

LB

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

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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 Stewart, 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

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,  
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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

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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

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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

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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",  
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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"

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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 than 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

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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



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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

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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

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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.

13

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<sup>LB</sup> 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

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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.

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 irrelevant.

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

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. <sup>LB</sup> "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

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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,

LB

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

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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



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,

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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

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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



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

25

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.



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

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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 aside, 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

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

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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 <sup>LB</sup>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  
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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.)

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CERTIFICATE

I, Diane Hulme, a Court Reporter, do hereby certify that the foregoing is a true and accurate transcript from the record of the court proceedings in the above entitled matter.

I, Diane Hulme, further certify that the foregoing is in compliance with the Administrative Office of the Trial Court Directive on Transcript Format.

I, Diane Hulme, further certify that I neither am counsel for, related to, nor employed by any of the parties to the action in which this hearing was taken, and further that I am not financially nor otherwise interested in the outcome of the action.

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