

UNITED STATES DISTRICT COURT  
DISTRICT OF MASSACHUSETTS

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LB, a Minor by his Mother and Next Friend,	)	
VG,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Civil Action No.
	)	
BRIAN A. O'CONNELL, KONSTANTIA B.	)	
LUKES, ROBERT A. BOGIGIAN, JOHN L.	)	
FOLEY, DOROTHY J.G. HARGROVE, JOHN	)	
F. MONFREDO, MARY J. MULLANEY,	)	
MAUREEN McCULLOUGH, ROBERT	)	
PEZZELLA, DR. DEIDRE LOUGHLIN, and	)	
MELINDA J. BOONE,	)	
	)	
Defendants.	)	
	)	
	)	

**MEMORANDUM IN SUPPORT OF  
PLAINTIFF'S MOTION FOR A PRELIMINARY INJUNCTION**

Plaintiff LB, a minor, by and through his mother and next friend, VG, submits this memorandum in support of his motion for a preliminary injunction to be reinstated in the Worcester public school system. Defendants suspended LB from school for over a year based on a zero tolerance weapons policy. In doing so, Defendants deprived LB of his right to a free public education under Massachusetts law in violation of his federal and state Constitutional rights to procedural and substantive due process and equal protection, the procedures mandated by state statute, and Defendants' own hearing procedures.

## FACTS<sup>1</sup>

LB is a 14-year old Latino male. ¶1. On February 12, 2009, LB was enrolled as an eighth grade student at Forest Grove Middle School in Worcester, Massachusetts (the “School”). ¶12. LB was in honors-level English, Math, Science, and World Geography/History classes and was on the School’s honor roll based on his grades. ¶12. On his report card for the first half of eighth grade, his teachers commented that LB had “[e]xcellent classroom behavior,” and that he was an “[o]utstanding achiever” who “[s]hows sincere effort.” ¶1. Prior to February 12, 2009, LB was an exemplary student with no prior disciplinary history. ¶12.

LB is friends with another eighth grade student at the School, R. ¶13. On the morning of February 12, 2009, LB was in gym class when R approached him and told him that he was afraid because a third eighth-grade student, C, had threatened both R and another student, J, with a small pocketknife and a cigarette lighter. ¶13. According to R, C had held a small to his chest and threatened him, saying he was going to kill him. ¶13. C also threatened J with a lighter. ¶13.

When R told LB about these threats, R also told LB that he was going to report C to a school administrator after gym class. ¶14. LB agreed that reporting C was a good idea, and he encouraged R to do so. ¶14. LB believed that because his knowledge of the incident was indirect and second hand, and because R was the one that C had threatened, that R should be the one to report the incident. LB offered to go with R to report the incident. ¶14.

After hearing of these threats, LB was concerned for the safety of his friend and other students. LB sought out and confronted C, asking him why he would threaten R and J. ¶15. LB then demanded that C give him the small pocketknife and lighter. ¶15. C complied. ¶15. In

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<sup>1</sup> “¶” refers to paragraphs from the Verified Complaint filed together with this Motion.

confronting C and confiscating the small pocketknife and lighter, LB's sole purpose was to immediately diffuse a potentially violent and dangerous situation by stopping C from following through on his threats to harm both R and J. ¶16.

Upon confiscating the small pocketknife and lighter from C, LB placed the small pocketknife in his wallet and then put both the wallet and the lighter in his pocket for safekeeping. ¶17. LB did so with the knowledge that R was planning to inform school officials of C's threats and of C's possession of the small pocketknife and lighter. ¶17. LB was also aware that, upon learning of C's threats and the presence of these items in the School, he would be required to turn over those items to school officials. ¶17. It was always LB's intent to be a temporary custodian of the small pocketknife and lighter until R informed a school administrator of the threat and the items could be handed over. ¶18.

R was told by his teacher in the next class to wait until the end of the period to go to talk to the school administrator. ¶19. R, who was unaware that LB had confiscated the items for C, waited and sought out Assistant Principal Mark Williams and informed him of C's threats and of the existence of the small pocketknife and the lighter. ¶19. Upon learning this information, Mr. Williams sought out and confronted C, who ultimately confessed to the incident and stated that LB had taken the small pocketknife and lighter away from him in gym class. ¶20. Mr. Williams then sought out LB, found him in the cafeteria eating lunch, and asked him if he still had the small pocketknife and lighter. ¶21. LB promptly and without any hesitation removed the small pocketknife from his wallet and the lighter from his pocket and handed them over to Mr. Williams, as he had always expected and planned to do. ¶21. In doing so, LB informed Mr. Williams that he had taken the items from C and was temporarily holding them because he was afraid that C would carry out his threats to harm R and J. ¶21.

LB never threatened anyone with either the small pocketknife or the lighter. ¶23. In fact, at no point did LB tell anyone, including either R or J, that he had taken the items away from C or that he was temporarily holding them. ¶22. LB never showed either one of the items to another student or allowed another student access to the items. ¶22.

On the following day, February 13, 2009, after meeting with Mr. Williams, LB was suspended from school for ten days. ¶24.

### **The Suspension Hearing Before Principal Maureen McCullough**

That same day, the School sent by U.S. mail a letter to LB's mother, VG, notifying her that on February 12, 2009, LB had violated Rule 7 of the Worcester Public Schools Policy, which prohibits students from possessing weapons on school property.<sup>2</sup> ¶25. The letter also informed VG that a long-term suspension hearing based on that violation would be held on February 25, 2009.<sup>3</sup> ¶26.

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<sup>2</sup> The Policies Handbook for the Worcester Public Schools (the "Handbook") provides, in pertinent part, as follows:

#### **Rule 7. - Policy on Possession or Use of Weapons**

If any device which may be considered a weapon under this policy, is distributed by a teacher, for use in the classroom, then no student receiving such a device shall be charged with an offense under Rule 7 provided the device remains in the classroom and provided the device is only used for the classroom purpose.

A student shall not possess, use, or attempt to use, any weapon on school premises or at a school-related situation, including but not limited to travel to and from the situation.

In order to protect the students of the Worcester Public Schools, any student who is found on school premises . . . in possession of a dangerous weapon, including, but not limited to, a gun or a knife may be subject to expulsion or a long-term suspension from the school by the principal regardless of the size of the knife.

For purposes of this policy, a dangerous "weapon" includes but is not limited to a . . . knife . . . . Any other device or object used or attempted to be used to inflict bodily harm on a person may be considered a weapon.

This policy will be implemented according to the due process provisions of the Worcester Public Schools Discipline Code applicable to Regular and Special Education students.

<sup>3</sup> The Handbook defines a long-term suspension as "a suspension of up to one year during which time the student is assigned to an off-site location." The Handbook goes on to provide as follows:

At the hearing, Assistant Principal Williams read only selected excerpts of the written statement given by LB and the entire written statement given by C, both of which were taken on the day of the incident. ¶26. Prior to the hearing, no one informed LB that the School had taken the written statements of C, R, and J. ¶27. Prior to and at the hearing itself LB was not given copies of or permitted to read any of the written statements from C, R, J, or himself. ¶28. Because Defendants withheld these statements from LB, LB was not able to respond to them or prepare and present a defense at the hearing. ¶29. It was the School's informal policy not to provide copies of witness statements to students facing disciplinary action. ¶30.<sup>4</sup>

Prior to the hearing, LB requested that he be able to call as witnesses, confront, and cross-examine the other students involved, namely C, R, and J, during the hearing. ¶31. Although the February 13, 2009 letter stated that LB could "present witnesses and evidence" on his behalf, school officials, following their informal policy, denied this request, stating that only LB and his family would be allowed at the hearing. ¶¶31, 33. School officials conducted the hearing without C, R, or J being present, but rather used C's and LB's written statements, which they purposefully and intentionally withheld from LB. ¶31.

School officials took these actions despite the fact that the Policies Handbook for the Worcester Public Schools (the "Handbook"), Legal Policies, Due Process, Section II, provides

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Determination of the length of suspension is based upon the severity of the incident, its effect on the school community, or its effect on individual students or staff. The effect on the school community includes such concerns as safety of individuals, protection of property, disruption of school activities and disruption of a positive educational environment. Where appropriate, the number and nature of previous offenses will be considered in determining an appropriate penalty. Parents/Guardians may be requested to attend a conference at the school with school administrators regarding the suspension.

Any student who received a long-term suspension from the Worcester Public Schools shall not be eligible for readmission for one calendar year from the date of the long-term suspension . . .

<sup>4</sup> Not until months later, in May, 2009, did Defendants finally provided LB's counsel copies of the students' statements.

that a student charged with violating Rule 7, and for whom expulsion or long-term suspension by a school principal is a possibility shall, at the hearing before the school principal, have the right to be represented by counsel or an advocate and have the right to present and cross-examine witnesses. ¶32. The Legal Policies, Due Process section of the Handbook provides, in pertinent part:

All students have the constitutional right (*Goss v. Lopez*) to receive due process procedures including notice and the right to a hearing where required in matters of suspension, transfer and expulsion.

## Section II

Where a student has been charged with a violation of [Rule 7] and expulsion or a long-term suspension by a school principal is a possibility, then the student shall be notified, in writing, of an opportunity for a hearing before the school principal.

- a. The student shall be given written notice of the charges.
- b. At the hearing before the school principal, the student has the right to be *represented by counsel or an advocate*. The student also has the right to *present witnesses and to cross-examine witnesses*.
- c. Any student who has been expelled or issued a long-term suspension by the school principal for a violation of [Rule 7] may appeal to the Superintendent. The appeal must be filed within ten (10) days of the expulsion or a long-term suspension. The student has a right to be represented by counsel or an advocate at a hearing before the Superintendent.

Handbook at p. 5 (emphasis added).

That same day, Principal Maureen McCullough issued her decision, in writing, to suspend LB from school for an additional full year beginning on March 9, 2009 through, and including, March 9, 2010. ¶34. Attached to Principal McCullough's decision were her Findings of Fact. ¶35.

**The Hearing Before The Superintendent's Executive Assistant, Robert F. Pezzella**

LB appealed Principal McCullough's decision to the Superintendent of Schools for the Worcester School District pursuant to Mass. Gen. Laws c. 71, § 37H and Section II of the Legal Policies of the Handbook. ¶38. A hearing was held on March 11, 2009, at which Robert F. Pezzella, the Executive Assistant to the Superintendent for School Safety and Violence Prevention, presided. ¶39. Interim Superintendent Deidre Loughlin was not present at the hearing in accordance with Defendants' own policy. and M.G.L. c. 71, § 37H. ¶40. ¶39.

Although by that time LB and his family had secured legal representation, due to scheduling conflicts, their attorney was not able to attend a hearing on March 11, 2009. ¶40. They requested, on three separate occasions, including at the hearing itself, that the hearing be rescheduled so that their legal counsel could be present; Mr. Pezzella denied their requests without providing any reason and pursuant to Defendants' informal policy of not accommodating such requests. ¶¶40, 41. Moreover, Defendants did not provide an interpreter at the appeal hearing for LB's Spanish-speaking parents, despite having done so at the hearing before Principal McCullough and knowing that LB's parents did not speak English. ¶39.

In addition, LB again requested that witnesses be present at the March 11 hearing so that he could confront and cross-examine them, most notably among them, C. ¶42. Mr. Pezzella, like Principal McCullough before him, denied LB's request pursuant to Defendants' informal policy. ¶¶42, 43. C was not present at the hearing. ¶42. LB had no opportunity to confront or cross-examine C. ¶42. Notwithstanding Mr. Pezzella's prohibition on witnesses, LB brought R to the hearing, and R corroborated the statements LB made in his written statement and in his oral testimony. ¶44. Defendants continued to withhold from LB his own written statement and C's, J's, and R's written statement, pursuant to Defendants' informal policy. ¶¶45, 46.

Defendants also continued to fail to inform him of the existence of written statements made by R and J. ¶45.

Subsequently, a written decision signed by Robert F. Pezzella upheld LB's long-term suspension. ¶47. Although Mr. Pezzella signed the decision "for Interim Superintendent Deidre Loughlin," Ms. Loughlin did not attend or participate in the hearing. ¶47. She did not hear the evidence first hand or participate in the appeals process at all. ¶47. Due to her absence from the hearing, Ms. Loughlin was not able to observe LB's or R's demeanor or assess their credibility. ¶47.

### **Woodward Day School**

After the hearing before Mr. Pezzella, Defendants offered LB the option of enrolling in the Woodward Day School for the period from March 12, 2009 until his long-term suspension ended on March 9, 2010. ¶49. Woodward is operated by the Central Massachusetts Special Education Collaborative for regular and special education students who have been suspended or expelled from public school under M.G.L. c. 71, § 37H or who have a pending felony charge and have been suspended under M.G.L. c 71, 37H½. ¶49. Woodward does not offer LB an education comparable to the education he had been receiving in his honors level classes at the School or the honors level classes he would receive as a freshman in a Worcester public high school. ¶50. Woodward does not offer LB a safe learning environment as its students, unlike LB, had serious discipline and/or legal issues. ¶51. For these reasons, VG sought and obtained approval from Worcester Public School officials to have LB home-schooled, primarily by his sister, who is currently a college student at the University of Massachusetts at Amherst. ¶52. Although far superior to Woodward, home schooling is not comparable to the honors-level education LB was receiving at the School and would be receiving at a Worcester public high

school. ¶52. In addition, home schooling is a burden on LB's sister, taking time away from her own studies and impeding her ability to work a part-time job to support her own educational pursuits. ¶52.

The wrongful long-term suspension is a blight on what otherwise was a stellar academic and behavioral record and will hurt LB's college admission opportunities. ¶53. It has already damaged his unblemished reputation and, unless expunged from his record, will follow him on his permanent record for his entire academic career with the very real possibility of foreclosing future academic opportunities. ¶53. Defendants' wrongful long-term suspension of LB has also caused him emotional distress for which LB has sought and obtained counseling. ¶54.

LB brings this injunction action seeking to be reinstated to the Worcester public schools at the beginning of the 2009-2010 academic year, to have his record wiped clean of all discipline relating to the February 12, 2009 incident, and for other compensatory relief. He brings claims under 42 U.S.C. § 1983 for Defendants' violation of his federal Constitutional rights to procedural and substantive due process, and equal protection rights, and claims violations of the Massachusetts State Constitution, M.G.L. c. 71, § 37H and of the School's own policies.

### ARGUMENT

A preliminary injunction is appropriate when the plaintiff demonstrates: (1) a likelihood of success on the merits; (2) that he or she will suffer irreparable harm if the injunction is not granted; (3) that the risk of irreparable harm to the plaintiff outweighs any similar risk of irreparable harm the injunction would create for the defendants; and (4) that granting the injunctive relief will not adversely affect the public interest. *See Acevedo-Garcia v. Vera-Monroig*, 296 F.3d 13, 16 n.3 (1st Cir. 2003); *Wholey v. Tyrell*, 567 F. Supp. 2d 279, 288 (D. Mass. 2008). The most critical of the four preliminary injunction criteria is the movant's

likelihood of success on the merits. *See Acevedo-Garcia*, 296 F.3d. at 16 (“Likelihood of success is the main bearing wall of the four-factor framework.”). *See also Narragansett Indian Tribe v. Guilbert*, 934 F.2d 4, 6 (1st Cir. 1991). To satisfy these criteria, the moving party does not need to prove its claims; rather, it must only demonstrate that it is likely to be able to prove its claims later. *See Kleczek ex rel. Kleczek v. Rhode Island Interscholastic League*, 768 F. Supp. 951, 953 (D.R.I. 1991).

**I. LB HAS A SUBSTANTIAL LIKELIHOOD OF SUCCESS ON THE MERITS ON ALL OF HIS CLAIMS.**

As discussed below, LB is likely to prevail on all of his federal and state constitutional claims, as well as on his claims based on Defendants’ violation of state law and their own policies.

**A. LB Is Likely To Prevail On His Due Process Claims Under the Fourteenth Amendment To The U.S. Constitution.**

The principal cause of action of LB’s Complaint falls under 42 U.S.C. § 1983 for violation of LB’s constitutional rights to due process. The Fourteenth Amendment to the U.S. Constitution provides that no state shall deprive “any person of life, liberty, or property without due process of law.” When a state actor’s decision implicates an interest protected by the Fourteenth Amendment, due process is required. Under the Due Process Clause of the Fourteenth Amendment, as well Pt. 1, Art. X of the Massachusetts Constitution and 42 U.S.C. § 1983, a plaintiff’s procedural due process rights are violated if: (1) he is deprived of a property interest defined by state law and (2) the defendant(s), acting under color of state law, deprived the plaintiff of that interest (3) without adequate process. *PFZ Properties, Inc. v. Rodriguez*, 928 F.2d 28, 30 (1st Cir. 1991) (*citing Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 428 (1982)); *Mancuso v. Mass. Interscholastic Athletic Ass’n, Inc.*, 453 Mass. 116, 122-23 (2009).

Due process requirements apply when a “state actor” deprives an individual of life, liberty or property. *Bd. of Regents v. Roth*, 408 U.S. 564, 569 (1972) (“[T]he requirements of due process apply only to the deprivation of interests encompassed by the . . . protection of liberty and property.”). LB has a liberty interest in his personal reputation. *Goss v. Lopez*, 419 U.S. 565, 574-575 (1975); *see also Wisconsin v. Constantineau*, 400 U.S. 433, 437 (1971) (“Where a person’s good name, reputation, honor, or integrity is at stake because of what the government is doing to him, notice and an opportunity to be heard are essential”). Due process liberty interest is implicated when there is a threat of serious damage to “students’ standing with their fellow pupils and their teachers as well as [interference] with later opportunities for higher education and employment. *See Goss*, 419 U.S. at 575. State action violates a liberty interest in reputation when it stigmatizes an individual and causes some other independent tangible loss. *See Paul v. Davis*, 424 U.S. 693, 701 (1976).

Unlike liberty interests, protected property interests are not derived from the U.S. Constitution; rather, they are typically created by independent sources such as state statutes. *Bd of Regents v. Roth*, at 577 (1972). Massachusetts has recognized that all children in the Commonwealth have a protected property interest in public education. *Mancuso*, 453 Mass. 116, 125 (2009); *see also Pomeroy v. Ashburnham Westminster Reg’l Sch. Dist.*, 410 F. Supp. 2d. 7, 14-15 (D. Mass. 2006) (holding that students have a property interest in public education and a liberty interest in reputation); *McDuffy v. Sec’y of Executive Office of Educ.*, 415 Mass. 545, 621 (1993). That property interest is derived from the Education Clause of the Massachusetts Constitution, which provides:

Wisdom and knowledge, as well as virtue, diffused generally among the body of the people, being necessary for the preservation of their rights and liberties; and as these depend on spreading the opportunities and advantages of education in the various parts of the country, and among the different orders of the people, *it shall*

*be the duty of legislatures and magistrates, in all future periods of this Commonwealth, to cherish the interests of literature and the sciences, and all seminaries of them; especially the university at Cambridge, public schools and grammar schools in the towns . . . .*” Part II, c. 5, Section 2 (emphasis added).

The Education Clause is not merely “aspirational or horatory,” but imposes on the Commonwealth a mandatory “duty to provide an education for all its children, rich and poor, in every city and town through the public schools.” See *McDuffy*, 415 Mass. at 606. Moreover, M.G.L. c. 76, § 5 states that “[e]very person shall have a right to attend the public schools of the town where he actually resides . . . .” while M.G.L. c. 76, § 1 mandates compulsory full-time education for all students, with limited exceptions. M.G.L. c. 76, § 1 (“Every child between the minimum and maximum ages established for school attendance by the board of education . . . shall . . . attend a public day school in said town, or some other day school approved by the school committee, during the number of days required by the board of education in each school year . . . .”).

The U.S. Supreme Court has applied § 1983 to protect the constitutional rights of public school students who are subjected to suspension proceedings. *Wood v. Strickland*, 420 U.S. 308 (1975). Section 1983 is not a source of any substantive rights; rather it provides a vehicle for redress when a student’s federal constitutional rights have been deprived by state actors under color of state law.

Here, it is beyond question that Defendants were state actors. A school district is created by and acting to implement state law. M.G.L. c. 71, § 16. The school committee manages the school district and promulgates policy that is consistent with “the requirements of law.” M.G.L. c.71, § 37. The superintendent and principal act as agents of the school district, as the school committee has the power to appoint and terminate the superintendent, and the superintendent has the power to appoint and supervise the principal. M.G.L. c.71, §§ 37, 59B.

Nor can it be disputed that in suspending LB from school for over a year, Defendants acted under color of state law. The Legislature gave superintendents and principals the power to manage the school system and school, respectively. M.G.L. c.71, §§ 59, 59B. Defendants therefore were state actors, acting under color of state law at the time of LB's disciplinary hearings at which they suspended LB, depriving him of his right to an education.

Because Defendants (state actors), acting under the color of state law in suspending LB from school for over a year, deprived LB of both a property interest and liberty interest, they owed him due process. As explained below, Defendants failed to provide procedural due process in at least three respects and substantive due process as well.

**1. LB has been deprived of his right to procedural due process under the Fourteenth Amendment to the U.S. Constitution.**

In its seminal decision in *Goss v. Lopez*, the United States Supreme Court set forth the procedural rights of students who are facing suspension from school:

[T]he total exclusion from the educational process for more than a trivial period, and certainly if the suspension is for 10 days, is a serious event in the life of a child. Neither the property interest in educational benefits temporarily denied nor the liberty interest in reputation, which is also implicated, is so insubstantial that suspensions may constitutionally be imposed by any procedure the school chooses, no matter how arbitrary . . . . At the very minimum, therefore, students facing suspension and the consequent interference with a protected property interest must be given *some* kind of notice and afforded *some* kind of hearing.

*Goss*, 419 U.S. at 576-579. The Court went on to hold that, in connection with a suspension of ten days or less, a student must be provided "oral or written notice of the charges against him and, if he denies them, an explanation of the evidence the authorities have and an opportunity to present his side of the story." *Id.* at 581. These procedures are the *minimum* due process requirements in cases when a student is facing a suspension of any duration. When a student is facing a suspension of more than ten days, the Court observed that more formal procedures may be required. *Id.* at 584.

To determine what procedures are due in long-term suspension cases, the First Circuit has weighed three factors: (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's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail. *Gorman v. Univ. of Rhode Island*, 837 F.2d 7, 13 (1st Cir. 1988) (quoting *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976)); see also *Pomeroy*, 410 F. Supp. 2d. at 15.

Applying these factors, courts have weighed the student's interest in continuing to attend an institution where he or she was in good standing against the school's interest in disciplining the student for the institution's benefit. *Gorman*, 837 F.2d at 13 (citing *Dixon v. Alabama State Bd. of Educ.*, 294 F.2d 150, 159 (5th Cir. 1961)). In the process, courts have determined that schools must observe the following *minimum* requirements in student disciplinary hearings to ensure the necessary balance between the substantial interests of the student and of the state:

- (1) The student must be advised of the charges against him;
- (2) The student must be informed of the nature of the evidence against him;
- (3) The student must be given an opportunity to be heard in his own defense;
- (4) The student must not be punished except on the basis of substantial evidence;
- (5) The student must be permitted the assistance of a lawyer in major disciplinary hearings;
- (6) The student must be permitted to confront and to cross-examine the witnesses against him; and
- (7) The student has the right to an impartial tribunal.

*Johnson v. Collins*, 233 F. Supp. 2d. 241, 248 (D.N.H. 2002) (quoting *Carey ex rel. Carey v. Maine Sch. Admin. Dist. No. 17*, 754 F. Supp. 906, 919 (D. Me. 1990)); see *Keene v. Rodgers*, 316 F. Supp. 217, 221 (D. Me. 1970).

Defendants' actions here did not meet even these minimum requirements. Defendants violated LB's right to procedural due process by: (1) denying him the opportunity to review the evidence relied upon by Defendants in reaching their decisions; (2) denying his request to present, confront and cross-examine witnesses at both hearings; and (3) denying his request to postpone the superintendent's hearing so he could be represented by counsel.

**a. Denial of opportunity to review the evidence**

At a minimum, LB was entitled to copies of the witness statements in advance of both hearings. *Goss* 419 U.S. at 581 (student was entitled to "oral and written notice of the charges against him and, if he denies them, *an explanation of the evidence the authorities have* and an opportunity to present his side of the story") (emphasis added). See also *Hill v. Rankin County, Mississippi Sch. Dist.*, 843 F. Supp. 1112, 1118 (S. D. Miss. 1993) (student is entitled to "the names of the witnesses with a summary of their testimony") (quoting *Williams v. Dade Co. Sch. Bd.*, 441 F.2d 299 (5th Cir. 1971)); *L.Q.A. v. Eberhart*, 920 F. Supp. 1208, 1218 (M. D. Ala. 1996) (finding no procedural due process violation where student was given the names of the witnesses against him and "the substance of the statements made by those witnesses").

Defendants intentionally and purposefully failed to comply with this minimum procedural safeguard. Defendants not only neglected to disclose the existence of the written statements prior to the hearings, they *never* informed LB of the existence of R and J's written statements. Moreover, they refused to allow LB to see even *his own* written statement. Defendants offered no justification for withholding the witness statements from LB, leading to the singular conclusion that they were not interested in conducting a full and fair hearing. This is

not a case where the identity of the witnesses was unknown or needed to be withheld for the witness's protection. LB (and everyone else) knew the handful of individuals involved -- C, R, J and himself. *See* page 17, *infra*. Under the circumstances, Defendants violated LB's procedural due process rights. *See Newsome v. Batavia Local Sch. Dist.*, 842 F.2d 920 (6th Cir. 1998) (finding a deprivation of procedural due process when superintendent disclosed evidence to school board of which plaintiff was unaware during suspension hearings); *Pomeroy*, 410 F. Supp. 2d. at 23-24 ("Whatever the level of procedural formality . . . the hearing must be meaningful and must afford the accused the opportunity to respond, explain, and defend. It is axiomatic that in order to respond, explain, and defend, the accused must have an opportunity to assess the evidence against him.") (internal quotations and citations omitted); *Carey*, 754 F. Supp. at 29 n.9 (stating that due process requires that school officials "not willfully withhold any material evidence").

This constitutional violation prejudiced LB's ability to present and argue his case. Being confronted for the first time at the hearing itself with selected passages read from a couple of the statements did not permit LB to present a case or answer the "evidence" against him.

**b. Denial of right to present, confront and cross-examine witnesses**

The hearings on both February 25, 2009 and March 11, 2009 were also constitutionally infirm because Defendants deprived LB of his right to present, confront, and cross-examine witnesses, despite LB's numerous requests to do so. *Anable v. Ford*, 653 F. Supp. 22, 41-42 (W.D. Ark. 1985) (stating that due process requires that aggrieved students be given the opportunity "to confront and cross-examine their [student] accusers"). By foreclosing the opportunity to cross-examine his accusers, Defendants deprived LB "of *any* meaningful opportunity to defend against the charges" against him. *Johnson*, 233 F. Supp. 2d at 249 (finding

that student's expulsion was constitutionally deficient as student was not permitted to cross-examine the witnesses against him); *see Warren County Bd. of Educ. v. Wilkinson*, 500 So.2d 455, 461 (Miss. 1986) (student denied procedural due process when she was not provided with the names of the witnesses against her nor was permitted to cross-examine them); *but see Gorman*, 837 F.2d at 16 (finding no procedural due process violations where student "had the opportunity to cross-examine his accusers as to the incidents and events in question").

In cases like this one where the credibility of the witnesses is a key, if not a determinative issue, LB's ability to cross-examine C, was an essential part of a fair hearing. *See Winnick v. Manning*, 460 F.2d 545, 550 (1972) (stating that where issues of credibility are central to the case – i.e. where decision maker has to choose to believe one party over another – cross-examination of witnesses is essential to a fair hearing).

In addition, C, whose statement both the principal and Mr. Pezzella read at the hearing, was himself implicated in the incident and thus had an obvious motive to divert attention away from his wrongful actions onto LB. *See Johnson* 233 F. Supp. 2d at 250 (denial of student's right to cross-examine witnesses was constitutional violation, especially when witnesses were also implicated in the incident). LB was deprived of any opportunity to uncover any potential biases that underlie C's statements and to test the credibility and truthfulness of those statements.

Finally, as was the case with the witness statements, it was not necessary to deny LB the opportunity to cross-examine C in order to protect C. C's identity and role in the incident was well known to all involved, and C himself was already subject to his own disciplinary proceedings. *See Dillon v. Pulaski Cty Special Sch. Dist.*, 468 F. Supp. 54, 58 (E.D. Ark. 1978), *aff'd*, 594 F.2d 669 (8th Cir. 1979) (finding a due process violation where student was not permitted to cross-examine witness who would not be subject to ostracism or reprisal). *Compare*

*Newsome*, 842 F.2d at 925 (“[T]he necessity of protecting student witnesses from ostracism and reprisal outweighs the value to the truth-determining process of allowing the accused student to cross-examine his accusers.”).

**c. Denial of the right to counsel**

Defendants violated LB’s due process rights in yet a third way by preventing him from being represented by counsel at the appeal hearing. *See Johnson v. Collins*, 233 F. Supp. 2d. 241, 248 (D.N.H. 2002) (*quoting Carey ex rel. Carey v. Maine Sch. Admin. Dist. No. 17*, 754 F. Supp. 906, 919 (D. Me. 1990)) (holding that due process requires that students be “permitted the assistance of a lawyer in major disciplinary hearings”); *Keene v. Rodgers*, 316 F. Supp. 217, 221 (D. Me. 1970) (stating that due process clause requires representation by counsel at suspension hearings); *see also Givens v. Poe*, 346 F. Supp. 202 (W.D.N.C. 1972) (same); *Esteban v. Central Missouri State Coll.*, 277 F.Supp. 649 (W.D.Mo.1967), *aff’d*, 415 F.2d 1077 (8th Cir.1969) (same).

Defendants denied LB’s requests (on three separate occasions, including at the appeal hearing itself) to reschedule the appeal hearing so that his counsel could attend. No explanations or reasons were given for these denials, suggesting that, once again, Defendants had no intention of providing a fair and impartial hearing and instead were bent on placing LB at a disadvantage in responding to the accusations made against him. Further placing LB at a disadvantage, Defendants failed to provide an interpreter for LB’s non-English speaking parents. Had LB been able to have counsel represent him at the hearings, counsel would have raised at those earlier times many of the points he now raises in this action -- Defendants’ wrongful withholding of the witness statements, wrongful denial of an opportunity to cross-examine C, and failure of the superintendent to preside at the appeal hearing as state law required. Clearly, Defendants prejudiced LB by denying him the right to be represented by counsel at the appeal hearing.

**2. LB has been deprived of his right to substantive due process under the Fourteenth Amendment to the U.S. Constitution.**

In addition to violating LB's procedural due process rights, Defendants have violated LB's substantive due process rights. When the state action does not affect fundamental rights,<sup>5</sup> substantive due process is violated if there is no rational relation between the offense and punishment. *Demers v. Leominster Sch. Dep't*, 263 F. Supp. 2d 195, 206 (D. Mass 2003); *Seal v. Morgan*, 229 F.3d 567, 575 (6th Cir. 2000). See also *Pomeroy*, 410 F. Supp. 2d at 17 n.7 (quoting *Demers*, 263 F.Supp. 2d at 206) (internal quotation marks omitted) ("Typically, excessive punishment claims against school are framed as substantive due process violations. In this context, the plaintiff must demonstrate . . . 'that there is no rational relationship between the punishment and offense.'"). A punishment has no rational relation to the offense, i.e., is arbitrary, if it is grossly disproportionate. *Swany v. San Ramon Valley Unified School Dist.*, 720 F. Supp. 764, 779 (D. Cal. 1989); *Petrey v. Flaughner*, 505 F. Supp. 1087, 1091-92 (E.D. Ky. 1981). When a "penalty is so grossly disproportionate to the offense as to be arbitrary in the sense that it has no rational relation to any legitimate end, it may be a violation of . . . substantive due process." *Swany*, 720 F. Supp. at 779 (internal quotation marks omitted).

The Fourteenth Amendment protects LB against arbitrary and capricious actions taken against him. The long-term suspension of LB, an exemplary honors student with no record of prior discipline, was not rationally related to any legitimate state purpose. In other words, there was no "rational relationship between the punishment and the offense." *Seal*, 229 F.3d at 575; see *Demers*, 263 F. Supp. 2d at 205-06

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<sup>5</sup> Education is not a fundamental right under the United States Constitution. *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1, 35, 38-40 (1973). Nor is education a fundamental right under the Massachusetts Const. though it is "cherished". Mass. Const. pt II, c.5 §2.; *Hancock v. Comm'r of Educ.*, 443 Mass. 428 (Mass. 2005).

To the extent LB's suspension in excess of one calendar year and substantially interrupting two school years was based on what Defendants treated as a "zero tolerance" policy for weapons possession under any and all circumstances, the suspension is so grossly disproportionate to the offense that it has no relation to any legitimate interest, and, consequently, is a violation of substantive due process. *See Seal*, 229 F.3d at 575-580 (holding that to suspend a student for weapons possession pursuant to a "zero tolerance policy" without a proper analysis of the facts and circumstances was not rationally related to a legitimate state interest). Presumably, Defendants' purpose in banning weapons from schools is to promote and insure a safe, learning-conducive environment for their students and personnel. Punishing LB for "possession" of the items he confiscated from C does not further this purpose. Moreover, the punishment itself is so grossly disproportionate in relation to LB's actions as to be arbitrary. It is undisputed that LB (1) did not bring the knife or lighter to school, (2) did not show it to anyone or let anyone know he had custody of it, (3) confiscated it from C and assumed temporary custody of it to diffuse a potentially violent and dangerous situation, and (4) knew, all along, that R planned to inform school officials of the incident and that he (LB) would be asked to turn those items over to school officials. These facts, combined with LB's spotless discipline record demonstrate that the year plus suspension of LB was grossly disproportionate and unconstitutional.

Courts have previously considered claims of substantive due process violations based on disproportionate punishments and have emphasized two principal reasons in concluding that the contested punishments were not disproportionate: (1) the plaintiff had a history of disciplinary infractions and/or behavioral problems, and (2) the plaintiff used the prohibited item in some manner and/or permitted other students to handle the item. *See Petrey v. Flaughner*, 505 F. Supp.

1087 (E.D. Ky. 1981) (affirming plaintiff's expulsion for smoking marijuana at school, stating that it was not excessive because "plaintiff had some fairly serious disciplinary problems prior to this time and had been threatened with suspension or expulsion on at least one occasion"); *Doe v. Superintendent of Sch. of Worcester*, 421 Mass. 117, 120-21 (1994) (upholding expulsion of plaintiff for bringing a knife, finding that it was not excessive because plaintiff had a history of emotional disturbance and disciplinary infractions and because she brought the knife to school and permitted other students to handle it). Neither reason applies here.

Perhaps in hindsight LB should have gone immediately to the gym teacher or assistant principal to report C's threats or to turn the items over. Instead, in the midst of the unfamiliar situation and with the judgment of a fourteen year old, he deferred to his friend R and waited for R to report C. Although his judgment may not have been perfect, his actions certainly do not warrant *any* suspension from school, let alone a one plus-year suspension that substantially interrupts two school years.

While the circumstances surrounding the plaintiffs in *Petrey* and *Doe* may have justified their punishment, this case is markedly different. The uncontradicted evidence demonstrates that LB was an exemplary honors student, that he did not bring the weapons to school, but rather confiscated them from another student, and that LB never openly displayed the small pocketknife and lighter (indeed neither R or J was aware that the items were even in LB's possession). In addition, LB turned both items over willingly when asked to do so. See *Lyons v. Penn Hills Sch. Dist.*, 723 A.2d 1073 (Pa. 1999) (overturning suspension of student for possession of a small army knife where honors student found knife at school and had no intention to use knife in a harmful manner).

In light of these facts, LB's one-year suspension was grossly disproportionate to his "offense," if it could be said that he committed one. Suspending a student for over a year for disarming a fellow student and thus preventing a dangerous situation does not rationally advance the School's very legitimate interest in preventing its students from bringing dangerous weapons to school. Accordingly, Defendants' suspension of LB violates his right to substantive due process.

**B. LB Is Likely To Prevail On His Equal Protection Claim Under The Fourteenth Amendment To The U.S. Constitution.**

A student treated differently from others based on the school's failure to follow its rules has an equal protection claim if the different treatment has a "discernible effect . . . on the action taken by the agency and its treatment of" the student. See *United States v. Caceres*, 440 U.S. 741, 751 (U.S. 1979); see also *Hupart v. Bd. of Higher Educ.*, 420 F. Supp. 1087, 1107 (S.D.N.Y. 1976) (admissions procedure violated equal protection because it was "a deliberate departure<sup>6</sup> from a contrary policy"); Note, *Violations by Agencies of Their Own Regulations*, 87 Harv. L. Rev. 629, 636 (1974) (basis for requiring agencies to follow their own rules is the "danger of inconsistent treatment"). Defendants violated LB's right to equal protection by failing to follow the Worcester Public Schools' Policies Handbook during the course of the principal's and appeal hearings by: (a) denying LB the opportunity to learn, in advance of the hearings, the evidence they had against him; (b) denying LB the opportunity to present and cross-examine witnesses at the two hearings; (c) denying LB the right to counsel at the appeal hearing; (d) failing to provide an interpreter for LB's parents at the appeal hearing; and (e) failing to consider LB's spotless disciplinary history when determining the degree of punishment and in the process treating LB

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<sup>6</sup> Defendants' intent can be inferred from the circumstances surrounding their actions. *United States v. Woodward*, 149 F.3d 46, 57 (1st Cir. 1998); see also *United States v. Tajeddini*, 996 F.2d 1278, 1282 (1st Cir. 1993). Their intent to treat LB differently than similarly situated individuals can be inferred from their presumed awareness of Worcester Public Schools' policies and their failure to adhere to these policies.

differently than other students facing disciplinary action to whom they afforded these procedural safeguards.<sup>7</sup> Defendants' different treatment of LB had a discernible effect because it significantly restricted his ability to present his case and to respond to the evidence presented and ultimately relied upon by Defendants.

**C. LB Is Likely To Prevail On His Procedural and Substantive Due Process Claims And Equal Protection Claim Under The Massachusetts Declaration Of Rights.**

Thus far the due process and equal protection analysis has been under the federal Constitution. Defendants, however, have also deprived LB of his right to procedural and substantive due process and equal protection under the Massachusetts Constitution, Part I, Article X. The protections afforded by and analysis under the Massachusetts Constitution are exactly the same as those for its federal counterpart. *See Liab. Investigative Fund Effort, Inc. v. Mass. Med. Prof'l Ins. Ass'n*, 418 Mass. 436, 443 (1994) (treating "the procedural due process protections of the Massachusetts and United States Constitutions identically"); *Allen v. Assessors of Granby*, 387 Mass. 117, 119-20 (1982) (using the same analysis to assess both state and federal due process violations). In fact, the Massachusetts Constitution is even "more protective of individual liberty and equality than the Federal Constitution." *Cote-Whiteacre v. Dept. of Public Health*, 446 Mass. 350, 376 (2006). Through the actions detailed above, Defendants have violated LB's state constitutional rights as well.

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<sup>7</sup> Note that in prior cases involving schools disciplining students who allegedly violated school weapons possession regulations, Worcester school officials abided by the Worcester Public School Policies Handbook and considered the accused's disciplinary history in determining the degree of punishment. *See Doe v. Superintendent of Schools of Worcester*, 421 Mass. 117, 122 (Mass. 1995).

**D. LB Is Likely To Prevail On His Claim That Defendants Violated M.G.L. c. 71, § 37H(c).**

In addition to violating LB's federal and state constitutional rights, Defendants violated state law as well. The relevant Massachusetts statute concerning suspension and expulsion procedures provides:

(c) Any student who is charged with . . . [possession of a dangerous weapon] shall be notified in writing of an opportunity for a hearing; provided, however, that *the student may have representation, along with the opportunity to present evidence and witnesses at said hearing before the principal . . .* (d) Any student who has been expelled [under this section] shall have the right to appeal to the superintendent. The expelled student shall have ten days from the date of the expulsion in which to notify the superintendent of his appeal. *The student has a right to counsel at a hearing before the superintendent.*

M.G.L. c. 71, § 37H(c)-(d) ("§ 37H") (emphasis added). LB is likely to succeed on the merits of his claim that Defendants violated this statute.

When the language of a statute is clear, a court is to give effect to that language's plain and ordinary meaning. *See Commonwealth v. Parra*, 445 Mass. 262, 265 (2005) (quoting *Commonwealth v. Kennedy*, 435 Mass. 527, 530 (2001)). The Massachusetts Supreme Judicial Court ("SJC") has noted that courts should interpret unambiguous statutory wording "according to the approved usage of language . . . ." *McCarty's Case*, 445 Mass. 361, 364 (2005). If a court can apply a statute's provisions in a commonsense manner without resort to fanciful interpretation or guesswork, it will do so. Courts have interpreted § 37H according to that statute's clear wording. *See, e.g., Doe v. Superintendent of Schs. of Worcester*, 421 Mass. 1 (1995).

Here, Defendants violated § 37H(c) by depriving LB of the opportunity to "have representation," and to "present evidence and witnesses at said hearing," as that section provides. LB's requests to reschedule the appeal hearing before the superintendent so his attorney could be

present were met with unexplained denials. The statute provides that LB was entitled to have representation. Defendants violated this provision.

Defendants also wrongfully denied LB the opportunity to present evidence and witnesses at both the principal's and appeal hearing by withholding the witness statements from LB. Section 37H provides that a student at a principal's hearing "may have representation, [and may] present evidence and witnesses at said hearing . . . ." M.G.L. c. 71, § 37H(c). A student, like LB, who is refused access to witness statements can hardly "present evidence and witnesses" if he does not know what the "evidence" is.

LB is not asking this Court to superimpose the rights that a criminal defendant enjoys onto his school long-term suspension proceeding. Rather, he seeks only to have those rights the Legislature has afforded him. Certain procedural criteria must be met to provide a baseline that can, at the very least, make the hearing "meaningful." *Pomeroy*, 410 F. Supp. 2d at 16. A suspension hearing must "afford the accused 'the opportunity to respond, explain, and defend.'" *Id.* (quoting *Gorman*, 837 F.2d at 12). Here, Defendants denied LB that opportunity by: (1) failing to inform LB that they planned to present excerpts from certain witnesses' statements and failing to allow LB access to those statements at or before the hearing; and (2) denying LB the opportunity to present, confront, and cross-examine witnesses. In doing so, Defendants deprived LB of the "opportunity to . . . defend" himself in any meaningful sense. LB could not properly defend himself not knowing what evidence Defendants planned to present and rely on at the hearing. Nor could LB properly defend himself stripped of the ability to present his own witnesses and to cross-examine the witnesses against him. Principal McCullough ignored the clear mandates of § 37H. Because the hearing she conducted was in violation of the statute

empowering her to suspend LB, her decision must be vacated and LB restored to the Worcester Public Schools.

**E. LB Is Likely To Prevail On His Claim That Defendants Violated § 37H(d).**

In what became a recurring pattern, Defendants continued to disregard their obligations under § 37H when it came to LB's appeal. As they did at the principal's hearing, Defendants, at the appeal hearing, once again denied LB access to the witness statements and of the opportunity to present and cross-examine witnesses. At the appeals hearing, however, Defendants violated LB's rights in two additional ways. An accused student whom a principal expelled after a hearing under § 37H(c) "has the right to counsel at a hearing before the superintendent." M.G.L. c. 71, § 37H(d). Defendants denied LB the right to have counsel represent him at the appeal hearing, denying, without explanation, his repeated requests to reschedule the hearing so that his counsel could be present to represent him. Also, Interim Superintendent Loughlin, however, did not preside over or participate in the appeal hearing as statutorily required. Instead, Mr. Pezzella, an executive assistant to the superintendent, presided over the so-called "superintendent's hearing." This violates § 37H. The relevant portion of the statute provides that a student who appeals the principal's decision to expel him may have a lawyer with him "at a hearing before the superintendent." *Id.* The statute does *not* read "at a hearing before the superintendent or her assistant."

The statute clearly required the superintendent to preside over the hearing and decide the appeal. That she did not is, in and of itself, enough for a violation. The statute does not empower her to delegate this important task to an underling, and apparently, that is exactly what she did here. There was no written record of the hearing, so in addition to not observing for herself LB's and R's demeanor and assessing their credibility, Interim Superintendent Loughlin could not even read for herself what was said at the hearing. Instead, if she participated in the

decision at all (and there is absolutely no evidence that she did), she would have been forced to rely on a second hand account of the proceedings from Mr. Pezzella.

Interim Superintendent Loughlin's decision must be vacated because she did not attend the hearing and likely did not even participate in rendering the decision to uphold LB's suspension. Instead, she shunted that responsibility off on an underling in violation § 37H(d). Defendants plainly did not follow the process laid out by the Legislature necessary before a long-term suspension could be imposed. For this reason, the long-term suspension itself is invalid and LB must be reinstated in school.<sup>8</sup>

**F. LB Is Likely To Prevail On His Claim That Defendants Violated Their Own School Policies.**

The "Policies Handbook for the Worcester Public Schools" (the "Handbook") provides that

At a hearing before the school principal [regarding possible suspension or expulsion], the student has the right to be represented by counsel or by an advocate. The student also has the right to present witnesses and to cross-examine witnesses . . . [If the student is expelled or suspended,] he may appeal to the Superintendent . . . The student has a right to be represented by counsel or an advocate at a hearing before the Superintendent.

Handbook, Legal Policies, Due Process, § II(b)-(c). While these policies mirror those in § 37H and apply safeguards imposed by courts as constitutionally required, the fact that they are embodied in the Handbook provides an independent and additional basis upon which LB can claim his rights were violated. A school handbook of policies is not a document that the school

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<sup>8</sup> Although the Handbook provides, with respect to Section III, that the superintendent "or his designee" shall preside over any appeal, this provision does not apply to Rule 7, at issue here, and in any event, the provision contravenes the express language of the statute and therefore is of no force or effect. Defendants cannot use their regulatory authority to detract from the rights that the Legislature granted in the first place. *See, e.g., Pyle v. S. Hadley Sch. Comm.*, 423 Mass. 283 (1996) (holding that a public school cannot enforce a dress code that infringes on students' free speech rights under M.G.L. c. 71, § 82). Here, § 37H requires that the superintendent preside at the appeal hearing. M.G.L. c. 71, § 37H(d). In allowing the superintendent's designee to preside over the hearing in the superintendent's place, defendants have overstepped the authority given them by § 37H. "Insofar as [a r]egulation [contradicts a state statute], that regulation cannot be given effect." *Niles v. Boston Rent Control Adm'r*, 6 Mass. App. Ct. 135, 151 (1978).

can follow or not as it pleases. *See Pavadore v. Sch. Comm. of Canton*, 473 N.E.2d 205, 206-07 (Mass. App. Ct. 1985). In Massachusetts, if the Legislature grants an agency of the Commonwealth the authority to make and enforce rules, that agency is bound by the rules it makes; those rules have the “force of law” against the agency and the individual citizen alike. *DaLomba’s Case*, 352 Mass. 598, 603-04 (1967).

Here, the Worcester public school system’s Handbook provides that a student in LB’s situation may present witnesses and may cross-examine witnesses at the principal’s hearing. Handbook, Legal Policies, Due Process, § II(b). Further, the Handbook provides that the student has the right to be represented by counsel or an advocate at the superintendent’s hearing for the appeal. *Id.* § II(c). A political subdivision of the Commonwealth, like the Worcester School District, is obligated to fulfill its promises made pursuant to the authority granted to it by the Legislature. *See Pavadore*, 19 Mass. App. Ct. at 943 (citing *Inhabitants of Bath v. Inhabitants of Freeport*, 5 Mass. 325 (1809)). In failing to allow LB to reschedule the superintendent’s hearing so his counsel could be present, Defendants have not only violated § 37H, but have violated their own hearing procedures. Defendants have further run afoul of the policies in their Handbook by refusing LB the chance to present and cross-examine witnesses, the chance to read witnesses’ statements in advance of the principal’s hearing, and thus the chance to defend himself in any meaningful way.

In addition to the violations specified above, Defendants also violated the Worcester Public School “Discipline Code” (the “Code”). Under the Code, a suspension’s length “is based upon the severity of the incident, its effect on the school community, or its effect on individual students or staff.” Worcester Public School Discipline Code, *available at* <http://www.wpsweb.com/administration/safety/discipline.asp> (last visited June 25, 2009).

Neither Principal McCullough, nor Mr. Pezzella, in their decisions, shows the slightest indication that they took into account any of these factors.

## **II. LB WILL SUFFER IRREPARABLE HARM IF INJUNCTIVE RELIEF IS NOT GRANTED.**

Irreparable harm is the second of the four criteria to be satisfied for injunctive relief. “Irreparable harm is a substantial injury that is not accurately measurable or adequately compensable by money damages.” *Johnson*, 233 F. Supp. at 251. An actual, viable, currently existing threat of serious harm must be present in order for there to be irreparable harm. *Id.* Due to the stigma of the long-term suspension and the lack of a comparable alternative to the honors curriculum in which LB was enrolled, LB is suffering and will suffer further actual, imminent, and irreparable harm absent an injunction. The imposition of the long-term suspension, coming as it does at such a formative time in LB’s social development and educational career, will have a damaging effect on LB’s self-image, his attitude toward his education, and his ability to interact with his teachers and other school administrators. In addition to the stigma and isolation associated with a long-term suspension, it can irreparably harm a child’s academic performance, increasing the risk of failure and dropping out.<sup>9</sup>

All students have a protected liberty interest in their reputations, and that interest is affected by school suspensions. *Goss*, 419 U.S. at 573-74 (holding that long-term suspensions are detrimental to a student’s liberty, namely to his or her “good-name, reputation, honor, or integrity”). Indeed, courts have concluded that a long-term suspension seriously damages “students’ standing with their fellow pupils and their teachers as well as interferes with later

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<sup>9</sup> See Russ Skiba & Reece Peterson, *The Dark Side of Zero Tolerance: Can Punishment Lead to Safe Schools?* 80 PHI DELTA KAPPAN 372, 376 (1999) (“More than 30% of sophomores who had dropped out of school had been suspended, a rate three times that of peers who stayed in school”) (citing Ruth B. Ekstrom et al., *Who Drops Out of School and Why? Findings from a National Study*, 87 TCHRS. C. REC. 356-73 (1986)).

opportunities for higher education and employment.” *Id.* at 575; *see Brown v. Plainfield Cmty. Consol. Dist. 202*, 522 F. Supp. 2d 1068, 1073-74 (N.D. Ill. 2007) (concluding that, because students have an important interest in attending school, long-term suspensions damage students’ reputation among classmates and teachers and have “long term negative consequences with respect to later opportunities for higher education or jobs”); *see also Laney v. Farley*, 501 F.3d 577, 583 (6th Cir. 2007); *Tun v. Fort Wayne Cmty. Schs.*, 326 F. Supp. 2d 932, 942-43 (N.D. Ind. 2004).

LB’s long-term suspension will seriously damage his reputation. Injury to reputation constitutes irreparable harm. *Ross-Simons of Warwick, Inc. v. Baccarat, Inc.*, 217 F.3d 8, 13 (1st Cir. 2000); *see, e.g., K-Mart Corp. v. Oriental Plaza, Inc.*, 875 F.2d 907, 915 (1st Cir. 1989); *Camel Hair & Cashmere Inst. v. Associated Dry Goods Corp.*, 799 F.2d 6, 14-15 (1st Cir. 1986).

LB was an excellent student at the School. He was enrolled in several honors class, was on the School’s honor roll, and had an outstanding reputation. Since LB’s suspension was premised on his alleged possession of dangerous weapons, his reputation among his teachers and his classmates will suffer greatly if that suspension is upheld.

In addition to the damage to LB’s reputation, the loss of his right to a free public education will affect his future educational opportunities. Though Defendants offered LB placement at the Woodward Day School for the duration of LB’s suspension, that school does not offer the courses LB needs to effectively reintegrate and continue his education as an honors level student.<sup>10</sup> In a school district in which Latino students have a dropout rate that is almost

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<sup>10</sup> Due to the lack of a comparable education available at Woodward Day School, LB obtained permission from the Worcester Public Schools to be home schooled, primarily by his sister. Courts have recognized that “home schooling for disciplinary purposes . . . could certainly constitute sufficient irreparable harm to justify issuance” of injunctive relief. *Snyder v. Farnsworth*, 896 F. Supp. 96, 98 (N.D.N.Y. 1995) (*citing Ross v. DiSare*, 500 F. Supp. 928, 934 (S.D.N.Y. 1977) (assuming irreparable harm where suspended student was home schooled).

two times as high as the dropout rate for white students,<sup>11</sup> LB had been on a path of academic excellence with the strong likelihood of pursuing successful post-secondary education. The loss of LB's right to free public education may impact his future opportunities and is "not accurately measurable or adequately compensable by money damages." *Johnson*, 233 F. Supp. at 252; *see Warren v. Nat'l Ass'n of Secondary Sch. Principals*, 375 F. Supp. 1043, 1048 (W.D. Tex. 1974). Additionally, the long-term suspension will adversely affect LB's future opportunities by damaging his academic record. Specifically, LB will be required to disclose the suspension on college applications. Over sixty percent of the universities and colleges in Massachusetts specifically inquire as to whether the applicant has ever been suspended. *See* Affidavit of Jenny Chou, *Exhibit A*, submitted herewith. LB has shown that he will be irreparably harmed if the suspension is not overturned, he is reinstated in school, and his record expunged.

### III. THE BALANCE OF HARMS FAVORS THE ISSUANCE OF AN INJUNCTION.

The third factor -- balance of harms -- also favors LB and the issuance of an injunction. The goal of a preliminary injunction is to minimize the risk of irreparable harm. *See Packaging Indus. Group, Inc. v. Cheney*, 380 Mass. 609, 616 (1980). If the moving party demonstrates that injunctive relief is necessary in order to prevent irreparable harm and "that *granting the injunction poses no substantial risk of such harm to the opposing party*, a substantial possibility of success on the merits warrants issuing the injunction." *Id.* at 617 n.12 (emphasis added).

Since February 13, 2009, LB has not been permitted to attend school with his classmates. His constitutional and statutory rights are violated each day he is not allowed to do so. Worse, his education is being compromised with each passing day. These injuries to LB are severe and

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<sup>11</sup> In its report on the 4-Year Graduation Rate (2008) for the Worcester Public Schools, the Massachusetts Department of Elementary and Secondary Education (DESE) indicated that the percent of Latino students who dropped out was 21.5%, as compared to 12.0% of white students who had dropped out. *See* DESE, COHORT 2008 GRADUATION RATES: 4-YEAR GRADUATION RATE (2008), available at [http://profiles.doe.mass.edu/grad/grad\\_report.aspx?orgcode=03480000&fycode=2008&orgtypecode=5&](http://profiles.doe.mass.edu/grad/grad_report.aspx?orgcode=03480000&fycode=2008&orgtypecode=5&) (last visited July 14, 2009).

ongoing and grow worse over time. In contrast, Defendants would suffer no injury were LB allowed to return to the classroom. The balance of harms to LB and the defendants weighs heavily in favor of granting injunctive relief.

#### **IV. GRANTING AN INJUNCTION WILL SERVE THE PUBLIC INTEREST**

The fourth factor in determining whether to grant a preliminary injunction is the public interest. A moving party must show that “granting of injunctive relief will not denigrate the public interest.” *Wholey*, 567 F. Supp. 2d at 288; *see McGuire v. Reilly*, 260 F.3d 36, 42 (1st Cir. 2001). In assessing this prong, the potential injury an injunction may cause to the public interest is given “considerable weight.” *McLaughlin v. Boston Sch. Comm.*, 938 F. Supp. 1001, 1017 (D. Mass. 1996). The relevant inquiry is whether the issuance of an injunction would have such an adverse effect on the public interest that, despite the plaintiff’s entitlement to the injunction pursuant to the other factors, the injunction should not be granted. *McLaughlin*, 938 F. Supp. at 1017.

Here, granting an injunction will serve the public interest. In fact, there is no public interest served in denying LB his constitutional and statutory rights. Though there is an undeniable public interest in maintaining safety in schools, the state laws and school policies aimed at ensuring this safety must be administered in such a manner so as not to conflict with the public interest in educating children and in protecting their rights. A punishment may be excessive and contradict the public’s interest in educating children. Those circumstances are present here. LB assumed temporary custody of the prohibited items for two class periods in an attempt to diffuse a potentially dangerous and violent situation. He had a stellar academic record and spotless discipline record. Any suspension – let alone a suspension in excess of an entire calendar year substantially disrupting two school years – is excessive in these circumstances and contradicts, rather than serves, the public interest.

### CONCLUSION

For the reasons stated above, LB respectfully requests that this Court issue an injunction reinstating him immediately in the Worcester public school system, expunging his record of any school discipline from the February 12, 2009 incident, and ordering defendants to provide LB with whatever remedial or other academic assistance is required for LB to begin the ninth grade at the same academic level as when he was wrongfully suspended from school.

Respectfully submitted,  
LB, a Minor by his Mother and Next Friend,  
VG,

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