SJC-10981

COMMONWEALTH OF MASSACHUSETTS
APPEALS COURT

No. 2011-P-0127

ROBERT DOE,

Plaintiff-Appellee

v.

TOWN OF WESTON
SUPERINTENDENT OF SCHOOLS,

Defendant-Appellant

On Appeal from an Order of the Superior Court

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

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

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

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INTRODUCTION AND INTERESTS OF *AMICI CURIAE*

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

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

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

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

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

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

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

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

STATEMENT OF THE ISSUE

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

STATEMENT OF FACTS

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

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

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

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

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

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

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

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

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

SUMMARY OF ARGUMENT

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

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

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

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

ARGUMENT

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(emphasis added).

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

2. What disciplinary measures may be imposed.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

CONCLUSION

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

court's order should, therefore, be affirmed.

Respectfully Submitted,

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