COMMONWEALTH OF MASSACHUSETTS

SUPREME JUDICIAL COURT

SJC No. 11977

KATELYNN GOODWIN,

Plaintiff-Appellant,

v.

LEE PUBLIC SCHOOLS AND OTHERS,

Defendants-Appellees.

On Direct Appellate Review of a Judgment
of the Berkshire Superior Court
(C. Jeffrey Kinder, J.)

BRIEF *AMICI CURIAE* OF THE CENTER FOR LAW AND EDUCATION AND THE CHILDREN'S LAW CENTER OF MASSACHUSETTS

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Dated: February 25,2016

Corporate Disclosure Statement

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

Pursuant to Supreme Judicial Court Rule 1:21, amicus curiae, **Children's Law Center of Massachusetts** 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.

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INTRODUCTION AND INTEREST OF *AMICI CURIAE*

The Center for Law and Education ("CLE") and the Children's Law Center of Massachusetts ("CLCM") submit this brief *amici curiae* to address whether a student who is seeking to recover in tort for an unlawful exclusion from school based on the misuse of G.L. c. 71 § 37H1/2(1) must first appeal the principal's decision to suspend her to the superintendent under G.L. c. 71, § 37H1/2(1) and G.L. c. 249, § 4. This case pertains to G.L. c. 71, § 37H1/2(1), which contains a narrow exception authorizing a school principal to suspend a student charged with certain felonious behavior or activity occurring off school grounds. The court's interpretation of G.L. c. 71, § 37H1/2(1) in the context of this case raises an issue of law that is of critical importance to public school age youth in Massachusetts, in particular, students of color and those from low-income families who are disproportionately suspended and expelled from school and typically without legal representation. For example, during the 2012-2013 school year, "[b]lack students received 43% of all out-of-school suspensions and 39% of all expulsions...despite making up only

8.7% of students enrolled in Massachusetts."[1] Further troubling is data showing that "[w]hile 1 in 27 White students were disciplined, 1 in 10 Latino students, and 1 in 8 Black students, were disciplined at least once."[2] "Students receiving free or reduced lunch were disciplined at a rate almost double their enrollment... accounting for 38% of students enrolled but 73% of students disciplined."[3]

It is not possible to extrapolate from this data the number of students who are suspended by principals after being charged with a felony complaint or felony delinquency complaint under subsection (1) of G.L. c. 71, § 37H1/2(1). This data is not currently collected by the Massachusetts Department of Elementary and Secondary Education (DESE)[4], although DESE does require schools and school districts to track and report

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[1] Matt Cregor, Priya Lane, Joanna Taylor, Not Measuring Up: The State of School Discipline in Massachusetts, at 3 (2014).

[2] Id.

[3] Id.

[4] E-mail from Joshua Varon, Legal Counsel, Massachusetts Department of Elementary and Secondary Education, to Jenny Chou, Staff Attorney, Center for Law and Education (Feb. 16, 2016, 14:07 EST) (on file with author).

annually the incidence of students suspended or expelled after a felony conviction consistent with subsection (2) of G.L. c. 71, § 37H1/2.[5] Amici believe that DESE's failure to monitor suspensions under subsection (1) of G.L. c. 71, § 37H1/2 has the effect of camouflaging the extent to which school districts are excluding students under this provision. As evidenced by the treatment accorded the appellant in this case, amici believe that subsection (1) of G.L. c. 71, § 37H1/2 is inappropriately relied upon and misused to unlawfully exclude students from school. Amici believe this problem is exacerbated by the dearth of attorneys in the Commonwealth who provide free legal assistance to students from low-income families who are most vulnerable to disciplinary exclusion. Because school districts' current use of G.L. c. 71, § 37H 1/2(1) is rarely challenged, some students are subjected to unlawful exclusions for which they have no adequate remedy except through tort under G.L. c. 76, § 16. Here, the appellant was

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[5] *Felony Conviction Outside of School*, MASS. DEP'T OF ELEMENTARY AND SECONDARY EDUC.,http://profiles.doe.mass.edu/ssdr/default.aspx?orgcode=00000000&orgtypecode=0&=00000000& (last visited February 22,2016).

charged with neither a felony complaint nor a felony delinquency complaint, but was nonetheless suspended based on G.L. c. 71, § 37H 1/2(1) for virtually the entire second semester of her senior year in high school. Such an exclusion constituted an unlawful exclusion for which she has no adequate remedy except through tort under G.L. c. 76, § 16.

Amici organizations provide direct representation to low-income students who are subject to disciplinary suspensions/expulsions, constructive exclusions from school resulting from schools' failure to provide effective instruction, and other school pushout practices, including criminalizing student behavior and making inappropriate referrals to the juvenile or criminal court. Amici provide legal support, training and technical assistance to the limited number of legal services staff who provide free legal representation to students in education law related matters, in particular, those who, as a result of disciplinary exclusion, are faced with loss of their property interests in their education and liberty interest in their reputations. Both organizations also provide training, legal support, and technical

assistance to private pro bono counsel who assist in keeping these students in school to learn.

CLE is a national non-profit resource and support organization that works with families, advocates, and educators to improve the quality of education for all students, and in particular, indigent students. One of a few national organizations rooted in both civil rights and school reform, CLE focuses on bringing the two together to address systemic barriers that impede low-income students, who are disproportionately students of color, English learners, and students with disabilities, from learning to high standards and remaining in school to learn.

The Children's Law Center of Massachusetts ("CLCM") is a private, non-profit legal advocacy and resource center that has provided individual and appellate representation for indigent children in education, child welfare, juvenile justice and immigration matters for close to forty years. Our organization works with public and private agencies, the courts, and school districts to achieve the shared goal of helping young people become contributing members of our Commonwealth. CLCM attorneys, including advocates within its EdLaw Project, regularly

represent children and youth in education disputes such as the one at the heart of the instant case. The CLCM believes that our youth and the public are best served by a system of education that ensures inclusion, due process and equitable treatment of all students.

STATEMENT OF THE ISSUE

Whether Katelynn Goodwin ("Ms. Goodwin"), who was charged with neither a felony complaint nor a felony delinquency complaint and was therefore wrongfully suspended from public school by her principal based on G.L. c. 71, § 37H 1/2(1), was required to file an appeal to the superintendent under that statute or seek certiorari review under G.L. c, 249, § 4 before bringing an action for unlawful exclusion under G.L. c. 76, § 16.

STATEMENT OF FACTS

Sometime in December 2011, Ms. Goodwin was alleged to be involved with the theft and possession of stolen goods. The principal of Lee Middle and High School, Kerry A. Burke ("Principal Burke"), citing G.L. c. 71, § 37H1/2, informed Ms. Goodwin in a letter dated January 6, 2012 ("January 6 letter") that effective, Monday, January 10, 2012, she was

indefinitely suspending Ms. Goodwin "for the duration of all criminal proceedings as a result of the issuance of criminal complaints by the Lee Police." R.A.26. No such criminal complaint had been issued against Ms. Goodwin as of January 6, 2012. Ms. Goodwin, who was enrolled in her a senior year at Lee Middle High School, was not represented by legal counsel and was not provided a hearing prior to being suspended from school by the Lee Public Schools ("LPS"). In the January 6 letter, Principal Burke notified Ms. Goodwin of her "right to appeal" to Superintendent Jason P. McCandless ("Superintendent McCandless") in writing within five days following the effective date of her suspension. Id. On April 17, 2012, the Southern Berkshire District Court issued a criminal complaint charging Ms. Goodwin with two counts of the misdemeanor offense of receiving stolen property under $250. R.A.35.

SUMMARY OF ARGUMENT

The lower court erred in finding that Ms. Goodwin was required to exhaust administrative remedies based on G.L. c. 71, § 37H1/2(1) prior to filing an action in tort under G.L. c. 76, § 16 because G.L. c. 71, § 37H 1/2(1) did not apply to Ms. Goodwin. G.L. c 71,

§ 37H1/2(1) did not apply to Ms. Goodwin because Ms. Goodwin was charged with neither a felony complaint nor a felony delinquency complaint. Ms. Goodwin was unlawfully excluded from school through the improper use of G.L. c. 71, § 37H1/2(1), and, accordingly, she has a cause of action under G.L. c. 76, § 16 against Lee Public Schools and Town of Lee.

Principal Burke violated the plain language of G.L. c. 71, § 37H 1/2(1), and the statute as applied, by suspending Ms. Goodwin. For a principal to suspend a student under G.L. c. 71, § 37H1/2(1), (1) a felony complaint or felony delinquency complaint must have been issued against the student *and* (2) the principal or headmaster must make a finding based on reasons related to the felony charge that the student's continued presence in school would have a substantial detrimental effect on the general welfare of the school. (pp. 10-17). Because neither a felony complaint nor a felony delinquency complaint ever issued against Ms. Goodwin, G.L. c. 71, § 37H 1/2(1), as a matter of law, did not apply to her, and Principal Burke's suspension of Ms. Goodwin under G.L. c. 71, § 37H1/2(1) was wholly improper. (pp. 17-20).

The school district unlawfully excluded Ms. Goodwin from school from January through April of her senior year in high school by misapplying G.L. c. 71, § 37H1/2(1). Instead of taking responsibility for this serious error of law, the Defendants-Appellees seek to shift the blame by placing the burden on Ms. Goodwin, an unrepresented student, to "appeal" Principal Burke's decision to suspend Ms. Goodwin under G.L. c. 71, § 37H1/2(1) to Superintendent McCandless. As shown throughout, this decision was entirely wrongful and based on an inapplicable statute. The facts do not support Ms. Goodwin's having to exhaust administrative remedies pursuant to G.L. c. 249, § 4. Rather, LPS' misuse and failure to correct the misapplication of G.L. c. 71, § 37H1/2(1) is an error of law. This error of law resulted in the wrongful suspension of Ms. Goodwin under G.L. c. 71, § 37H1/2(1), and her "unlawful exclusion" from school as contemplated by, and actionable under, G.L. c. 76, § 16. (pp. 20-27).

Even if the court were to accept the characterization of the appellees that a "mistaken belief" allowed them to proceed as if the prerequisite felony complaint or felony delinquency complaint had

been issued, LPS unlawfully suspended Ms. Goodwin without providing her a hearing. By failing to hold a hearing in the face of Ms. Goodwin's possible exclusion, LPS deprived Ms. Goodwin of both her property interest in her education and liberty interest in her reputation without adhering to the procedural safeguards required by G.L. c. 71, § 37H1/2(1) and well established constitutional law.[6] Accordingly, LPS' suspension of Ms. Goodwin without first providing her with a hearing was unlawful. (pp. 27-40).

ARGUMENT

I. PRINCIPAL BURKE SUSPENDED MS. GOODWIN IN VIOLATION OF THE PLAIN LANGUAGE OF G.L. C. 71, § 37H 1/2(1)

When interpreting a statute, courts will construe that statute as consistent with its plain language. Mosquera-Perez v. Immigration and Naturalization Serv., 3 F.3d 553, 555 (1st Cir. 1993) ("We assume that the ordinary meaning of the statutory language accurately expresses the legislative purpose.") (internal citations omitted); G.L. c. 4, § 6 ("Words and phrases shall be construed according to the common

[6] Goss v. Lopez, 419 U.S. 565 (1975).

and approved usage of the language."); Commonwealth v. Ray, 435 Mass. 249, 252 (2001) ("When the text of a statute is clear and unambiguous, it must be construed in accordance with its plain meaning.") 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.").

A. The plain language of G.L. c. 71, § 37H1/2(1) mandates that before a student may be suspended under this subsection, a felony complaint or a felony delinquency complaint must have issued against the student, and the principal must find that, because of the charge, the student's continued presence in school would have a substantial detrimental effect on the general welfare of the school.

G.L. c. 71, § 37H 1/2(1) expressly states, in relevant part, that:

> "Upon the issuance of a criminal complaint charging a student with a felony or upon the issuance of a felony delinquency complaint against a student, the principal or headmaster of a school in which the student is enrolled may suspend such student for a period of time determined appropriate by said principal or headmaster if said principal or headmaster determines that the student's continued presence in school would have a substantial detrimental effect on the general welfare of the school. The student shall receive written notification of the charges and the reasons for such suspension *prior to such suspension* taking effect." (emphasis added).

In essence, G.L. c. 71, § 37H 1/2(1) establishes a two-pronged test that vests the principal or headmaster of a school with particular authority to suspend a student only if both prongs are met.

First, there must be the "issuance of a criminal complaint charging a student with a felony or...the issuance of a felony delinquency complaint against a student." G.L. c. 71, § 37H 1/2(1). G.L. c. 71, § 37H 1/2(1) implicitly adopts G.L. c. 274, § 1's definition of a felony as "[a] crime punishable by death or imprisonment in the state prison." See Commonwealth v. Zone Book, Inc., 372 Mass. 366, 369 (1977) (undefined statutory terms assume "their usual and accepted meanings as long as these meanings are consistent with statutory purpose[;]" courts "derive the words' usual and accepted meanings from sources presumably known to the statute's enactors, such as their use in other contexts and dictionary definitions"). A felony complaint does not become "issued" until "[t]he complainant...sign[s] the complaint under oath, before an appropriate judicial officer" and the judicial officer determines that "the information presented by the complainant establishes probable cause to believe that the person against whom

the complaint is sought committed an offense." Mass. R. Crim. P. 3(g)(1),(2). The issuance of a felony complaint or a felony delinquency complaint *is a necessary condition, i.e., a prerequisite,* to a principal's authority to suspend a student under G.L. c. 71, § 37H1/2(1).

Second, provided a felony complaint or a felony delinquency complaint has been issued, the principal or headmaster may suspend the student "if said principal or headmaster determines that the student's continued presence in school would have a substantial detrimental effect on the general welfare of the school." G.L. c. 71, § 37H1/2(1). Absent such a determination, the principal or headmaster has no authority under G.L. c. 71, § 37H 1/2(1) to suspend a student for whom a felony complaint or a felony delinquency complaint has issued. See Doe v. Superintendent of Schs. of Stoughton, 437 Mass. 1, 4 (2002) ("A felony charge alone is not sufficient basis for imposing suspension...."). Furthermore, consistent with the language of G.L. c. 71, § 37H1/2(1) expressly requiring that "[t]he student shall receive written notification of the charges *and the reasons for such suspension prior to such*

suspension taking effect" (emphasis added), a nexus must exist between the underlying behavior related to the felony and the principal's assessment of the student's future detrimental behavior in school. See Superintendent of Schs. of Stoughton, 437 Mass. at 7 (upholding the suspension of a high school student for sexual assault of a young child because there was a felony charge and "[g]iven the nature and seriousness of the allegations, [the student's] admitted participation in the crime, and [the student's] lack of remorse or appreciation for the gravity of his actions, the principal reasonably concluded that there was a danger [the student] may attempt to engage in similar behavior with his fellow students"); Doe ex rel. Doe v. Winchendon School Comm., 18 Mass.L.Rptr. 53, 3 (Mass. Super. Ct. 2004).

In summary, a principal or headmaster *only has authority to suspend a student under G.L. c. 71, § 37H 1/2(1) if* (1) a court has issued a felony complaint or felony delinquency complaint against the student, *and* (2) the principal or headmaster makes a determination that, because of behavior(s) related to the felony complaint or felony delinquency complaint, the student's continued presence in school would have a

substantial detrimental effect on the general welfare of the school.

B. Lee Public Schools violated the plain language of G.L. c. 71, § 37H 1/2(1), and G.L. c. 71, § 37H 1/2(1) as applied, by suspending Ms. Goodwin when neither a felony complaint nor felony delinquency complaint had been issued against her.

Principal Burke's January 6, 2012 suspension of Ms. Goodwin under G.L. c. 71, § 37H 1/2(1) violated the plain language of G.L. c. 71, § 37H 1/2(1) because no court ever issued a felony complaint or a felony delinquency complaint against Ms. Goodwin. Absent a felony complaint or felony delinquency complaint, Principal Burke had no "authority" based on G.L. c. 71, § 37H1/2(1), for "invoking [her] right to suspend [Ms. Goodwin] for the duration of all criminal proceedings as a result of the issuance of criminal complaints by the Lee Police against Katelynn." R.A.26. Principal Burke's statement that the Lee Police had issued a criminal complaint against Ms. Goodwin by January 6, 2012 was patently false for two reasons: (1) the Lee Police Department does not have legal authority to issue criminal complaints, and (2) no court had issued a criminal complaint of any kind against Ms. Goodwin as of January 6, 2012. In fact, the Southern Berkshire District Court did not issue a

complaint of any kind until April 17, 2012. R.A.35. Further, the Southern Berkshire District Court charged Ms. Goodwin with two counts of the *misdemeanor offense* of receiving stolen property under $250. Id. (emphasis added). Misdemeanor offenses are not offenses for which a principal or headmaster may suspend a student under G.L. c. 71, § 37H 1/2(1); such an action by a principal or headmaster is *ultra vires*.

LPS also violated G.L. c. 71, § 37H 1/2(1) as applied because, in the absence of a felony complaint, Principal Burke could not make a determination that Ms. Goodwin's continued presence in school would pose a substantial detrimental effect to the welfare of the school. Principal Burke's claimed determination that Ms. Goodwin's continued presence posed a detriment to the general welfare of the school is invalid because Principal Burke's determination had no nexus with a felony complaint, as there was no felony complaint. See Superintendent of Schs. of Stoughton, 437 Mass. at 7; Winchendon Sch. Comm., 18 Mass.L.Rptr. at 3.

Because a court issued neither a felony complaint nor a felony delinquency complaint against Ms. Goodwin, G.L. c. 71, § 37H 1/2(1) *never applied* to Ms. Goodwin's situation. Accordingly, Principal Burke's

decision to suspend Ms. Goodwin under G.L. c. 71, § 37H1/2(1) was in violation of the plain language of G.L. c. 71, § 37H 1/2(1), constituted a misapplication of the narrowly crafted statute, and resulted in Ms. Goodwin's unlawful exclusion from school.

C. Whether a felony complaint or a felony delinquency complaint has been issued against a student is an indisputable statutorily mandated prerequisite to suspension.

Defendants insinuate that whether a felony complaint or felony delinquency complaint has been issued falls within the discretion of the principal or headmaster. See Brief for Defendant-Appellees, at 32-35, Katelynn Goodwin v. Lee Pub. Schs. and Others, No. SJC-11977 (stating that "[b]ased upon Ms. Goodwin's argument that she does not have to exhaust administrative remedies under G.L. c. 71, § 37H 1/2 because she was not issued a felony complaint, the court would be put in the position of usurping the deference to the school system's discretion as to whether a suspension is proper"). However, to the contrary, G.L. c. 71, § 37H 1/2(1), by its plain language, is clear that "the issuance of a criminal complaint," not the principal's determination of the issuance of a criminal complaint, is required as a

condition precedent for G.L. c. 71, § 37H 1/2(1)'s application. Only after that statutorily mandated criterion is met does the General Court grant the principal or headmaster discretion to consider the second prong of G.L. c. 71, § 37H 1/2(1) (suspension is proper "if said principal or headmaster determines that the student's continued presence in school would have a substantial detrimental effect on the general welfare of the school").

The absence of discretionary language in the first prong, in comparison to the clear discretionary language in the second prong, should be read as delineating the difference between a non-discretionary and discretionary decision. Keene Corp. v. U.S., 508 U.S. 200, 208 (1993) ("'[W]here Congress includes particular language in one section of a statute but omits it in another..., it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.'") (quoting Russello v. U.S., 464 U.S. 16, 23 (1983)); Malloch v. Town of Hanover, 472 Mass. 783, 790 (2015) (courts do not "read into [the] statute a provision which the Legislature did not see fit to put there, [and to] add

words that the Legislature had an option to, but chose not to include.") (internal quotations omitted).

As enacted, G.L. c. 71, § 37H 1/2 is a very narrow statute that carves out an exception to the limitation placed on public school officials' authority to punish students for conduct that occurs off school grounds and is unrelated to a school-sponsored event. See G.L. c. 71, § 37H1/2 ("Notwithstanding the provisions of section eighty-four); G.L. c. 71, § 84 ("No student shall be suspended, expelled, or otherwise disciplined on account of marriage, pregnancy, parenthood or for conduct which is not connected with any school-sponsored activities."). The narrowness of G.L. c. 37H1/2(1)[7] and the severity of loss a student suspended under G.L. c. 71, § 37H1/2(1) suffers underscore the critical need for a principal or headmaster proposing to suspend a student under G.L. c. 37H 1/2(1) to

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[7] G.L. c. 71, § 37H1/2(1) "was motivated by the perceived need to exclude several students charged with or convicted of serious violent felonies. The Department recommends that principals reserve the exclusion power for such offenses." Robert V. Antonucci, *Advisory Opinion on Student Discipline*, MASSACHUSETTS DEPARTMENT OF ELEMENTARY AND SECONDARY EDUCATION (January 27, 1994) (archived), http://www.doe.mass.edu/lawsregs/advisory/discipline/AOSD1.html.

ensure that a felony complaint or a felony delinquency complaint has actually been issued. The student does not have the burden of disproving the issuance of a felony complaint or felony delinquency complaint. Rather, evidence that a felony complaint or felony delinquency complaint was issued is a non-discretionary, indisputable prerequisite to a principal proposing to suspend a student under G.L. c. 71, § 37H 1/2(1).

II. THE EXPRESSED STATUTORY LIMITATION ON PRINCIPAL BURKE'S AUTHORITY TO SUSPEND MS. GOODWIN UNDER THE AUSPICES OF G.L. C. 71, § 37H 1/2(1) IS A PURE QUESTION OF LAW AND NOT A QUESTION OF FACT SUBJECT TO ADMINISTRATIVE APPEAL

This case strictly involves an error of law concerning LPS' misuse of an inapplicable statute, G.L. c. 71, §37H 1/2(1), not a factual dispute relating to whether the school authorities abused their discretion. Consequently, this court should find that there is no basis for exhaustion under the administrative procedures of either G.L. c. 71, § 37H1/2(1) or G.L. c. 249, § 4. Further, because Ms. Goodwin is neither subject to exhaustion under G.L. c. 71, § 37H1/2(1) nor G.L. c. 249, § 4, this court should find that Ms. Goodwin has a right to pursue her

legal remedy for unlawful exclusion under G.L. c. 76, § 16.

A. The Defendants-Appellees committed an error of law when Principal Burke suspended Ms. Goodwin under G.L. c. 71, § 37H 1/2(1) in the absence of a court having issued a felony complaint or a felony delinquency complaint against her.

Defendants-Appellees committed an error of law when Principal Burke suspended Ms. Goodwin on January 6, 2012 under the auspices of G.L. c. 71, § 37H 1/2(1) absent a felony complaint or a felony delinquency complaint. As described above, Principal Burke's improper invocation of statutory authority to suspend Ms. Goodwin from school where none existed is a legal issue, not a factual issue. Principal Burke had no authority to suspend Ms. Goodwin under G.L. c. 71, § 37H 1/2(1) because neither a felony complaint nor a felony delinquency complaint was issued against Ms. Goodwin. Defendants-Appellees committed an error of law and unlawfully excluded Ms. Goodwin when they applied G.L. c. 71, § 37H 1/2(1) to suspend Ms. Goodwin despite the fact that G.L. c. 71, § 37H1/2(1) was legally inapplicable to Ms. Goodwin's situation.

B. This court should review LPS' actions in suspending Ms. Goodwin under G.L. c. 71, § 37H 1/2(1) *de novo* because LPS committed an error of law.

A court reviewing a decision to suspend a student under G.L. c. 71, § 37H 1/2(1) for a factual error 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. A court reviewing a legal error, however, will conduct a *de novo* review of the matter. Deutsche Bank Nat'l Ass'n v. First American Title Ins. Co., 465 Mass. 741, 744 (2013). The decision by Principal Burke to suspend Ms. Goodwin under G.L. c. 71, § 37H 1/2(1) was neither an error of fact nor a determination within the discretion of the principal and other school officials. Rather, as discussed above, LPS' application of G.L. c. 71, § 37H1/2(1) to Ms. Goodwin's situation was an error of law because the legal criterion for applying G.L. c. 71, § 37H1/2(1) never existed. Accordingly, because the Lee school officials committed an error of law the court should review the school district's actions in erroneously suspending Ms. Goodwin under G.L. c. 71, § 37H1/2(1) *de novo*.

C. Ms. Goodwin may proceed in tort under G.L. c. 76, § 16 without exhausting administrative remedies under either G.L. c. 71, § 37H1/2(1), including an appeal to the superintendent, or G.L. c. 249, § 4 because G.L. c. 71, § 37H1/2(1) never applied to Ms. Goodwin's situation.

Defendant-Appellees claim that Ms. Goodwin forfeited her right to tort claims under G.L. c. 76, § 16 because Ms. Goodwin failed to exhaust her administrative remedies under G.L. c. 71, § 37H 1/2(1); specifically, Ms. Goodwin failed to appeal her suspension to Superintendent McCandless. R.A.13-14. However, Ms. Goodwin did not have to exhaust the administrative remedies under G.L. c. 71, § 37H 1/2(1) because G.L. c. 71, § 37H 1/2(1), as a matter of law, *never applied* to Ms. Goodwin's situation. Ms. Goodwin was at no point subject to either the punitive measures or administrative procedures contemplated by G.L. c. 71, § 37H 1/2(1) because no felony complaint or felony delinquency complaint ever issued against her. The lack of a felony complaint or felony delinquency complaint is a fact acknowledged by the Defendants-Appellees, and fatal to their claim that Ms. Goodwin failed to exhaust administrative remedies under the inapplicable G.L. c. 71, § 37H 1/2(1). See Brief for Defendant-Appellees, at 23, Katelynn Goodwin

v. Lee Pub. Schs. and Others, No. SJC-11977 ("LPS does not dispute that Ms. Goodwin was suspended under G.L. c. 71, § 37H1/2 on January 10, 2012, *due to the belief* she had been charged with a felony.") (emphasis added).

Similarly, G.L. c. 249 § 4, was also *never applicable* to Ms. Goodwin's situation because there was no proceeding "not otherwise reviewable by motion or by appeal." G.L. c. 249, § 4. Such a proceeding is a requirement for triggering G.L. c. 249, § 4's provisions. This court has recognized that G.L. c. 249, § 4 is the appropriate avenue to appeal a superintendent's decision under G.L. c. 71, § 37H1/2(1); however, a student's use of G.L. c. 249, § 4 to redress a wrong under G.L. c. 71, § 37H1/2(1) relies on the fact that the superintendent's administrative decision under G.L. c. 71, § 37H1/2(1) is a final decision with regard to the suspension. See Superintendent of Schs. of Stoughton, 437 Mass. at 5 ("Because [G.L. c. 71, § 37H1/2] does not provide a particular method of seeking judicial review of the superintendent's decision, an aggrieved party may seek relief under G.L. c. 249, § 4."). Superintendent McCandless never came to a final decision pursuant to

G.L. c. 71, § 37H1/2(1) because G.L. c. 71, § 37H1/2(1) never applied to Ms. Goodwin's circumstances. Accordingly, without G.L. c. 71, § 37H1/2(1) applying to Ms. Goodwin's situation, Ms. Goodwin did not have to comply with G.L. c. 249, § 4's filing requirements because G.L. c. 249, § 4 was similarly inapplicable.

Because, as a matter of law, Ms. Goodwin neither had to exhaust administrative remedies under G.L. c. 71, § 37H 1/2(1) nor G.L. c. 249, § 4, Ms. Goodwin is entitled to pursue a tort claim under G.L. c. 76, § 16 against LPS for unlawful exclusion.

D. LPS unlawfully excluded Ms. Goodwin as contemplated in G.L. c 76, § 16 when Principal Burke suspended Ms. Goodwin under G.L. c. 71, § 37H1/2(1) without a felony complaint or felony delinquency complaint.

G.L. c. 76, § 16 provides that

> "[a]ny pupil who has attained age eighteen, or the parent, guardian or custodian of a pupil who has not attained said age of eighteen, who has been refused admission to or excluded from the public schools or from the advantages, privileges and courses of study of such public schools shall on application be furnished by the school committee with a written statement of the reasons therefor, and thereafter, if the refusal to admit or exclusion was unlawful, such pupil may recover from the town or, in the case of such refusal or exclusion by a regional school district from the district, in tort...."

Absent particular definition, "unlawful" takes on its plain meaning of "not authorized by law, illegal." Black's Law Dictionary, 1771 (10th Ed. 2014); G.L. c. 4 § 6. Similarly, exclusion means "the state of being excluded." Meriam-Webster: Exclusion (http://www.merriam-webster.com/dictionary/exclusion) (last visited 02/16/16). See, e.g. Doe v. Yunitz, 15 Mass.L.Rptr. 278, 7 (2001) (allowing a biologically male high school student who was diagnosed with gender identity disorder to amend her complaint to state a claim under G.L. c. 76, § 16 "alleging constructive expulsion without due process" where school refused to let her attend school wearing "girls" clothing).

Defendant LPS unlawfully excluded Ms. Goodwin from school when Principal Burke suspended Ms. Goodwin under G.L. c. 71, § 37H1/2(1) in the absence of a felony complaint or felony delinquency complaint. G.L. c. 71, § 37H1/2(1)'s express exemption that G.L. c. 71, § 37H1/2(1) exists "[n]otwithstanding the provisions of...[section] sixteen...of chapter seventy-six" is immaterial in this instance because, as discussed throughout, G.L. c. 71, § 37H1/2(1) *never applied* to Ms. Goodwin's situation. Absent a felony complaint or felony delinquency complaint, LPS'

exclusion of Ms. Goodwin under G.L. c. 71, § 37H1/2(1) was unlawful as contemplated in G.L. c. 76, § 16.

III. EVEN ASSUMING THE PREREQUISITE FELONY CHARGE HAD BEEN ISSUED, G.L. c. 71, § 37H1/2(1) REQUIRES A PRINCIPAL TO PROVIDE A STUDENT WITH A HEARING PRIOR TO SUSPENDING THE STUDENT FROM SCHOOL

G.L. c. 71, § 37H1/2(1) mandates that a principal or headmaster who relies upon G.L. c. 71, § 37H1/2(1) as a basis for proposing to suspend a student must hold a hearing prior to the decision to suspend the student from school. This court, in interpreting G.L. c. 71, § 37H1/2(1), has expressly recognized such a requirement. Superintendent of Schs. of Stoughton, 437 Mass. at 4 ("The principal or headmaster...*must* provide the student with written notification and a hearing *before* any suspension may take effect.") (emphasis added).

A. The plain language of G.L. c. 71, § 37H1/2(1) requires a principal seeking to suspend a student under G.L. c. 71, § 37H1/2(1) to provide the student with a hearing prior to any such suspension.

The requirement that a school must hold a hearing when a student is facing exclusion under G.L. c. 71, § 37H1/2(1) is both implicit and explicit from the plain language of G.L. c. 71, § 37H1/2(1).

Explicitly, the requirement that a principal provide a student facing exclusion under G.L. c. 71, §

37H1/2(1) with a hearing is evident from the fact that "[t]he student shall receive written notification of the charges *and the reasons for such suspension prior to such suspension taking effect*." (emphasis added). G.L. c. 71, § 37H1/2(1). See Superintendent of Schs. of Stoughton, 437 Mass. at 4. The principal cannot make a rational, fact-based decision upon which to provide the student with "the reasons for such suspension" without first conducting a hearing. Further, G.L. c. 71, § 37H1/2(1) provides that "the student shall have the right to appeal the suspension to the superintendent." G.L. c. 71, § 37H1/2(1)'s use of the word "appeal" assumes a hearing in the face of a possible exclusion. The matter for the superintendent to review upon appeal is the principal's determination that the student's continued presence poses a detrimental effect to the general welfare of the school. This is, again, a determination that the principal or headmaster cannot come to without first conducting a hearing. See Superintendent of Schs. v. Stoughton, 437 Mass. at 7 (listing the comprehensive fact-based factors that went into the principal's valid determination that the

student's continued presence posed a detriment to the general welfare of the school).

Implicitly, G.L. c. 71, § 37H 1/2(1)'s requirement that a principal or headmaster provide the student with a hearing is apparent when reading G.L. c. 71, § 37H 1/2(1) in conjunction with its companion sections concerning school discipline: G.L. c. 71, § 37H and G.L. c. 71, § 37H 3/4.[8] See Wachovia Bank v. Schmidt, 546 U.S. 303, 315-16 (2006) ("under the in *pari materia* canon of statutory construction, statutes addressing the same subject matter generally should be read as if they are one law") (internal quotations omitted); Bd. of Educ. v. Assessors of Worcester, 368 Mass. 511, 513-14 (1975) ("[W]here two or more statutes relate to the same subject matter, they should be construed together so as to constitute a harmonious whole consistent with the legislative purpose.").

G.L. c. 71, § 37H deals with the suspension and expulsion of students (1) found in possession of a dangerous weapon, (2) a controlled substance, or (3)

[8] Chapter 380 of Acts of 1993 amended G.L. c. 71, § 37H to add § 37H 1/2; Chapter 222 of Acts of 2012 amended c. 71, § 37H to add § 37H 3/4.

who have assaulted school staff on school grounds or at a school-sponsored event or school-related event. G.L. c. 71, § 37H(c) is clear that any student charged with a violation "shall be notified in writing of an opportunity for a hearing; provided, however, that the student may have representation, along with the opportunity to present evidence and witnesses at said hearing before the principal."

G.L. c. 71, § 37H3/4 "govern[s] the suspension and expulsion of students enrolled in a public school in the commonwealth who are not charged with a violation of subsections (a) or (b) of section 37H or with a felony under section 37H 1/2." Similarly, G.L. c. 71, § 37H3/4 contains extensive procedural protections and is clear that "[f]or any suspension or expulsion under this section...[t]he student shall receive written notification and shall have the opportunity to meet with the principal or headmaster, or a designee, to discuss the charges and reasons for the suspension or expulsion prior to the suspension or expulsion taking effect." G.L. c. 71, § 37H3/4(c).

The necessity to read G.L. c. 71, § 37H1/2(1) in *pari materia* to require a hearing is supported by the fact that G.L. c. 71, § 37H1/2(1) presents greater

risk of error of exclusion based upon unproven facts than G.L. c. 71, § 37H and G.L. c. 71, § 37H3/4. It is absurd and illogical to presume the legislature denied procedural protection to the students arguably most at risk of a suspension in the face of innocence. See Flemings v. Contributory Retirement App. Bd., 431 Mass. 374, 375-76 (2000) ("If a sensible construction is available, we shall not construe a statute to make a nullity of pertinent provisions or to produce absurd results."); Manning v. Boston Redevelopment Auth., 400 Mass. 444, 453 (1987) (same).

Furthermore, reading G.L. c. 71, § 37H 1/2(1) as not requiring a school to provide a student facing exclusion with a hearing opens G.L. c. 71, § 37H1/2(1) to constitutional challenge. See Goss v. Lopez, 419 U.S. 565 (1975); Mathews v. Eldridge, 424 U.S. 319 (1976). Consistent with rules of statutory construction, this court should interpret G.L. c 71, § 37H1/2(1) consistent with the statute as a whole to require a hearing before a possible exclusion, as a contrary interpretation would render G.L. c. 71, § 37H1/2(1) unconstitutional. See Baird v. Attorney General, 371 Mass. 741, 745 (1977) ("The presence of a serious constitutional question under one

interpretation should be avoided if, as here, there is another reasonable interpretation of the statute which would allow the court to not address the constitutional question").

For the foregoing reasons, Defendants argument that G.L. c. 71, § 37H1/2(1)'s post-suspension "appeal" is sufficient process is untenable when reconciled with the plain language of G.L. c. 71, § 37H1/2(1), the statutory scheme as a whole, and, as discussed *infra*, established constitutional precedent. Accordingly, G.L. c. 71, § 37H1/2(1) requires that a school provide a student facing a potential exclusion under G.L. c. 71, § 37H1/2(1) with a hearing.

B. A student is entitled to due process protections based on well-established constitutional precedent prior to being suspended by a principal under G.L. c. 71, § 37H1/2(1).

There is no question that Ms. Goodwin, as any student, had both a property interest in her education and a liberty interest in her reputation that were protected by due process.[9] See Gorman v. Univ. of

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[9] 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., Neff v. Comm'r of Dep't of Indus. Accidents, 421 Mass. 70, 80 (1995); Liab.

Rhode Island, 837 F.2d 7, 12 (1st Cir. 1988); Pomeroy v. Ashburnham Westminster Reg'l Sch. Dist., 410 F. Supp. 2d 7, 14-15 (D. Mass. 2006). A public school student's property interest in her education derives from the Education Clause of the Massachusetts Constitution. See Mancuso v. Mass. Interscholastic Athletic Ass'n, Inc., 453 Mass. 116, 125 (2009) (citing McDuffy v. Sec'y of Exec. 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 v. Lopez, 419 U.S. 565 (1975)] that no State actor could deny the plaintiff a public education without complying with the requirements of the due process clause.").[10] A student's liberty interest arises from the fact that, given the serious nature of offenses G.L. c. 71, § 37H1/2(1) is meant to deal with, a suspension under

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Investigative Fund Effort, Inc. v. Mass. Med. Prof'l Ins. Ass'n, 418 Mass. 436, 443 (1994).

[10] A student's property interest in her education also derives from the Massachusetts compulsory education statute, G.L. c. 76, § 1. See Parkins v. Boule, 2 Mass. L. Rptr. 331, 1994 WL 879558, *13 (Mass. Super. Ct. 1994) aff'd sub nom. Doe v. Superintendent of Schs. of Worcester, 421 Mass. 117 (1995); Pomeroy, 410 F. Supp. 2d at 14-15. See also G.L. c. 76, § 5 ("Every person shall have a right to attend the public schools of the town where she actually resides").

G.L. c. 71, § 37H1/2(1) "could seriously damage [Ms. Goodwin's] standing with [her] fellow pupils and [her] teachers as well as interfere with later opportunities for higher education and employment." Goss, 419 U.S. at 575. Accordingly, such protected interests "may not be taken away for misconduct without adherence to the minimum procedures required by [the Due Process Clause]." Id. at 574.

For suspensions of 10 days or less, Goss firmly holds that "[a]t the very minimum...students...must be given *some* kind of notice and afforded *some* kind of hearing," including "oral or written notice of the charges against [the student] and, if [the student] denies them, an explanation of the evidence the authorities have and an opportunity to present his side of the story." Id. at 576-79, 581. "Longer suspensions or expulsions...may require more formal procedures" and "in unusual situations, although involving only a short suspension, something more than the rudimentary procedures [may] be required." Id. at 581, 584. The Court in Goss stressed that, "as a general rule[,] notice and hearing should precede removal of the student from school." Id. at 582.

To determine what procedures are due in long-term suspension cases, the First Circuit has weighed three factors: "[1] the private interest that will be affected by the official action; [2] the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and [3] the [state's] interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail." Gorman, 837 F.2d at 13 (quoting Mathews v. Eldridge, 424 U.S. 319, 335 (1976)); see also Pomeroy, 410 F. Supp. 2d at 15. Due process is flexible, Morrissey v. Brewer, 408 U.S. 471, 481 (1972), and the greater the deprivation, the greater the process owed.

In light of Goss, Mathews, and the guarantees of procedural due process, it is clear that G.L. c. 71, § 37H1/2(1) requires a principal or headmaster to provide a hearing to any student who is the subject of possible suspension under G.L. c. 71, § 37H 1/2(1). See Superintendent of Schs. of Stoughton, 437 Mass. at

4.[11] A student's interest in continuing her education uninterrupted by a period of suspension is obviously a strong interest. This court has recognized that both the individual and the state have an interest in a continuing, uninterrupted education. See McDuffy v. Sec'y of Exec. Office of Educ., 415 Mass. at 606 ("the Commonwealth has a duty to provide an education for *all* its children...and...this duty is designed not only to serve the interests of the children, but more fundamentally, to prepare them to participate as free citizens of a free State to meet the needs and

[11] The Massachusetts Department of Elementary and Secondary Education has recognized that students facing exclusion under G.L. c. 71, § 37H1/2 are entitled to "a fair hearing that generally includes the following procedural rights...: "(a) written notice of the charges (in the student's primary language); (b) the right to be represented by a lawyer or advocate (at the student's expense); (c) adequate time to prepare for the hearing; (d) access to documented evidence prior to the hearing; (e) the right to request that witnesses attend the hearing, and to question them (although some courts have held that in the school context, the student's right to confront and cross-examine student witnesses may be outweighed by the need to protect them from possible retaliation); and (f) a reasonably prompt written decision including specific grounds for the decision." Robert V. Antonucci, *Advisory Opinion on Student Discipline*, MASSACHUSETTS DEPARTMENT OF ELEMENTARY AND SECONDARY EDUCATION (January 27, 1994) (archived), http://www.doe.mass.edu/lawsregs/advisory/discipline/AOSD1.html.

interests of a republican government, namely the Commonwealth of Massachusetts").

Additionally, the risk of erroneous deprivation of that right under G.L. c. 71, § 37H 1/2(1) without providing a hearing prior to suspension is high, as any missed class time can have a dramatic and irreversible effect on the social, emotional, and academic development of a child. See Brown v. Bd. of Educ. of Topeka, Shawnee Cnt'y, Kan., 347 U.S. 483, 493 (1954) ("education is perhaps the most important function of state and local governments[,]...[and] it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education").

Finally, the fiscal and administrative burdens that providing a hearing before a possible exclusion would entail are minimal.

Accordingly, given the above considerations, G.L. c. 71, § 37H 1/2(1) requires a principal seeking to suspend a student under G.L. c. 71, § 37H 1/2(1) to provide that student with a prior hearing consistent with well-established constitutional precedent.

C. LPS violated G.L. c. 71, § 37H 1/2(1)'s procedural protections when Principal Burke suspended Ms. Goodwin without first providing her with a hearing prior to her suspension.

LPS did not afford Ms. Goodwin with the procedural protections that G.L. c. 71, § 37H1/2(1) guaranteed her because LPS failed to provide Ms. Goodwin with a hearing before her January 6, 2012 suspension. The only process Ms. Goodwin received prior to her suspension was a letter from Principal Burke on January 6, 2012 informing Ms. Goodwin and her mother that she was invoking her right [under G.L. c. 71, § 37H1/2(1)] to suspend the student. The letter indicated that Ms. Goodwin would be excluded "effective January 10, 2011 [sic]...for the duration of all criminal proceedings as a result of the issuance of criminal complaints by the Lee Police against [Ms. Goodwin]." R.A.26. In this same letter, Principal Burke informed Ms. Goodwin of her "right to appeal this suspension to Superintendent Jason P. McCandless...which includes a request for a hearing on [Ms. Goodwin's] behalf, [and] must be submitted to the superintendent in writing no later than five (5) calendar days following the effective date of the suspension." R.A.26.

Intimation by LPS that Ms. Goodwin lost her right to any sort of hearing by not requesting an appeal in writing to Superintendent McCandless is immaterial because LPS only offered a *post-suspension* appeal when G.L. c. 71, § 37H 1/2(1) required LPS to offer, and Ms. Goodwin was entitled to receive, a hearing prior to being suspended. LPS' actions are especially egregious given the gravity and severity of Ms. Goodwin's suspension; a suspension for an unspecified time period based on a non-existent felony or felony delinquency complaint. See R.A.26. LPS unlawfully suspended Ms. Goodwin from January 10, 2012 until May 2, 2012. Ms. Goodwin's suspension cost her four months of in-class learning as well as opportunity to participate in senior year activities with her peers, graduate with her classmates, and delayed her ability to achieve her diploma for an entire school year.

G.L. c. 71, § 37H 1/2(1) required LPS to provide Ms. Goodwin with a hearing before her suspension took effect on January 10, 2012. LPS failed to provide Ms. Goodwin with a hearing prior to her suspension, and, in doing so, completely denied Ms. Goodwin her procedural protections under G.L. c. 71, § 37H 1/2(1)

and unlawfully excluded Ms. Goodwin from her public education.

CONCLUSION

At no point was Ms. Goodwin charged with a felony complaint or a felony delinquency complaint. Principal Burke's suspension of Ms. Goodwin under the auspices of G.L. c. 71, § 37H 1/2(1) constituted an "unlawful exclusion" under G.L. c. 76, § 16 because G.L. c. 71, § 37H 1/2(1) *never applied* to Ms. Goodwin's situation. Ms. Goodwin was at no time subject to either the punitive measures or administrative provisions of G.L. c. 71, § 37H 1/2(1). Ms. Goodwin had no need to exhaust administrative remedies under G.L. c. 71, § 37H 1/2(1) or G.L. c. 249, §4 because G.L. c. 71, § 37H 1/2(1) was inapplicable and there were no proceedings to review. Accordingly, Ms. Goodwin may maintain an action under G.L. c. 76, § 16 to recover in tort on a claim of unlawful exclusion.

Respectfully submitted,

THE CENTER FOR LAW AND EDUCATION AND THE CHILDREN'S LAW CENTER OF MASSACHUSETTS

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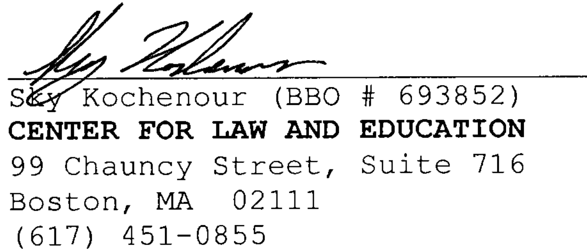
Dated: February 25, 2016

Certificate of Compliance
Pursuant to Rule 16(k) of the
Massachusetts Rules of Appellate Procedure

Certificate of Compliance

I, Sky Kochenour, hereby certify that, to the best of my knowledge, the foregoing brief substantially complies with the Rules of this Court pertaining to the filing of briefs including, but not limited to, Rules 16, 17, and 20 of the Massachusetts Rules of Appellate Procedure.



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