VII. DISCUSSION OF ISSUES

A. What provisions of the Board's Code of Conduct were violated by the student and when?

Finding:

The misconduct placed by Dr. Peoples in the hearing notice, dated December 17, 2007, was appropriate and consistent with the language and provisions of the Code of Conduct. [redacted]

Accordingly, pursuant to the Board's established procedures for determining guilt or innocence, she violated two specific provisions of the Code.

First, within the section on "Possession of Pagers, Cell Phones, Two Way Radios and all other Electronic Devices with Wireless Communication Capabilities," found at page 11:

2. **Students may not carry about or operate cell phones in school buildings.**

Second, within the section of "Prohibited Conduct", Subdivision "B" is titled:

Engage in conduct that is insubordinate, found at page 8. Examples of insubordinate conduct include but are not limited to:

1. Failing to comply with the valid directions of teachers, school administrator or other employees in charge of students or other wise demonstrating disrespect.
2. **Lateness for, skipping or leaving school with out permission;**
3. Skipping detention.

Discussion:

Pursuant to Dr. Monica Peoples' letter to [redacted] and Mary Jo Pfeiffer's letter Crystal Barton, both dated December 17, 2007, [redacted] was charged with what

appears to be three separate violations of the Board's Code of Conduct. Specially the charge read:

[redacted]

This investigation reviewed the requirements for a Code of Conduct in New York State and execution of its provisions. At the outset, it is concluded that the District's Code of Conduct meets the requirements of New York law. This analysis requires further discussion of the contents of the Code and its application to student disciplinary hearings.

The regulation of conduct on school district property by a Board of Education is governed by Article 55 of the New York Education Law, Section 2800. Section 2801 (2) requires every Board of Education within the state to adopt and enforce a code of conduct for the maintenance of order on school property and at school functions, which shall govern the conduct of students, teachers, and other school personnel, as well as visitors.

Pursuant to the regulations of the Commissioner of Education, the Code must include provisions regarding conduct, dress and language that is deemed both appropriate and acceptable and inappropriate and unacceptable on school property. In addition, the Code must include a range of disciplinary measures that can be imposed for code violations. The Code must include procedures by which violations are reported, determined, discipline measures imposed and discipline measures carried out.

Further, the Board is required to annually review and update the Code as necessary. Lastly, the Education Law and the Commissioner's regulations require that the Code meet sixteen minimum standards that govern both the procedural and substantive aspects of the code's content and its enforcement.

This Board of Education has adopted a Code of Conduct as required by New York law. The Code is maintained by Dr. Monica Peoples, Assistant Superintendent for Pupil Personnel Services. The Code currently being used by Dr. Peoples is dated 2005-2006. The major topics addressed, Students Rights and Responsibilities; Dress Code; Procedures for Possession of Electronic Devices; Prohibited Conduct and Penalties for Infractions; Parents and Visitors and Further Information, generally meet the requirements of New York law.

The section on Prohibited Conduct has eight separate and distinct categories beginning with minor misconduct and reflecting additional misconduct with an increasing progression of seriousness. The categories are:

(a) Disorderly Conduct

(b) Insubordinate Conduct

(c) Disruptive Conduct

(d) Violent or threatening Conduct

(e) Conduct which endangers safety, morals, health or welfare of others

(f) Misconduct on a school bus

(g) Academic Misconduct

(h) Instigation or encouragement of another person to violate the Code

In addition to the actual Code document, the District also maintains a Summary Version of the Code. This is a eight page document in booklet or pamphlet format. The Education Law contains four specific requirements for the Board with respect to its code summary: (1) provide copies of the summary to all students at a general assembly held a the beginning of the school year; (2) make copies of the code available to persons in parental relations to students at the beginning of the school year; (3) mail a plain language summary to persons in parental relations to students at the beginning of the school year and (4) make the code available on request.

The summary version of the Board's code, which is currently being distributed is dated 2005-2006 school year. The major topics covered are Students Rights and Responsibilities; Dress Code; Procedures for Possession of Electronic Devices; Prohibited Conduct and Penalties for Infractions; Parents and Visitors and Further Information. Dr. Peoples is currently reviewing the summary version to determine required changes in anticipation of distribution in fall 2008. It is District policy to provide each student in the District with a copy of the Summary Code upon enrollment. Dr. Peoples maintains that the requirements with respect to distribution of the summary code to students and parents are met by the District each year, however, each building principal is allowed to exercise discretion to determine how best to meet these requirement. Any subsequent version of the summary version Code of Conduct must be disseminated in accordance with the procedures contained in the Education Law.

This analysis requires that we discuss the fact that misconduct that was to be considered at the formal suspension hearing, was determined at the sole discretion of Dr. Peoples, based solely on the "one date one charge" rule. The language used by both the Principal initially in her request for a suspension hearing and by the Assistant Superintendent, did correlate with the delineated sections and language found in the Code of Conduct to describe student misconduct. We note that the notice provided by the District does not have to particularize every single charge against a student, nor does it have to cite the specific provisions of the code of conduct which a student allegedly violated.

Specifically, as discussed above, [redacted] reported by the administrator, Mrs. Barton, took place on two days; December 11 and 12, 2007. The [redacted] ent to the parent and used at [redacted] listed December 13, 2007 as the [redacted] According to Dr. Peoples this date was selected solely because it was [redacted] imposed by Mrs. Barton. Thus the notice letter sent to the parent, gave a date for [redacted] by beginning with: "On or about December 13, 2007...."

What is required is that a student and parent be given sufficient information to advise the student and the students counsel of the activities or proceeding giving rise to the proceeding and the basis for the hearing. [redacted] The correctness of the date is essential to the fairness of this process. This practice

created a situation that, with forceful advocacy on behalf of the student could have resulted in the dismissal of all the charges.

Associate Superintendent Will Keresztes considered these issues in his undated report. First, we agree with his findings that the practice of modifying charges prepared by the principal, the "one date/one charge" rule, was a long standing practice aimed at providing deference to a student. Specifically, in cases where the misconduct occurs over two or more days, Administrators were permitted to choose infractions from one day or the other, but not both. Second, [redacted] That was not her reason for [redacted] Lastly, although not addressed in the Report, we disagree with Mr. Keresztes' position that using the language "on or about" is sufficient to give the student and parent enough notice of the misconduct being reviewed. We are aware that as of February 18, 2008, Mr. Keresztes directed that the "one date/one charge" rule be discontinued, with the exception of addressing grammatical errors and we agree with this policy decision.

B. (1) What was the appropriate measure of discipline for the identified misbehavior and violations of the Board's Code of Conduct?

Finding:

Simply stated, fifteen days. Monica Peoples, the Assistant Superintendent for Student Services, unequivocally stated in her interview with the Special Independent Investigator that [redacted] In other words, the penalty imposed by Dr. Peoples would have been ten additional days following the five day suspension imposed by McKinley beginning December 13, 2007. Thus, had Mrs. Barton not directly interfered with [redacted] would have returned to school on January 14, 2008.

(2) Was the suspension of the McKinley High School student appropriate in relation/comparison to violations of the same nature during a time period to be determined by the SII?

Finding:

We have determined that the suspension was not appropriate in relation/comparison to violations of the same nature during a similar time period. Indeed, this suspension was excessive.

Discussion:

Dr. Peoples assumed the duties of Associate Superintendent for Student Services beginning July 1, 2007 after working as the Assistant Director of Pupil Personnel Services with then-outgoing Director of Pupil Personnel Services Eric Rosser since May 2007.[14] Since assuming those

[14] Dr. Peoples ascension to the position of Assistant Superintendent for Student Services has not been without controversy. The Special Independent Investigator learned from Dr. Williams that Crystal Barton, as the President

duties. Dr. Peoples advised the Special Independent Investigator that she has imposed a minimum penalty of seven days and a maximum penalty of twelve days for the inappropriate use of a cell phone. Where [redacted] there have been other circumstances relating to the suspension, Dr. Peoples has imposed a greater period of suspension. It is important to note, however, that as directed by the District Safety/Security Office, schools have their own policies for inappropriate use of a cell phone and it is only after repeated violations that the matter escalates to the level of a formal suspension hearing. Specifically, Dr. Peoples explained that as reflected in the Code of Conduct, the penalty for inappropriate cell phone use at the school level is as follows:

> Any students **carrying** or **operating** a cell phone in a school building will be subject to having that item confiscated by school district Administrative or Safety/Security Staff.
>
> Such confiscated devices will be treated as contraband and will be delivered to the District Safety/Security Office.
>
> The District Safety/Security Office will retain such devices for a period of 10 days or until any disciplinary charges against the student are satisfied. A Parent/Guardian must pick up the confiscated item. (Emphasis in original.)

As Dr. Peoples explained, once a student's conduct escalates to the level where a formal suspension hearing is requested and the student is found to have violated the Code of Conduct, the penalty imposed will be more severe, for example an out-of-school suspension for seven to twelve days.

As discussed elsewhere in this Report, Dr. Peoples' [redacted]

of the Buffalo Council of Supervisors and Administrators, filed a grievance on behalf of an individual who sought, but was not awarded, the position now held by Dr. Peoples. The basis of the grievance is that the other candidate had more seniority.

[redacted] The Hearing Officer who presided over [redacted] Kelli Daniels, noted in her "Disposition Rationale" that:

[redacted] (Emphasis in original.)

Based solely on Ms. Daniels' notations in [redacted] file, Dr. Peoples sought to achieve a compromise and as she explained, was [redacted] from what she anticipated would be Mrs. Barton's request for an involuntary transfer to the Academy School if the penalty assessed to [redacted] was not severe enough. According to Dr. Peoples, the District has a separate procedure that allows a principal to initiate an involuntary transfer of a student if desired. This request would be reviewed and decided by Dr. Peoples separate and distinct from her disposition of a disciplinary proceeding. It was for this reason and this reason alone, that Dr. Peoples dramatically departed from the penalty that she would have otherwise imposed on [redacted] a fifteen day total suspension (5 days imposed by the school and 10 days imposed by Pupil Personnel Services). Inexplicably, Dr. Peoples did not attempt to ascertain additional information from Ms. Daniels or from Mrs. Barton concerning the basis for Mrs. Barton's request to Kelli Daniels [redacted] rather she simply reviewed the written record (she did not even listen to the audio recording of the hearing) and handed down a lengthy suspension that, as of January 31, 2008, was one of only two of that length that did not involve the more serious violations of fighting, weapons possession, drug possession or a sex offense.

When asked by the Special Independent Investigator if faced with an identical factual scenario today would she impose the same penalty, Dr. Peoples stated she wasn't sure. When asked why not, Dr. Peoples stated that in the intervening months she has gained more experience, a better understanding of her ability to confer with a hearing officer and if necessary, the ability to contact a Principal or an Assistant Principal to ascertain more facts before reaching a decision.

Prior to Dr. Peoples assuming her position, her predecessor generally adopted the recommendation of the hearing officer without further review or questions. Dr. Peoples, however, has elected to review the actual file of each student when considering the recommendation of the hearing officer to determine whether there are other factors that warrant further consideration of a different disposition than what was recommended.

We have examined records forwarded by the District reflecting the lengths of suspensions given to students at McKinley for various infractions or violations of the Code of Conduct. This information was also reviewed by the Buffalo News, which concluded that [redacted] was longer than all of the 537 suspensions given at McKinley during the three prior years. We agree with the findings of the Buffalo News and we reviewed these findings with Dr. Peoples as well. Those findings are well known and need not be recited in this Report. Based on our review of this matter with Dr. Peoples, we are comfortable in reporting that it is her intention to make every effort to ensure that disciplinary penalties are assessed system wide on fair and consistent basis. There can be no dispute, Dr. Peoples is a strict disciplinarian and imposes stiff penalties for all violations of the Code of Conduct. As compared to her predecessor, Dr. Peoples

has taken a decidedly more "hands-on" approach and has instructed all of the hearing officers that she wants to see each and every file and has demonstrated a willingness to depart from a hearing officer's recommendation in assessing a final penalty.

C. (1) Was the suspension of the McKinley High School student made in accordance with all applicable New York Law, including due process rights?

(2) Was the suspension of the McKinley High School student made in accordance with protections afforded by the United States or New York Constitution?

Findings:

There is a sufficient basis to conclude that the requirements of due process in the Education Law which govern formal suspension hearings were not adhered to. In consideration of this conclusion, we do not need to reach a finding with respect to a violation of the United States Constitution. Thus, we recommend that the disposition reached by Dr. Peoples on January 4, 2008, be considered a nullity and that the matter be expunged from the student's record.

Discussion:

A *long-term suspension* as that term is commonly used, refers to the suspension of a student from school for a period of time greater than five days in accordance with the provisions of section 3214 of New York's Education Law. The protections afforded to a student and that student's parents pursuant to New York's Education Law bear a striking resemblance to the protections afforded criminal defendants under the New York and United States Constitutions. Section 3214(3)(c) provides that no student may be suspended for greater than five days unless the student and the student's parents have been provided with an opportunity for a hearing held on reasonable notice. At a suspension hearing, students may bring their parents and are presumed innocent, students have the right to be represented by an attorney, may testify on their own behalf, present witnesses and evidence and cross-examine the school's witnesses. See N.Y. Educ. Law § 3214(3)(c) (McKinney 2001); Appeal of K.D., 37 Educ. Dep't Rep. 702 (1998); Appeal of Johnson, 34 Educ. Dep't Rep. 62 (1994); Matter of Montero, 10 Educ. Dep't Rep. 49 (1970).

The student and the student's parents have the right to a hearing on reasonable notice. In other words, the student and the student's parents are entitled to fair notice of the charges against the student and of the date when the hearing will take place. See Bd. of Educ. of Monticello CSD v. Commissioner of Education, 91 N.Y.2d 133 (1997); Matter of Carey v. Savino, 91 Misc.2d 50 (1977). With respect to the charges, the notice must give the student and the student's parents sufficient information to advise the student and the student's counsel of the activities or proceedings giving rise to the proceeding or forming the basis for the hearing. Board of Educ. v. Commissioner of Education, 91 NY2d 133 (1997); Appeal of L.L., 45 Educ. Dep't Rep 217 (2004); Appeal of K.B., 41 Educ. Dep't Rep. 431 (2002); Appeal of a Student with a Disability, 39 Educ. Dep't Rep. 427 (1999). Unlike a criminal proceeding, the notice to the student need not particularize every single charge against the student. Board of Educ. v. Commissioner of Education, 91 NY2d 133 (1997). Nor does the notice need to cite the specific provisions of the code of conduct which a student is alleged to have violated. Appeal of L.L., 45 Educ. Dep't Rep 217 (2004).

Similar to the notice of the charges against a student, New York's Education Law does not specify what constitutes reasonable notice of the date of the long-term suspension hearing. Indeed, what may constitute reasonable notice of the date will vary depending on the circumstances of each case. Appeal of M.A., 45 Educ. Dep't Rep. 206 (2005); Appeal of a Student with a Disability, 41 Educ. Dep't Rep. 206 (2005); Appeal of J.D., 39 Educ. Dep't Rep. 593 (2000). As in a criminal proceeding, a student is presumed innocent of any wrongdoing until proven otherwise. Matter of Montero, 10 Educ. Dep't Rep. 49 (1970). The school district

bears the burden of proof and a decision to impose a long-term suspension must be based on competent and substantial evidence that the student indeed participated in the misconduct charged and may consist of a student's admission of guilt, unrefuted testimony, corroborated testimony or hearsay and reasonable inferences. Appeal of M.H., 45 Educ. Dep't Rep. 42 (2005); Appeal of L.T., 44 Educ. Dep't Rep. 89 (2004); Appeal of D.B., 45 Educ. Dep't Rep. 197 (2005); Board of Educ. of Monticello CSD v. Commission of Educ., 91 N.Y.2d 133 (1997).

A student's anecdotal record may be considered only when fixing a penalty and only after a finding of guilt has been established. A student and the student's parents must be given notice whenever a student's anecdotal record will be considered in setting the penalty. Appeal of Student of a Suspected of Having a Disability (Somers CSD), 41 Educ. Dep't Rep. 253 (2002). Moreover, a penalty may not be based on conclusions unrelated to the actual charges against a student. Appeal of A.Q., 41 Educ. Dep't Rep. 331 (2002); Appeal of G.M., 41 Educ. Dep't Rep. 479 (2002); Appeal of R.C., 41 Educ. Dep't Rep. 446 (2002).

The Education Law and the District's Policy both state that a student cannot remain out of school beyond the five days until he or she has had an opportunity for this hearing. This provision has been interpreted by many to mean that within five days of a student being formally suspended, a Superintendent's hearing must be commenced or the student must return to school. However, there is ample case law to support the interpretation that as long as the student receives notice of an opportunity to attend a hearing within the first five days of a formal suspension, the school district has met its legal obligation. Thus, this issue will not be addressed further in this Report.

Notice of the Charges and the Date of the Hearing

With respect to [redacted] against [redacted] between McKinley and the Office of Pupil Personnel Services, [redacted] and [redacted] were inundated with multiple letters purporting to describe the incident(s) that gave ris[redacted] First, [redacted] received a letter dated December 12, 2007, stating that effective December 13, 2007, [redacted] has been [redacted] from school for a period of time not to exceed five days due to an infraction of the Buffalo Public Schools' Code of Conduct. The reason [redacted] stated [redacted] An informal conference was scheduled for December 20, 2007 at 9:00 a.m. [redacted] was provided with a copy of this letter in school on December 12, 2007. In the process of delivering this letter to [redacted] engaged in behavior that [redacted] sanctions.

By letter dated December 13, 2007 from McKinley, [redacted] was advised that effective December 13, 2007, [redacted] had been [redacted] due to an infraction of the Buffalo Public Schools' Code of Conduct. The reason [redacted] stated: [redacted] A handwritten note at the bottom of this letter

states: [redacted]

[redacted] also received another letter from McKinley dated December 13, 2007, advising that [redacted] effective December 13, 2007, due to an infraction of the Buffalo Public Schools' Code of Conduct. Unlike the previous letter dated December 13, 2007, the [redacted] in this letter stated: [redacted]

As a threshold matter, the two December 13, 2007 letters are significantly different both in the salient facts, as well as [redacted] Most notably, the first December 13, 2007 letter alleges that the [redacted] took place on December 11, whereas the second December 13, 2007 letter alleges that [redacted] took place on December 13. Moreover, the first December 13, 2007 letter alleges that [redacted] whereas the second December 13, 2007 letter alleges that [redacted] Throughout the course of this investigation, the Special Independent Investigator inquired of school administrators, district employees and [redacted] and [redacted] what those complete phrases mean and although certain individuals opined as what portions of those phrases

meant, not a single witness could clearly articulate based on those two phrases what aspect of the Code of Conduct [redacted] had allegedly violated.

In addition to the three letters from McKinley [redacted] on either December 11, December 12 and or December 13, [redacted] received a letter from City Hall dated December 17, 2007, purporting, to set forth [redacted] and the date and time for a hearing. The [redacted] in the December 17, 2007 letter states: "[redacted] Upon the receipt of the December 17, 2007 letter, [redacted] had received four letters from the Buffalo Public Schools [redacted] Suffice it to say, it was never clearly articulated to either [redacted] or [redacted] which letter set forth [redacted] Moreover, as described above, Mrs. Morrell was also confused as to [redacted] to be decided at the December 21, 2007 [redacted] Accordingly, the notices provided to [redacted] and [redacted] purporting to provide fair notice [redacted] were confusing and failed to provide proper, adequate notice.

Right to be Represented

As the December 17, 2007 letter states and as the record of [redacted] reveals, [redacted] were advised of their right to be represented by an attorney [redacted] They did not bring an attorney with them [redacted] and elected to be represented by a hearing advocate. As described above, Eugene Thomas was the hearing advocate assigned to School 26 on December 21, 2007. We can't opine or comment on the quality of representation provided by

the advocate in other cases. however, in this case. we conclude that Mr. Thomas failed to provide quality representation to this student.

Mr. Thomas failed to provide [redacted] and [redacted] with meaningful representation before, during and after [redacted] Mr. Thomas failed to explain the process and procedure employed [redacted] failed to inquire of [redacted] of the facts and circumstances surrounding the events [redacted] failed to require the hearing officer to adhere to proper procedure and require testimony [redacted] failed to adequately advise [redacted] of her ability to testify and to present evidence on her own behalf; failed to review with [redacted] the student file and anecdotal record; [redacted] failed to ensure that a proper record [redacted] maintained; and failed to assist [redacted] in presenting mitigation evidence. In short, the "representation" provided by Mr. Thomas was tantamount to having no representation at all.

Right to Deny Charges

As is evident from that portion [redacted] that was memorialized, [redacted] notwithstanding the lack of advice from her hearing advocate, [redacted] Dr. Peoples agreed that [redacted] the officer should have taken testimony from the witness and received evidence. [redacted] Rather, the hearing advocate was

complicit in the hearing officer's berating of [redacted]d in the hearing officer's insistence that [redacted]

Right to Present Evidence

Even if [redacted] she still had the right to present evidence [redacted] Repeatedly [redacted] attempted to explain the circumstances surrounding the events [redacted] neither the hearing advocate nor the hearing officer would provide [redacted]ith that opportunity. In fact, each time [redacted] would attempt to offer an explanation, either the hearing officer would interrupt or would turn off the tape. Thus, [redacted] but the recording of [redacted] was tampered with and did not adequately reflect the [redacted] and the discussion had during [redacted] New York State Education law provides that the hearing must be recorded.

Anecdotal Record

As the tape [redacted] unmistakably reveals, [redacted] states that she only briefly had the opportunity to review the school's file. Following a conversation off the record and after being berated by Ms. Daniels, [redacted] admitted to having reviewed the school's file, however [redacted] advised the Special Independent Investigator that the hearing advocate made no effort to review with her the contents of the school's file. More significantly however is that fact that Ms. Daniels unequivocally states on the record that if [redacted] had not had an ample opportunity to review the school's file she could do so after the hearing "because it will have no bearing on the

case." While it is true that the contents of the anecdotal record do not play a role in the determination of guilt of innocence, the anecdotal record plays a role in the determination of a penalty and the only opportunity for [redacted] and [redacted] to dispute any of the contents of the anecdotal record is at the hearing in front of the hearing officer; [redacted] and [redacted] were deprived of that opportunity. Moreover, information obtained by the Special Independent Investigator has revealed that following the conclusion [redacted] McKinley faxed a much lengthier [redacted] to Ms. Daniels and Dr. Peoples for consideration in [redacted] Neither [redacted] nor [redacted] were provided with notice that a separate [redacted] (anecdotal record) was going to be considered, nor were they given the opportunity to review it and to dispute its contents. Dr. Peoples advised the Special Independent Investigator that notwithstanding the notation from Ms. Daniels on the face of the document that the parent had not had the opportunity to review the supplemental [redacted] she considered the supplemental history in [redacted]

Based on the foregoing, the Special Independent Investigator has concluded that the entire suspension process from notice of the charges, to the actual conduct of the hearing itself, to the determination of the penalty failed to satisfy New York State law, including due process rights protected under the New York State Constitution. Specific recommendations with respect to the hearing process and procedure can be found in the Recommendation section of the Report. Accordingly, we conclude that this hearing failed to meet the requirements of due process guaranteed by the New York State Constitution. In consideration of this conclusion, we do not need to reach a finding with respect to a violation of the United States Constitution. Thus, we

recommend that the disposition reached by Dr. Peoples on January 4, 2007 be considered a nullity and that the matter be expunged from the student's record.

D. Was the suspension of the McKinley High School student made in accordance with all of the Board's Policies and Procedures?

Finding:

In the preceding section, we concluded that the suspension was not made in accordance with all applicable New York laws, including due process rights. Specifically, we discussed in detail deficiencies with respect to the adequacy of the notice of the charges and of the hearing, the quality of representation, the right to deny and present evidence charges and the use of anecdotal evidence. Accordingly, here we must conclude that the suspension of the McKinley High School student was not handled in a manner consistent with the limited Board's Policies and Procedures that are in existence.

Discussion:

We requested that the District produce all policies and/or procedures relating to the reporting of a violation of the Code of Conduct, determining a violation of the Code of Conduct, imposing discipline and carrying out disciplinary measures in effect for the 2007-2008 school year, including any modifications. The District provided three documents in response to this request.

The first document provided was the District Policy # 7313, "Subject: Suspension of Students". Mr. Keresztes and Dr. Peoples are of the opinion that this five-page document is the District's only policy or procedure document regarding the suspension of students in existence and in use in the District.

The policy includes a section, consisting of seven paragraphs, regarding informal suspensions. A suspension of less than five days, also known as a short term or informal suspension is defined as the suspension of a student from school for a period of five days or less in accordance with the provisions of the Education Law. This section of the District's policy clearly and accurately reflects each of the requirements of the Commissioner of Education for an informal suspension.

The policy also includes a section regarding suspensions of "More Than Five School Days". This section, consisting of only two paragraphs, is set forth on page two. A suspension of more than five days, also known as a long term or formal suspension is defined as the suspension of a student from school in excess of five days in accordance with the provisions the Education Law. This section of the District's policy does not reflect all of the requirements of the Education Law.

The District's policy correctly identifies some of the fundamental requirements for handling the suspension of a student for more than five days. It indicates that, (1) the student/parent on reasonable notice, (2) shall have an opportunity for a fair hearing, (3) at the hearing, the student shall have the right of representation by counsel, (4) the right to question witnesses, and (5) the right to present witnesses and evidence. We note, however, that the two major requirements identified in the Education Law regarding critical aspects of the suspension process that are not included in the districts' written policy, the requirement to (a) make a record of the hearing and (b) the right to appeal the Superintendent's decision.

Along with the this policy, we were provided with several templates for notices, letters and reports, presumably used by District employees when executing the provisions of this policy.

Dr. Peoples is in the process of writing new policies and procedures for formal suspension hearings

The second document produced in response to our request was a summary version of the Code of Conduct, discussed above. We were subsequently provided with the actual Code of Conduct. We conclude that the Code of Conduct has limitations when being viewed as a procedural manual. We submit that to be viewed as a procedural manual, the document must delineate the processes and activities necessary to implement policies of an organization; in other words, the day-to-day operations. In a very general sense, procedures are intended to be a step-by-step description of how the process is conducted. Accordingly, we conclude for this discussion that the Code of Conduct minimally meets the acceptable definitions of serving as the District's procedure. It is our view, however, that a procedure manual of documented processes is vital to the proper functioning of the school District, because we have learned that the work of Pupil Personnel Services affects more than one function or department within this organization.

The District also provided a third document titled "Buffalo Public Schools, Department of Student Support Services and Compliance, Student Discipline, Question and Answer Guide". This twenty page document contains forty-four separate questions covering most of the critical subject areas related to student conduct and discipline. The answers to each question provide the reader with a clear grasp of the subject area being discussed. Each answer identifies that basic legal standard that governs the topic and directions for procedural aspects of a particular stage of the disciplinary process. Many answers make reference to correlating provisions of the State Education Law, and the Commissioner's Regulations and decisions. This document parallels the

sections on "Student Discipline" in the School Law publication of the New York State School Boards Association and the New York State Bar Association. It remains unclear to whom this document is made available.

Based on the description of this third document, we do not believe that the District should consider this document to qualify as its procedural manual for relating to the reporting of a violation of the Code of Conduct, determining violation of the Code of Conduct, imposing discipline and carrying out disciplinary measures. However, this document is very useful in assisting staff in understanding both the District's responsibilities, as well as the rights and responsibilities of students. Clearly this document can be vary helpful to administrators involved in the disciplinary process, as it is rather thorough in its contents and is organized in a manner that would lend it for easy adaptation as a procedural guide. Thus, this document could and should serve as a reference guide to building administrators, hearing advocates, hearing officers and all others charged with the determination of a violation, the imposition of discipline and the carrying out of disciplinary measures.

We note that while some in the District may consider this document to constitute its procedures for student discipline, as stated, Dr. Peoples operates under the belief that Policy # 7313, is the only official document that could be considered either district policy or procedure governing student misconduct. Thus, we are concerned about whether this document, which appears to have has been adopted by the Board as its standard procedures for informal and formal suspensions, has been disseminated to building administrators with the direction that it should be considered as District procedure

E. Was the student's First Amendment right to free speech improperly restricted?

Finding:

There is a sufficient basis to conclude that the unilateral request for the removal of the student's name from the speaker's list for the December 12, 2007 Board of Education meeting was improper. Seven students requested permission to speak at this meeting. McKinley Principal, Crystal Barton represented to Board of Education staff that the parents of all the students wanted their children's names removed from the list of speakers. The principal did not speak with [redacted] and at least one other parent before directing that their names be removed from the list. Punishment for improper use of a cell phone to call the Board office, should be handled through the Code of Conduct as appropriate and not through efforts to restrict free speech.

Discussion:

It is well-settled law that the School District cannot prevent a student from expressing an opinion on a controversial issue while on school premises. The United States Supreme Court has ruled that neither students nor teachers shed their constitutional rights to freedom of speech or freedom of expression at the schoolhouse gate. Tinker v. Des Moines School District, 393 U.S. 503, 89 S. Ct. 733 (1969). We must assume for purposes of this Report that the expression of one's views at a meeting of the Board of Education is the legal equivalent of expressing one's views on school premises, and must be accorded the same constitutional protections. To justify an action prohibiting a student's expression of a particular opinion, school districts must show that the expression would result in a material and substantial interference with the work of the school or impinge on the rights of other students. A mere desire on the part of school officials to avoid

controversy and the discomfort and unpleasantness that could result from statements or comments made by students are not a legitimate basis for prohibiting a student's expression. Educators may exercise editorial control over the style and content of student speech in school-sponsored activities so long as their actions are reasonably related to a legitimate concern. Similarly, it is recognized that school administrators have a substantial interest in insuring the orderly operation of schools and in preventing student expression that creates a material and substantial disruption of school activities.

The Board of Education allows parents, community leaders and even students the opportunity to speak at meetings of the Board, simply by requesting permission to have one's name placed on the speakers list for a particular meeting of the Board. School officials cannot, however, punish students for expressing their personal, political or religious views on school premises.

In this matter, we have learned that on December 11, 2007, [redacted] and six other [redacted] contacted the Board of Education office to request that their names be placed on the speaker's list for the Board's meeting the following day. Shortly thereafter, McKinley Principal Crystal Barton was advised of the telephone calls made by the students to the Board office.

According to a Board stenographer, Mrs. Barton contacted the Board office and directed her to remove the names of the seven McKinley students from the Board speaker's list. However, the stenographer advised Mrs. Barton that she could only do so with the permission of the parent of each student. Later in the day, Mrs. Barton again contacted the Board office and indicated that

she had spoken with the parents of the girls on the speaker's list and that each parent wished to have their respective child's name removed from the list. Based on Mrs. Barton's representations, the stenographer removed the seven girls' names from the speaker's list. Notwithstanding her representations to the Board stenographer, Mrs. Barton did not contact the parent of [redacted] or the parent of at least one other child.

As a result of Mrs. Barton's representation to the Board stenographer, [redacted] name and the names of six other [redacted] were removed from the speaker's list of December 12, 2007. But for Mrs. Barton's phone call to the Board of Education office and her interference in this matter, [redacted] and some of her [redacted] would have been allowed to speak at the Board meeting.

We are unaware of any compelling or even legitimate reason why Mrs. Barton would not want the students to speak at the Board of Education meeting. Accordingly, we conclude that Mrs. Barton's actions constituted imposing an inappropriate restriction on the students' First Amendment free speech protections.

VIII. CONCLUSION

While not everyone will agree with every finding and conclusion contained in this report, it is our hope that this report will be viewed as instructional and will lead to positive dialogue in the school district generally and with respect to the student disciplinary process specifically. It is also our hope that the result will be better a understanding of our disciplinary system and better execution of the system at all levels. We firmly believe that the employees of the Buffalo Public Schools seek to utilize this system on a good faith basis each day in an effort to assist the District in reaching its objective of providing a safe and orderly school setting where students may receive and District personnel may deliver quality a education, with minimal or no disruption or interference. We applaud each and every employee of this District for their effort and commitment.

We express our sincere appreciation to President Mary Ruth Kapsiak and the Members of the Board of Education, Superintendent James A. Williams and members of his staff, including administrators, teachers and staff and the parents and students of the Buffalo Public Schools without whose cooperation this report would not have been possible.