s the stakes get higher, more process is required."). A copy of the L.B. decision is attached hereto as *Addendum*. To determine the specific procedures due, courts have engaged in a balancing of the three factors delineated in Mathews v. Eldridge, 424 U.S. 319, 335 (1976) – namely:

1. The private interest that will be affected by the official action;

2. The risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and

3. The [State] interest, including the function involved and fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

See, e.g., Gorman, 837 F.2d at 13; Pomeroy, 410 F. Supp. 2 at 14; see also Neff, 421 Mass. at 80; Roe v. Attorney General, 434 Mass. 418, 427 (2001).

With respect to the first Mathews factor, because the case involves the permanent expulsion of a 17 year old student from public school, the private interest at stake is extremely strong. With an expulsion under M.G.L. c. 71, § 37H, no other school district would be required to admit Doe or to provide him with educational services. Id. § 37H(e). Moreover, if he were to apply for admission to another district, the superintendent of the expelling district would be obligated to provide the superintendent of the new district, upon request, with a statement in writing of the reasons for the expulsion. Id.

As a student with no prior discipline record, who was enrolled in an Advanced Placement U.S. history class (R. App. 112), Doe has already suffered a great loss. After the trial court issued its preliminary injunctive order dated September 9, 2010, Doe has returned to Weston High School;[9] however, as a result

[9] It is noteworthy that Weston filed this interlocutory appeal when the lower court denied its Motion for Reconsideration of the Court Order of September 9, 2010. Weston did not object to Doe's reinstatement in

of his exclusion beginning on April 1, 2010 of his junior year, he missed the last third of the 2009-2010 school year (R. App. 189). Consequently, when he returned in the fall of 2010, he had to re-enroll as a junior with credit for only some of the courses he had taken the previous year. Doe has also lost the experience of graduating with his peers and will likely be passed over by more selective colleges to which he previously planned to apply.[10] Additionally, his reputation within his school and community has been significantly tarnished as a result of the serious allegations that have been brought against him.

The second Mathews factor pertains to the risk of an erroneous deprivation of the student's interest

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school or to his receiving academic help to make up for lost time. They did, however, "strenuously" object to the court's authorization that Doe's school record be expunged at a later date and to the court's refusal to expel Doe automatically if a random drug test outside of school showed that he tested positive. Expungement is an equitable judicial remedy necessary to make the plaintiff student whole and is fully within the discretion of the lower court. An automatic expulsion without a hearing violates Due Process. See Johnson v. Collins, 233 F. Supp. 2d. 241, 250-51 (D. N.H. 2002).

[10] Most college applications, including the Common Application permitted by 415 schools across the nation, inquire as to whether a student has faced disciplinary action in school. An affirmative answer is often the death knell for an acceptance.

(here, Doe’s continued education) through the procedures used and the probable value of additional safeguards. In the present case, because there was a lack of direct physical evidence and because Weston relied heavily on hearsay statements made by other students who themselves were implicated in the cookie incident, the risk for factual error was high. Thus, given the totality of the circumstances, Doe should have been afforded the opportunity for a hearing, access to the witness statements, and the opportunity to confront and cross-examine his accusers, consistent with his right to fundamental fairness.

With respect to the third Mathews factor, the State’s interest, it is important to emphasize that this interest includes, *but is not limited to*, consideration of the financial and administrative burdens associated with the additional procedures. The State’s interest also includes the very important interest of ensuring that all its children are well-educated and that their educational opportunities are not unnecessarily limited. Weighing the financial and administrative burdens associated with providing Doe the opportunity for an expulsion hearing, access to oral or written witness statements, and the

opportunity to confront and cross-examine witnesses against the State’s broader interest in ensuring that all of its children are educated as well as the student’s interest in not losing his education reveals that Doe should have been afforded these procedures.

A. Weston Denied Doe the Opportunity for an Expulsion Hearing.

Doe was deprived of the most basic element of due process, as required under Goss and further clarified under Mathews, because he was not afforded a hearing prior to Principal Parker’s decision to expel. While Goss requires that students facing suspensions of 10 days or less be provided with some form of a hearing, 419 U.S. at 579, in the present case, in which Doe was facing a much more significant loss – i.e., permanent expulsion – he was not afforded *any* kind of hearing. See Johnson, 233 F.Supp.2d at 250-51(finding a violation of due process when the student “was not afforded any hearing prior to the expulsion.”).

B. Weston Denied Doe Access to Oral or Written Witness Statements.

Doe also should have been given access to the witness statements of his accusers. In order to have a fair opportunity to defend oneself, it “is axiomatic that . . . the accused must have an opportunity to

assess the evidence against him." Pomeroy, 410 F.Supp.2d at 16; see also L.B., at 21 ("At a bare minimum, to be able to defend a serious charge against you, you need to understand what is being said about you, and to be able to rebut it."). After placing great weight on Doe's silence, Weston apparently relied on the statements made by the other two unnamed students who were implicated in the cookie incident. Denying Doe access to these statements was particularly egregious because, as discussed above, Doe had no way of knowing the specific details of the acts of which he was being accused. Without this information, the risk of error (i.e., the second Mathews factor) was very high, and Doe was unable to defend himself in the face of the serious charges that had been brought against him. See Pomeroy 410 F.Supp.2d at 16 (finding that because a student who had been charged with distributing drugs had been required to leave the hearing whenever any witnesses testified, the student was "denied access to relevant evidence against him, and as a result was denied a fair opportunity to rebut that evidence."); L.B., at 21 (concluding that failure to provide the plaintiff student with witness statements prior to the

suspension hearing was "inconsistent with the requirement in Goss that the student [have] an explanation of the evidence against him"); Newsome v. Batavia Local Sch. Dist., 842 F.2d 920, 927 (6th Cir. 1998) ("[I]t was incumbent upon the school officials who possessed evidence [against the student] to inform [the student], during the school board hearing, of their evidence so that he would have an opportunity to rebut the evidence."); see also Cary ex rel. Carey v. Maine Sch. Admin. Dist. No. 17, 754 F. Supp. 920, 926 n. 9 (stating that due process requires that school authorities do "not willfully withhold any material evidence necessary to an equitable result.").

C. Weston Denied Doe an Opportunity to Confront and Cross-Examine Witnesses.

Given that Weston purportedly relied heavily on the witness statements of the other two students implicated in the cookie incident, the credibility of these witnesses was critical, and Weston should have provided Doe the opportunity to confront and cross-examine his accusers. See Colquitt v. v. Rich Township High Sch. Dist. No. 227, 699 N.E.2d 1109, 1116 (Ill. App. Ct. 1998) ("Here, the outcome of the hearing was directly dependent on the credibility of

witnesses whose statements were received by the hearing officer. . . . In such an instance, the opportunity for cross-examination is imperative."); Smith ex rel. Cook v. Miller, 514 P.2d 377, 387 (Kan. 1973) ("[W]hen the outcome [of school discipline hearings] is directly dependent on the credibility of two witnesses (possibly including the student threatened with expulsion) . . . then cross-examination is imperative in establishing the truth."). Although having the right to confront and cross-exam witnesses in school discipline hearings may not be warranted in all cases, here, these procedures were particularly important because the two student witnesses who were also implicated in the cookie incident had a possible motive to target Doe as the wrongdoer – namely, to divert focus away from themselves. See Johnson, 233 F.Supp.2d at 250 (finding that cross-examination of witnesses was key when "the other students most likely to have [committed the alleged act] had an obvious motive to divert attention away from themselves and onto [plaintiff student]."); see also Colquitt, 699 N.E.2d at 865 (stating that cross-examination may be necessary in school discipline hearings to protect

against witnesses 'motivated by malice, vindictiveness, intolerance, prejudice, or jealousy.'") (internal citations omitted).

In addition, the hearsay nature of the evidence is further reason why Doe should have been provided the opportunity to confront and cross-examine his accusers. Weston argues that "in Massachusetts, that a school's evidence is of a hearsay nature and that it does not identify student witnesses does not state a violation of the due process clause of the state constitution." (Appellant's Br., 32-33) (citing S.W., 221 F.Supp.2d at 229).[11] While it is true that hearsay evidence is not automatically impermissible at school discipline hearings, Weston fails to acknowledge the

[11] It is worth noting that in S.W., unlike in the present case, the anonymous statements of the other students were presented to the plaintiff at the expulsion hearing. See S.W., 221 F.Supp.2d at 223-24 ("At the hearing, the school presented the evidence on which it had based its decision to expel S.W., including the statements of some unnamed students who had claimed that S.W. was giving drugs to other students in the school."). In addition, as noted earlier, at the Superintendent's hearing in S.W., the student's attorney was permitted to cross-examine the nurse who had examined one of the students who had claimed that S.W. had given him some pills. Id. at 224. In contrast, here, although Weston's counsel stated at the hearing before the trial court that the nurse at Weston High School had examined the student who had allegedly ingested the cookie (R. App. 189), Doe's attorney was not given the opportunity to cross-examine the nurse.

additional due process implications that emerge when hearsay evidence is introduced, particularly when this evidence forms a critical and necessary basis of the district's decision to expel and when the student has not been provided access to any of the evidence. See L.B., at 22 (noting that the act of reading the statements to the student at the hearing constituted "hearsay, which is not prohibited per se, but certainly a cause for concern when the hearsay involves . . . critical or essential facts that are in dispute in the particular proceeding."); Colquitt, 699 N.E.2d at 865 ("[I]n this instance, the admission of hearsay accusatory statements . . . is a particularly egregious departure from the adversarial standard.").

In a recent Massachusetts federal district court decision involving a one-year suspension of a student charged with possession of a knife under M.G.L. c. 71, § 37H, the court utilized the Mathews factors to determine that the student was entitled to receive access to witness statements prior to the discipline hearing and was entitled to confront and cross-examine his student accusers:

> [T]he student's interest given that it was a one-year suspension and a possible expulsion is obviously very strong. The student has

> an extremely strong interest in continuing his education and not being suspended or expelled from school for a period of a year. The risk of erroneous deprivation is relatively high, depending on the level of safeguards. . . .
>
> And in terms of the administrative and fiscal burdens of additional safeguards, at least in this context, they appear to be relatively minimal. There was no risk of intimidation of witnesses or other danger to the community. If the witness statements were given, or if witnesses were required to appear at the hearing, photocopying of written statements would be a minimal cost and burden. Securing witnesses attendance and permitting cross-examination does, of course, add to the formality and length and complexity of the hearing. But, again, in this context it's greatly outweighed by the likelihood, the stronger likelihood, *the truth will emerge*.

L.B., at 20-21 (emphasis added).

Application of the Mathews factors in the present case leads to the conclusion that Weston's failure to provide Doe with the opportunity for an expulsion hearing, access to witness statements, and the opportunity to confront and cross-examine witnesses constituted a significant denial of procedural due process. These procedures were warranted in light of the strong presence of police officer Mahoney, the lack of physical evidence, the weak chain of evidence due to the nature of the contraband (i.e., a cookie), Weston's reliance on hearsay statements of student

accusers who had a possible motive to identify Doe as guilty, and the high stakes nature of a permanent expulsion. Consequently, Weston's decision to expel Doe was not entitled to judicial deference and the trial court did not abuse its discretion in issuing the injunction reinstating Doe.

IV. Because Weston's Failure to Afford Doe the Opportunity to Cross-Examine Witnesses Violated Its Own Policy Handbook, Weston's Actions Denied Doe Due Process and Equal Protection and Were *Ultra Vires* Departures from Weston's Authority under the Statute.

The General Court has expressly granted Massachusetts school committees power to promulgate rules concerning school discipline proceedings. See M.G.L. c. 71, §37H ("Each school district's policies pertaining to the conduct of students shall include the following: disciplinary proceedings, including procedures assuring due process; standards and procedures for suspension and expulsion of students"). Weston's policy handbook, in addition to tracking the language of M.G.L. c. 71, § 37H (R. App. 59, Ex. R), expressly states the following: "*In any case in which a student may be suspended from school for more than ten days . . . or expelled from school*, the student shall be given written notice stating:

1. What the student is alleged to have done wrong.

2. What disciplinary measures may be imposed.

3. The date, time, and place of the *disciplinary hearing*.

4. The student's right to be represented by an advocate or lawyer.

5. The *right of the student to question, present witnesses, and present evidence*.

6. The administrator's decision, including the reason for the decision, and any right to appeal the decision."

(R. App. 60-61, Ex. R) (emphasis added).

Furthermore, the handbook states that "[t]he superintendent shall hold a hearing on a student's appeal of a suspension for more than ten days . . . within a reasonable time of receiving the student's request for an appeal. The superintendent *shall give* the student written notice and conduct a hearing on the appeal *as outlined above*."[12] Id. (emphasis added).

Thus, according to Weston's own rules, Doe was entitled to question (i.e., cross-examine) witnesses prior to Weston's decision to expel him. Doe, however, was denied this procedure at the meeting

[12] Although the Handbook refers to suspensions over ten days, it can be assumed that such procedures would also apply to permanent expulsions.

before Principal Parker on April 1, 2010 and at an expulsion hearing, which never occurred. Moreover, while Superintendent Maloney had the opportunity to cure the error on appeal, she, likewise, failed to present Doe with any evidence or allow him the opportunity to question witnesses at the appeal hearing on May 4, 2010.

The failure of Weston to follow the procedures outlined in its own handbook, including the opportunity to question and present witnesses, violated due process. See United States v. Caceras, 440 U.S. 741, 752-53 (1979) (where "an individual has reasonably relied on agency regulations promulgated for his guidance or benefit and has suffered substantially because of their violation by the agency," due process is implicated); Morton v. Ruiz, 415 U.S. 199, 235 (1974) ("Where the rights of individuals are affected, it is incumbent upon agencies to follow their own procedures."); Smith v. Denton, 895 S.W.2d 550, 555 (Ark. 1995) ("To protect due process, the courts, in matters pertaining to a governmental entity's observance and implementation of self-prescribed procedures, must be particularly vigilant and must hold such entities to a strict

adherence to both the letter and the spirit of their own rules and regulations."); Wilkinson, 500 So. 2d at 461 (finding that the student was denied due process when she was not afforded the opportunity to cross-examine witnesses, as required under the school board's rules); see also Hinds County Sch. Dist. Bd. of Trustees v. R.B. ex rel. D.L.B., 10 So. 3d 387, 400 (Miss. 2008) (while "the requisite amount of due process requires a case-by-case inquiry," an "opportunity for cross-examination may be appropriate . . . in cases where school districts have explicitly provided for this right in their policies and handbooks."). Thus, in addition to the due process violation described earlier, the fact that Weston failed to comply with its own rules upon which Doe had a reasonable expectation to rely was fundamentally unfair.

In addition, the actions of Weston in violating the regulations laid out in its own handbook denied Doe his rights under equal protection, as he was treated differently from other students similarly situated (i.e., others being punished by the Weston Public Schools) because he was denied an opportunity to question and present witnesses as set forth in

Weston's handbook. See Caceres, 440 U.S. 741, 752 (1979) (determining that an individual may have a claim for an equal protection violation based on an agency's failure to follow its own regulations if the inconsistency has some "discernable effect . . . on the action taken by the agency and its treatment of" the individual).

Furthermore, by disregarding the rules outlined in its own policy handbook, Weston's actions were *ultra vires* departures from its authorized functions under M.G.L. c.71, §37H. See Galveston Indep. Sch. Dist. v. Boothe, 590 S.W.2d 553, 556 (Tex. Civ. App. 1979) (striking down an expulsion because the district did not follow its own rules requiring the use of other alternatives prior to resorting to expulsion where a state statute authorized expulsion for violation of school-enacted rules); see also DaLomba's Case, 352 Mass. 598, 603 (Mass. 1967) ("Rules which have been promulgated pursuant to a legislative grant of power generally have the force of law. . . . And whereas they may be properly revoked or amended, they may not be arbitrarily disregarded by individual members of the rule-making body to the prejudice of a party's essential rights.") (internal citation

omitted); Pavadore v. School Committee of Canton, 19 Mass. App. Ct. 943, 943 (Mass. App. 1985) (holding that a school committee was bound by the procedures and rules contained in its "Rules and Regulations" and that a custodian was, therefore, entitled to an appeal of his termination).

CONCLUSION

For the foregoing reasons, the trial court did not abuse its discretion in ordering Weston to reinstate Doe in school. Weston's permanent expulsion of Doe on the basis of a violation of M.G.L. c. 71, § 37H was arbitrary and capricious and therefore not entitled to judicial deference. Standing alone, Doe's silence was not enough to justify expulsion without independent, probative evidence offered against him. Whatever evidence Weston had was insufficient to prove that Doe had engaged in misconduct under the statute. Failure to provide Doe an expulsion hearing, access to the evidence against him, and the opportunity to confront and cross-examine witnesses was also a violation of procedural due process. Moreover, because Weston violated its own policies, the expulsion of Doe violated due process and equal protection and was beyond its authority under the statute. The trial

court's order should, therefore, be affirmed.

Respectfully Submitted,

THE CENTER FOR LAW AND EDUCATION
AND THE CHARLES HAMILTON HOUSTON
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ADDENDUM

Volume II
Pages 1-34

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS (WORCESTER)
CIVIL DOCKET FOR CASE 09-CV-40124

LB,
Plaintiff,
vs

O'CONNELL, ET AL.
Defendants.

JUDGE F. DENNIS SAYLOR, IV
Martin Castles, Clerk

MOTION HEARING
August 6, 2009
Courtroom 2 - Fifth Floor, Worcester, Massachusetts

APPEARANCES:

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On behalf of the Defendants

Diane Hulme, Court Reporter

1 (On the record 10:33 a.m.)

2 THE CLERK: Case No. 09-40124. LB vs. O'Connell.

3 Counsel, please note your appearance for the record.
4 MR. BARANIAK: John Baraniak, from Choate, Hall and
5 Stewart, for the plaintiff LB.
6 THE COURT: Good morning.
7 MS. CHAMPION: Sarah Champion, from Choate, Hall
8 and Steward, for the plaintiff.
9 THE COURT: Good morning.
10 MS. CHOU: Attorney Jenny Chou, from the Center of
11 Law and Education, for the plaintiff.
12 THE COURT: Good morning.
13 MS. KARGER: Joanne Karger, from the Center of Law
14 and Education, for the plaintiff.
15 THE COURT: Good morning.
16 MR. MOORE: David Moore for the defendants.
17 THE COURT: Good morning.
18 MS. McGUIGGAN: Good morning, Your Honor. Janet
19 McGuiggan for the defendants.
20 THE COURT: Good morning. All right. Thank you
21 for your patience and in coming back here for a second
22 day. The purpose of this is for me to render my
23 decision on plaintiff's motion for a preliminary
24 injunction.
25 To cut to the chase, for the reasons that I will

3

1 explain, I conclude that a preliminary injunction
2 should issue permitting the plaintiff to attend school
3 in September, that is not, of course, a final decision
4 on the merits. As always, preliminary injunctions are
5 issued or denied on somewhat incomplete records and
6 with legal issues framed somewhat in haste.
7 The standard for issuing a preliminary injunction,

8 as counsel is well aware, is four parts: The moving
9 party must show a substantial likelihood of success on
10 the merits; that the party will suffer immediate
11 irreparable harm if the injunction is not issued; that
12 the balance of harms favors issuance of the injunction;
13 and that the public interest was found adversely
14 effected. This case was submitted on verified
15 complaint with affidavits and exhibits and briefing and
16 oral arguments. No parties sought any evidentiary
17 hearing.
18 Let me, again, emphasize, as I did yesterday, that
19 it's emphatically not the role of the federal court to
20 run the Worcester Schools. It is not my role to simply
21 second guess school administrators. And I don't get to
22 change the decision of school administrators, simply,
23 because they may have been unwise or less than
24 compassionate or even foolish.
25 I am not an educator, obviously. I don't work in

4

1 the schools. And I certainly strongly respect the
2 notion that violence in schools or the threat of
3 violence in schools is an extremely serious issue.
4 And, again, as I said yesterday, that schools have
5 the right to be concerned, to take action, to adopt
6 strict rules, and to enforce those rules strictly.
7 And, again, I don't think there's any question, at all,
8 that if the student brought the knife to school that
9 this would be a very different case, in deed.
10 And I also note that this does not involve an
11 academic decision but a disciplinary one, and obviously

12 the Court needs to be even more differential to
13 decisions that involve academics.
14 Let me touch on the facts quickly. The plaintiff
15 is a fourteen year old. His mother does not speak
16 English. I understand he is Hispanic. He was enrolled
17 in the eighth grade at Forest Grove Middle School in
18 Worcester, last February. He was on the honor role,
19 based on his grades, and was enrolled in several honor
20 role courses. And he was, I don't think it's disputed,
21 a student with no prior disciplinary history, with
22 commendations from his teacher for classroom behavior
23 and achievement.
24 On the morning of February the 12th, he was in his
25 gym class when a student identified as "R" approached

5

1 him and told him he was afraid because another student
2 identified as "C" had threatened both "R" and another
3 student identified as "J" with a knife and a cigarette
4 lighter.
5 According to "R", or at least as relayed to LB, "C"
6 had held the knife to his chest and threatened him,
7 said he was going to kill him, and he also threatened
8 to burn him with the lighter -- I'm sorry, threatened
9 "J" with the lighter.
10 "R" told LB, the plaintiff, about the threats. "R"
11 said that he was going to report "C" to a school
12 administrator after gym class. LB agreed or encouraged
13 "R" to do so. And according to LB, he thought that "R"
14 should be the one who report the incidents, since he
15 was the one who witnessed it and was affected by it.
16 Without "R's" knowledge, LB confronted "C",

17 demanded that he give him the knife and the lighter.
18 "C" complied and turned both items over to him. The
19 knife was a switchblade knife with a two-inch blade.
20 According to LB, his purpose was to remove the threat
21 and to prevent "C" from following through from making
22 good on his threat to harm "R" and/or "J".
23 LB took the knife and put it in his wallet and put
24 both the wallet and the lighter in his pocket.
25 According to LB, he did so with the knowledge that "R"

1 was planning to tell administrators about the
2 situation. And that, according to LB, he intended at
3 the time and understood that he would be required to
4 turn those items over to school officials, once "R"
5 made threat and the presence of the items known, and
6 that LB had no intent other then to be a temporary
7 custodian, so to speak, of the knife and the lighter
8 until "R" had informed administration and that he could
9 turn the items over.
10 There was a delay in "R" telling the administrator,
11 apparently. He was told by his teacher, in his next
12 class period, to wait until the end of the period to
13 talk to the administrator. "R" apparently was not
14 aware that LB had taken the items. "R" went and found
15 Assistant Principal, Mark Williams, he told him of the
16 situation and the threat. Williams confronted "C".
17 It's not entirely clear on what happened there.
18 "C" apparently said, at some point, that he and LB
19 had agreed that he would tell the school administrators
20 that he had thrown the knife in the woods. It's not

21 clear in what order he told the information to
22 Williams, but there is evidence in the record that
23 there was at least some search conducted by teachers or
24 administrators in the woods for the knife. But in all
25 events, "C" ultimately confessed the incident and told

1 Williams what LB had taken the knife and lighter away
2 from him.
3 Williams found LB in the cafeteria eating lunch,
4 asked him if he had the knife and the lighter, and LB
5 produced them promptly and turned them over and told
6 Williams that he had taken the items from "C", in order
7 to prevent him from carrying out the threats.
8 About two hours had elapsed between the time that
9 LB took the knife and the lighter and the time he
10 turned them over to Williams. During that time period,
11 it was part of a gym class, part of another class, I
12 believe it was English, and part of the lunch period.
13 There was testimony ultimately at the superintendent's
14 hearing that LB did not feel comfortable talking to his
15 teacher, because he didn't think the teacher would
16 handle it right.
17 LB was asked by his sister why he did not feel
18 comfortable and responded somewhat ambiguously, "All
19 they do is tell you; they don't show you." And, I
20 believe, it was "R" who testified that he knew LB would
21 watch his back and make sure that nothing would happen
22 to him.
23 LB did not threaten anyone with either the knife or
24 the lighter. In fact, LB did not tell anyone,
25 including "R" or "J", that he had taken the items. He

1 never brandished the items. He never showed them to
2 anyone and kept them in his pocket during the two
3 periods.
4 LB was suspended from school, initially for ten
5 days, beginning on February the 13th. The school sent
6 a letter to LB's mother notifying her of a violation, a
7 possible violation of Rule 7, of the Worcester Public
8 Schools' policy, on possession and/or use of weapons,
9 and that a hearing would be held on February 25th.
10 That hearing was, in fact, held.
11 Assistant Principal Williams read the selected
12 excerpts of the written statement given by LB and the
13 entire written statement given by "C", both of which
14 were taken on the day of the incident. LB says that he
15 was not aware that there were written statements of
16 "C", "R", or "J", and that he did not have and was not
17 permitted to obtain or read any of those written
18 statements, including his own written statements.
19 According to LB, he requested the right to call
20 witnesses and confront and cross-examine them,
21 specifically "C", "R", and "J". And, again, according
22 to LB, school officials denied the request and
23 indicated that only LB and his family would be
24 permitted at the hearing. At this point, counsel had
25 not been engaged.

1 The Worcester Public Schools' handbook does
2 indicate that at such a hearing before a principal that

3 the student has the right to be represented by counsel
4 or an advocate, which was not then implicated, at least
5 not in the sense of legal counsel, and that the student
6 has the right to present witnesses and to cross-examine
7 witnesses.
8 The principal of the school, Maureen McCullough,
9 issued a decision that day suspending LB from school
10 for an entire year, from March 9th, 2009, through March
11 9th, 2010, and made various findings of fact. LB
12 appealed that decision to the superintendent of schools
13 pursuant to the handbook of the school and Chapter 71,
14 Section 37H of the Massachusetts General Laws.
15 There was a hearing held on March 11th, 2009.
16 Robert Pezella the Executive Assistant of the
17 Superintendent of the School Safety and Violence
18 Prevention presided. There was an interim
19 superintendent at that point Deidre Loughlin -- or
20 Loughlin, she was not present. By that point, LB and
21 his family had secured legal counsel. The attorney was
22 not able to attend on March 11th.
23 LB's sister requested from a superintendent's
24 office, on several occasions, that the hearing be
25 rescheduled so that the counsel could be present.

10

1 According to LB, Mr. Pezella denied those requests.
2 Pezella submitted an affidavit indicating that the
3 request was never made, and it's not clear whether
4 Pezella was aware that the request was made.
5 In any event, at the March 11th hearing, LB
6 requested that witnesses be present so he could
7 confront and cross-examine them. According to LB, that

8 was denied. It's not disputed that "C" was not
9 present. "R" did come to the hearing. And "R" did, in
10 fact, testify. And LB, again, was not given his own
11 written statements or written statements of "C", "J",
12 or "R".
13 Mr. Pezella upheld the long-term suspension and
14 signed the decision for the interim superintendent, and
15 Ms. Loughlin did not participate in the decision. The
16 Worcester School System offered LB the option of
17 enrolling in the Woodward Day School during the period
18 of his suspension. The Woodward School is apparently
19 operated by the Central Massachusetts Special Education
20 Collaborative. It's operated for students who have
21 been suspended or expelled from public school or have a
22 pending felony charge against them.
23 According to LB, Woodward does not have honors
24 level classes comparable to those at the Worcester
25 Middle School that he attended or where he would attend

11

1 as a freshman in high school, in ninth grade. And LB
2 contends that it is not a safe learning environment,
3 due to the presence of students with significant and
4 serious disciplinary issues.
5 LB's mother or parents requested that he be home
6 schooled primarily by his sister, who is a student at
7 the University of Massachusetts in Amherst. The school
8 system agreed, and home schooling apparently is how the
9 defendant finished out the 2008, 2009 academic year.
10 Again, that's a brief sketch of the facts, primarily
11 for purposes of background.

12 The first element that the plaintiff must establish
13 is likelihood of success on the merits. Plaintiff
14 filed a multiple count verified complaint asserting
15 various federal and state law theories. Plaintiff
16 claims a violation of substantive due process,
17 procedural due process, and equal protection under the
18 Federal Constitution, and similar claims under the
19 Massachusetts Constitution, which I understand it for
20 these purposes are essentially identical.
21 There is a claim for violation of Chapter 71,
22 Section 37H of the Massachusetts Law. A claim under
23 the Massachusetts Constitution for a violation of the
24 right to education, and a claim alleging violation of
25 school rules, which it's unclear of whether that claim

1 sounds in breach of contract or tort or some other
2 theory.
3 I do not reach the equal protection claim, the
4 right to education claim or the violation of school
5 rules claim for the reasons I will indicate. And my
6 decision is based on substantive due process,
7 procedural due process, and to some extent Chapter 71,
8 Section 37H.
9 Let me turn first to the substantive due process
10 claim. This standard has been formulated in multiple
11 ways. But in this context, it appears that the
12 standard is whether the school's decision bears no
13 rational relationship to legitimate state eunuchism,
14 that is, whether there is no rational relationship
15 between the punishment and the offense.
16 And in my view, in this specific context, the

17 answer to that question turns on whether this was a
18 zero tolerance policy applied without regard to the
19 state of mind of the student. And for authority, I
20 cite Seal v. Morgan, S-e-a-l, 229 F.3d 567 (6th Circuit
21 2000).
22 There is ample confusion and doubt as to whether or
23 not this was a zero tolerance policy or not. I will
24 assume for these purposes that it was and then examine
25 the question of what the result is if it's not.

1 In terms of the evidence that this was a zero
2 tolerance policy, that is, that this state of mind in
3 this student does not matter, certainly counsel for the
4 city, for the school, argued that nothing mattered
5 other than the fact of possession, that is, once the
6 plaintiff acknowledged that he had a knife and had it
7 in his possession that what happened at these
8 disciplinary hearings before the principal and the
9 assistant superintendent was irrelevant. In other
10 words, the plaintiff's reason for possessing the knife,
11 his purpose, his intent, his state of mind, his
12 saintlier, however you want to frame it, is not
13 relevant; therefore, the fact that this student says
14 that he only maintained the custody of the knife
15 temporarily to protect his friend, and disarm the
16 aggressor, and in order to give his friend an
17 opportunity to report the incident, and that he
18 intended to turn it over to the school at an
19 appropriate time, according to this argument, even if
20 those facts are true, they're not relevant.

21 I ask the hypothetical during oral argument: If
22 the plaintiff had taken the knife away from "C" in the
23 gym, in the midst of a fight, or to remove an immediate
24 threat to his friend, and if he immediately turned it
25 over to the teacher, whether that would violate the

1 policy, and the answer was no. And I'll return to that
2 point in a moment.
3 But to illustrate this issue, we can spin this out
4 somewhat. If plaintiff took the knife from the gym and
5 walked down the hallway looking for a teacher and was
6 stopped with the knife, it might violate the policy, it
7 might not. If he continued to walk to the front office
8 looking for the principal, it might violate the policy.
9 Again, the knife is still in his pocket during this
10 time.
11 If the principal were not available, if he waited
12 for principal, because he was in a meeting or
13 unavailable, and he sat there for two hours, sitting
14 outside the office, and the knife had been discovered
15 in his pocket, would the same result obtain?
16 If he became frustrated with the way he had decided
17 to attend the class and to try again and was found with
18 the knife in his pocket, would a different result
19 obtain?
20 As near as I can make out, according to the
21 position taken by the school, the answer is: It would
22 be the same result in all those scenarios that if he
23 had the knife in his pocket and that violates the
24 school weapons policy and the fact that his intent may
25 have been innocent is not relevant.

15

1 As an aside this stated goal, according to the
2 school or to the city, is not punishment but safety,
3 that does not, I think, add to the rationality of the
4 zero tolerance policy. It means everyone receives the
5 same consequence, both the egregiously guilty and the
6 incident. And it means that the school effectively
7 ignores the consequence to the student or the nature of
8 the student in addition to the intention of the
9 student.
10 And, in any event, I think it's merely semantics.
11 This is a punishment, and a pretty severe one, whether
12 it's solely built up or not. But, in any event,
13 normally in the law, to possess something means
14 something other than holding it in your hand. To use a
15 simple example, DEA agents seize drugs every day but
16 they don't possess them illegally, because they don't
17 have the requisite degree of intent. And normally a
18 person's state of mind is highly unrelevant.
19 Again, here, the fact that LB's idea may have been
20 a bad one, that is, his decision to wait for events to
21 play out rather than turning it in immediately may have
22 been bad judgement or a bad call under the
23 circumstances but is not necessarily reflected for a
24 guilty intent.
25 Furthermore, the best evidence that the school

16

1 imposed a de facto zero tolerance policy, regardless of
2 what the policy actually says, is that LB and "C"

3 receive the same punishment. "C" brought the weapon to
4 school. He allegedly used it to threaten someone. The
5 plaintiff took it from him. Did not show it to anyone.
6 Did not brandish it. Did not threaten anyone. Again,
7 apparently intended to turn it over.
8 "C's" behavior by any rational measure is many
9 worse a magnitude worse in terms of danger to others,
10 in terms of safety, or the threat to safety in the
11 school, in terms of behavior or morality. It's much,
12 much, much worse. "C" created the situation. "C"
13 created the danger. And yet they were treated exactly
14 the same. And it's hard to say that that is a rational
15 outcome.
16 So, again, all of that assumes that this was, in
17 fact, a de facto zero tolerance policy in which the
18 student's intent is irrational. The school's position
19 is somewhat schizophrenic. And, in fact, there is
20 evidence that the plaintiff's state of mind did, in
21 fact, matter. There are multiple references in the
22 record to the fact that the plaintiff did not turn over
23 the knife voluntarily and that that was a factor. In
24 fact, in the findings of fact made by Principal
25 McCullough, she specifically noted that the plaintiff

17

1 did not voluntarily turn over the items, that is, the
2 knife and the lighter.
3 The school cited the fact that there had been this
4 wild goose chase of looking for the knife in the woods.
5 The obvious implication is that the plaintiff was not
6 telling the truth, was part of a coverup, did not
7 intend to play it straight with school administrators,

8 and that well may have affected the consequence.

9 There is evidence that the school was effected by
10 the fact that the plaintiff kept the knife for two
11 hours. Again, Principal McCullough indicated that the
12 plaintiff had sufficient time to turn them into a
13 teacher or administrator, after he took them from a
14 friend; and therefore, the amount of time matters. It
15 can only matter if it affects his mental state or
16 intent, because otherwise holding the knife briefly, or
17 holding it for two hours will result in the same
18 consequence.

19 In the brief in opposition, the school indicated
20 that a portion of the superintendent's hearing, as
21 well, focused on the reasons that LB did not turn the
22 weapons over to school officials immediately after he
23 acquired them. And then, again, in my hypothetical,
24 during oral argument yesterday, counsel for school
25 acknowledged that if the plaintiff had taken the knife

18

1 away and immediately handed it over that no consequence
2 would follow.

3 All of that suggests that the length of time that
4 he possessed it and the purpose for which he possessed
5 it and his intents and his state of mind actually
6 mattered. If his state of mind matters, if his purpose
7 and intentions matter, if his credibility matters, then
8 what happened at the hearings mattered. And something
9 other than the mere fact of possession may have
10 effected the result. And the way the hearings were
11 conducted and whether they were fair and purported with

12 due process in the state law and the school policy
13 mattered if the plaintiff's state of mind matters.
14 Again, to frame it somewhat differently, if the
15 school system actually looks at the specific individual
16 facts and circumstances and considers the state of mind
17 of the student and makes its best judgments under the
18 circumstances, taking into account all of the facts
19 including, of course, the need to protect the students
20 in the school and to promote safety, but also taking
21 into account the consequence to the student and the
22 degree of innocence or guilt, that would satisfy due
23 process, substantive due process.
24 But procedural due process now matters. In other
25 words, the school says -- if the school had said, We

1 looked at the facts. We considered your intentions.
2 We think you exercised bad judgment. It was not as bad
3 as bringing the knife to school, of course, but you
4 exercised bad judgement nonetheless. That would
5 satisfy substantive due process, assuming that there
6 was a rational connection. So, if the hearing matters,
7 procedural due process matters.
8 And let me turn now to procedural due process.
9 There is intertwined with this a statutory right under
10 Chapter 71, Section 37H that is also implicated under
11 the statute that plaintiff had the right to be notified
12 in writing of an opportunity for a hearing, that
13 appears to have been satisfied. A right to
14 representation, which I'll get to in a moment. I'll
15 treat that factor and the similar factor of the
16 procedural due process at the same time, and the

17 opportunity to present evidence and witnesses, again,
18 which I'll treat simultaneously with the constitutional
19 requirements.
20 The procedural requirements, procedural due process
21 requirements are set forth originally in Goss v. Lopez,
22 a supreme court case. They are less clearly delineated
23 perhaps then they might be, according to the Gorman
24 case in the first circuit interpreting Goss. The Court
25 is required to balance the private interest at stake,

1 the risk of erroneous deprivation in probable value of
2 the issue of safeguards and the state's interest,
3 including the administrative and financial burden at
4 issue. To put it in simple terms, it's something of a
5 sliding scale.
6 Goss v. Lopez addressed specifically what was
7 required for a suspension of ten days or fewer. And as
8 the stakes get higher, more process is required. For
9 these purposes, the relevant rights, I think, are the
10 right to an explanation of the evidence against this
11 student, which where Goss is required, even for a
12 suspension of only ten days, the opportunity to present
13 his side of the story, the opportunity to confront and
14 cross-examine witnesses, and the opportunity to obtain
15 an assistance of counsel. More may be required, but in
16 this context this is what is disputed.
17 Here the student's interest given that it was a
18 one-year suspension and a possible expulsion is
19 obviously very strong. The student has an extremely
20 strong interest in continuing his education and not

21 being suspended or expelled from school for a period of
22 a year. The risk of erroneous deprivation is
23 relatively high, depending on the level of safeguards.
24 There's nothing unusual about the safeguards that we're
25 discussing here. They are basic to an adversary

1 proceeding.
2 And in terms of the administrative and fiscal
3 burdens of additional safeguards, at least in this
4 context, they appear to be relatively minimal. There
5 was no risk of intimidation of witnesses or other
6 danger to the community. If the witness statements
7 were given, or if witnesses were required to appear at
8 the hearing, photocopying of written statements would
9 be a minimal cost and burden. Securing witnesses
10 attendance and permitting cross-examination does, of
11 course, add to the formality and length and complexity
12 of the hearing. But, again, in this context it's
13 greatly outweighed by the likelihood, the stronger
14 likelihood, the truth will emerge.
15 In terms of the plaintiff's ability to see the
16 witness statements prior to the hearing and including
17 his own statement, I find that the school's actions
18 were inconsistent with the requirement in Goss that the
19 student had an explanation of the evidence against him.
20 Again, in other context it may not be the requirement
21 that the actual written statements be provided. But,
22 again, given the very high stakes here, due process did
23 require production of those statements. At a bare
24 minimum, to be able to defend a serious charge against
25 you, you need to understand what is being said about

1 you, and to be able to rebut it. And the school, in
2 fact, has not attempted to provide written statements
3 to the plaintiff. They indicate only that it did not
4 matter under the circumstances.
5 I'd also find that "C", "R", and "J" should have
6 been present at the hearing, before the principal, that
7 the defendant -- or the plaintiff rather should have
8 had the opportunity to confront and cross-examine them.
9 What instead was done was a written statement by "C"
10 was read, that, of course, is hearsay, which is not
11 prohibited per se, but certainly a cause for concern
12 when the hearsay involves a critical or essential facts
13 that are in dispute in the particular proceeding. It's
14 true that "R" came to the hearing before the executive
15 assistant and the superintendent, that does mitigate
16 the impact somewhat of the hearing before the principal
17 but not entirely.
18 The third issue after the written statements and
19 the right to confront and cross-examine the witnesses
20 is the availability of counsel. I am less moved by his
21 argument, although I think clearly that right was
22 somewhat impaired. Again, the evidence is that the
23 sister called and asked that the proceeding be moved to
24 accommodate the lawyer, and was not. Mr. Pezella's
25 affidavit did not deny what she said. It simply

1 indicated that he was unaware that they were seeking
2 legal counsel. I'm paraphrasing, but that was the

3 implication of it. It would have been strongly
4 preferable, of course, to accommodate counsel for the
5 family, but I'm not prepared to say that standing alone
6 that that violated due process or his statutory right
7 to counsel in this context, but certainly it was part
8 of the mix.
9 The proceedings would have been fair had counsel
10 been permitted to participate in the proceeding, I
11 should say, because only the superintendent's hearing
12 is implicated. Counsel, of course, not only can
13 develop facts, and certainly they are more capable of
14 that than a normal fourteen-year old boy, but also
15 counsel, of course, can persuade as well.
16 I pause to emphasize and to state the obvious. The
17 school is not required to provide the full panoply of
18 the protections available in a criminal trial. The
19 proceedings, of course, may be substantially more
20 informal, including such matters as introduction of
21 hearsay evidence. But, again, as the stakes get
22 higher, the need for safeguards and protection
23 increases. And the stakes in this case were relatively
24 high.
25 So, for those reasons, I conclude that plaintiff

24

1 has established a substantial likelihood of success on
2 the merits as to procedural due process violations, as
3 well as a violation of Chapter 71, Section 37H, in so
4 far as it requires an opportunity to present evidence
5 and witnesses to recap if this was, in fact, a de facto
6 zero tolerance policy in which the mental state of the
7 plaintiff was irrelevant, as long as he had the knife

8 in his possession, even if his intent was clearly
9 innocent. It is not rationally related to a legitimate
10 governmental interest and therefore violates
11 substantive due process.
12 If this is, in fact, not a zero tolerance policy
13 and the consequences to the plaintiff turned on factual
14 findings at hearing, such that the plaintiff's state of
15 mind, intentions and credibility matter, then the
16 hearing had to purport with procedural due process in
17 Chapter 71, Section 37H, and it did not principally
18 because the school did not provide plaintiff with
19 copies of the written witness statements including his
20 own, and did not permit plaintiff to call, confront or
21 cross-examine witnesses.
22 As an aside I do not find that Section 37HD was
23 violated. There is no right to a hearing before the
24 superintendent, as I read the statute, when the harm is
25 a suspension as opposed to an expulsion. And I do not

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1 find that the school policy was violated or the statute
2 violated by having the executive assistant conduct the
3 hearing. Again, this is entirely irrational,
4 inappropriate, and certainly the superintendent of the
5 Worcester Schools System does not need to be engaged
6 full time in presiding over evidentiary hearings.
7 I also find, for these purposes and for what it's
8 worth, that this was, in fact, a suspension for one
9 year, despite the offer of alternate schooling at the
10 Woodward year. It certainly, in all respects, had the
11 same effect as a suspension.

12 So, again, on a limited record, and with the usual
13 caveats that come with a hearing on motion for
14 preliminary injunction, I conclude that the plaintiff
15 has shown a substantial likelihood of success on the
16 merits on at least some of his claims.
17 In terms of the irrevocable harm factor, I have no
18 trouble whatsoever concluding that the plaintiff has
19 established immediate irrevocable harm. His ongoing
20 education in eighth and ninth grade has been seriously
21 effected. He will have different educational
22 opportunities, as well as a different level of safety
23 at the Woodward School or through home schooling, not
24 safety obviously with home schooling, but home
25 schooling by a nineteen-year old sister is in no way a

1 substitute for taking an honors class at high school.
2 His future educational opportunities are obviously
3 effected. Colleges will undoubtedly care about this
4 episode, as they're considering his applications for
5 admission. And, of course, he has a strong
6 reputational interest.
7 For similar reasons, I find that the balance of
8 harms are favorite issuance of the injunction. The
9 harm to the student is relatively extreme. I see no
10 realistic threat to school safety if he is readmitted
11 under the circumstances. Again, he did not bring the
12 knife to school. And I do not see that issuance of the
13 injunction underminds the viability of the Worcester
14 Schools' weapons policy. Similarly, the public
15 interest does not weigh against issuance of the
16 injunction.

17 Again, the school argues that this would create
18 wide-spread doubt about the viability of the policy, I
19 disagree. First off, I don't think anyone looking at
20 this situation, or my ruling, would conclude that the
21 Worcester School System is tolerant of weapons in the
22 schools. And the policy itself is really not subject
23 to serious challenge here.
24 So for those reasons, I concluded that the
25 preliminary injunction should issue. I think the

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1 simplest injunction is the preferable one, and that
2 would be an injunction ordering that he be readmitted
3 so that he can begin the school year on September the
4 2nd, that his disciplinary record be expunged, and that
5 he receive whatever tutoring is necessary to insure
6 that he is not behind his classmates as school starts.
7 My understanding is that because he would be moving
8 from eighth to ninth grade that he would be starting a
9 high school. It's not clear to me. I couldn't tell
10 that the high school principal is a defendant here.
11 The middle school principal is. And I think the
12 sensible thing is simply to issue the injunction as to
13 the superintendent of the Worcester Schools. I don't
14 see any reason why the school committee or any other
15 administrators need to be enjoined, although I will
16 need to hear from counsel, if you think I have that
17 wrong.
18 And, finally, under normal circumstances, certainly
19 Rule 65 requires that a preliminary injunction may only
20 issue upon issuance of a bond. It's not clear to me

21 that a bond is appropriate here. I would imagine that
22 the student is either indigent or not very wealthy, but
23 I think that matter needs to be addressed as well.
24 So that is my ruling. I will issue a written
25 preliminary injunction order. It's not my intention to

1 issue a written opinion given the timetable here. I
2 want to make sure the school has an adequate
3 opportunity to appeal before the school year starts and
4 a written opinion will simply slow that process down.
5 THE COURT: Mr. Baraniak, let me ask you about,
6 first, the bond. How do you propose to handle that?
7 MR. BARANIAK: My client is indigent, Your Honor,
8 so I don't know if the Worcester Schools are going to
9 require one, but I don't think so.
10 THE COURT: Mr. Moore, will the defendants waive
11 the prep of a bond?
12 MR. MOORE: Your Honor, yes, we waive the bond
13 issuance.
14 THE COURT: Is there any request for clarification
15 or further findings, anything from the plaintiff?
16 MR. BARANIAK: No.
17 THE COURT: Anything from the defendant?
18 MR. MOORE: Your Honor, the point of clarification
19 is the expunging of the records. Is your order saying
20 that the entire disciplinary proceeding being expunged
21 from the school records?
22 THE COURT: Well, it's a fair question. Let me ask
23 plaintiffs. And let me add it as a maside, it's
24 populist for me that there's going to be behavioral
25 irrevocable harm yet due that. In other words, if

1 that's an issue, that can be considered in due course.
2 But let me hear from the plaintiff as to that issue.
3 MR. BARANIAK: Clearly, we obviously ask for his
4 entire record to be expunged. It's hard to know how to
5 partially expunge it. I don't know how you can do that
6 without the harm that he shouldn't have suffered. I
7 mean, if you wanted to recreate the record and say, You
8 should be suspended for one day, perhaps two. Maybe
9 you're right, we don't have to decide that right at
10 this second.
11 THE COURT: I mean, one of the things I suppose --
12 I'm thinking out loud here -- is the school decides
13 what we are going to do is reduce this to time served,
14 so to speak, and move forward, and really the only
15 issue remaining is the record, and at that point it's
16 quite a different case.
17 Why don't we do this: I'm going to, for the time
18 being, make no finding, condition or injunction on
19 expunging of the record. Let's take that up in due
20 course. I think it's certainly an issue that needs to
21 be addressed. I don't think he's applying for colleges
22 yet.
23 MR. BARANIAK: That's correct.
24 THE COURT: I think some time and thought will
25 produce a materially more intelligent result. So let

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1 me modify on the injunction, again, to just address the
2 admission of school and the tutoring, and we'll leave

3 the record aside from the tending. Does that answer
4 your question, Mr. Moore?
5 MR. MOORE: Yes, it does. Thank you.
6 THE COURT: All right. Remind me procedurally
7 where we stand. This order is appealable. It's
8 something I intended to be appealable. Normally,
9 preliminary injunctions may be appealed.
10 Have the defendants answered to the complaint or
11 moved to dismiss? I don't think they have. Is that
12 right?
13 MR. MOORE: No, we have not. We've accepted
14 service for purposes of the injunction hearing, but
15 there's still that process that needs to go through the
16 loop, the waiver of the individual service. Certainly,
17 the current superintendent is aware of these
18 proceedings.
19 THE COURT: Why don't we do this: I think what I
20 would like to do is set it for a further status
21 conference and allow some time for service of process
22 to decide what it is you are going to do in terms of
23 appeal and responding to this. I would like to put
24 this case on the fast track, to the extent it's here,
25 conduct discovery and so forth. And I don't want this

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1 to linger too long.
2 I also suspect, as in the defendant's Footnote 1 to
3 their memo indicates, I think there's many more
4 defendants here than probably are necessary, and
5 perhaps that can be worked out by agreement so that we
6 can focus on really who ought to be the defendant here
7 and not necessarily complicate this. But that's simply

8 an instinct. I'll leave that up to the parties to
9 think through, obviously, it's your own case. There
10 well may be reasons. I'm not thinking of why these
11 people need to be defendants.
12 So what I would propose is: I'm going to be gone
13 for some period in August, and, I guess, what I would
14 propose is that we set up for a status conference after
15 Labor Day, and then the parties can request an earlier
16 status conference, if you think that would be
17 desirable. In other words, you can go back and think
18 about it and contact Mr. Castles. And if you think I
19 need to see you before September 2nd, we can do that.
20 Would that work Mr. Moore?
21 MR. MOORE: Yes, it would.
22 THE COURT: Okay. Let's set it then. If nothing
23 else, this will be placed over for the end of the week,
24 after Labor Day, 3:15 on September the 10th for a
25 status conference. And, again, the idea here is to see

1 where we are. You know, we have different scenarios.
2 Maybe the school won't appeal. Maybe they will appeal.
3 And I'll be sustained or upheld. Maybe if they appeal
4 I'll be reversed. Under any of those scenarios, we'll
5 have a lawsuit still. They'll have to have a timetable
6 for discovery, motion practice, and so on. And I would
7 like, again, to reasonably expedite that, and would
8 like the parties to give some thought to where we go
9 from here on how we accomplish in a relatively
10 efficient manner.
11 And, again, just let me speak one more time for the

12 record. It is not in the slightest my intention to
13 suggest that I think knives at school are a good idea.
14 But I intend to undermine the weapons policies of the
15 Worcester Schools, or any schools in Massachusetts, or
16 that I think LB exercised perfect or even very good
17 judgment. But -- well, I said what I need to say in
18 that regard. Mr. Moore?
19 MR. MOORE: Your Honor, if I could have one more
20 point of clarification on the injunction. Am I to
21 understand your ruling as precluding the exercise of a
22 subsequent hearing to hear the procedural due process
23 defects and the resulting of the due process finding?
24 THE COURT: Right now that is not precluded. I
25 thought about that. I can't simply remand something

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1 the way I would remand it for a federal agency, if the
2 school decides to go ahead and have another hearing and
3 we wind up with the same result. I don't know whether
4 you can do that. I don't know what that implicates.
5 But right now it's not barred by injunction, except my
6 injunction will require that he be attending school on
7 September 2nd.
8 I'm not precluding you from holding a hearing.
9 Although if, you know, the plaintiff wants to try to
10 enjoin it, I'll listen to what you say. I simply don't
11 know the answer to that, but it's not precluded by my
12 injunction.
13 MR. MOORE: Thank you.
14 THE COURT: Provided that he begin school on
15 September the 2nd.
16 And, again, if developments change, and you want to

17 be heard, contact Mr. Castles, and I'll see you as
18 quickly as I can.
19 All right. Anything further from the plaintiffs?
20 MR. BARANIAK: No, Your Honor.
21 THE COURT: Anything further from Mr. Moore?
22 MR. MOORE: No, Your Honor.
23 THE COURT: All right. Thank you. This was very
24 well briefed on short notice and I appreciate that.
25 (Off the record at 11:23 a.m.)

1 CERTIFICATE

2 I, Diane Hulme, a Court Reporter, do hereby certify that the foregoing is a true and accurate transcript
3 from the record of the court proceedings in the above entitled matter.
4
I, Diane Hulme, further certify that the foregoing is
5 in compliance with the Administrative Office of the Trial Court Directive on Transcript Format.
6
I, Diane Hulme, further certify that I neither am
7 counsel for, related to, nor employed by any of the parties to the action in which this hearing was taken,
8 and further that I am not financially nor otherwise interested in the outcome of the action.
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10
(Signature)
11 Name of the Court Reporter
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17 E-Mail Address
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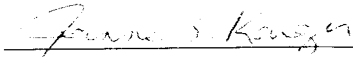
MASSACHUSETTS RULES OF APPELLATE PROCEDURE

Certificate of Compliance

I, Joanne S. Karger, hereby certify that the foregoing brief complies with the rules of court pertaining to the filing of briefs including, but not limited to, Rules 16, 17, and 20 of the Massachusetts Rules of Appellate Procedure.



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Dated: March 31, 2011

CERTIFICATE OF SERVICE

I, Joanne S. Karger, hereby certify under the penalties of perjury, that I have made service, on this date, two copies of the following documents:

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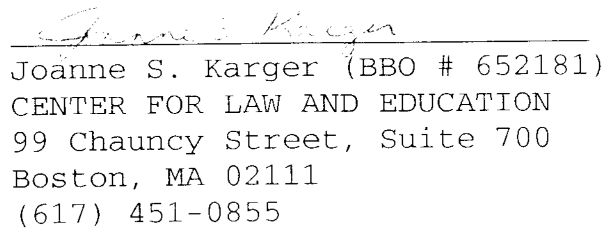

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