

**Testimony of Phillip Kassel to the Joint Committee on Education of the Massachusetts
General Court Regarding H 3435:
An Act to Help Students Stay in School**

I am an attorney for people who have legal needs and cannot afford a lawyer, and have served in this capacity for 30 years. I am currently the Advocacy Director of South Coastal Counties Legal Services, which provides legal assistance to the poor in the southeast portion of our Commonwealth. I oversee SCCLS' education advocacy throughout the region and am one of the principal authors of H 3435. I would like to address the necessity for legislative reform in the area of school discipline and the appropriateness of the bill's strategy of enhancing procedural protections against arbitrariness to promote accountability and keep students in school.¹

H 3435 is remedial legislation. It is designed to address a serious problem that emerged as a consequence of school reform legislation enacted in 1993. Disciplinary provisions that were part of the school reform package were originally intended to give public school principals the authority to protect students and staff from those few youth who threaten school safety. Instead, these provisions gave rise to so-called "zero tolerance" policies that often result in the long-term or even permanent exclusion of students whose conduct cannot reasonably be described as seriously threatening.² It is time for the General Court to ask school districts: "Zero tolerance for *what?*"

The notion that school administrators should have no patience for violence and drugs in schools has morphed into blanket permission to utilize nearly unreviewable discretion to damage kids lives for reasons that often do not relate to school safety.³ Certainly, some school disciplinarians use their powers judiciously. But advocates statewide believe that suspension upon the charge of a "felony," for example, is nearly automatic.⁴ Indefinite exclusion is often imposed when the crime is not violent or particularly serious or where there is no nexus between the conduct and school.⁵ According to the Department of Elementary and Secondary Education, the power to suspend and expel for out-of-school criminal conduct was "motivated by the perceived need to exclude several students charged with or convicted of serious violent felonies."⁶ Given this history, the DESE advises schools to "reserve the exclusion power for such offenses."⁷ As several of the vetted students' stories attached indicate, this advice is often ignored.

What should the Committee make of such stories? While the data indeed indicates that the use of exclusionary discipline is widespread,⁸ how is the Committee to know if this is indicative of a failure to respond proportionately and appropriately to minor transgressions, or if it demonstrates a high incidence of serious misconduct? In other words, how can you know if these stories are aberrational or the norm?

I respectfully suggest that the Committee examine these stories carefully. A single story can say much about what a disciplinarian generally does in the normal course of events.

Take, for example, the story of Carlos and David. Carlos was suspended indefinitely for accidentally, according to the principal's recorded statement at hearing, hitting a teacher with a hard candy he intended to throw to a classmate who asked for a piece. The teacher was not

injured. He assumed the object was a rock, but there was no evidence of this. He applied for a criminal complaint against the student, and subsequently revealed his incorrect assumption, based on no apparent reason other than the student's race, that Carlos was already well-acquainted with the criminal court. He was unconcerned that his actions would cause Carlos to have a criminal record.

We can tell from Carlos' story that this was no aberration.⁹ First, the principal imposed the punishment even though she knew the conduct was accidental. G.L. c. 71, § 37H 1/2 requires that principals specifically find that the student is charged or convicted of a felony (in this case, assault with a "dangerous weapon"),¹⁰ and *also* that the student's presence in school gives rise to a "substantial detriment" to other students and staff.¹¹ Unless the student was repeatedly and wantonly reckless (not the case here), a single accident, whether involving candy or a rock, should not be sufficient to meet this standard.

But the principal found otherwise. She also indefinitely suspended David, Carlos' brother, who carried out his non-English-speaking father's request that he investigate the incident and explain it to him. The teacher alleged he was threatened by David's inquiry and filed yet another criminal complaint for the felony of "intimidating a witness." In both cases, the principal, when confronted with professional advocacy, reduced Carlos' and David's punishments to a face-saving 5 days and one day, respectively. The teacher agreed to withdraw the criminal complaints.

This story speaks volumes. It means that the principal of one of the largest high schools in the Commonwealth believes that it is appropriate to indefinitely exclude a student for accidental conduct.¹² She also believes that a conversation between an English-speaking teacher and a student whose first language is Cape Verdean Creole and who has no history of violence can render a student a "substantial detriment," someone who should be excluded from school indefinitely. If this is how she understands her powers, it does not stand to reason that Carlos and David are the only students who have suffered because of it.¹³

The manner of coming to these expulsion decisions is another clue as to whether the incident is a genuine exemplar of what routinely occurs or is an aberration. The students were suspended without hearing for 15 days. The "suspension notice" they received did not describe the evidence supporting the generally stated charge or the potential outcomes of the hearing, which served primarily as an opportunity for the boys to be harshly lectured and resulted, *pro forma*, in the decision to indefinitely suspend them.¹⁴ The principal did not investigate, make factual findings based on evidence, or otherwise explain why she thought Carlos and David were detrimental to the school. She sent a *form letter* that merely stated her conclusion without providing reasons.¹⁵

By definition, a form letter is used to relieve the sender of the trouble of individualizing correspondence in circumstances that are repetitive. Please note that the attached letter does not even leave space for an explanation of reasons or a statement of facts pertaining to the specific student and incident in question. This indicates clearly that the principal of the school does not believe she needs to explain her reasoning, which is a clear invitation to arbitrariness.

Perhaps the most important aspect of H 3435 is the requirement that disciplinarians state the reasons for their decision in writing and without use of formulaic conclusory language, as is the current practice. Notwithstanding complaints from school administrators that H 3435 would unduly burden them,¹⁶ this is a minimal requirement to achieve even a modest degree of fairness and accountability. The recently released report of the Dropout Commission states this recommendation.¹⁷

The burden argument is otherwise a red herring. The bill, in the proposed new section, G.L. c. 71, § 37H 3/4, requires:

- *Fair notice and a description of students' rights at hearing.* This creates no burden once the form is drafted, as the new notice must merely be substituted for the existing one;
- *A hearing that employs fair procedures* (e.g. reliable evidence; a chance to rebut; a right to an advocate; a record of proceedings, etc.). This is already required under existing law for long-term exclusions. That constitutionally-based legal requirements may be burdensome is no excuse for failing to comply with them;
- *That principals apply a newly articulated standard in determining what constitutes a "substantial detriment" to the school.* This standard is the undefined threshold requirement for exclusion under existing law. While the change would prohibit principals from defining the term themselves, its clarification in law would not create an administrative burden, particularly if the term is reasonably applied at present;
- That principals consider factors that clearly go to the genuine necessity for exclusion (e.g. egregiousness of the conduct and likelihood of replication). Disciplinarians concerned about using long-term exclusion judiciously should be considering these matters already. The requirement that a principal go down a checklist and write a reasoned decision creates no burden that does not already exist for the conscientious disciplinarian.

Due process is a concept that expands and contracts in accordance with what is at stake. The more weighty the deprivation the more protective the procedures. Under current practice, the decision to exclude a student from school long-term is accompanied by less process than, for example, an appeal of a decision to assess a surcharge on a driver's insurance premium.¹⁸ Given the baneful impact on society of excluding students from school and effectively encouraging them to drop out,¹⁹ it is in everyone's interest to minimize the risk of an erroneous decision. H 3435 will help assure that any decision to take the serious and damaging step of removing a student long-term be rigorously justified after careful consideration.

¹ I understand that other witnesses plan to address data and policy supporting the need for reform, the connection between discipline and the drop out problem, and discrimination against minority groups and children with disabilities. I will not touch on these topics in detail or at all.

² I have attached a document compiling student statements about being unreasonably discharged from school. These stories have been vetted by counsel and are consistent with documents in the students' records. Research shows that such stories are not atypical. *See* note 3.

³ The Department of Elementary and Secondary Education, in an advisory entitled: *Structuring Schools for Student Success: A Focus on Discipline and Attendance* ("DESE discipline and attendance policy"), 1991, 12, stated that "upwards of 90% of suspensions are for attendance violations and friction offenses (disrespect, insubordination), actions in which neither people nor property are physically harmed." *See also* Anne Wheelock and Gayle Dorman, *Before It's Too Late: Dropout Prevention in the Middle Grades* ("Wheelock"), 1988, 37 ("suspension is often the official response to school misbehavior," most are for catch-all offense: "school disruption"). The DESE recommends that suspension be used "only for behavior that endangers the school, staff, or students." DESE discipline and attendance policy, 20.

⁴ Well-intentioned administrators sometimes believe that their "hands are tied" and that they *must* exclude students charged or convicted of crimes. A city school superintendent told me, with relief, that since a student's alleged crime classed as a misdemeanor she was not compelled to suspend pending adjudication, as if she *were* compelled if the crime charged was a felony, which is, of course, untrue.

⁵ In apparent recognition of this latter concern, the Dropout Commission, in *Making the Connection: A Report of the Massachusetts Graduation and Dropout Prevention and Recovery Commission* (Oct., 2009), 22, recommended districts "consider critically the nexus between the student's conduct and the school's welfare before making a determination that a student should be excluded."

⁶ *See* the DESE website at <http://www.doe.mass.edu/lawsregs/advisory/discipline/AOSD1.html> # 15. A court decision created the specific impetus for G.L. c. 71 § 37H 1/2. The Appeals Court held that school officials lacked authority to exclude a student notwithstanding that he was charged with a murder that inflamed the school and community. *Petrucelli v. Shawsheen Valley Regional Technical High School*, (Mass. App. No. 93-J-237, April 7, 1993).

⁷ *Id.*

⁸ According to data obtained from the DESE by the Appleseed Foundation, in 2007-2008, school districts in the Commonwealth reported 68,968 incidents of school exclusion for more than one day to the DESE. These incidents involved 35,561 disproportionately poor and minority students. There were 4200 exclusions of longer than 10 days. Since the only incidents reported are those involving students with disabilities or drugs, weapons, and assaults on school staff, even if districts were in full compliance with recently reduced reporting requirements the total number of disciplines reported undoubtedly understates the incidence of suspension and expulsion. And full compliance with these limited requirements is unlikely according to school superintendents themselves. At a recent meeting attended by advocates, several complained of technological problems making reporting difficult and time consuming.

⁹ I have first hand experience with this case.

¹⁰ It is undisputed that the principal violated 37H 1/2 by suspending the student indefinitely upon the teacher's *application* for a complaint under the civilian initiation procedure, as opposed to the *issuance* of the complaint subsequent to demonstrating probable cause at a magistrate's show cause hearing.

¹¹ Such as in the *Petrucelli* case.

¹² Neither boy had any history of serious misconduct, nor was past experience with the brothers cited as a basis for the action against them.

¹³ In fact, according to DESE data provided on line, there were 1506 instances of out-of-school exclusion affecting 35.3% of this high school's population in the 2007-08 school year. The school will be disclosed upon request. *See* data at http://profiles.doe.mass.edu/state_report/indicators.aspx?mode=school&orderBy=.

¹⁴ The notice was vague enough that the boys' father brought Carlos to school believing that the purpose of the meeting was to return Carlos to school. He told us he felt "ambushed" when the principal set up a tape recorder and proceeded to berate Carlos in the ostensible context of a "hearing."

¹⁵ *See* letter attached.

¹⁶ With all due respect to the many dedicated administrators who are a credit to their schools and the Commonwealth, in my 30 years of law practice, including substantial successful institutional advocacy, I

have never heard a governmental official rue his or her discretionary authority or welcome the imposition of limitations on discretion.

¹⁷ See Dropout Commission report, 22.

¹⁸ See 211 CMR 88.06 - 88.09, providing for several levels of review, fair notice, and specifying rigorous procedural rights at hearing.

¹⁹ See Wheelock, 14,15 (students tend to “perceive their suspensions to be a message of rejection” distancing them psychologically from school; exclusion “strongly correlated with early school leaving,” according to research); See also DESE discipline and attendance policy, 6 (research shows that “high absence and suspension rates have a direct correlation to low academic achievement and future decisions to drop out of school.”).