

# NO MORE HALL PASSES: A CALL TO INCREASE DUE PROCESS PROTECTIONS FOR COLORADO STUDENTS

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*In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right that must be made available on equal terms.*<sup>1</sup>

Chief Justice Earl Warren, *Brown v. Board of Education*

## INTRODUCTION

A Colorado first-grader who sang lyrics from the song “Sexy and I Know It” to a peer was suspended for sexual harassment.<sup>2</sup> In Grand Junction, Colorado, a third grade girl was suspended for violating the school’s dress code after shaving her head to express solidarity with a friend battling cancer.<sup>3</sup> A second grade Loveland student was suspended for throwing an imaginary grenade during recess while “trying to save the world from evil.”<sup>4</sup> In Colorado Springs, a severely disabled student was suspended after his mother accidentally packed yogurt mixed with medical marijuana in his lunchbox.<sup>5</sup>

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1. *Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954).

2. CNN Wire Staff, *Colorado First-Grader Suspended for Singing ‘Sexy and I Know It,’* CNN (May 7, 2012, 8:29 PM), <http://www.cnn.com/2012/05/07/us/colorado-first-grader-suspended/> [<https://perma.cc/BWB3-MLVG>].

3. Nancy Lofholm, *Girl’s Shaved Head Draws National Furor at Grand Junction School*, DENVER POST (Mar. 25, 2014, 10:58 AM), [http://www.denverpost.com/news/ci\\_25418689/girls-shaved-head-draws-national-furor-at-grand](http://www.denverpost.com/news/ci_25418689/girls-shaved-head-draws-national-furor-at-grand) [<https://perma.cc/EW5U-QMEU>].

4. Jessica Maher, *Second-Grade Loveland Student Reportedly Suspended for Imaginary Weapon*, REPORTER-HERALD (Feb. 5, 2013, 2:37 PM), [http://www.reporterherald.com/ci\\_22524862/second-grade-loveland-student-reportedly-suspended-imaginary-weapon](http://www.reporterherald.com/ci_22524862/second-grade-loveland-student-reportedly-suspended-imaginary-weapon) [<https://perma.cc/9SME-BFTE>].

5. Kassondra Cloos, *Colorado Springs Student Suspended for Bringing Medical Marijuana to School*, GAZETTE, <http://gazette.com/colorado-springs-student-suspended-for-bringing-medical-marijuana-to-school/article/1551881> (last updated May 14, 2015) [<https://perma.cc/77BH-C8ED>].

Troubling though these instances may be, they offer only a microcosmic glimpse into the unjust and fractured extensive use of suspensions and expulsions in Colorado's public schools.

Unexplainable suspensions are occurring not only in Colorado. Across the country, schools are suspending students—predominantly, minority students—for minor infractions at an alarming rate.<sup>6</sup> Some schools suspend 50 percent of their students over the course of each school year.<sup>7</sup> In the 2014–2015 school year, minor misbehaviors, such as disobedience, defiance, and “repeated interference,”<sup>8</sup> accounted for 85 percent of the 80,526 out-of-school suspensions in Colorado.<sup>9</sup> Pushing students out of school for minor infractions, such as defiance, does not even serve the primary purpose of suspensions—keeping schools safe.<sup>10</sup> Rather, schools are using this extreme measure as a tool to address common issues of student misbehavior. Moreover, the use of school suspensions and expulsions disparately impacts minority students across the nation—including in Colorado.<sup>11</sup>

Black students are suspended and expelled at a rate three

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6. Kinjo Kiema, *U.S. Students Losing 18 Million Days of Instruction Due to Suspensions*, NEATODAY (Feb. 26, 2015, 8:41 AM), <http://neatoday.org/2015/02/26/u-s-students-losing-18-million-days-instruction-due-suspensions/> [<https://perma.cc/UHW3-LE5U>]; Tamar Lewin, *Black Students Face More Discipline, Data Suggests* (Mar. 6, 2012), [http://www.nytimes.com/2012/03/06/education/black-students-face-more-harsh-discipline-data-shows.html?\\_r=0](http://www.nytimes.com/2012/03/06/education/black-students-face-more-harsh-discipline-data-shows.html?_r=0) [<https://perma.cc/6VBQ-HTSH>].

7. Derek W. Black, *The Constitutional Limit of Zero Tolerance in Schools*, 99 MINN. L. REV. 823, 825 (2015).

8. The Colorado Department of Education defines repeated interference as willful disobedience or openly and persistent defiance. COLO. DEP'T OF EDUC., BEHAVIOR STATUTES & CLARIFICATIONS: SCHOOL DISCIPLINE AND ATTENDANCE DATA (2016), <https://www.cde.state.co.us/datapipeline/sdabehaviorstatutesclarification> [<https://perma.cc/J943-ZY2F>].

9. COLO. DEP'T OF EDUC., TEN-YEAR TREND DATA: 2015-16 STATE SUSPENSION AND EXPULSION INCIDENT RATES AND REASONS (2016), <https://www.cde.state.co.us/cdereval/suspend-expelcurrent> [<https://perma.cc/T643-SX63>].

10. See Kevin P. Brady, *Zero Tolerance or (In)tolerance Policies? Weaponless School Violence, Due Process, and the Law of Student Suspensions and Expulsions: An Examination of Fuller v. Decatur Public School Board of Education School District*, 2002 B.Y.U. EDUC. & L.J. 159, 160 (2002).

11. OFFICE FOR CIVIL RIGHTS, U.S. DEP'T OF EDUC., DATA SNAPSHOT: SCHOOL DISCIPLINE 1 (2014), <http://ocrdata.ed.gov/Downloads/CRDC-School-Discipline-Snapshot.pdf> [<https://perma.cc/777K-PNA3>]; PADRES & JÓVENES UNIDOS, THE 2ND ANNUAL COLORADO SCHOOL DISCIPLINE REPORT CARD 6 (2015), <https://assets.documentcloud.org/documents/1815319/discipline-report-card-2015.pdf> [<https://perma.cc/G7WM-Y2DL>].

times greater than white students.<sup>12</sup> Nationally, five percent of white students are suspended compared to 16 percent of black students.<sup>13</sup> In Colorado, black students represent 4.6 percent of the student population; however, they account for 10.4 percent of the students disciplined.<sup>14</sup> These statistics are particularly disturbing in light of the fact that suspensions and expulsions have become “de facto educational death penalties.”<sup>15</sup> A single suspension leads to decreased academic achievement that, in turn, increases a student’s school-dropout rate.<sup>16</sup>

A single suspension not only increases the likelihood that a student will dropout by 16 percent,<sup>17</sup> but it is in fact the number-one predictor of school dropout.<sup>18</sup> Increasing the chances a student drops out of school places students at a higher risk of unemployment and, ultimately, incarceration.<sup>19</sup> The current school discipline system and lenient use of suspensions nationally and locally have encouraged a “pipeline into the prison system, increasing students’ risk of contact with the criminal justice system and directly referring students to the juvenile justice system.”<sup>20</sup> The school-to-prison pipeline is the result of “increases in school-based arrests, student suspensions and expulsions, the adoption of zero tolerance policies, the use of disciplinary alternative education programs, and the criminalization of students for minor schoolyard

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12. OFFICE FOR CIVIL RIGHTS, *supra* note 11, at 3.

13. *Id.* at 1.

14. COLO. DEP’T OF EDUC., MOVING FROM ZERO TOLERANCE TO SUPPORTIVE SCHOOL DISCIPLINE PRACTICES: A COMPARISON OF STUDENT DISCIPLINE INCIDENTS FOR THE 2011-12 AND 2013-14 SCHOOL YEARS (2015), <https://www.cde.state.co.us/dropoutprevention/cdereportsdi20132014> [<https://perma.cc/JLX7-EZ6X>].

15. Black, *supra* note 7, at 833.

16. Thalia González, *Keeping Kids in Schools: Restorative Justice, Punitive Discipline, and the School to Prison Pipeline*, 41 J.L. & EDUC. 281, 294 (2012).

17. DANIEL J. LOSEN & TIA ELENA MARTINEZ, THE CIVIL RIGHTS PROJECT, OUT OF SCHOOL & OFF TRACK: THE OVERUSE OF SUSPENSIONS IN AMERICAN MIDDLE AND HIGH SCHOOLS 1 (2013), [http://civilrightsproject.ucla.edu/resources/projects/center-for-civil-rights-remedies/school-to-prison-folder/federal-reports/out-of-school-and-off-track-the-overuse-of-suspensions-in-american-middle-and-high-schools/Exec\\_Sum\\_OutofSchool\\_OffTrack\\_UCLA.pdf](http://civilrightsproject.ucla.edu/resources/projects/center-for-civil-rights-remedies/school-to-prison-folder/federal-reports/out-of-school-and-off-track-the-overuse-of-suspensions-in-american-middle-and-high-schools/Exec_Sum_OutofSchool_OffTrack_UCLA.pdf) [<https://perma.cc/6FSS-KBYA>].

18. Mary Ellen Flannery, *The School-to-Prison Pipeline: Time to Shut it Down*, NEATODAY (Jan. 5, 2015), <http://neatoday.org/2015/01/05/school-prison-pipeline-time-shut/> [<https://perma.cc/B6QA-S2NZ>].

19. Black, *supra* note 7, at 833.

20. *Id.* at 834.

misconduct.”<sup>21</sup>

Colorado, particularly Denver, has been recognized as a national leader in dismantling the school-to-prison pipeline.<sup>22</sup> In 2013, the Denver police signed an agreement with Denver Public Schools encouraging educators to handle routine discipline issues without resorting to police assistance by defusing problems within the classroom.<sup>23</sup> Pursuant to the agreement, police officers may intervene only when “absolutely necessary”<sup>24</sup> and are trained three times a year on teenage psychology and cultural competency, all in effort to curtail school-based arrests and police involvement in student discipline.<sup>25</sup> Additionally, a number of Denver schools have implemented restorative justice programs that emphasize “inclusion in the school community, rather than exclusion, to address issues of school discipline . . . without a disproportionate reliance on suspensions and expulsions.”<sup>26</sup>

In addition to the school-police agreement and the implementation of restorative justice programs, the Colorado legislature also passed the Smart School Discipline Law in 2012.<sup>27</sup> This law addressed the catastrophic link between zero tolerance policies<sup>28</sup> and the school-to-prison pipeline, and

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21. India Geronimo, *Systematic Failure: The School-To-Prison Pipeline and Discrimination Against Poor Minority Students*, 13 J.L. & SOC'Y 281, 282 (2011).

22. Rebecca Klein, *Denver is Leading the Way in Dismantling the School-to-Prison Pipeline. Here's How.*, HUFFINGTON POST, [http://www.huffingtonpost.com/2015/07/15/denver-public-schools-discipline\\_n\\_7715358.html](http://www.huffingtonpost.com/2015/07/15/denver-public-schools-discipline_n_7715358.html) (last updated Sept. 8, 2015) [<https://perma.cc/Y7D9-A8AD>].

23. Sadie Gurman, *Agreement Keeps Denver Police Out of Most School Discipline Problems*, DENVER POST (Feb. 19, 2013, 7:39 AM), [http://www.denverpost.com/ci\\_22622094/agreement-keeps-police-out-most-school-discipline-problems](http://www.denverpost.com/ci_22622094/agreement-keeps-police-out-most-school-discipline-problems) [<https://perma.cc/E7ZZ-SVDR>].

24. *Id.*

25. *Id.*

26. *Id.* at 285.

27. Rebecca Jones, *Zoning Out School Zero-Tolerance Policies*, CHALKBEAT (Aug. 30, 2012), <http://co.chalkbeat.org/2012/08/30/zeroing-out-school-zero-tolerance-policies/#.VkOgAYSJnwx> [<https://perma.cc/AG26-WX2F>].

28. The Gun-Free School Act required public schools to implement a zero tolerance policy requiring an absolute one-year expulsion for the possession of weapons on school property. Gun Free Schools Act, 20 U.S.C. § 7961 (1994). In addition to expulsions for weapon possession, some state legislatures and school boards passed legislation that extended zero tolerance policies to include drug use, possession, and distribution actionable offenses that required automatic suspensions and expulsions. Avarita L. Hanson, *Have Zero Tolerance School Discipline Policies Turned Into a Nightmare? The American Dream's Promise of Equal Educational Opportunity Grounded in Brown v. Board of Education*, 9 U.C. DAVIS J. JUV. L. & POL'Y 289, 307 (2005). Colorado even implemented a three-

eliminated mandatory expulsions for drugs, weapons, assaults, and robberies.<sup>29</sup> The Smart School Discipline Law also identified factors for schools to consider when determining disciplinary action and promoted alternative discipline practices to decrease out-of-school suspensions and expulsions.<sup>30</sup>

Although Colorado has made promising steps to help end the school-to-prison pipeline, the state must still address the disparate impact of discipline on minority students,<sup>31</sup> the extensive use of suspensions for nonviolent acts,<sup>32</sup> and the over 80,000 instructional days lost due to student suspensions annually.<sup>33</sup> Currently, Colorado law addressing school discipline requires the appropriate minimal due process protections outlined in *Goss v. Lopez*<sup>34</sup> for student suspensions lasting less than ten days.<sup>35</sup> Specifically, Colorado school districts must provide the following due process protections for suspensions lasting fewer than ten days: (1) the right to oral and written notice of the charges, (2) a hearing consisting of an explanation of the evidence, and (3) the opportunity to present the student's version of the events.<sup>36</sup> For more long-term suspensions and expulsions, Colorado only requires that the school district provide (a) notice, (b) a hearing in the presence of a hearing officer, and (c) the opportunity to be heard in a "meaningful manner."<sup>37</sup> Additionally, the student may appeal the hearing officer's decision.<sup>38</sup> The statute grants school

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strikes mandatory expulsion policy for habitually disruptive students. JOHN W. SUTHERS, COLORADO SCHOOL VIOLENCE PREVENTION AND STUDENT DISCIPLINE MANUAL 4 (2009), <http://cdpsdocs.state.co.us/safeschools/Resources/CO%20AG%20Colorado%20Attorney%20General%20Office/Colorado%20School%20Violence%20Prevention%20and%20Discipline%20Manual.pdf> [https://perma.cc/TC6S-MPBL].

29. *Id.*

30. COLO. JUVENILE DEF. COAL., COLORADO'S 2012 SCHOOL DISCIPLINE BILL (2012), <http://cjdc.org/wp/wp-content/uploads/2012/06/School-Discipline-Bill-Summary.pdf> [https://perma.cc/JZU7-UYYE].

31. PADRES & JÓVENES UNIDOS, *supra* note 11, at 6.

32. OFFICE FOR CIVIL RIGHTS, *supra* note 11.

33. *Id.*

34. 419 U.S. 565 (1975) (holding the Due Process Clause of the Fourteenth Amendment requires students facing suspensions of ten days or less to be afforded written notices of the charges against him, an explanation of the evidence, and an opportunity to rebut the charge).

35. COLO. REV. STAT. 22-33-105(2)(c) (2016).

36. *Lopez*, 419 U.S. at 581.

37. *Nichols ex rel. Nichols v. DeStefano*, 70 P.3d 505, 507 (Colo. App. 2002).

38. COLO. REV. STAT. § 22-33-105(2)(c) (2016).

districts broad discretion on the remaining procedures for long-term exclusions from school.<sup>39</sup>

To further protect students from excessive suspensions and expulsions and guard against their dire consequences, the state should amend the school discipline hearing statute to provide clear and concrete due process protections, such as the right to cross-examine witnesses and the opportunity to retain legal counsel, for suspensions lasting longer than ten days cumulatively and in expulsion hearings. In response to the improving but still troubling issues plaguing Colorado's public school system, and the exacerbating national school-to-prison pipeline, this paper will proceed in two parts. Part I outlines the far-reaching impact of suspensions and expulsions on Colorado students and the varying degrees of due process protections implemented throughout the state. Part II argues for the need to amend Colorado's school disciplinary hearing law to explicitly include a student's right to cross-examination witnesses and right to counsel in formal disciplinary hearings to help combat the school-to-prison pipeline and better protect the state's most vulnerable students.

## I. CROSSING THE CONTINENTAL DIVIDE: TREATING STUDENTS EQUALLY IN COLORADO

Although Colorado has been on the forefront of school discipline reform and a key state in the battle against the national school-to-prison pipeline, Colorado school districts' use of out-of-school suspensions and expulsions continues to disparately impact minority students.<sup>40</sup> Since the enactment of the Colorado Smart School Discipline Law in 2012, the statewide out-of-school suspension rate has dropped by 17 percent, the expulsion rate has declined by 36 percent, and the referral to law enforcement rate has decreased by 23 percent.<sup>41</sup> However, Colorado school districts continue to primarily use out-of-school suspensions to address defiant and detrimental behaviors.<sup>42</sup>

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39. *Id.*

40. PADRES & JÓVENES UNIDOS, *supra* note 11, at 6.

41. *Id.* at 5.

42. JULIANA ROSA, JANELLE KRUEGER & ANNETTE SEVERSON, COLO. DEPT' OF EDUC., MOVING FROM ZERO TOLERANCE TO SUPPORTIVE SCHOOL DISCIPLINE PRACTICES: A COMPARISON OF STUDENT DISCIPLINE INCIDENTS FOR THE 2011-12 AND 2013-14 SCHOOL YEARS 7 (2015), <https://www.cde.state.co.us/>

While most school districts are experiencing a steady decline in out-of-school suspensions and expulsions, the suspension and expulsion rate is declining much faster for white Colorado students than black, Latino, and Native American students.<sup>43</sup> Furthermore, Colorado's black students are still 4.1 times more likely to receive an out-of-school suspension than their white peers, and 3.8 times more likely to receive an expulsion.<sup>44</sup> Likewise, Hispanic students comprise 32.7 percent of Colorado's student population, but account for 42.3 percent of students disciplined.<sup>45</sup> They are almost twice as likely to receive out-of-school suspensions or expulsions than white students.<sup>46</sup> Additionally, Native American students are currently 2.5 times more likely to receive a suspension and 3.8 times more likely to be expelled than a white student.<sup>47</sup>

The disparate use of suspensions and expulsions for minority students is particularly disconcerting when coupled with the academic performance gap between minority students and their non-Hispanic white peers, often referred to as the achievement gap.<sup>48</sup> Nationally, substantial gaps in National Assessment of Educational Progress (NAEP) test scores have persisted for low-income students, English language learners, students with disabilities, and minority students.<sup>49</sup> For example, in 2013, 34 percent of black students scored below basic on the NAEP fourth grade mathematics test whereas only 9 percent of white students scored similarly.<sup>50</sup> Additionally, minority students demonstrate proficiency in reading at much lower levels than their white peers.<sup>51</sup> The achievement gap has infected Colorado schools, as well. In 2015, black students averaged 21 points and Hispanic students 29 points less than their white peers on a NAEP fourth grade reading proficiency

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dropoutprevention/cdereportsdi20132014 [https://perma.cc/MQR6-BZST].

43. PADRES & JÓVENES UNIDOS, *supra* note 11, at 6.

44. *Id.*

45. ROSA, KRUEGER & SEVERSON, *supra* note 42, at 4.

46. PADRES & JÓVENES UNIDOS, *supra* note 11, at 6.

47. *Id.* at 5.

48. Susan Ansell, *Achievement Gap*, EDUCATION WEEK, <http://www.edweek.org/ew/issues/achievement-gap/> (last updated July 7, 2011) [https://perma.cc/3B9T-XUST].

49. NAT'L EDUC. ASS'N, UNDERSTANDING THE GAPS: WHO ARE WE LEAVING BEHIND—AND HOW FAR? 1, 4 (2013), [http://www.nea.org/assets/docs/18021-Closing\\_Achve\\_Gap\\_backgrndr\\_7-FINAL.pdf](http://www.nea.org/assets/docs/18021-Closing_Achve_Gap_backgrndr_7-FINAL.pdf) [https://perma.cc/HY5L-KDM7].

50. *Id.*

51. *Id.*

test.<sup>52</sup> Thus, the disparate removal of minority students from schools exacerbates the achievement gap.

While some Colorado districts have made drastic improvements in their out-of-school suspension and expulsion rates, others have continued to use harsh disciplinary practices. In 2013–14, sixty-one districts experienced higher suspension rates than they did in 2012–13.<sup>53</sup> Forty-eight districts experienced an increase in expulsions.<sup>54</sup> The dramatically diverse disciplinary practices used throughout the state result in the inconsistent treatment of Colorado students. For instance, on average, less than two in every 100 students were suspended across sixty-seven districts; however, some individual districts suspended ten, fifteen, or twenty students per 100 students.<sup>55</sup> These variations cannot be attributed to the demographic makeup of more urban school districts. Indeed, high rates of suspensions and expulsions are occurring in both Colorado's smallest and largest school districts.<sup>56</sup>

## II. A COLORADO STUDENT'S DUE . . . ? THE NEED FOR STATUTORY REFORM IN COLORADO

The disparate use of out-of-school suspensions and expulsions on minority students, coupled with the variability in statewide school discipline practices, is leading to the unequal treatment of Colorado's students. To continue Colorado's worthy effort to end the school-to-prison pipeline, the state should next identify clear due process protections to be required during suspension hearings for students whose removal lasts more than ten days. Specifically, Colorado should reform its suspension statute to explicitly provide for the right to cross-examine witnesses, or, at the very least, the

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52. NAT'L CTR. FOR EDUC. STATISTICS, NAEP STATE COMPARISONS (2016), <http://nces.ed.gov/nationsreportcard/statecomparisons/withinyear.aspx?usrSelecti ons=0%2cRED%2c2%2c0%2cwithin%2c0%2c0> [<https://perma.cc/865R-LJTR>].

53. *Id.*

54. *Id.*

55. *Id.*

56. De Beque 49JT, with a student population of 149 students, had the highest out-of-school suspension rate in 2013-14. PADRES & JÓVENES UNIDOS, *supra* note 11, at 10. Adams-Arapahoe 28J had the fifth highest out-of-school suspension rate and has a student population of 41,797 students from 2016-17. COLO. DEP'T OF EDUC. PUPIL MEMBERSHIP DISTRICT DATA, <https://www.cde.state.co.us/cdereval/pupilcurrentdistrict> [<https://perma.cc/ZM7A-99CN>]; PADRES & JÓVENES UNIDOS, *supra* note 11, at 10.

opportunity to confront an accuser's statement, and present legal counsel at long-term suspension hearings. Those involved in long-term suspension and expulsion hearings face a daunting standard of review if they choose to appeal the school district's decision.<sup>57</sup> Courts will uphold a school district's decision to expel or suspend a student absent a showing that the school district acted in an "unconstitutional, illegal, arbitrary, capricious, [or] unreasonable manner," or in a manner "unsupported by a preponderance of the evidence."<sup>58</sup> This heightened standard of review requires additional due process protections, including the right to cross-examine witnesses and the right to retain legal counsel, to help preserve the record of events and foster uniformly fair proceedings throughout the state. The singular importance of education makes it difficult to understand how such an elemental component of our society can be abridged with relative ease in the absence of procedural safeguards.

A. *Statutory Reform: A Prerequisite to Cross-Examination of Colorado's Students*

There is a split among a number of state and federal courts as to whether students have the right to cross-examine witnesses in school disciplinary hearings;<sup>59</sup> however, no Colorado court has ruled explicitly on the issue. In *Nichols ex rel. Nichols v. Destefano*,<sup>60</sup> the Colorado Court of Appeals held that a high school student was permitted to interview and subpoena two teachers concerning her involvement in a physical fight at school during her suspension hearing.<sup>61</sup> The court agreed with the school district that the statute did not explicitly provide for compulsion of witnesses in school disciplinary hearings but recognized that a school district may

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57. Hanson, *supra* note 28, at 361.

58. *Id.* at 361.

59. Compare *Colquitt v. Rich Twp. High Sch. Dist.*, 699 N.E.2d 1109, 1113 (Ill. App. Ct. 1998) (finding that school districts must allow the opportunity to cross-examine witnesses during long-term suspension and expulsion hearings), with *Newsome v. Batavia Local Sch. Dist.*, 842 F.2d 920, 925 (6th Cir. 1988) (holding that the need to protect student witnesses, in addition to the administrative costs associated with cross-examination, outweighed the student's interest in the safeguard at long-term suspension and expulsion hearings).

60. *Nichols*, 70 P.3d at 508.

61. *Id.* at 507.

not “isolate potential witnesses from [a] student.”<sup>62</sup> The court vacated the expulsion order because, by failing to afford the student an opportunity to present voluntary witnesses to challenge the school’s anonymous statements, the school violated the student’s due process rights.<sup>63</sup>

In *Nichols*, the Colorado Court of Appeals took a step towards affording students the opportunity to cross-examine witnesses, but appeared unwilling to grant this right without clear statutory authority.<sup>64</sup> Even without granting this right, the court recognized its importance by overturning the expulsion decision.<sup>65</sup> In its decision, the court noted the significant disparity between the school and the student’s ability to present evidence.<sup>66</sup> Unlike the school administrators, who were able to offer numerous anonymous statements illustrating an expansive view of the situation, the student was not given an opportunity to challenge any of these statements through the presentation or cross-examination of witness testimony.<sup>67</sup> In order to provide equal opportunities for both parties to paint a comprehensive picture of the questionable behavior during school suspension hearings, Colorado’s legislature should provide the right to cross-examine witnesses in long-term suspension and expulsion disciplinary hearings.

### B. *Different Jurisdictions, Different Rights?*

Even without clear statutory authority, many Colorado school districts have voluntarily extended this right to their students. Mapleton Public Schools permits the student or his representative the right to cross-examine witnesses against him.<sup>68</sup> Some school districts, such as Woodland Park District Re-2, place the decision in the hands of the administrator. Woodland Park’s handbook states that an administrator “may allow a student to present witnesses or may call the accuser”

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62. *Id.* at 508.

63. *Id.*

64. *Id.*

65. *Id.*

66. *Id.*

67. *Id.*

68. MAPLETON PUB. SCH. DIST., MAPLETON PUBLIC SCHOOLS: STUDENT BEHAVIOR STANDARDS (2015), [http://www.mapleton.us/files/user/3/file/Parents/Behavior%20handbooks/Handbook%202015%20rev%206%203%2015%20Eng%20final\\_updated%20ST.pdf](http://www.mapleton.us/files/user/3/file/Parents/Behavior%20handbooks/Handbook%202015%20rev%206%203%2015%20Eng%20final_updated%20ST.pdf) [<https://perma.cc/9PX2-29B2>].

for informal suspension hearings.<sup>69</sup> On the other hand, neither Colorado Springs School District 11<sup>70</sup> nor Harrison School District Two<sup>71</sup> permits the cross-examination of witnesses in suspension or expulsion hearings.

Many school districts across Colorado follow the approach taken by the school district in *Nichols*, which refused to extend the right to cross-examine witnesses absent clear statutory authority. This may be especially true in smaller districts with high suspension and expulsion rates, such as De Beque 49JT, which does not publicly disseminate any information concerning its suspension hearing processes.<sup>72</sup> Statutory reform of the school disciplinary hearing law to explicitly include a student's right to cross-examine witnesses will lead to fairer results and promote the consistent use of cross-examination during formal disciplinary hearings throughout the state. The pressing consequences of suspensions and expulsions on a student's future require the state to extend the right to cross-examine witnesses to all Colorado students subject to long-term disciplinary hearings.

### C. *Safeguarding Student Witnesses*

Just as pressing as the need for clear statutory language articulating the right to cross-examine is the need to include an exception in which students can opt-out of testifying under circumstances where they legitimately fear retaliation and there is a significant risk of harm.<sup>73</sup> To safeguard all students,

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69. WOODLAND PARK SCH. DIST. RE-2, WOODLAND PARK HIGH SCHOOL: PARENT/STUDENT HANDBOOK 2014-2015, at 26 (2015), <http://www.wpsdk12.org/wp-content/uploads/2014/07/WPHS-Student-Handbook-2014-15.pdf> [<https://perma.cc/36NM-NQEH>].

70. COLO. SPRINGS SCH. DIST. 11, STUDENT CONDUCT, DISCIPLINE, AND ATTENDANCE HANDBOOK (2015), <http://www.d11.org/StudentServices/StudentDiscipline/Documents/Student%20Conduct,%20Discipline%20and%20Attendance%20Handbook.pdf> [<https://perma.cc/M5GP-SYKC>].

71. HARRISON SCH. DIST. 2, CODE OF CONDUCT 2017 – 2017 (2016), [http://www.hsd2.org/dynimg/\\_aJAAA\\_/docid/0x7D64073B96A0DA24/6/New%2BCode\\_of\\_Conduct\\_2016-2017\\_rev%2B80316.pdf](http://www.hsd2.org/dynimg/_aJAAA_/docid/0x7D64073B96A0DA24/6/New%2BCode_of_Conduct_2016-2017_rev%2B80316.pdf) [<https://perma.cc/8F35-XVGT>].

72. De Beque 49JT had the highest out-of-school suspension rate in the state in 2013-14 by suspending 20.5 students per 100 students. PADRES & JÓVENES UNIDOS, *supra* note 11, at 11.

73. *Colquitt v. Rich Township. High Sch. Dist.*, 699 N.E.2d 1109, 1116 (Ill. App. Ct. 1998). *See also* *Stone v. Prosser Consol. Sch. Dist.*, 971 P.2d 125 (Wash. Ct. App. 1999) (holding that students have the right to cross-examine witnesses in school discipline hearings but if student witnesses “fear violent retaliation or

schools should only exempt students from confrontation when there is an express finding of risk and the witness would be subject to retaliation.<sup>74</sup> In order to create safe schools and foster the equal treatment of students, the state's concern for the well-being of students must extend beyond the student involved in the school discipline hearing. Schools walk a tightrope between creating inclusive, safe spaces while also encouraging students to report dangerous misbehaviors occurring at schools. An exception for situations that would cause undue burden on the reporting student will encourage students to inform teachers of student misconduct while also providing students in suspension and expulsion hearings the appropriate due process protection.

#### *D. The Right to Legal Counsel*

Colorado should also afford students the right to obtain legal counsel for school suspensions lasting more than ten days and in expulsion hearings. The presence of an attorney would ensure that the best interests of the student are represented and that the disciplinary proceeding is conducted properly. Legal counsel will help monitor local school districts by creating a “checks-and-balances system” capable of “pinpoint[ing] due process violations when they occur . . . and [highlighting] questionable discipline practices established and administered on the local level.”<sup>75</sup>

The presence of legal counsel at disciplinary hearings will also help reduce the disparate use of suspensions and expulsions for minority students. As mentioned earlier, minority students are suspended more frequently and often given harsher punishments for subjective behavior violations.<sup>76</sup>

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ostracism” they may opt out of cross-examination).

74. The United States Department of Education Office for Civil Rights defines retaliatory conduct as “intimidating, threatening, coercing, or in any way discriminatory against [an] individual . . . because of the individual’s complaint or participation.” OFFICE FOR CIVIL RIGHTS, U.S. DEP’T OF EDUC., DEAR COLLEAGUE LETTER (2013), <http://www2.ed.gov/print/about/offices/list/ocr/letters/colleague-201304.html> [<https://perma.cc/PH2M-QWMZ>]. In its reform, Colorado should adopt the Department of Education’s definition for retaliation to provide guidance for administrators in defining acts considered retaliatory.

75. Simone Marie Freeman, *Upholding Students’ Due Process Rights: Why Students are in Need of Better Representation at, and Alternatives to, School Suspension Hearings*, 45 FAM. CT. REV. 638, 642 (2007).

76. Russell J. Skiba, Suzanne E. Eckes & Kevin Brown, *African American*

For instance, a minority student is referred more often than his or her white peers for disrespectful behavior or excessive noise.<sup>77</sup> During a disciplinary hearing, legal counsel can present evidence and cross-examine witnesses to thoroughly contest many of these subjective offenses that are pushing students out of school.

Furthermore, legal counsel would assist in identify racial biases manifesting in school discipline, including the unequal treatment of students who are similarly situated. The mere presence of legal counsel will also put schools on notice that they are being held accountable for providing students of all backgrounds their due process rights. Without clear statutory language instructing school districts to permit the right to legal counsel during long-term suspension and expulsion hearings, school administrators will have expansive discretionary power to decide whether to permit this due process right, if at all.

Colorado's school discipline hearing statute is silent as to whether students are entitled to the right to counsel.<sup>78</sup> Consequently, Colorado's schools have implemented diverse degrees of due process procedures. Larger and more urban school districts, such as Denver Public Schools<sup>79</sup> and Jefferson County Public Schools,<sup>80</sup> provide detailed guidance on school discipline hearings in their handbooks, including the right to legal counsel in some instances; whereas smaller more rural school districts, like Trinidad School District Number 1<sup>81</sup> and De Beque 49JT,<sup>82</sup> completely ignore the issue of due process hearings. Even more concerning, Trinidad School District, which had the second highest out-of-school suspension and

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*Disproportionality in School Discipline: The Divide Between Best Evidence and Legal Remedy*, 54 N.Y.L. SCH. L. REV. 1071, 1088 (2010).

77. *Id.*

78. COLO. REV. STAT. § 22-33-105 (2016).

79. DENVER PUB. SCHS., STUDENT CONDUCT AND DISCIPLINE PROCEDURES (2014), <http://www.boarddocs.com/co/dpsk12/Board.nsf/goto?open&id=973MTZ5CDE41#> [<https://perma.cc/6F8V-NFJG>].

80. JEFFERSON CTY. PUB. SCHS., CODE OF ACCEPTABLE BEHAVIORS AND DISCIPLINE AND THE STUDENT BILL OF RIGHTS 10 (2015), <https://archive.jefferson.kyschools.us/Pubs/codeofconduct.pdf> [<https://perma.cc/T5M5-5ZZV>].

81. TRINIDAD SCH. DIST. NO. 1, TRINIDAD HIGH SCHOOL PARENT-STUDENT HANDBOOK 2015-2016 (2015), <http://tsd1.org/wp-content/uploads/2014/12/THSHandbook.pdf> [<https://perma.cc/JGX4-YL4B>].

82. DE BEQUE 49JT, HIGH SCHOOL HANDBOOK 2014/15 (2015), <https://docs.google.com/document/d/1hDzCT7WYzSF8LICuZYJlk2VyK4WJFiX3d1bYIMm3sg/pub> [<https://perma.cc/B2LM-TSJ4>].

expulsion rate in the state in the 2013–14 school year,<sup>83</sup> cites the former Colorado statute that once required mandatory expulsions for certain offenses before its 2012 revision in its most current student discipline handbook.<sup>84</sup> Although states should afford school districts discretion in school discipline practices, ultimately a uniform implementation of specific due process procedures, including the right to legal counsel, will help create fairer school discipline hearings. Without clear and concrete due process protections imposed on all Colorado school districts, the value of the process is ultimately diminished.<sup>85</sup> The divergence of school districts on the implementation of the due process right to secure legal counsel is leading to the inconsistent treatment of Colorado's students that yields variable success in the reduction of school suspensions and expulsions.

#### CONCLUSION

Colorado's overzealous implementation and reliance on zero-tolerance policies for over a decade resulted in the exclusion of thousands of students from public school classrooms.<sup>86</sup> Schools across the state continue to treat students differently and unequally by implementing varying degrees of due process procedures in formal disciplinary hearings. Thus, a student who faces expulsion in a Telluride, a student prohibited from cross-examining witnesses and consulting legal counsel, will be less equipped to defend herself against the school's charges than a Denver student, who is afforded both of these procedural protections. Colorado should amend its current law governing school disciplinary hearings to include the right to cross-examine witnesses and permit legal counsel at hearings to foster fair and just disciplinary proceedings.

Many Colorado students face an uphill battle every time they walk through the schoolhouse doors. Some have not eaten much, if anything, since they left last school.<sup>87</sup> Others have

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83. PADRES & JÓVENES UNIDOS, *supra* note 11, at 11.

84. TRINIDAD SCH. DIST. NO. 1, *supra* note 81.

85. Ellen L. Mossman, *Navigating a Legal Dilemma: A Student's Right to Legal Counsel in Disciplinary Hearings for Criminal Misbehavior*, 160 U. PA. L. REV. 585, 598 (2012).

86. COLO. DEP'T OF EDUC., *supra* note 9.

87. "Nearly 1 in 5 Colorado kids may not know when or where they will get

spent the majority of their night carrying for their younger siblings.<sup>88</sup> But, the majority of students and their teachers recognize and value that education is truly the only equalizer. In light of this reality, Colorado students deserve to have the appropriate tools to adequately challenge a threat of school removal.

The long-term detrimental impact that suspensions and expulsions have on students requires explicit procedural protections. The due process procedures guaranteed to a student should not depend on which school district the student is enrolled in. School disciplinary hearings are usually life-altering affairs for students and “often the first stop along the [school-to-prison] pipeline.”<sup>89</sup> The “health and strength of our nation,” and specifically our state, “depend[s] on us rectifying the school-to-prison pipeline problem.”<sup>90</sup> Without granting clear statutory authority for schools to provide these particular due process procedures, students throughout Colorado will continue to receive unequal and unjust treatment during due process hearings.

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their next meal. . . . [And] [n]early 1 in 6 Colorado households with children report an inability to afford adequate food.” HUNGER FREE COLO., FACTS: HUNGER & POVERTY IN COLORADO (2017), <https://www.hungerfreecolorado.org/wp-content/uploads/2017/02/CO-Hunger-Facts-Hunger-Free-Colorado-2-17.pdf> [<https://perma.cc/8RKV-3FXA>].

88. See Ann Schimke, *Two of Colorado’s Largest Districts Explore Later High School Start Times*, CHALKBEAT (Aug. 15, 2016), <http://www.chalkbeat.org/posts/co/2016/08/15/two-of-colorados-largest-districts-explore-later-high-school-start-times/> [<https://perma.cc/SQ76-WEDB>].

89. Donna Lieberman, N.Y. Civil Liberties Union, Testimony before the New York City Council Committees on Education and Civil Rights Regarding The Impact of Suspensions on Students’ Education Rights (Jan. 23, 2008), <http://www.nyclu.org/content/impact-of-school-suspensions-and-demand-passage-of-student-safety-act> [<https://perma.cc/3Q74-QJET>].

90. Jason Nance, *Dismantling the School-to-Prison Pipeline: Tools for Change*, 48 ARIZ. L.J. 313, 371 (2016).